

1751.

BOOKSELLERS
OF LONDON
AND
EDINBURGH.

DANIEL MIDWINTER, *et alii* Book- } *Appellants* ;
sellers in London, - - - }
ALEX. KINCAID, *et alii* Booksellers } *Respondents*.
in Edinburgh and Glasgow, - - - }

11 *February* 1751.

PROCESS.—LITERARY PROPERTY.—ACT 8 ANNE c. 19.—Found in the House of Lords, that an action on the statute was improperly and inconsistently brought, by demanding at the same time damages for books surreptitiously sold, and also the penalties of the act ; and likewise, by joining in the same summons several pursuers claiming distinct and independent rights in different books.

[*Elchies voce Literary Property, No. 3. Mor. 8295.*]

No. 93. By the act 8 of Queen Anne, entitled “ An act for
“ the encouragement of learning, by vesting the
“ copies of printed books in the authors or pur-
“ chasers of such copies during the times therein
“ mentioned,” (as extended by act 12 Geo. II.)
it is, *inter alia*, provided, that “ the author of any
“ book, and his assigns, shall have the whole liber-
“ ty of printing it for fourteen years ; and if any
“ person, within that time, shall print, reprint, or
“ import such book, without consent of the pro-
“ prietor ; 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 fur-
“ ther, shall forfeit one penny for every sheet found
“ in his custody, printed or printing, one moiety to
“ the crown, the other to him who shall sue for the

“ same. It is further declared, that these for-
 “ feitures shall only apply to books duly entered at
 “ Stationers Hall before publication ; and that all
 “ actions under this act must be brought within
 “ three months after the offence done.”

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Upon the ground that the provisions of this act had been violated by the respondents, an action was raised against them by the appellants, in which, after founding upon the statutes, the summons set forth : “ And moreover, that abstracting from
 “ the penalties of the said statutes, all persons con-
 “ travening the prohibitions thereof, and thereby
 “ encroaching on the property of their fellow-sub-
 “ jects, to the great discouragement of learning,
 “ and prejudice of the interest of the public, be-
 “ come liable to an ordinary action in law or equity,
 “ that they may be compelled to render damages
 “ to the party aggrieved, in respect of such books
 “ as they should have sold, contrary to the prohi-
 “ bitions of the law, and to render up such books
 “ and copies as they might still have upon hand,
 “ and are not legally entitled to expose the same
 “ to sale, as having been printed, reprinted, or im-
 “ ported contrary to the law and to the private in-
 “ terest of the lawful proprietors of the copies of
 “ such books :” —and concluded, that therefore the said penalties ought to be adjudged against the defenders, “ at least and in the option of the pur-
 “ suers, that the defenders ought to be ordained
 “ to pay damages to the pursuers for every surrep-
 “ titious copy that had been sold by them or any
 “ of them,” and to deliver up all copies remaining in their possession.

Objections being made to the relevancy of this libel, the pursuers' counsel stated that “ at present

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“ he did not insist for the penalties in the acts of
 “ Parliament, but only upon the common law ;
 “ and that at present he restricted their said libel
 “ to the property of the two books, &c. and for
 “ the profits which the defendants had made by
 “ sale of those books, and the damages sustained
 “ by the pursuer.”*

The Court (24 Dec. 1746) found, “ that an ac-
 “ tion of damages lies at the pursuers’ instance to
 “ the extent of the profits made by the defenders
 “ on such of the books libelled as have been enter-
 “ ed in Stationers’ Hall, and reprinted in Britain,”
 and appointed parties to be further heard on the
 question, “ Within what length of time the penal-
 “ ties enacted in the 12 Geo. II. can be sued
 “ for ?”

Parties being heard accordingly, the Court, upon
 advising a petition for the defenders with answers,
 found, (2 Dec. 1747) “ that no action lies on the
 “ statute for offences against the same, except when
 “ it is brought within three months of the offence,
 “ and that no action of damages lies on the sta-
 “ tute.”

Entered,
 1 Dec. 1749.

The appeal was brought from an interlocutor of
 4 February, part of the interlocutor of 24 Dec.
 1746, and those of 2 Dec. 1747, and 7 June 1748.

Pleaded for the Appellants :—Where an act of
 Parliament forbids an injurious act, whether under
 an express penalty or not, the party aggrieved has
 consequently a remedy by action, although no such
 action be named or allowed by the act.

* Printed case for respondents. In all the reports of the case it is
 stated that the libel was absolutely restricted ; but *vide* judgment of
 House of Lords. It likewise appears from the proceedings in the
 Court of Session, that the question of penalties was not entirely
 waved.

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The act in question admits a property in copies of books to have existed to the authors or their assigns before its date; and was meant as an additional security to that property for a certain term of years. The legal consequences of property at the common law is, that the proprietor may maintain an action for the violation of it. Even supposing the property in question to have been created by that statute, yet the common law and equity would operate for its security in the same manner as if it had been a property at common law.

Pleaded for the Respondents:—This action, which is admitted to be the first of its kind in Scotland, appears from the libel to be complicated and inconsistent. One branch is for the recovery of different penalties given by different statutes, one half to the crown, the other to the informer; and yet the King's Advocate is not a party, nor do the pursuers sue as well for the crown as for themselves. The second branch is an action upon the statute for damages, which is not authorised by the statutes; while if it is taken as an action for damages at common law, then it cannot be joined with an action for the penalties.

The action is brought by a number of persons alleging separate rights to several books, on which their libel is founded against the respondents, (who are twenty-four separate traders,) without charging them to be joint offenders.

It is a mistake in fact to say that this is an action in nature of a bill in equity for an account of profits, waving the penalties. The libel is expressly for penalties and damages; and the attempt to vary the nature of the cause was illegal and appears not to have been really intended: for as the

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Judgment,
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appellants first restricted their libel to two books, and waved penalties, and in the next place restricted it to three books, and insisted on the penalties under the act 12 Geo. II. so in the very last step of the cause they resumed, and insisted to proceed for the penalties under the statute of Queen Anne.

After hearing counsel: “ It is declared, &c. “ that the action brought by the appellants in the “ Court of Session was improperly and inconsist- “ ently brought, by demanding at the same time “ a discovery and accompt of the profits of the “ books in question, and also the penalties of the “ act of Parliament, which the appellants have “ never absolutely waved in the proceedings be- “ low; and also by joining several pursuers claim- “ ing distinct and independent rights in different “ books in the same action; and that therefore “ the points determined by the said interlocutors “ could not regularly come in question in this “ cause: And therefore ordered and adjudged “ that the said several interlocutors be reversed, “ without prejudice to the determination of any of “ the said points when the same shall properly be “ brought in judgment: and it is hereby also de- “ clared, that the libel in this case is non-relevant: “ and ordered that the said Court of Session do “ proceed accordingly.”

For Appellants, *W. Murray, Alex. Lockhart.*

For Respondents, *A. Hume Campbell, C. Yorke.*

Lord Elchies says, that “ it was written from London that it was “ the opinion of the House, (or seemed to be,) that a suit, if properly “ brought, lies for profits within the term granted by the statute, but “ not after that term.”