1774. *December* 23. JAMES DODSLEY *against* COLIN M'FARQUHAR.

LITERARY PROPERTY.

Whether the exclusive right to Literary Property be merely personal to authors or their assignees during their life, or be descendible to heirs.

[*Fac. Coll. VII.* 485; *App. Literary Property, No.* 1.]

AUCHINLECK. The only question is, Whether Mr Dodsley has produced a proper title to insist? It is said that an interdict is only required for a small time; but a *small time* is the same with a *long period.* The success of the publication depends on the present moment: modern publications are like newspapers; they are read for a few days, and then they are forgotten. Why should we go so far as to secure to Dodsley an hour's sale of this temporary book?

PRESIDENT. When I came here, I had no doubt that a title should be produced. A notarial copy, or even a certificate from Stationer's Hall, would have been sufficient. It was an error not to produce a title, excusable in a stranger. Mr Dodsley confines his demand as to producing for a very few days. As a court of equity, we may give that remedy which is asked.

KAIMES. It is a little singular to give an interdict without a title: an interdict for ten days is little, if we were sure that, after ten days, it would cease; but *this* is not a common case of an interdict where the subject may be used as profitably after the interdict is removed as it ever could have been. *Here,* if you stop the sale of Elliot's book, you promote the sale of Dodsley's.

COALSTON. We cannot refuse the interdict as now demanded; nevertheless, as no title is produced, caution for damages ought to be found. A man is not obliged to carry his titles everywhere with him. When his property is in sudden and eminent hazard, you will allow him a few days in order that he may produce his titles, and you will not suffer any damages to be done to him in the interim.

On the 23d December 1774, "The Lords continued the interdict until Tuesday 3d of January, Mr Dodsley finding caution for L.500, to pay any damage that shall afterwards appear to have occurred to Elliot and M'Farquhar."

Act. R. Cullen, H. Dundas. *Alt.* Ilay Campbell.

Reporter, Pitfour.

1775. *July* 26.—HAILES. Various questions occur in this case. I will speak to them as briefly as I can.

The *first* question is as to the nature of the statute of Queen Anne: Whether is it a penal statute, or a statute, from its intention and ends, deserving a li-

beral interpretation? I think it is of the latter sort; and this the rather because we must now suppose, that, without it, authors had no right in their work when once published. Custom also has given it a liberal interpretation: it was intended for the benefit of the learned and ingenious. The registers of Stationer's Hall show how many books are entered *there*, which have no pretensions to the name of *learned and ingenious*, and yet no one questions the copy-right of such books. The counsel for M'Farquhar has confounded a penal statute with a statute containing penalties.

The *second* question is, What sort of right does the statute give? On the one side, it is said that a monopoly is given: on the other, an exclusive right of publishing and vending. The difference here seems to be verbal. But I think that a right of property, for a term of years, was given, because the statute says so in express words. It matters not whether there be any example in law of such a property,—it is a statutory property, and that is enough.

The *third* question is, Whether private letters come within the statute? I think that they do; because the statute mentions *writings* as well as *books*, and because the statute ought to be, and has been liberally interpreted. Many men have chosen to convey instruction to the public in the form of letters. Almost the whole of Lord Bolingbroke's voluminous works are in that form, and some of them are familiar enough. There are other books composed of familiar letters not intended for the public, but which have been published, and have gained to the writers the name of authors. Is there any man who will deny to Madame de Sévigné the name of an author?—and yet we have nothing of her composition but familiar and confidential letters. Of them I shall only say, that they are of such a nature as to make me wish that the author were alive and of my acquaintance. I have read other letters without entertaining that wish.

The Letters of Languet to Sir Philip Sidney is a work of infinite merit, now antiquated, and almost unknown. Can we suppose that the statute of Queen Anne, which protects the Adventures of Humphry Clinker, would deny its protection to *Huberti Langueti Epistolæ?* Why may not a man write a system of education, lectures on ethics, or a preservative against infidelity, in the form of private and familiar letters?—and is not this just what Lord Chesterfield has done? Besides, in the book which is now the subject of our deliberations, there is contained a system of geography, an abridgement of the English history, and political maxims, extracted and translated from Cardinal De Retz. Are not these *books or writings* in the sense of the statute?

The *fourth* question is, Whether the letters have been assigned to Mrs Stanhope in the sense of the statute? That he who sends a letter to his correspondent, makes over to him the paper, ink, and wax, but not the words of the letter, is said to have been the notion of a great man. This, however, was an opinion given in the days of common-law property. I imagine that he who receives a letter, may read or repeat the contents of it to whom he will, and that he may give copies of it, no matter in what way, or what number. In short, that the words and contents are as much his own as the paper, ink, and wax. A wise man ought not, and a virtuous man will not disclose to the world the letters received from his correspondent, unless such letters do honour to the correspondent. But the temptation of a large sum of copy-money will some-

times dazzle wisdom and stagger virtue. Hence one man will be tempted to publish the lewd remembrances of a feeble old man: Another, the petulant dictates of a half-bred fashionable scholar: Another, maxims for deceiving men and debauching women, drawn from experience: Another, satirical portraits of courtiers in place, delineated by a splenetic courtier out of place. If such things have been done, it is not strange that, for L.1575, Mrs Stanhope should have published a collection of letters of a nature altogether different, and which "do honour to the writer:" for we are told that Lord Chesterfield's letters are calculated to improve and to form the mind, the heart, and the manners of young men of fashion: and, in a word, that what Horace says of Homer, may be applied to this noble author:—*Qui quid sit pulchrum, quid turpe, quid utile, quid non, plenius ac melius Chrysippo et Crantore dicit.*

I think that Lord Chesterfield assigned the letters *ipso facto* to Mr Stanhope; that Mr Stanhope assigned them to Mrs Eugenia Stanhope his executrix; and she to Mr Dodsley: Were there any difficulty here, it is removed by the consent or acquiescence of Lord Chesterfield's executors. *Here* I think that I go on good ground, for this is agreeable to the opinion of Mr Dunning; and when I see an opinion of an eminent English counsel on one side, and no opinion on the other, I must hold that he speaks the sentiments of the whole English bar. Had it not been for an opinion of lawyers in Scotland, of which mention has been made, I should have supposed that M'Farquhar and his associates had been engaged in doing what they knew to be wrong. I must be permitted to observe, that, as the law *now* stands, the printers in Scotland have no pretence for encroaching on the copy-rights of their English brethren; for there are books which they may lawfully print that are nearly as ingenious and as moral as the letters of Lord Chesterfield. My only difficulty is as to the form of entering in Stationer's Hall. The statute seems to require, that one entry be made by the proprietor: now I see no such entry in this case: the only one is of the publisher, which contains the title of the book, but gives no information who is the proprietor. It is said that this is agreeable to custom, and the question will be, Whether penalties can be exacted when the specific form required by the statute has, by reason of long usage, been neglected?

Monboddo. The nature of the work is immaterial to this cause. It has been determined, that an author has no property independent of the statute. It has been said that any one who comes fairly by a manuscript may publish it. I understand that the right was given to authors or proprietors only: as an author has the right of publishing, so he has the right of not publishing. If an author should order his works not to be published, I take it that such prohibition would be absolutely good. If an author should say nothing of his works in his will, his heir or executor would have no right to publish. I understand *assigns*, in the statute, to mean those who have right by deed. In the entry in Stationer's Hall, the consent of the proprietor is required. According to the statute, no man can print the works of another without express consent from him. How often does it happen that a man sets down things for his own instruction or the amusement of his friends?—Shall it be in the power of his executors to publish things of this sort, which may be very improper for publication? Mr Dodsley's right must either be as possessor, or as deriving right from Mrs Stanhope, or as deriving right from Lord Chesterfield's exe-

cutors. 1*st*, Possession is nothing; 2*d*, As to the right from Mrs Stanhope, no right in her person is produced: that still remains to be proved; and supposing it were proved that she was the executrix of Mr Stanhope, still Mr Stanhope had no right, for he was not the author, nor could he convey the letters by a general will. Lord Hardwicke, an oracle of the English law, has declared that Mr Stanhope had no right to the contents of the letters addressed to him. 3*d*, His right may be from the executors of Lord Chesterfield. If the executors had right, they have conveyed it; but I deny that they have a right. No liberty of publication was given. On the contrary, it was denied, as appears from the tenor of the letters themselves. Mr Dodsley has no more right than Mr M'Farquhar.

AUCHINLECK. I am sorry to see such a competition for such a work. The statute of Queen Anne was intended to encourage learned men and men of genius to publish books for the instruction of mankind. No person can have the benefit of the statute, unless he be an author, or in the right of an author. Lord Chesterfield did not mean to take a crop of this book, nor to suffer the person to whom he addressed it, to take a crop of it. How can we give a premium for publishing what was meant to be concealed. Mr Stanhope would have been guilty of a breach of trust had he published the letters. Mrs Stanhope and Mr Dodsley can be in no better situation.

COVINGTON. I cannot distinguish the right in the statute from a monopoly. The statute of James I. has declared all monopolies to be against law, but has qualified this declaration with an exception of patent to the first and true inventor of a manufacture. In this respect I consider the inventor of a manufacture, and the author of a book, to stand on the same footing. The only right is a claim of equity. By the statute of Queen Anne, an author came to have a right without the interposition of the Crown. By the statute of James I., the inventor of a manufacture, and, by the statute of Queen Anne, the author of a book, have a right, both limited for a time. The privilege extends to every book, be it good or be it bad. It does not enter into the cause, whether Lord Chesterfield intended the book for publication. If the right of property did transmit to executors, the power of publication also transmitted. I distinguish between the right of property which an author and his assigns have and the right of publication. Lord Chesterfield's right of property was independent of any registration. It would be pushing the argument very far to suppose, that, if Lord Chesterfield had kept copies of his letters, and were alive and willing to publish, Mr Stanhope could have prevented him. If Lord Chesterfield continued to have a right, so also have his executors. Lord Chesterfield, were he alive, would have had right to authorise the publication, and so also have his executors. But this does not imply a transfer of the right: they have only authorised the publication of one edition in 4to. They might have given a like authority to the publication of an edition in 8vo; and one permission would not have interfered with the other. Mr Dodsley has been authorised to publish an edition, and that has not been encroached on by M'Farquhar. I doubt how far the executors could give any consent, for they were but trustees, each having a special legacy left him. They are, *quoad ultra*, trustees for the nearest in kin. The exception made in this process would have been more competent to the persons for whose use the trust was created. I do not think that the right was ever in Mr Stanhope, or conse-

quently in Mrs Stanhope, supposing her to be executrix. As to the right of a publisher, I do not understand it. The being recorded in Stationer's Hall, will not, by itself, give a right. I cannot discover words in the statute which confer any right on mere editors. As to the form of recording in Stationer's Hall, I grant that great slovenliness may have crept in. The words of the statute are, *in the usual way and manner.* This must respect the manner used at the time of the statute, not a later practice. The registration of the title is one thing, the consent of the proprietor is another; and it also is required in the form of a separate registration.

ALEMORE. I consider the statute of Queen Anne to be, what a great man called it, a perpetual patent to authors. *Monopoly* is an odious *word;* but the thing was once a part of the royal prerogative. It has been abolished, and very properly. The power of the Crown to grant encouragement to inventions was salutary. That was a reservation inherent, and intermixed in our law. A patent to the authors of books is also a salutary thing. I was always a friend to the statute of Q. Anne. The law was salutary in its intentions; penalties were granted instead of damages. This is not unreasonable. The question is to *whom* was the privilege given? To authors and their assignees. I would not limit those words; they may comprehend assigns by deeds, or assigns of the law. If they have a right to publish, they have a right of property. This is a mixed work. Lord Chesterfield is the author, Mr Stanhope is the proprietor; the assigns of both together have a right of publication. It was not the intention of Parliament to canvass the titles at registration. Mrs Stanhope, as executrix of Mr Stanhope, had a right unless in as far as she was hindered by Lord Chesterfield's executors. They have not hindered her. [He supposed that the clause in the statute, respecting a registration in the name of the author, related to the case of reprinting books.]

GARDENSTON. We do not sit here to judge of the merit of books. The statute deserves a liberal interpretation. The right granted by it is different from the odious thing called *monopoly.* Here is a right founded on an equitable claim, though not founded on common law. I require nothing more but a just interpretation of the statute. I cannot go the length of extending the right to every lawful possessor without a right derived from the author. Possession may presume property, but it does not create property. Suppose an author dies in my garret, will that give me a right to his book which he left behind him in M.S.? I think that Mr Dodsley has the right; for the ratification, by Lord Chesterfield's executors, was of the sale, not merely of the publication of one edition. It was Lord Hardwicke's opinion that the right of publication remained with the author of letters as by joint property. Be this as it will, I can have no doubt that the concurring sale and approbation is enough. As to the certificate in Stationer's Hall, it is in the usual manner, and that is enough.

On the 26th July 1775, " the Lords continued the interdict."

For Mr Dodsley, R. Cullen, A. Murray, H. Dundas. *Act.* A. Ogilvy, A. Crosbie, Ilay Campbell.

Hearing in presence.

Diss. Auchinleck, Monboddo, Covington.