LITERARY PROPERTY.

1748. *June 7.*

DANIEL MIDWINTER and other BOOKSELLERS in London, *against* GAVIN HAMILTON, &c.

No 1.
An action was raised against certain booksellers in Edinburgh, for infringing the statute 8*vo Annæ*, c. 19., entituled, "An act for the encouragement of learning," &c. by printing and vending books which were the property of the pursuers, without their consent, and concluding for damages for every surreptitious copy.
Found, that no action lies upon the statute, except for such books as have been entered in Stationers Hall in terms of the statute. And found, that no action of damages lies upon the statute.

THE art of printing, among other advantages, enabled authors to make more profit by their works than they could do formerly. The profit indeed at first could not be considerable; for, a book once published became every man's right or property, which disabled undertakers from giving any great sum for a performance however valuable. This commerce deserved to be put upon a better footing for the encouragement of authors; and it was put upon a better footing in most civilized countries by the prerogative of the Prince, who took upon him to grant to authors, when he thought proper, an exclusive privilege or monopoly of their own works for a certain term of years. This, in particular, was frequently practised both in England and Scotland; though it may admit some doubt, whether a monopoly of this kind, being against the common rights of the subject, can be justified by the common law of the land.

To make this privilege general, without necessity of applying for a grant from the Crown; and perhaps to remove objections that might lie against the Crown's grants, the act of Parliament 8th of Queen Anne, was made, intituled, 'An act for the encouragement of learning, by vesting the copies of printed books 'in the authors or purchasers of such copies, during the times therein mentioned.' The regulations of this statute, so far as material to the present case, are as follow: 1*mo*, 'The author of any book, and his assigns, shall have 'the sole liberty of printing it for fourteen years. And if any person within 'that time, shall print, re-print, or import such book, without consent of the 'proprietor; or knowing the same to be so printed, or imported, shall publish 'or expose it to sale without such consent; the offender shall forfeit the books 'and sheets to the proprietor, who shall damask and make them waste paper; 'and further, shall forfeit one penny for every sheet found in his custody print-

No 1. ' ed or printing; one moiety to the Crown, the other to him who shall sue for ' the same. 2*do*, No person shall be liable to these forfeitures, unless the title ' to the copy of the book shall, before publication, be entered in the register- ' book of the Company of Stationers; and unless the consent of the proprie- ' tor be also entered. 3*tio*, The printer shall deliver nine copies of each book ' to the warehouse-keeper of the Company of Stationers for the use of the li- ' braries therein mentioned; and upon default, shall forfeit the sum of L. 5 ' for every copy not so delivered; as also, the value of the copy to be recover- ' ed for the use of the said libraries, with full costs of suit. 4*to*, If any action ' shall be brought for any thing done in pursuance of this act, the defendant ' may plead the general issue. 5*to*, All actions for any offence against this act ' shall be brought within three months after the offence done. And *lastly*, ' after the end of fourteen years the sole right of printing or disposing of ' copies shall return to the authors, if then living, for other fourteen years.'

Some booksellers of London brought a process against the booksellers of Edinburgh and Glasgow, setting forth, that the defendants had all of them presumed to transgress the said statute, by printing, re-printing, or importing, or publishing and exposing to sale, the several books specified, without consent of the proprietors; and therefore concluding for the penalties and forfeitures of the statute; at least, that the defendants ought to pay damages to the complainers for every surreptitious copy. The pursuers not being able to bring evidence by witnesses of any act transgressing the statute, waved all penalties, and restricted their libel to damages, or rather to the profits which the defendants were supposed to have made by dealing in an illicit trade; and to bring out the extent of these profits, they prayed a discovery by the oaths of the defendants. The claim for damages thus restricted, was put upon this footing, that by the statute a property is given to authors of the books published by them, which of itself is sufficient to found a claim for damages; because every proprietor is entitled to reparation and damages at common law against those who encroach upon his property. The property of every book (said the pursuers) is declared by the act to belong to the author and his assigns; which implies, that this proprietor shall be entitled to every competent action for defending his property against the unjust invasions of others, and obtaining relief to the extent of his real interest or damage. And the relief arising from the property thus declared, cannot be barred or excluded by the special penalties superadded in the statute; which were intended as a further restraint against the wrongs and abuses recited in the preamble, but could never be intended to put proprietors of books in a worse condition, than if such penalties had not been enacted.

The defendants, on the other hand, to prove that no action of damages can be sustained upon this statute separately, nor upon it conjoined with the common law, premised the following observation. It is a rule, that laws which abridge the common privileges of mankind are strictly to be interpreted; mo-

nopolies and restraints are introduced by statute contrary to natural liberty, debarring the lieges either absolutely, or in favour of certain persons, from doing certain things which are otherwise innocent and lawful. But whatever be the expediency of such statutes, they are not to be extended by judges beyond their precise terms. It would be gross injustice so to extend them; it would be abridging natural liberty without the authority of law, which is worse than private violence. Thus members of the College of Justice are prohibited to purchase pleas, under a penalty that the purchaser shall be degraded from his office. But, as such purchases are not declared null and void, the purchase is effectual in law. Hunting in woods, parks, &c. without licence of the owner, is discharged by statute under certain penalties. Here is a monopoly of wild fowl granted to every gentleman within his own inclosures; yet, if one transgress the statute, the proprietor may sue for the penalty, but has no claim for damages, not even a claim for the wild fowl taken. There are many statutory penalties against those who kill salmon in forbidden time; by this practice, those who have right to salmon fishing undoubtedly suffer, yet as this is only a statutory wrong, no action of damages can lie, because such action is not given by any of the statutes. And yet the prohibition of dealing in privileged books, is not stronger than the prohibition of killing salmon in forbidden time. The like observation occurs upon the statutes prohibiting cruives in salt water under certain penalties. Bleaching of linen-cloth with lime or pigeon-dung is prohibited under the penalty of confiscation of the cloth, and a pecuniary fine; but the purchaser who suffers thereby has not an action of damages. By the statutes establishing the post-office, private carriers are prohibited under a penalty to carry letters; yet an action of damages will not lie at the instance of the King or postmaster against those who transgress the law. And, not to multiply instances which are without end, Would an action of damages be competent at the instance of the East India Company against interlopers? Such an action was never imagined. No 1.

This doctrine, in general, is not controverted by the pursuers, who place their whole strength upon the above mentioned specialty, that by the statute under consideration, a *property* is bestowed upon authors and their assigns; and therefore this argument must be deliberately examined. When a man composes a book, the manuscript is his property, and the whole edition is his property after it is printed. But let us suppose that this whole edition is sold off, where is then his property? As property, by all lawyers, whether ancient or modern, is defined to be *jus in re*, there can be no property without a subject. The books that remain upon hand, are, no doubt, the property of the author and his assigns; but after the whole edition is disposed of, the author's property is at an end; there is no subject nor *corpus* of which he can be said to be proprietor. All that remains with him is an exclusive privilege granted by the statute, of re-printing this book, and of barring others from re-printing or vending it under certain penalties. It is neither more nor less than creating a monopoly, barring others from dealing in that particular commodity; the direct

No 1. consequence of which is, that so far as restrained by statute they must submit; but that in all other particulars, their natural liberty is preserved entire.

It is true, this monopoly or exclusive privilege is named a *property* in the statute; and so it is in one sense, because it is *proper* or peculiar to those to whom it is given by the statute. But then it was not intended to be made *property* in the strict sense of the word; for we cannot suppose the Legislature guilty of such a gross absurdity, as to establish property without a subject or *corpus*; these are relative terms which cannot be disjoined; and *property*, in a strict sense, can no more be conceived without a *corpus*, than a parent can be conceived without a child. But if the words of the statute shall be laid hold of, neglecting its spirit and meaning, all that can be concluded is, that it is a property *ad certum effectum* only, granted in order to support the several actions and penalties directed by the statute. It is a statutory property, and not a property in any just sense to be attended with any of the effects of property at common law. And indeed this argument is so conclusive against the supposition of real property, that the pursuers have been obliged to yield in some measure to it, by admitting that this is not a real property in any subject or *corpus*, but only a *quasi* property. This is admitting all that is demanded; for let them convert this law-term into common language, and they will not be able to make it any thing different from that monopoly or exclusive privilege which is established by the statute. It is clear then, that after all the bustle made by the pursuers about property and the effects of it at common law, they have not advanced one step. The only ground they have to take up is, to maintain, if they can, this proposition, that, from their *quasi* property or exclusive privilege, the same actions arise at common law, that are the consequence of property taken in its strictest sense; but they will not venture to take up this ground, because it is untenible. Any wilful encroachment upon real property is a moral wrong condemned by the law of nature, and by the laws of all nations; which therefore ought to be repaired. But an encroachment upon a monopoly, or an exclusive privilege, has nothing naturally immoral in it, is not *malum in se*; and therefore does not fall under any sanction of the common law. It is a statutory wrong, to be judged of solely upon the statute; and therefore no action can lie to redress such a wrong, but what is authorized by the statute.

And here a reflection must occur, which cannot fail to make an impression. The argument advanced for the pursuers, taken in its strongest light, must resolve into the following proposition; that an action of damages was intended by the Legislature to be one of the means for securing to authors the benefit of their own works; and that the only purpose of declaring a property to authors in their own works, was in order to found this action. If so, the matter has been aukwardly gone about; for, not to insist upon it, that this declared property is not to be found in the enacting clause, where it ought to have been, but only comes in by the bye as a figure of speech; was it not much easier for

the Legislature to give this action of damages in plain words, without attempting such an absurdity as to declare a property, without any subject or *corpus* to which it may relate? This very consideration, not to go further, makes it extremely evident, that the Legislature never intended in this case either a thing so inexpedient as an action of damages, or a thing so absurd as a real property. Had they intended an action of damages, they would have said so in plain terms. And it must be observed, that though it is not in the power even of the Legislature to establish property without a subject, it was very consistent to afford an action of damages without supposition of any thing like property; for an action of damages may lie upon a statute, as well as upon property, at common law. No 1.

In the *second* place, supposing so absurd a thing as that a real property is established by the statute, it appears evident that the pursuers can take no advantage of it, when they have not fulfilled the conditions upon which it is granted. The very first clause of the statute, which talks of bestowing the property upon the author, is what follows: 'And whereas many persons may, through ignorance, offend against this act, unless some provision be made whereby the property in every such book, as is intended by this act to be secured to the proprietor, may be ascertained; as likewise the consent of such proprietor for printing or re-printing may from time to time be known; be it therefore further enacted, that nothing in this act contained shall be construed to extend to subject any person to the forfeitures and penalties therein mentioned, unless the title to the copy shall, before publication, be entered in the register-book of the Company of Stationers, and unless such consent of the proprietor be in like manner entered.' Here two things are plainly implied, or rather expressed; *first*, that the property is not intended to be bestowed in every case; for the words are, 'Whereby the property, in every such book as is intended by this act to be secured to the proprietor, may be ascertained.' And *2dly*, The property is not bestowed directly upon composing, but is to be claimed or ascertained in a certain form established in the statute, viz. by entering in Stationers Hall, the name of the book, and the author's consent for printing the same. Upon these conditions the property is bestowed, and not otherwise. Nor does this argument land in a criticism upon words; it is founded on the very nature of the thing. For if it be true in fact, that many persons of distinction amuse themselves with composing books, without intending to take any pecuniary benefit by the publication, must it not be competent to every mortal to deal in such books, as much as it was to deal in all books before exclusive privileges were invented? It follows therefore, that every author who intends to make profit of his works, must signify the same to the public; or, in the language of the statute, must have the property ascertained to him. And as the method for claiming or ascertaing this property is also laid down in the statute, there must be established a *præsumptio juris et de jure*, that every new

No 1. book which is not thus entered in Stationers Hall is abandoned to the public, and a lawful subject of commerce for every man to deal in.

In the *third* place, Supposing all obstructions removed, which bar the pursuers from a property in this case strictly taken, and suppose their property to be such as to afford the same actions that may be founded on real property; yet it does not appear that they could take any benefit from these concessions. For how are damages to be ascertained? The only footing to go upon is, to show how far the proprietor's sale is lessened by interlopers. But this can never be determined otherwise than by mere conjecture; the proprietor himself cannot be certain that the persons who dealt with the interlopers would have purchased from him; without which the ascertaining damages is beyond the reach of law. And the pursuers tacitly yield this point, when they agree to confine their claim of damages to the supposed profits made by the defendants. Their claim so qualified does indeed relieve them of some part of the difficulty of proof, by no means of the whole; because an interloper, who has some part of a piratical edition in his possession, cannot know what profits he makes till the whole be sold off. But to let this pass, where is the foundation in law, equity, or common sense, to deprive the defendants even of their profits, unless the pursuers can specify that they have suffered thereby? If their sale be not lessened, they have no just ground of complaint. Let us give an example, which shall be Millar's Dictionary, published in two folios, and sold at a price beyond the reach of common gardeners. If a printer shall undertake an impression of this book on a very small type and very coarse paper, which will be purchased only by common gardeners, Philip Millar and his assigns will not lose a shilling by this edition; yet, by this low-priced book, knowledge in gardening is spread much to the benefit of the public. Would it be reasonable or just to deprive such an undertaker of his profits, when the public gain by the undertaking, and Mr Millar loses nothing? It is obvious then, that this claim for profits cannot be supported less or more as a claim of damages, when there is really no damage to the party privileged, or, which is the same, where damages cannot be proved.

In the *fourth* place, As it has been made evident that no action for damages can lie upon this statute, nor arise out of it; it will be equally evident, that the Legislature never intended to afford such a remedy against interlopers, not only for a reason given above, but also for the following reason, that it must have been foreseen, that such an action could have no other effect than to lead people into inextricable processes; it being impossible, in the nature of things, to ascertain damages in any satisfactory manner to be the foundation of a judgment of a Court. Can we believe that this matter has been overlooked by all the Princes in Christendom, who are in use to give privileges to authors? For we shall find not one example of giving an action of damages, among the many checks that have been contrived to secure to authors the monopoly of their own works. In lieu of damages, the constant rule is, to confiscate the

books, or part thereof, to the author, and to give him over and above a lump sum in name of penalty upon the transgressor. And when we consider the present statute, it is not even so favourable to authors, as are the patents which have been commonly given by sovereign princes. Far from affording an action of damages, it does not go so far as these patents in giving a lump sum to the author in name of damages. It does not give to the proprietor even the books forfeited; which are ordered to be damasked and made waste paper of. No 1.

Further, there is scarce one clause in the statute that is not directly or indirectly inconsistent with this supposed claim of damages. In the *first* place, damages were not overlooked; for an action is given to every university for the value of every undelivered copy, with full costs of suit; damages are given in this case, because they may be legally ascertained. The same consideration must have occurred with regard to the author; but to him damages are not given, because they cannot be ascertained. *2dly*, Allowing the defendants to plead the general issue in any action or suit commenced in pursuance of this act, is a proof that the Legislature had no view of damages to be claimed in a court of equity; every action that can be commenced in pursuance of this act must go before the courts of common law, and be determined by a jury. *3dly*, All actions, suits, &c. upon this statute shall be commenced within three months, &c. This could not have been the case, had there been any view of an action of damages; which in its nature is perpetual. And *lastly*, No action of damages can lie while the claim for the penalty subsists. Now, it is a strange action of damages which the proprietor can be deprived of, by any one commencing a popular action for the penalty. What if the proprietor shall commence his action for damages within three months, and thereafter a popular action be raised for the penalties also within the three months, which of these pursuers shall yield to the other? For it is plain that both actions cannot subsist together. The claim for the penalty, it is supposed, would be preferred, being founded in the express words of the statute. At this rate, an absolute stranger suing for penalties, shall cut out the proprietor claiming only his damages. This would be so disjointed a thing as not to be justifiable upon any sort of principles; and it may serve for an instance, that there is no end of wandering when people desert the beaten tract of the law, and seek out new paths to themselves.

The pursuers endeavoured to draw an argument to the present case, from a bill of equity in Exchequer for the single duty of beer or ale; which is sustained, waving penalties; the extent thereof to be discovered by the oath of the defendant; but in vain, for there is no similitude betwixt these cases. The act of Charles II. establishing the hereditary excise, provides, 'That there 'shall be paid to the King, his heirs and successors, for ever, the duties fol-'lowing, &c.' under the penalty of double duty upon failure of payment in the terms appointed. Here is precisely a debt established by statute; which may be recovered by a common action of debt, as well as by a bill in equity.

No 1. But, will it follow from this instance, or any such instance, that damages may be recovered either by an action of debt, or by a bill in equity, from a person who does a thing innocent in itself, and lawful by the common law of the land, and which is only discharged by statute under certain penalties? If the person take his hazard of these penalties, and pay the forfeit, he fulfils the law, and is no further liable.

" Found, That no action lies upon the statute, except for such books as have been entered in Stationers Hall in terms of the statute. And found, That no action of damages lies upon the statute."

Fol. Dic. v. 3. *p.* 387. *Rem. Dec. v.* 2. *No* 92. *p.* 154.

*** D. Falconer reports this case :

By a statute 8*vo Annæ*, it is enacted, that the author of any book that should thereafter be composed, and his assignee, should have the sole right of printing the said book for fourteen years; and if any other person should within that time import or print it, he should forfeit all the books to the proprietor of the copies, who should make waste paper thereof; and should also forfeit one penny for each sheet in his custody, printed or exposed to sale; the one half to the Queen, and the other to any who should sue for it; and 'whereas 'many persons might, through ignorance, offend against the act, unless some 'provision were made, whereby the property of every such book as was in-'tended by the act to be secured to the proprietor might be ascertained,' it is further enacted, that no person should be subjected to the penalties, unless the title to the copy were entered in the register books of the Company of Stationers before publication, in such manner as had been usual; provided that all actions for any offence against the act should be brought within three months after commission of the offence.

By a statute, 12th George II. it is enacted, that after 29th September 1739, it should not be lawful to bring into the kingdom for sale any book first composed and printed there; and that any person so importing, or knowingly selling any such book so imported, should forfeit all the sheets to be made waste paper, and should further forfeit L. 5 Sterling, and double the value of every book, one half to the King, and the other to any that should sue for it; provided that the act should not extend to any book that had not been printed in the kingdom within twenty years before its importation.

On these acts, Andrew Millar and others, booksellers in London, brought an action against Hamilton and Balfour booksellers in Edinburgh, and Andrew Stalker bookseller in Glasgow, for printing or importing certain books their property, or for importing them, they having been printed within twenty years in the kingdom; concluding for the penalties, with an alternative, that the defenders ought to pay them damages for every surreptitious copy sold by them, and forfeit the remaining copies to be destroyed; and in the process they restric-

ted their libel to this conclusion, and offered to prove the number sold by their sobrok ooaths. No 1.

Pleaded for the defenders, That no action for damages was competent; for an author had no monopoly, whereby he could hinder other persons from printing his book antecedent to the statute; which giving the right, gave no action of damages, but laid down a method for inforcing the regulation. Laws restrictive of liberty were to be strictly interpreted, and it was a rule, *Quod nec ipso jure nulla essent contra leges gesta, si lex pœna in contravenientes statuta contenta esset*; and hence the purchase of litigious subjects by lawyers was valid, though the purchasers were punished. This obtained with regard to acts which could be rendered null; or if, as in the present case, there was no habile terms for the sanction of such nullity, an action of damages might be competent, were it not that the statute had inflicted a penalty for sanction.

No action of damages could be competent, while at the same time the defender was liable in a popular action for penalties; and it could not be supposed such action could arise after lapse of the time limited for prosecution of the penalties, if it was not competent before.

No action at all could be competent to any who had not complied with the terms of the statute; and the pursuers could not subsume, that the books were regularly entered in Stationers hall.

Pleaded for the pursuers, That the statute vested a right of property in them, the consequence whereof was, that at common law they were entitled to damages against all infringers of it; the act proceeded afterwards to inflict special penalties, to make a person liable to which, it was necessary the book should be entered; but this was not necessary to vest the property, which of itself was a sufficient ground of action: That the prosecution for penalties having been found a very insufficient remedy, it was the constant course in England to wave them, and to apply to a court of equity for damages; as in the case of frauds against the revenue, where this was ordinarily practised; and particularly, in the year 1737, the Executors of John Gray obtained their damages against James Watson for printing the Opera of Polly, or the second part of the Beggars Opera.

For the defenders, That the expression of property was abusively applied to a book, the only subject of property was the particular copies, and the author's right really no more than a monopoly of printing, secured to him by the sanctions of the act, which gave no damages; and to give him this right, the entering the book was necessary; That the instance of Mr Gray's Executors differed so far from this case, that the copy was entered; and those brought from the practice concerning the revenue, did not apply; for there was a debt due to the King, to wit, the duties, which he might sue for, waving penalties.

The Lords found, 4th July 1746, 'That there lay no action for damages in 'this case.'

No 1. On bill and answers, wherewith was produced an opinion by Mr Murray Solicitor-Genaral, that the entering the copies was necessary to entitle the owner to the penalties of the act; but it was the constant practice, waving the penalties, to have recourse to a court of equity, which proceeded upon the property declared by the act, and gave a remedy against pirates, by granting injunctions to restrain printing, and decreed them to account to the proprietors for all the profits made by the sale of a pirated edition; and in a court of equity, it was nowise material whether the book ever was entered.

There was also produced a certificate by the Keeper of the Register at Stationers Hall, that the books were entered in the usual manner.

The *objection* to the entry was, That the author's assignment to the bookseller, in whose name the books were registered, was not entered; but there was no final determination given concerning this.

THE LORDS, 24th December 1746, 'found that an action of damages lay at 'the pursuers' instance to the extent of the profits made by the defenders on 'such of the books libelled as had been entered in Stationers Hall, and found 'the defenders ought to discover upon oath the extent of the profits; and with 'respect to the books re-printed abroad and imported, declared they would 'hear parties procurators on this question, Within what length of time the penalties enacted by the 12th of King George might be sued for?'

The meaning of this reservation, with the determination of the question, may be seen in the decision, 13th January 1747, between the same parties. *voce* PRESCRIPTION.

On a bill for the Scots booksellers, and answers, *observed* on the Bench, That the Court of Session was indeed a court of equity, and so all other courts were in a certain sense; that this power consisted in explaining the law, in extending it from one case to another, and things of the like nature; but the constitution of the Chancery in England was of a different sort, and peculiar to that country, where the Chancery law and common law was different; and direct contrary decisions might be given in the same case, according as it happened to be determined in the Court of Chancery, or in any of the courts of common law; for instance, the Chancery, would, upon a note expressing a person's will, dispose of his estate accordingly, when, at common law, the heir at law would have been preferred.

THE LORDS, 2d December 1747, 'found that no action lay on the statute for offences, except when it was brought within three months of the committing such offence; and found that no action lay on this statute, except for such books as had been entered in Stationers Hall, in terms of the statute; and also found that no action of damages lay on the statute.'

On bill and answers the LORDS adhered.

Reporter, *Elchies.* Act *W. Grant & Lockhart.* Alt. *Home & J. Grant.* Clerk, *Forbes.*

D. Falconer, v. 1. *No* 256. *p.* 344.

No 1.

*** This case is also reported by Kilkerran:

THE Booksellers of London, it would appear, jealous of the progress of the art of printing in Scotland, which of late years has been brought to much greater perfection than ever before, brought a process some years ago against certain booksellers of Edinburgh and Glasgow, libelling on the statute 8*vo Annæ*, which provides, 'That every author of any book that should thereafter be 'composed, and his assignee, should have the sole right of printing thereof for 'the space of fourteen years; and that if any other person should within that 'time print or import it, he should forfeit the copies to the proprietor, and 'one penny for each sheet in his custody printed or exposed to sale, the one 'half to the Queen, and the other half to the person who shall sue for the 'same; provided that no person shall be subject to the penalty unless the title 'to the copy (that is the title of the book) were registered in Stationers Hall, 'in such manner as has been usual; and that all actions for any offence against 'the act should be brought within three months after commission of the of-'fence;' and, upon the statute 12th George II. whereby it is enacted, 'That 'after the 29th September 1639, it should not be lawful to bring into the king-'dom for sale any book first composed and printed there within 20 years before 'such importation, and that any person knowingly selling such book should 'forfeit all the sheets of such book to be made waste paper, and should further 'forfeit L. 5 Sterling, and double the value of every such book, one moiety to 'the King, the other to any that should sue for the same;' and libelling that the defenders had printed and imported books to the copies whereof they had right as assignees, contrary to the form of these statutes, and concluding for the penalties, at least for damage by them sustained thereby, waving penalties, and offering to prove the number of books by them so printed or imported by the oath of the defenders.

On occasion of this process, a variety of questions occurred, upon some of which judgments were given some time ago, though the case, having been still in dependence, be now for the first time marked.

The pursuers having, in arguing the case from the beginning, waved penalties; the first question debated was, Whether there lay any action for damages?

And, upon report, it was found, 4th July 1746, 'That no action of damages 'lay.'

But, upon advising petition and answers, it was, upon the 24th December 1746 found, 'That action of damages lay at the pursuers instance, to the ex-'tent of the profits made by the defenders, upon such of the books libelled as 'have been entered in Stationers Hall, and re-printed in Britain, and that the 'defenders ought to set forth upon oath what those profits were. But, before 'answer as to books imported, superseded advising till parties should be heard

No 1. ' on the question, Whether the penalties in the act 12th George II. fell under ' the act of Queen Elizabeth, limiting all prosecutions on penal statutes to two ' years.'

The difference between the pursuers' claim on the act 8*vo Annæ*, on books printed in Britain, and on the act 12th George II. on books imported, lay in this, that by the statute 8*vo Annæ*, the prosecution for penalties was confined to three months from the offence, whereas the penalties, by the act 12th George II. on books imported, were perpetual. And the COURT was unanimous, that where penalties were incurred by the fact charged, although they were not sued for, the defender was not by the law of Scotland obliged to set forth the fact upon oath; for if this were not the case, a man pursued for an assythment, as having murdered the pursuer's father, might be obliged to swear, which were absurd. It is true, that transgressions of the penal statutes are with us probable by oath, as also importation of Irish cattle, but that is only *vi statuti*.

The question therefore came to this, Whether the act of limitations, 31st Elizabeth, did limit prosecutions in Scotland upon penal statutes made since the Union; on which parties being heard, the Court was much divided.

It was on the one hand said, that it would be a strange thing if the same statute, imposing penalties on transgressions in every part of the island, should be of a longer endurance in one part of the country than in another, and that surely no such thing could be intended by the Legislature: In every penal statute the act of limitations was supposed to be repeated.

It was on the other hand said, that however strange it might look, if so the law stands, there is no help for it, till it be remedied by another statute; and that it did stand so at present, as no statute of England made before the Union extended to Scotland, except where it is expressly provided by statute that it should; that the intention of the Legislature can only be argued from the words of the statute, in which, if there be an imperfection, Judges cannot amend it. And *lastly*, That some years ago, in the case of Cowan in Stirling, where the prosecution was on the game act, it was found that the same did not fall under the act of limitations, where the prosecution was in Scotland, though it did in England.

Notwithstanding of all which, the LORDS, 13th January 1747, by the narrowest majority, found ' That the claim for the penalties enacted by the act of ' the 12th of the King. was limited to three years by the statute of the 31st ' Elizabeth;' and in consequence thereof found, ' That the defenders behoved ' to discover upon oath the extent of the profits on the books imported and ' sold by them, as well as on books by them re-printed.'

But the general point, Whether the action of damages at all lay, being still kept open by petitions, the same came now to be determined; when the LORDS found, ' that no action of damages lay on either of the statutes, nor any action ' at all upon the statute 8*vo Annæ* after three months from the offence.'

No 1.

THE LORDS at pronouncing their former judgment, had considered the author of a book as having a property therein *vi statuti*, and that the profits made of any subject by a third party without the owner's consent belong to the owner; but now on more mature consideration, they were of opinion, that as antecedent to the statute, an author had no property in a book composed and published by him, further than in the copies remaining in his hand, as nothing remained with him after printing and publishing his book but the thought of his mind, which does not admit the notion of property more than the invention of any machine, or of gun-powder, admits the notion of property in the author; so in the statute, though in the preamble the terms 'author' and 'proprietor, are used promiscuously, yet no more is meant by proprietor than an expression exegetick of author; and in the enacting part not a word is said of property, but only of the sole and exclusive privilege of printing; and that no more was intended was plain from the penalties going to the common informer, and their being limited to three month from the offence; which shews that the transgression was not considered as an encroachment on another's property, but as a transgression of the public law.

And whereas it had been urged, that such action for damages lay to the pursuers in England before the Chancery, for proof whereof the signed opinions of certain English lawyers of character were produced; the LORDS had no great regard to this; as the authority of a private lawyer is no evidence, further than that such processes were brought, but not of the judgment given in them, or how the law stands.

N. B. The opinions produced of the English counsel carried the matter thus far, that the action in equity for damages lay in Chancery, even although no entry at all had been made in Stationers Hall. But notwithstanding the great character of the lawyers, this was what the LORDS thought impossible to hearken to, as the entry in Stationers Hall was the express condition upon which the privilege was given to the author, and without which no printer could know what he was or was not at liberty to print; and therefore, supposing action of damages to have lain, where entry was made, none could lie where no entry was made; 'and accordingly the LORDS also *separatim* so found.'

Kilkerran, (BOOKS.) *No* 1. *p.* 96.

*** This case was appealed. The result is mentioned p. 8315.

1773. *July* 28. HINTON *against* DONALDSON. No 2.

ALEXANDER DONALDSON, and others, having reprinted and published, in Scotland, an edition of Stackhouse's History of the Bible, Hinton of London, who laid claim to the property of that work, not under the statute of Queen Anne, but in virtue of a supposed common-law right derived from the original publisher, brought action in the Court of Session against Donaldson and o-