ported by Forbes and Fountainhall; only the one account of it is more special than the other.

KENNET. The curators cannot be excused as to omissions, for they neglected to make up inventories.

PRESIDENT. An express statute was necessary, in order to authorise the father to dispense as to omissions. We cannot extend the statute: if we could, we ought not; for then every curator would insist to be named without being liable for omissions. If this is the common practice, so much the worse. A judgment of the Court is the more necessary, to correct abuses.

On the 16th July 1773, the Lords found the curators liable for omissions; adhering to the interlocutor of Lord Auchinleck.

1773. *July* 20. ROBERT GORDON of Hallhead *against* JAMES BRODIE and OTHERS.

SASINE.

[*Supplement, No.* 5,587.]

MONBODDO. IT was not necessary for the notary to be more special than he has been.

COALSTON. It would be much better for notaries to follow the common style. Yet I dare not listen to an objection which might overturn many a real right. At least, I would make a previous inquiry into the practice.

On the 20th July 1773, "the Lords repelled the objection, and ordered Mr Gordon to be enrolled."

Act. A. Gordon, Cosmo Gordon. *Alt.* J. Ferguson, &c.

1773. *July* 27. JOHN HINTON, Bookseller in London, *against* ALEXANDER DONALDSON and OTHERS.

LITERARY PROPERTY.

[Woodhouselee's *Dictionary, III.* 388; *Dictionary,* 8307.]

KENNET. I meddle not with the law of England. I am not acquainted with that law, nor do I think that the question can be determined by that law. The question is as to the law of Scotland. The claim is not founded on the law of nature. That law is not founded on abstract reasoning; it must be

something that immediately corresponds with our feelings. Nor on the law of nations. There, *consensus gentium* is required. There are no traces of it in our law; neither *responsa prudentum*, nor practice, nor *series rerum similiter judicatarum*, nor statute. The statute 8*vo Annæ* takes not any right away. On the contrary, the rubric, the act of the legislature, looks as if there were no right to take away.

AUCHINLECK. The question is interesting,—what never received judgment but once in England, and that very lately, and there too the judges differed. *Nil tam absurdum quod non dicendo fit probabilis.* The judges in England were bewildered in the multiplicity of arguments. [Lord Auchinleck told me that he had read the report of Burrows; that he understood Judge Yate's argument, but not the others. Now, said he, when I meet with a thing that I do not understand, I conclude it to be nonsense.] The question itself is not difficult. That an author has a right to his conceptions while in his head or in his cabinet, is certain, but the question is as to the property of a performance after publication. The bar jumped from *ideas* to the *written book.* I took an intermediate step,—the words. Has a man a right to the property of a *bon mot* as long as he lives, and his heirs after him? *Nescit vox missa reverti.* If once a man speaks out a sentiment, he communicates it to his hearers, and it is theirs for ever. Homer's works were preserved by memory for many ages; so were the works of Ossian; so was Chevy Chase: was there any copy-right in it? I am old enough to remember when sermons were delivered *extempore*, without notes or premeditation. It would have been ill taken if a man had not trusted in Providence for his sermon. What sort of a property had a man in a sermon which he could not have repeated? Printing is a wider publication than speaking. Much has been said as to the *English injunctions.* I neither know what they are, nor do I desire to know; for we have no concern with the law of England. Many privileges have been granted since the invention of printing; none before. This shows that there was no idea of a right in authors after publication. There is no restriction at this day from taking copies in writing. The right claimed by the bookseller is a jumble of common-law rights, with ordinances and statutes. Prerogative copies are from the sovereign's superintendency in religion and the education of youth; not from any notion of property. In 1567, a license was granted by the Scottish government to Robert Leprevick for printing various books during 20 years, under pain of escheat of the books. This right was not a right of property, but of political superintendency. It was granted not to an author, but to a printer.

HAILES. I am of opinion that, in England, an author may have a common-law right in his works even after publication. So the English lawyers have said: so it has been determined in the Court of King's Bench. English law, as to us, is foreign law. Foreign law is matter of fact; and of the fact, I ask no better evidence, for I can have no better evidence than the opinion of lawyers and judges in that foreign country. Whether this right is a property or an interest, or something distinguishable from either, is of no moment. If we are once satisfied of the existence of a legal right, every inquiry into the mode of its existence is superfluous. The London booksellers have put strange interpretations on this common-law right. The Bishop of Gloucester, in his admirable charge to his clergy, has bestowed the appellation of the sages in St Paul's Church-yard

on the London booksellers. The doctrine of these sages is exceedingly commodious: they limit or enlarge this common-law right as best suits their own conveniency. 1. They limit it when maintaining that an author has a right to the whole of his work: they take the liberty of using any part of it that may serve as a proper ingredient for their monthly hachis of literature, their universal magazines of knowledge and pleasure, (published by Hinton.) If the work chances to be short, they retail it in a newspaper, under the appellation of a criticism or an extract. 2. They limit this common-law right by exciting their dependants to make abridgments of valuable works. Herein Stackhouse, the author of the day, was an adept: he published an abridgment of the discourses pronounced at Mr Boyle's lecture. He and this bookseller would have condemned Donaldson and his associates for encroaching on the property of Bentley and Gastrel, yet he scrupled not to abridge the argument of Bentley and Gastrel in defence of religion; nor did his bookseller scruple to print and publish the abridgment. How much of the original arguments evaporated in this literary process, I pretend not to say. Perhaps an abridgment acquires a right by a sort of specification, according to the trite saying—*Male dum recitas, incipit esse tuus.* 3. They limit this common-law right by their dictionaries of arts and sciences. A hundred authors are ransacked, and from them is composed what the sages of St Paul's Church-yard term *an entire new work*. Postlethwait common-placed the authors who had written of trade and commerce. He says, under the article books, "It would be hard that I should be deprived of my twenty years' labour by a literary pirate." That is, it would be hard if any one should steal from me what I have been for twenty years stealing from other people. The London booksellers see no harm in the thefts of Posthlewait, while they remain proprietors of his dictionary. 4. They limit this common-law right even in prerogative copies. They dare not print the text of the Bible by itself; that belongs to the Sovereign: but they print it with notes borrowed from Geneva sometimes, but more frequently from Poland. [This alludes to Goodby's Socinian Bible.]

Again, they enlarge this common-law right in various ways. It seems admitted that there is no property in the work of an author who is absolutely unknown. If ever there was an anonymous author, it is the author of the practical treatise entitled *the Whole Duty of Man*: At this day the sex of the author is problematical. And yet the London booksellers have contrived to appropriate to themselves a work, wherein the pious author pretended no property. Dr Hammond, in his commendatory epistle, says, that the author had thrown the work into the Corban, or public treasury. The London booksellers have taken it out of the Corban. Dr Hammond, in his commendatory epistle, had said that the manuscript was in the possession of Garthwait, the publisher, before publication. Hence the London booksellers have concluded that the property of the Whole Duty of Man was in the heirs or assigns of Garthwait. This, by the way, shows that injunctions have sometimes been granted without an accurate inquiry into the merits of the case. On this momentous circumstance, that a publisher was possessed of the manuscript which he published, is founded the injunction 1735. The London booksellers enlarge this property, by bestowing the appellation of *original author* on every tasteless compiler. Hereof the author of the day affords an opposite example. He was as very a compiler as ever descended from a bookseller's garret. The incorporeal substance of Stackhouse's ideas is a non-

entity. And yet, in the opinion of the trade, he is no less an original author than Hooker or Warburton. Here lies my first difficulty. Were we to copy the judgment of the King's Bench in the case of *Miller* against *Tailor*; were we to find that the common-law right of authors in England could be made effectual in Scotland; were we even to find that literary property was established in the law of nature and nations,—still we could not pronounce for the pursuer, unless we were to find that Stackhouse is an original author: That I never can do. But I have a farther difficulty in this case. It is material to inquire how the law of Scotland stood before the statute of Queen Anne? These are the words of an eminent person on a similar occasion. This inquiry was not material, had he understood literary property to be grounded on the law of nature and nations. That law varies not in different countries, according to the elegant passage which we heard from the bar: it is not *aliud Romæ, aliud Athenis.* Neither was the inquiry material, if the common-law right could have had effect in a foreign country. The inquiry which that great man thought material has been made. Of this right there is not a vestige in the law of Scotland. From Lord Stair down to Forbes, all our authors are silent concerning it. From Lord Stair down to Forbes, all our authors have acted as if there had been no such right.

It is said that the privilege which Lord Stair obtained, prohibiting others from printing his work, did indeed confer nothing upon him; but that his remedy lay by an ordinary action at law. It is strange that he should have sought a privilege which gave him no right, and yet should never have mentioned the right which he had. It is vain to say that our authors lived under the despotic sway of a Scottish privy-council. The Scottish privy-council was not despotic after the Revolution. It was a legal court, and legally administered. It was indeed abolished at the Union of the two kingdoms; not because it was despotic, but because it could no longer exist. For the same reason, and at the same time, the English privy-council was abolished. Lord Stair published his corrected work after the Revolution. Forbes wrote in the days of Queen Anne; Lord Bankton in the days of Geo. II. I dare not pronounce that to be a right in the law of Scotland, which has escaped the observation of all our statutes, lawyers, and authors.

Monboddo. This is a cause of greater property than any that ever came before the court. The first question is, Whether an author has a right to his work after publication. The second question, Whether this is taken away by the statute 8th Anne? The preliminary question, Whether an author can have a right? If the statute has given a right for a limited time, the common law may give a property to perpetuity. This property is an incorporeal right: it consists in the faculty of enjoying the subject without molestation. The property of a purchaser of a book is that of reading and using: the property of an author is that of multiplying the copies by reprinting. An author has a right to the MS.; if he gives copies of the MS. this will not entitle the person receiving to multiply copies. It was so found in the case of Lord Clarendon's MS.: if Lord Clarendon had sold the MS. the purchaser could not have taken it to the press and printed it: the presumption in law is, that it was intended to remain in MS. If an author prints and distributes copies *gratis*, it may not be printed by another. If an author has a right to print once, he has a right to print again. The purchaser has only a right to dispose of the individual copy as he pleases. The

sense of this contract of emption-vendition goes no farther. The title-page of books bears printed *for* the author, or for a bookseller. This is asserting a property in the book. A book without such notification may be understood to be given to the public. It has been found that the author of a private letter had right to every thing but the paper and ink. No man has a property in *ideas*, but he has a property in words, which no man can take from him by a mechanical operation, without having any idea of the subject or even of the language. This is the difference between a book and an engine: a man cannot make an engine without having an idea of the mechanism of that engine. This is the difference between a plagiary and a printer. The plagiary steals the thoughts, the printer only the words. If a man could get a book by heart, without understanding it, and repeat it to a printer, there would be no injustice. [There the injustice would lie in the reader, who, as is the case of some readers, had an idea of the subject.] The law of Scotland stands upon the same footing as the law of every other country, upon a *naturalis ratio*. The practice of taking patents is no objection. That was owing to a right of licensing claimed by the Crown. That claim being at an end, the patent is nothing but securing a statutory or common-law right. As to the second question, If there was a common-law right, it was not taken away by the statute, 8th Anne. The argument from the preamble is most unsatisfactory. It is answered by the statute vesting the estates of certain traitors in the Crown. The Crown had an antecedent right: the preamble supposes a right in the author. The body of the statute is clear. As to the inconveniences arising from this literary property, it is not our business, but that of the Legislature, to remedy them. There are great inconveniences from the contrary doctrine. The merit of a book may not be known for more than the term prescribed in the statute 8th Anne. A longer term had elapsed before Lord Sommers informed the English that they had in their language the noblest of modern heroic poems.

Justice-Clerk. The pursuer seeks no benefit from the statute of Queen Anne, or from patent: his claim is at common law. Suppose an action of damages, at the instance of one Scotsman against another, for a book published 40 years ago; this right falls under none of the ideas or principles in the common law of this country: there is no trace of it, *nec nota nec vestigium*. In the writings of the Roman lawyers, though the subject-matter then existed in the ancient world, every man might buy a copy, and employ an hundred slaves in transcribing an hundred copies of it. I see no idea of such a right on the Continent. An author has right to his manuscript: when once published, I see nothing in the common law which limits the right of property in the purchaser. Natural justice, and moral right, are not always the foundation of civil claims: for example, a man lays out his whole fortune in erecting and furnishing a public inn: another man erects an inn just opposite from pique, and with the view to hurt his neighbour: in conscience he is self-condemned, and yet the law of the land gives no aid. There is nothing here but a *jus imperfectum*. After a man has once given his copy to the public, there is no principle in the common law which can limit the use of that copy. It is said that the purchaser of a book is under a tacit condition: this seems a *petitio principii*. I admit that there is good reason to give a right of property to authors, larger or smaller, as the Legislature thinks fit. Literary property is said to be a thing fit and expedient: this may be an argument with the Legislature; to me, a

judge of the common-law, all arguments from expediency are nothing. After ransacking the writings of all our lawyers, nothing concerning literary property can be there discovered. The law of Scotland will sustain action for every species of property founded in the law of England, provided that it is a right acknowledged in the law of Scotland, and not opposed by the rights of individuals. Thus, a patent may be granted in England for the invention of a machine: This is a good common-law right in England, and yet good for nothing in Scotland, because it would impinge upon the right of individuals. The same is the case as to the assignees under a commission of bankruptcy. The subjects of the bankrupt are vested in them; yet, in Scotland, their preference must depend not on their right, but on their diligence. I see, demonstratively, from the argument in the King's Bench, that, if the question had occurred there, immediately after the invention of printing, the judges would have given the same judgment that I have given.

KAIMES. We must judge of this question by the law of Scotland. All damages arise from breach of covenant or breach of property. If I write a book, the manuscript is mine; if any one steals the manuscript from me, I have a *rei vindicatio*: If I die, the manuscript belongs to my heir. If my manuscript is purchased at an auction, for instance, he who purchases it, becomes the proprietor; he may destroy it, give manuscript copies of it, or print it. If I have a privilege as an author of a book, I have the same as an inventor of a machine, as designer of a picture, &c. If I invented the art of gilding my ball, must no man gild his? Faust invented printing: had he a right by the law of nature to the art of printing? Why has man an imitative nature, if he may not be allowed to imitate? Such privilege is inconsistent with property. [After having spoke much upon general topics of conveniency and inconveniency, which are foreign to the office of a judge of positive law.] I think that the statute, 8th Anne, supposed that there was no common-law right in authors.

GARDENSTON. The sources of our common law are: *First*, Usages and established consuetude; *Second*, Feudal law; *Third*, Civil law, in so far as received with us; *Fourth*, Every apparent principle of justice which has been received by the other civilized nations of Europe. 1*st*, As to usage, it is directly contrary to the claim of literary property: All our lawyers, themselves, demanded no protection but from temporary patents; 2*d*, The feudal law can give us no light; 3*d*, It is not so much as introduced into the language of the civil law, although the civil contains an infinity of cases of property and servitude; 4*th*, It is no principle acknowledged by civilized nations: they have uniformly gone into the idea, that an author has no more than an equitable claim to a temporary protection in the publishing his works. A man, it is said, has a property in a manuscript, why should he lose it by publishing? This argument is not sufficient to overturn the practice of nations. After publication, every thing is at large. I never could find out a difference between the inventor of a machine and of a book. I never could see a solid metaphysical distinction. Both have a property, before publication. There is no reason to suppose that, by publication, the one meant to sell his art more than the other. It is said that a printer has no ideas, but that the maker of a machine has. I cannot see that. Both are dull mechanics, neither capable of writing a book or of inventing a machine. I cannot distinguish this case from that of engra-

vers. Hogarth is as much an author as Swift or Butler, and I have read his prints with as much pleasure as their works. I cannot reconcile this new property to our ideas of ancient property. There must be, first, a property in nonsense,—that will be a large one; then a property in bawdry, blasphemy, and seditious libels. Mr Wilkes will have the property of the Essay on Woman and No. 45. Many books are nothing more than transcripts of former ones. As well might a man pretend to the property of a piece of cloth by dyeing it. Then we have translations, and what Mr Bayes calls transposings and transversings. How is such property to be transmitted from the dead to the living? Executors may be numerous: their title cannot be made complete without a joint consent. Therefore, any one executor of a hundred may put a negative upon the sale of the works of the deceased. I do not suppose that injunctions prove any thing: they are no more than interpositions in equity, in order to give a temporary protection. The statute, 8th Anne, has left the matter just where it was.

Coalston. This question is of little moment either to learning or authors; for the difference between twenty-eight years and a perpetuity will make little difference in the value of copies: but it is of great moment to booksellers and to the public. My reasons for giving judgment against the pursuer are the same with those of my brethren. This is said to be a right of common law, and yet it is not admitted into any country but England, nor even there till lately. I cannot restrain a man from using a book which he has bought, nor can I distinguish between printing and engraving. If this is a common-law right, I cannot distinguish between the case of natives and foreigners. If action lies for a MS. stolen, as has been found upon the supposition of a common law right, the same must lie for publishing the works of foreigners. I do not think that the statute 8*vo Annæ* is strong enough to take away a common-law right. Yet I am convinced that the legislature had no view to such a right. The expression, *no longer*, is well calculated to cut off the plea of the stationers: it is not used in the Act concerning engravers, who had not made any claim of right in times past. There is also a specialty in this case. The publication was not clandestine: the book was published at different times. This might imply an abandon of the right, if there was any.

Alva. All the difficulty here has arisen from language invented by the London stationers. There is no property here, but merely a benefit or an interest; for rendering of which effectual, the intervention of society is necessary. It is a privilege or monopoly depending on the state. It is a negative right from others being prohibited.

President. The question is to be divested of the statute, and of all ideas of conveniency and inconveniency. The question is as to the property of authors. It is strange that a property should have existed so long without being known. Is it possible to say that, because another has genius and invention, he has a property in his works, more than the inventor of a machine would have, which is also the effect of genius. A book is written, proposing a method of raising supplies; the Parliament adopts it: has the author any claim against Parliament, or even any claim for a gratification? The case of engraving is strong and apposite. If there was a property, how could the legislature look on and see it violated, as in the case of books printed abroad? The legislature

has, in effect, declared that this literary property could be invaded with impunity by the importation of books from abroad? This was not prohibited till the statute 12th Geo. II. This is inconsistent with the idea of a common-law property. The statute of Geo. II. does not so much as insinuate that there was any such right. Its preamble proceeds upon the defrauding of the customs, not upon the preservation of the property of authors. It was made temporary; which shows that it was not understood to be a statute in support of common law. If a property is in an author, the legislature cannot take it from him; and yet the statute, 12th Geo. II. allows tracts, printed abroad, to be brought over, if bound up with others. Translations are inconsistent with the idea of property in the original work. Property does not depend upon specialties, and yet the argument in the King's Bench is founded on ten or a dozen specialties: hence I infer that this is not a property, in the common understanding of that word. Mention is made in the case on which that judgment proceeded, of copies necessary for sale having been provided by the plaintiff. How comes that to be material in a question as to property? [This is an acute argument, which the President just hinted at. If an author has a property in a work published, why should he be obliged to furnish a greater number of copies for the impatience of the public than he judges consistent with his own advantage. If the book is his, and if any copy which he sells cannot be multiplied, what right has the public to limit him as to the exercise of his property? No individual has a right to more than the reading of the copy which he purchased, at the rate which the proprietor chose to put upon it. All individuals can have no greater intrinsic right than each; and therefore the inquiry ought not to be whether there are copies sufficient to supply the public, but whether the public has any right to desire to be supplied? If I print an impression of 300 copies, I mean to let 300 persons share in the emolument of learning accruing from my labours. If I print no more than 50 copies, I limit my readers. If I have a property in what is published, why should I be obliged to diffuse my ideas further than I choose. To require evidence that there are copies enough to supply the public, is to suppose that the public may insist for a reading of my work. This is asserting a right in the public inconsistent with the idea of a common-law right in the author. The argument escaped the observation of the bar, and yet it is a forcible argument, and deserves to be treated of at large.] The expression, *printed for the author*, means that the author employed the printer to print that edition, and it means no more. If an author has a right, it may be confirmed, or it may be attached. This right of property can neither be confirmed nor attached. When a man communicates his ideas to the public, he confers an obligation of gratitude on the public, but he has no action against the public for satisfying this obligation of gratitude. The ordinances in England relate merely to the interest of the stationers. The original draught of the Act of Q. Anne had *securing*, but this was altered in the committee to *vesting*. I am persuaded that the words, *no longer*, were purposely inserted in order to prevent any argument from the word vesting. An argument has been drawn from the word vesting in the statute 20th Geo. II.; but it is erroneous. The forfeited estates could not be vested in the king without an inquest, attended with a thousand intricacies. The statute went upon liberal Revolution principles, for

speedy payment of the debts of the person forfeiting. It was devised for the special purpose of avoiding those intricacies. The Act 8*vo Annæ* is absurd if a prior common-law right had been established. The additional clause for 14 years more, if he is still alive, has never received an answer.

On the 27th July 1773, the Lords sustained the defences, and assoilyied.

Act. A. M'Connochie, A. Murray, D. Rae. *Alt.* J. Boswell, Ilay Campbell, J. M'Laurin.

Diss. Monboddo.

1773. *August* 4. DUKE of QUEENSBERRY *against* VISCOUNT of STORMONT.

SALMON-FISHING.

[*Faculty Collection, VI.* 215; *Dictionary,* 14,251.]

ALVA. Nothing in the *tenendas* clause can enlarge the dispositive clause.

MONBODDO. Even in charters from the Crown, were it not that the *tenendas* clause is not revised by the Barons, a grant of fishings in the *tenendas* clause would be good. It is always good in charters from a subject. If the Duke of Queensberry and his predecessors had continued in possession, there would have been more difficulty; but the direct contrary is the case. I think there is both a title and prescription.

KAIMES. A salmon-fishing is *inter regalia,* so that it passes by a particular symbol. There is no such thing here. If a man have a salmon-fishing from the Crown, may not that go as part and pertinent without any symbol? It occurred to me, that no exclusive grant was given, but only a permission to possess promiscuously. It is proved, however, that the possession was not promiscuous, but as large as a vassal could enjoy.

JUSTICE-CLERK. The charter, 1649, not only grants the lands, but also the salmon-fishings, or what is equivalent to salmon-fishing. This conveys to my mind that the adjudger has taken the description from the title-deeds of his debtor, as mentioning a particular mode of fishing. There is some defect in the progress; but the charter 1687 is a voluntary charter: bearing a *novodamus,* it confirms all the charters of apprising. If the Duke's challenge had been recent, there might have been more difficulty; now there is a proof, on Lord Stormonth's part, of long possession, not for pleasure, but for profit: On the other side, a precarious possession, yielding no profit to the Duke of Queensberry. I do not find myself at liberty to play with the rights of parties, so as to take the subject from the Viscount and give it to the Duke of Queensberry.

KENNET. In order to acquire a right of prescription, there must be a title, and there must be possession. The defender has both. There is no doubt as to *possession.* The titles produced are not sufficient to give a right *per se,* but they are sufficient with possession. According to the present mode of revising charters in Exchequer, I would lay no weight upon the *tenandas* clause in a