Chapter 3

Nineteen Days in Court

In April 1769, the Court of King's Bench had recognized the plaintiffs' claim to their perpetual copyright in the *Millar v. Taylor* case. Alexander Donaldson must have felt that Millar and his cohorts had gotten the head start on him by taking Taylor as their target.[86] As long as Lord Mansfield's judgment held, Donaldson knew his business would be hobbled. The only way to reverse this situation was to bring the House of Lords, which had long resisted the demands of the monopolistic booksellers, into the fray, and fight out his case at Westminster.

There was probably only one scenario for realizing this scheme: to provoke Thomas Becket and the other monopolist booksellers who carried on Millar's cause in such a way that they would demand that Donaldson be penalized. Should Becket and his cohorts appeal to the Court of Chancery, the court, inasmuch as Lord Mansfield's earlier decision in favor of perpetual copyright prevailed, would no doubt place the blame on Donaldson and hand him a penalty. The case would then be moved from England to Scotland because the Statute of Anne stated that persons in Scotland charged with violating the Act should be brought before the Court of Session there, and Donaldson was a citizen of Edinburgh. Although England and Scotland were one kingdom at the time, their social, including legal, systems were completely different. There were no precedents in Scotland recognizing copyright, a situation that well revealed the contrast in social conditions of the two parts of the kingdom less than a century after Scotland and England had been united.

Donaldson could be assured of winning if the trial were held in Scotland, and once having won in the local court, he could appeal against the Court of Chancery judgment to the House of Lords. Such was the long and difficult scenario that Donaldson must have envisioned. So, in order to provoke Becket and his cohorts, he carried on with the publishing of *The Seasons* even after the April 1769 decision in the *Millar v. Taylor* case.

The monopolist booksellers promptly responded to the provocation. They apparently underestimated him, concluding that suppressing Donaldson would be easily done since perpetual copyright had been recognized. They appealed to the Court of Chancery on 21 January 1771 demanding that Donaldson cease publication of *The Seasons* and hand over to them the profits accrued from its sale. The then Lord Chancellor Lord

86 A pamphlet taking issue with the decision of the Court of King's Bench and explaining the essence of the Statute of Anne was published anonymously in Edinburgh on 8 May 1769. Deazley attributes the pamphlet to Alexander Donaldson. (Deazley 2004, p. 163)

Apsley (Henry Bathurst; 1714–1794) called Donaldson for hearings that year from 16 to 20 July, and it was the autumn of the following year, 16 November 1772, that the Lord Chancellor decided, as in the case of *Millar v. Taylor*, that literary property was protected in perpetuity, and that Donaldson must reimburse Becket et al. Based on Lord Mansfield's earlier decision, the judgment fully supported the claims of the plaintiffs. Donaldson then, citing Article 6 of the Statute of Anne, wasted no time in appealing the case in the Court of Session of Scotland.

It was only a little later, in 1773, incidentally, that another of the London monopolist booksellers, John Hinton (?–1781) was suing Donaldson in the Scottish Court of Session.[87] Hinton declared that the copyright to *A New History of the Holy Bible* by Thomas Stackhouse (1677–1752), belonged to him and sought to stop Donaldson from publishing the "pirated" edition. Hinton, who had married the widow of the bookseller who had published Stackhouse's book, had obtained the copyright. Donaldson's attorney in this *Hinton v. Donaldson* case was Boswell, author of *Life of Johnson.* The result of the trial held in Edinburgh was eleven of the twelve judges in favor of Donaldson. It was an overwhelming victory for the "pirate" side.

The suit with Becket et al. proceeded in the same direction. The conclusion of the deliberations of Scotland's Court of Session on 27 July 1773 was, as Donaldson had calculated, that in Scotland authors did not hold exclusive property rights to their work. That victory in hand, Donaldson immediately appealed to the House of Lords: was copyright indeed an eternal right? And was not the decision of the Court of Chancery ordering him to be penalized a decision made in error?

Just at about that time, Donaldson moved his shop from the Strand to London's exclusive bookstore district, St. Paul's Churchyard, only 160 feet away from the office of the Stationers' Company. It was a location that suggests something of Donaldson's alacrity for the showdown before him.

Taking the Battle to the House of Lords

Without adequate knowledge of the history of the West and the history of law, understanding the courts of eighteenth-century England is like trying to grasp hold of a cloud. In her book *Dr. Johnson's London*, Liza Picard quotes sources of the time to give a vivid image of the court of the House of Lords. She introduces a case that dealt with a member of the House of Lords who had ended up killing a man in a duel. The Lords were forced to pass judgment on one of their own. The court convened not in the hall of the House of Lords but in Westminster Hall. To accommodate an audience, tiered seats as well as boxes covered with crimson provided for members of the royal family and foreign envoys

87 Tompson 1992.

were installed in the hall. For the ladies in the audience, it was apparently something of a fashion show, as they were "decked in the finest manner with brocades, diamonds and lace, [and] had no other headdress but a riband tied to their hair over which they wore a flat hat adorned with a variety of ornaments." The gaily dressed audience having been settled, the 250 members of the House of Lords entered the court, "walking two by two, in their long, red ermine-trimmed robes and 'hats of all shapes and sizes', which two by two they took off to salute the throne with the appropriate bow, disclosing an equal variety of hairstyles and wigs."[88]

The *Donaldson v. Becket* case was conducted in Westminster Hall as well, and the same colorful atmosphere created by the presence of gaily dressed women presumably characterized the proceedings. There is no officially accurate record of the number of the audience, but inasmuch as the case was of deep concern to writers and authors, we can be fairly sure that the audience included many eminent cultural figures. We know, for example, that political theorist Edmund Burke (1729–1797) and author Oliver Goldsmith (1730–1774) were there.[89]

Lord Mansfield, whose decision had recognized perpetual copyright and who was chief of the Court of King's Bench, was present. Those attending the sessions were well aware that although the case concerned publishing, it was also one that would indirectly examine whether Lord Mansfield's decision concerning perpetual copyright should stand or be reversed.

The presence of one other man in the audience was notable, and that was Lord Mansfield's greatest rival, Lord Camden (Charles Pratt, 1714–1794), who had served as lord chancellor until four years previously. The product of a family of men who served at the bar, Lord Camden's father had been chief justice of the Court of King's Bench. Lord Camden was also a close friend of William Pitt (the Elder Pitt, 1708–1778), who was a schoolmate at Eton and would later become acting prime minister. They continued to support each other even after Pitt entered politics.

Seemingly born rivals, Lord Mansfield and Lord Camden had sparred in many different court cases. Since their relationship is well illustrated by the 1763 Wilkes case, which dealt with freedom to publish, let me introduce it briefly here. An article was published in the newspaper *The North Briton*, number 45, in 1763 criticizing George III for his favoritism towards members of the Scottish nobility. Progressive politician John Wilkes (1725–1797) was suspected to be the publisher of *The North Briton* and the author of the piece itself.

This was the era in England of the infamous general warrants, often used to suppress freedom of speech, under which a person could be taken into custody without specifying

88 As quoted in Picard 2001 (2000), pp. 284–85.
89 Skinner 1928, p. 6.

the name of the person to be arrested. Wilkes was arrested under the general warrant and put on trial for seditious libel. It was later confirmed that Wilkes had indeed written the offending article, but the suspicion was not clarified before his arrest. Support for Wilkes spread widely among London citizens, sparking a popular movement demanding not just freedom to publish but greater political freedom. George III was the scion of the Scottish royal house of Stewart, and during his reign the nobility of Scotland was indeed ascendant. The Earl of Bute (John Stuart, 1713–1792), who served as British prime minister in 1762–1763, was also a Scotland-born politician.

Wilkes launched political attacks on the policies of George III and Prime Minister Bute in the pages of *The North Briton*. His criticism of Scotland-born Lord Mansfield also fanned the embers of anti-Scotland sentiment smoldering among the citizens of London. Wilkes gained a wide popular following under the cry of "Wilkes and Liberty!"

In the 1763 Wilkes case, it was Charles Pratt—the later Lord Camden—who, as chief justice of the Court of Common Pleas, ordered Wilkes's release, declaring the general warrant illegal and citing his privilege of immunity as a member of Parliament. Pratt had the stalwart support of the masses, but Lord Mansfield, deeply displeased with the decision, is said to have told George III that "[n]o man ever behaved so shamefully as Lord Chief Justice Pratt."[90]

Wilkes fled to France for a time, but consistently enjoyed popular support as people rallied to the call "Pratt, Wilkes and Liberty!" Immediately after Wilkes fled to France, he was expelled from the House of Commons in his absence and Lord Mansfield announced that he had been pronounced guilty in the Court of King's Bench. When Wilkes returned to England in 1768, Lord Mansfield ordered him placed in the Court of King's Bench jail, where he remained for a year and ten months. In the meantime Wilkes was reelected to Parliament from Middlesex; later he was again expelled, and again elected. He was elected to the House of Commons a total of four times. The masses applauded Wilkes's dauntless courage, and these events contributed to the tradition of popular rights as holding greater power than parliamentary decisions in the history of the British Isles.

Lord Camden, thus, was a populist, also known for a speech he gave in the House of Lords opposing the 1765 "Stamp Act." This law, requiring that the publication of legal documents, newspapers, and pamphlets in the North American colonies carry a stamp and be printed on paper issued by the Crown, was the first to be passed unilaterally in the British Parliament without the consent of the American colonies themselves; the protests against it under the slogan "no taxation without representation" led not long after to the American Revolution. Even after he became lord chancellor in 1766, Lord Camden consistently opposed unreasonable taxation of the colonies, although it led to his dismissal from the post of lord chancellor in 1770.

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90 Cash 2006, p. 119.

Lord Mansfield was a royalist and, as we saw in the Wilkes case, was concerned mainly with limiting the powers of publishing. Lord Camden, by contrast, was a populist and a liberal on the matter of publishing. From the viewpoint of Londonites, both Lord Mansfield and King George III were upstarts from the Scottish aristocracy. Lord Camden would have had mixed feelings about the way rule of England was passing into the hands of the nobility of Scotland. In particular, he must have harbored the impulse, if the opportunity presented itself, to deal a telling blow to his political rival Lord Mansfield. In the end, it was this personal rivalry between Lord Mansfield and Lord Camden that appears to have determined the direction of the *Donaldson v. Becket* case.

Court Convenes

Lord Camden attended the proceedings of the *Donaldson v. Becket* case from a strong position as a prominent member of the House of Lords. He, at age fifty-nine, and Lord Mansfield at age sixty-eight, were both men of great maturity and experience as they faced each other quietly in the hall. With the trial closely related to Lord Mansfield, Lord Camden could not possibly remain disinterested. Those present in the galleries would have recalled their rivalry in the Wilkes case of 1763, and there must have been great interest to see how and when these two senior members of the House of Lords would take a stand on the case.

Speaking for Donaldson were three barristers, Edward Thurlow, who by then had been promoted to attorney general; John Dalrymple (1726–1810), from Scotland; and Arthur Murphy, who had stood for Taylor in the second trial of the *Millar v. Taylor* case. Facing them, for the Becket side, were Alexander Wedderburn, John Dunning, and Francis Hergrave (d.u.). Most of these names were familiar ones from earlier trials dealing with copyright issues.

The case in the House of Lords was brought directly to determine whether the decision made by Lord Chancellor Apsley in 1772 demanding that Donaldson cease publication and that he pay compensation to the monopolist booksellers was appropriate. Lord Apsley, a Westminster-born member of the nobility, did not leave a particularly distinguished record as lord chancellor and seems to have had a reputation as second-rate among high officials of the government. He apparently had not expected to be appointed lord chancellor and was in fact not someone suited to the position.[91] Perhaps precisely because of that, Donaldson calculated that he could win his case.

The proceedings began on 4 February 1774 and continued until 22 February including some days of recess. They are recorded in a number of documents, including *The Cases of the Appellants and Respondents in the Cause of Literary Property, Before the House*

91 *Oxford Dictionary of National Biography.*

of Lords (1774); *The Parliamentary History of England, from the Earliest Period to the Year 1803* (1806–1820); and *The English Reports* (1900–1932), but, as with many old sources, there are discrepancies among them, and the views of scholars about them differ on some points.[92] For the layperson today, moreover, there will be much that remains puzzling. Nevertheless, after having compared all these different sources, I would like to try to reconstruct how the case unfolded. The record of the actual statements made is extremely lengthy, so I will quote only sections that will give highlights of the debate as a whole. The reader should be aware that this is by no means a complete account.

4 February 1774 (Friday): The parties to the appellant and the respondent, along with the members of the House of Lords gathered in the hall. The audience filling the galleries was extraordinarily large. Lord Chancellor Apsley began by reading out in sonorous tones the outlines of the case.

The first to take the stand for Donaldson was Attorney General Thurlow. "I shall endeavour," he began, "to shew that the Decree of the Court of Chancery, pronounced on the 16th Day of November, 1772, in Favour of the Respondents, to be highly injurious to the Appellants, my Clients." He sought to show that literary property was not secured under common law. Property of any kind is "begun by Occupancy, and continued by Possession." Is literary property corporeal or incorporeal? "If corporeal, it is descendible, like any other Chattel; if incorporeal, how is its Incorporeality to be ascertained?" (*Cases of the Appellants*: 19)

Then, in blistering words, Thurlow proceeded to lay bare the hypocrisy of the booksellers: "The Booksellers, my Lords, have not, till lately, ever concerned themselves about Authors." They had generally turned to the legislature for the security of their own property, he continued, and would probably not have included authors as parties in their claims to the common-law exclusive copyright had they not "found that necessary to give a colorful Face to their Monopoly." The Statute of Anne was not merely an "accumulative Act" giving additional penalties, but "a new Law to give learned Men a Property which they had not before."

The idea of an exclusive copyright, he said, did not prevail prior to or for a long time after the invention of printing. Authors complained only when their works were inaccurately printed, not because of violation of their property rights. Literary property exists only in the imagination, he declared, and it never entered into the heads of booksellers to claim it until they found it advantageous. "Authors never conceived the Notion of any Property vesting in them, but what was given by Statute, by Patent, the licencing Acts[,] the royal Privilege, or in Virtue of the Institution of the Stationers Company."

92 There are also other records of the *Donaldson v. Becket* case, the differences among which Deazley analyzes in detail. Deazley 2004, pp. 191–210.

So-called literary property, Thurlow argued, led to a "scandalous monopoly" imposed by "ignorant booksellers." Feeding on other people's "ingenuity," they grew fat by exploiting the fruits of authors' labors. Thurlow concluded by saying, "As the Lords of Session have freed Scotland from such a Monopoly, I sincerely hope your Lordships, following so praise-worthy an Example, will emancipate this Kingdom from such an odious Oppression."[93]

Mincing no words, he wasted no time exposing the true motive behind the London booksellers' claim to rights, and declared that while they might claim to be defending the rights of authors they are in fact only using authors to protect their own monopoly.

When we think that it was Donaldson who won his case, we must conclude that this first statement by Thurlow, its caustic tone notwithstanding, must have won the agreement of those assembled. When Thurlow's remarks were concluded, the court adjourned for the weekend, to reconvene on Monday.

7 February 1774 (Monday): The second to speak for Donaldson was Dalrymple, also from Scotland. Dalrymple had studied at the University of Edinburgh as well as Cambridge and practiced law in Scotland. He himself had had the experience of putting out a book with Millar's bookstore, one titled *The Essay towards a General History of Feudal Property in Great Britain* (1757). From this we may assume that he had some firsthand familiarity with the ways Millar and the other London booksellers sought to monopolize culture through control of copyright.

Historical sources reveal very little about Dalrymple's character or personality, but we get some hint from Boswell, who mentions the barrister's writing style in *Life of Samuel Johnson*, referring to a passage in Dalrymple's *Memories of Great-Britain and Ireland* (1771) about the secret deal between Charles II and Louis XIV (1638–1715;

93 **Original:** The Booksellers, my Lords, have not, till lately, ever concerned themselves about Authors, but have generally confined the Substance of their Prayers to the Legislature, for the Security of their own Property; nor would they probably have, of late Years, introduced the Authors as Parties in their Claims to the Common Law Right of exclusively multiplying Copies, had they not found *that* necessary to give a colorable Face to their Monopoly. . . . The Statute of Queen *Anne* is not merely an accumulative Act, declaratory of the Common Law, and giving additional Penalties, but a new Law to give learned Men a Property which they had not before . . .

No such Idea, my Lords, as that of an exclusive Right to multiply Copies prevailed previous to, or indeed long after, the Invention of Printing. This is instanced in several Cases, adduced for that Purpose, by the Appellants, in their said printed Case, where on Writer complains of another for printing his Works, not on account of any Violation of Property, but merely because the Party complained of had printed them inaccurately. Literary Property consists only in the Imagination; it never, till it was found advantageous, entered into the Head, of Booksellers themselves; Authors never conceived the Notion of any Property vesting in them, but what was given by Statute, by Patent, the licencing Acts[,] the royal Priviledge, or in Virtue of the Institution of the Stationers Company. What is called Literary Property gave rise to a scandalous Monopoly of ignorant booksellers, who, fattened at the Expence of other Mens Ingenuity, grew opulent by Oppression. As the Lords of Session have freed Scotland from such a Monopoly, I sincerely hope your Lordships, following so praise-worthy an Example, will emancipate this Kingdom from such an odious Oppression. (*Cases of the Appellants*, pp. 20–21)

r. 1643–1715) at the time of the third Anglo-Dutch war. Boswell writes that, "Johnson [said] '. . . This Dalrymple seems to be an honest fellow; for he tells equally what makes against both sides. But nothing can be poorer than his mode of writing: it is the mere bouncing of a school-boy. Great He! but greater She! and such stuff.' I could not agree with him in this criticism; for though 'Sir John Dalrymple's style is not regularly formed in any respect, and one cannot help smiling sometimes at his affected *grandiloquence*, there is in his writing a pointed vivacity, and much of a gentlemanly spirit.'"[94]

Calling attention to history, Dalrymple declared that there is no such thing as common law copyright. While maintaining the gentlemanly demeanor of a well-bred aristocrat of Scotland, his remarks now-and-then carried the sting of sarcasm.

> It should be considered, my Lords, that this pretended Property, which is supposed to have a Foundation in Common Law, cannot in the Records of the Common Law Courts any where be found: If you speak of the Subject before the Act of Queen *Anne*, you hear of nothing but licencing Acts, and the Company of Stationers . . .
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> My Lords, the History of the Act of Queen *Anne* deserves your Lordships Attention: What was the View of the Booksellers? Absurdity on the very Face of it. They applied for an Act, vesting in them a Property for fourteen Years which they pretend to have derived from the Common Law, for Futurity. Can it be supposed that Men who were any Ways clear in their perpetual Right, would apply for a fresh Right for fourteen Years only? It could not be. They knew their own Situation: they knew the Rottenness of their pretended Right, and wanted a new real one, instead of the old imaginary one . . .
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> But, my Lords, this Act of Queen *Anne*, which was ushered in under the Idea of encouraging Literature, was every far from having such a Tendency. It was to encourage Booksellers, but not Authors; however, supposing both interests the same, —— What did they gain? Why, a Perpetuity was changed to a Term of fourteen years only. A Price was fixed, and a Clause inserted to force them to send Copies to public Libraries —— What Encouragements are these? —— They, on the contrary, were Disencouragements. —— All which is sufficient to shew that the Booksellers never dreamed of a serious Property at Common Law for Perpetuity; had they such a Notion they would have petitioned against the Act.
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> Observe, My Lords, the Title of the Act: *To vest* the Copy-rights: that is, my Lords, to *give* them a Right they had not before; a marked Expression which could not be mistaken . . .
>
> What could be more absurd, my Lords, that an Act to vest a perpetual Right to a set of Persons for a limited Term, and inflicting Penalties? (*Cases of the Appellants* : 21–22)

94 Boswell 1998 (1791), p. 508.

And here Dalrymple gives a small performance to draw the interest of the judges and the audience. Referring to the official title of the Statute of Anne (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), he concocts a parody: "An Act for the Encouragement of Planting, by Vesting the Shoots of Hedges and Branches of Trees, in the Planters, during the Times therein mentioned" and presents its provisions. Those who plant trees and hedges shall be given the right to the plants for fourteen years and a fine be placed on anyone who might cut them down. By planting trees, the landscape is beautified. Publishing books, like planting trees and hedges, has a public service quality—so, he asks, is it acceptable to make something that by nature belongs to the public domain, the province of specified persons in perpetuity?[95] Dalrymple goes on:

> My Lords, this perpetual Right which they want would, instead of being beneficial to the Interests of Literature, be pernicious to it. It would encourage the Spirit of writing for Money; which is a Disgrace to the Writer, and to his very Age. My Lords, why should not Honour and Reputation be powerful Inducements enough for Authors, without that mean one of Profit? Foreigners know no such exorbitant pecuniary Rewards as have disgraced this Country. The Germans get nothing by writing. The Italian States are so small that no Literary Property can exist, as the Booksellers of one State would immediately print upon those of another. ——In France the Sums given to Authors are too small to have this Effect. My Lords, Mr. Hume, has told me that Rousseau assured him he had but fourscore Lewis d'ors for the Copy of his Emile. Such Sums as we hear of in *England*, are merely an Encouragement to the mercenary Spirit of Writing, not to the Merits of it. (*Cases of the Appellants*: 24–25)

Dalrymple also said that "twelve or thirteen booksellers were hovering, like eagles over a carcass, about the remains of poor Thomson."[96] He made two points: one, that copyright was not proven to exist in common law, and two, that the Statute of Anne had given authors rights that they had not previously been entitled to. For two and half hours, Dalrymple held forth on these subjects with great eloquence. Perhaps because he marshaled all his broad knowledge from the fields of metaphysics, law, science, and politics, he was apparently exhausted by the time he concluded his speech.[97] Thurlow and Dalrymple having spoken, Donaldson's side had completed its first round of assertions; the counterarguments from Becket and other London booksellers would be presented the following day.

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95 This anecdote is not recorded in *Parliamentary History of England*.

96 *Parliamentary History of England*, vol. 17, p. 962.

97 *Parliamentary History of England*, vol. 17, p. 963.

8 February 1774 (Tuesday): The court was convened. From this day, the Becket side presented its argument. It was only the third day of the case, but the galleries were packed with visitors. The first to take the stand was Attorney General Alexander Wedderburn. All concerned had waited with bated breath in the expectation that Wedderburn would have carefully scrutinized the statements by Thurlow and Dalrymple and would present a tightly formulated counterargument. As he spoke, however, it became clear that he was simply repeating, in more or less the same way, the arguments presented for Tonson in the first *Tonson v. Collins* case in 1760. Both the judges and the gallery felt betrayed—was the Becket side only going to repeat the stale statements of fourteen years earlier? Here let us look at key passages of the main body of Wedderburn's speech:

> Literary Property, my Lords, hath, by those who have spoke before me, been said to be so abstruse and chimerical, that it is not possible to define it. . . . any Idea, although it is incorporeal in itself, yet, if it promises future Profit to the Inventor of it, is a Property. And the latter Word hath, through Inaccuracy, been used as describing that, over which a Possessor holds an absolute Reign, Dominion, or Power of Disposal. The subject Matter may be immaterial, and yet liable to be appropriated. Property changes its Nature with its Place: In *England*, Portions of Land are private Property, among the *Arabs* and *Tartars* no such Idea prevails; they look upon Cattle and Chattels as the only private Property. Among the *Americans*, in certain Districts, Land is considered as Property, but not as the Property of Individuals; as the Inhabitants live upon the Gains of hunting, a Circumference of Land, sufficient for them to hunt on, is considered as the general Property of one Tribe or Nation.
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> The Lawyers Mode of describing Property, my Lords, is exceedingly trite and familiar; they generally divide it into corporeal and incorporeal, and in the present Case it hath been said to commence by Occupation, and continue by Possession. This is a narrow Scale of Argument. In the Courts of Law it is universally admitted, that Matters incorporeal are nevertheless Matters of Property . . .
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> Authors, my Lords, both from Principles of natural Justice, and the Interest of Society, have the best Right to the Profits accruing from a Publication of their own Ideas; and as it hath been admitted on all Hands that an Author hath an Interest or Property in his own Manuscript, previous to Publication, . . . It is an Author's Dominion over his Ideas, that gives him Property in his Manuscript originally, and nothing but a Transfer of that Dominion or Right of Disposal can take it away. It is absurd to imagine that either a Sale, a Loan, or a Gift of a Book, carries with it an implied Right of multiplying Copies; . . . it cannot be conceived, that when five Shillings is paid for a Book, the Seller means to transfer a Right of gaining one hundred Pounds . . .

> Licenses in general prove not that Common Law Right did not inherently exist, but were the universal Fetters of the Press at the Times in which Authors were obliged to obtain them.
>
> With Regard to the Statute of Queen *Anne*, my Lords, I am very willing to let that rest on the same Grounds the Attorney General hath placed it, viz. that if it gives no Right, it takes none away. . . . it contains a positive Clause, to let the Matter respecting a Common Law Right, remain precisely in the State in which it was, when that Act passed: and that the Court of *Chancery* considers that such a Right does exist, is evident from the several Injunctions that Court hath granted since the enacting of the Statute . . . ,
>
> I hope, my Lords, Sir *John Dalrymple*'s Memoirs of *Great Britain*, will not be suppressed, as I have Reason to lament its Author intends. . . . I therefore earnestly invoke your Lordships to sanctify the final Determination of a Question, founded on natural Justice, and the Interest of Society, by affirming the Decree. (*Cases of the Appellants*: 26–28)

As the argument is rather difficult to understand, I might add, Wedderburn noted that the previous Friday, Thurlow had stated, "[The Statute of Anne is] a new Law to give learned Men a Property which they had not before." Admitting this, he goes on, "if it gives no Right, it takes none away." If the Statute of Anne accorded authors new rights, does that not mean that the Act took away some kind of right that existed in common law? As proof for that, Wedderburn pointed out that the Statute of Anne had a provision that took into account common law. The inclusion of this provision, he declared, testifies to the fact that authors had common law rights. The provision he referred to was the ninth section of the Statute of Anne, which states that "nothing in this Act contained shall extend, or be construed to extend, either to Prejudice or Confirm any Right that the said Universities, or any of them, or any Person or Persons have, or claim to have, to the Printing or Reprinting any Book or Copy already Printed, or hereafter to be Printed." If this provision were taken literally, it would be read that printers had some kind of rights from before the Statute of Anne. And that was what Wedderburn called common law copyright. But this provision is saying that the Act does not nullify the rights to printing recognized by royal decree thus far; it does not claim that there is such a thing as common law copyright.[98]

The fact that Wedderburn's statement did not contain any new assertions was welcome as far as Donaldson's side was concerned. Once they discovered that the opponent was simply presenting old arguments, they began to think that the outcome would be in their favor and became convinced they would win. Next, Dunning stood for Becket's side:

98 Shirata 1998, p. 139.

Attempts, my Lords, have been made to prove that the Establishment of this Right [to perpetual copyright] would be injurious to Literature; a strange Assertion surely. It is as much as to say, that rewarding Authors in proportion to their Merit, is the way to discourage their productions; an Argument too weak to make an impression on your Lordships. . . . it is evident the Money given for Copy-Right has increased with the Increase of Security that has been given to the Property. Go back to *Milton's* Time, and from thence advance gradually to Queen *Ann*[*e*]*'s* Reign, when the Act of fourt[e]en Years Right was one Encouragement to the Booksellers, followed by some considerable emoluments in their Way to Authors. . . .

In no way is this to be accounted for, but by supposing the Booksellers Liberty to flow from the additional Security, thus given to their Property; and if this is not an Encouragement to Literature, my Lords, I should be glad to be informed what is an Encouragement. It might as reasonably be asserted, that Pensions and Rewards given by a Sovereign to learned Men, did not advance the Interests of Learning.

My Lords, the very Act of Queen *Anne* has been brought to prove, that there could not be a previous Common Law Right in the Copies of Books; but, my Lords, nothing can be more futile than such an Idea: let me illustrate this by a simila[r] case; there passed an Act last Sessions to make Turnips, Potatoes, Cabbages, Parsnips, Pease, and Carrots Property; now, my Lords, might it not be urged with as much Justice, that Turnips and so forth were not Property at common Law? Such an Idea would be ridiculous. Acts may pass to regulate Property, and to inflict Penalties on the Invasion of it, without in the least derogating from the Principles and Foundation of such Property.

We have been farther told, my Lords, that giving the Property of Copies will be giving the Right of Suppression; but this I conceive is a groundless Idea; we are not to suppose that Books of Instruction, Entertainment, or Amusement, will ever be suppressed, and as to Books neither instructive nor entertaining, the sooner they are suppressed the better. Certain, however, it is, that on some Subjects they are read in Proportion to their meriting Neglect. . . .

One Part of the Argument, my Lords, used for the Appellants, is that it would benefit Authors, if no exclusive Right of multiplying Copies existed; that is a very strange Assertion, and very extraordinary that Authors in general should think otherwise. It is customary for Booksellers, as Buyers, to buy as cheap as they can, and it is customary for Authors to sell as dear as they can; this cannot be the case if the Moment a Book is published every Man hath a Right to print it.

Authors formerly, my Lords, when there were but few Readers, might get but small Prices for their Labours, but the Books above-mentioned have been paid enormous Sums for, especially the last. If the Purchasers of these Copies have not the sole Right of multiplying Copies, how is the difference to be accounted for? . . .

> The Appellants, my Lords, want to sanctify the Importation of *Scotch* Books into *England*, in the same manner as the Importation of *Scotch* Cattle. The Book on which the present Cause is grounded, was written, indeed, by a *Scotchman*, but it was written in *English*, and originally printed in *England*. The Appellants had invaded the legal Purchaser, by printing a Copy in *Scotland*, and offering it to Sale in *London*; I hope, therefore, that your Lordships will teach them that Literary Property is sacred, by affirming the Decree. (*Cases of the Appellants*: 29–31)

The day's deliberations ended with Dunning's words. On Donaldson's side, the assertions of Thurlow and Dalrymple could be summed up as charging that to recognize common law copyright would allow individual booksellers to monopolize the printing of particular books. The counterarguments of Wedderburn and Dunning, for Becket's side, were that the profits of booksellers need to be protected in order to support the livelihood of authors.

In comparing the arguments of both sides, we come across some curious facets of the assertions on the Becket side. The rights of publishers (printers) were already protected under the Statute of Anne, yet the booksellers called for the author's perpetual ownership of their "sacred" literary property, linking the need to protect booksellers and the author's "ownership of the incorporeal." At the time, it was still customary for booksellers to purchase the manuscripts for books outright, and the amount paid to the author in most cases did not change no matter how well the book might sell. If, in addition to this practice, the publishers were given the right to print a manuscript thus obtained in perpetuity, then they would go on profiting indefinitely without ever having to pay the authors any more.[99] The wise members of the House of Lords were apparently quite well aware of the Becket-side deceit.

Five Questions

9 February 1774 (Wednesday): Again, Attorney General Thurlow stood for Donaldson. He held forth for nearly two hours, but mainly to repeat the position of his client. It was clear to all concerned that the discussion was getting nowhere.

Observing the situation, Lord Chancellor Apsley presented a proposal to break the deadlock. He proposed to ask questions of twelve judges of England's three courts of common law—the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer—to learn their views on the case. These judges were, for the Court of King's Bench, Chief Justice Lord Mansfield, Richard Aston, William Henry Ashurst (1725–1807), and Edward Willes; for Court of Common Pleas, Chief Justice William De Grey (1719–1781),

99 Shirata 1998, p. 187.

William Blackstone, George Nares (1716–1786), and Henry Gould (1710?–1794); and for the Court of Exchequer, Chief Justice Sydney Stafford Smythe (?–1778), James Eyre (1733–1799), Richard Adams (1710–1773), and Geroge Perrot (d.u.).

Of these, Blackstone had been Tonson's defense attorney in the 1761 *Tonson v. Collins* case and Willes, Aston, and Lord Mansfield were the justices who had accepted Millar's assertions in the *Millar v. Taylor* case. All of these were barristers inclined to side with the monopolist booksellers. As far as Donaldson was concerned, these were four votes out of twelve against him from the outset. For his part, on the other hand, Lord Chancellor Apsley—in order to survive the trial questioning his earlier judgment against Donaldson—must have wanted to hear the opinions of individuals who might present his side in a good light. Apsley narrowed down the questions to the following:

> 1. Whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same, without his consent?
> 2. If the author had such sole right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author?
> 3. If such action would have lain at common law, is it taken away by the statute of 8th Anne: and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby? (*Parliamentary History of England*, vol. 17: 970–71)

Translated into our contemporary idiom, the first question asks: Did the monopoly on printing and publishing of books traditionally belong to authors in common law—in other words had that monopoly belonged to authors since time immemorial? The second question is, if authors did hold such a monopoly, did that monopoly end the moment a book was printed and published? The third question is: if the right to bring such suits over the rights to print and publish books was handled under common law, did the Statute of Anne take away that right?

Lord Chancellor Apsley read out these questions twice. The questions focused on how common law—under which, as the Becket side asserted, author's rights had existed even before the Statute of Anne—was related to the Statute of Anne. If author's rights were accepted as having existed since before the Statute of Anne, it suggested that booksellers could ignore the fourteen-year limitation on their copyright and monopolize printing and publication for as long as they wanted. Surely everyone in the hall must have thought that these questions would set off the debate.

And then, the gaze of the audience was drawn to the figure of an elderly member of the House of Lords who rose to be recognized. Lord Camden made his move. Lord Chancellor Apsley, Lord Mansfield, and all in the audience were all ears to learn what he would say. To Lord Apsley's three questions, Lord Camden added the following two:

> 4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law?
> 5. Whether this right is any way impeached, restrained, or taken away, by the statute 8th Anne? (*Parliamentary History of England*, vol. 17: 971)

His questions probe even deeper into the matter under debate than those of Lord Apsley, who addressed the matter of the rights of the author. Lord Camden's added to the matter of the rights of the author, the rights of "his assigns." If Apsley's questions threw the House of Lords a curve ball, Camden's were straight and undisguised. Not only that, his questions called into open question the judgment made in the 1769 *Millar v. Taylor* case. Lord Camden's intention was obvious. The chief justice presiding at the *Millar v. Taylor* case was his rival Lord Mansfield. Camden was determined to have the House of Lords examine Mansfield's judgment on perpetual copyright, and if all went well, have the decision reversed.

One man must have listened to Lord Camden's statement with mixed feelings: the Becket-side lawyer John Dunning. Dunning had worked with Lord Camden at the time of the Wilkes case and, arguing that the general warrant under which Wilkes had been arrested was illegal, had been able to protect Wilkes from indictment. It must have been Camden who, as lord chancellor, had promoted Dunning to solicitor general in 1768.

And so, here we have Lord Camden—champion of the masses and great rival of Lord Mansfield, as well as having influence over Dunning, one of the barristers on the Becket side. Dunning thus could be counted as essentially on the Donaldson side.

The positions of the Donaldson and Becket sides regarding on these five questions are listed below:

	Donaldson side	**Becket side**
Question 1	Author did not have sole rights	Author did have sole rights
Question 2	Those rights were removed	Rights were not removed
Question 3	Rights removed by Statute of Anne	Rights not removed
Question 4	Common law does not give sole rights	Common law gives sole rights
Question 5	Rights impeached by Statute of Anne	Rights not impeached

The five questions posed by Lord Chancellor Apsley and Lord Camden were handed over to the judges and the court was adjourned for six days until 15 February.

15 February 1774 (Tuesday): After the court re-convened, the judges presented their opinions on the five questions assigned. As they did so, it became clear that their views were divided. These men, though all specialists on common law, were not of one mind on this issue. Lord Chancellor Apsley had hoped that the judges would present a very clear and unanimous support for perpetual copyright. His plan, however, was shattered. He was apparently informed of this prior to the convening of the proceedings, and thus began by saying "as the learned Judges might entertain dissimilar Opinions upon the Subject, their Lordships Attendance was required to hear the Opinion of each Judge delivered seriatim."[100] All the Lord Chancellor could do was to let each judge present his view to the court and then leave the matter in the hands of the members of the House. The first to present his views was James Eyre.

Eyre argued that the contents of a book, by its very nature, is incapable of being the object of common law property. Unlike every other kind of property that is subject to legal controls, for the content of books "nothing can be predicated of them, which is predicable of every other Species of Property subject to the Controul, and within the Limits of Protection under Common Law." Ideas are too "ethereal," he observes, to be defined, and too intellectual to be described with acceptable accuracy by the limited powers of the human mind. "Ideas, if convertible into Objects of Property, should bear some feint Similitude to other objects of Property; they do not bear any such Similitude, [so] they are altogether *anomalous*."

Next Eyre called attention to "another insuperable Difficulty": if one holds that ideas can be monopolized, how will they be classified or organized? Would they be categorized as simple, complex, combined, or multifarious? "They are not subject to Alienation, Transmission, Grant, or Delivery; and yet they are Objects of Property, to the exclusive Right of appropriating which, Men are clearly entitled by the Common Law, and by every Principle of natural Justice."

If ideas are the product of the commonly held human faculty of thought, he then asked, does it conform to the principles of natural justice to limit access to such ideas, which were presented as a common gift to be made available to all, to the exclusive benefit of one or a few?

If one rejected the notion that authors had a right under common law to the distribution of their works, such a rejection would essentially mean, observes Eyre, that authors could not sue anyone for publishing literary work without their consent. The question of a common law right had not even come up, he says, before the invention of "this useful Art" of printing, because authors did not imagine that anyone might appropriate their work to exclusive use. Only once the Stationers' Company was established did the notion of such exclusive proprietorship over a work emerge, and those who sought to

100 *Cases of the Appellants*, p. 31.

appropriate a literary composition secured their right by entering it in the records of the Company, regardless of who the author was.

Eyre posed the question what happens if a book and a mechanical invention were the same sort of thing. In a mechanical invention, ideas take concrete, material form, but "a Book is no more than a Transcript of Ideas; and, whether Ideas are rendered cognizable to any of the Senses, by the Means of this or that Art, of this or that Contrivance, is altogether immaterial: Yet every mechanical Invention is common, whilst a Book is contended to be the Object of exclusive Property!"

So, concluded Eyre, a book and a mechanical device share various similarities, both being distillations of intellect and unity of spirit: "[i]n a mechanic[al] Invention the Corporation of Parts, the Junction of Powers, tend to produce some one End. A literary Composition is an Assemblage of Ideas so judiciously arranged, as to enforce some one Truth, lay open some one Discovery, or exhibit some one Species of mental Improvement." And he concluded his remarks by saying that he was of the opinion that authors do not hold the right under common law to monopolize sales of their own books, because the inventor of a mechanical device did not possess such a right. [101]

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101 **Original:** From the very nature of the Contents of a Book, they are incapable of being made Objects of Common Law Property; nothing can be predicated of them, which is predicable of every other Species of Property subject to the Controul, and within the Limits of the Protection of the Common Law. A Right to appropriate Ideas, is a Right to appropriate something so ethereal as to elude Definition; so intellectual as not to fall within the Limits of the human Mind to describe with any tolerable Degree of Accuracy. Ideas, if convertible into Objects of Property, should bear some feint Similitude to other objects of Property; they do not bear any such Similitude, they are altogether *anomalous*. . . .

But here, my Lords, lies another insuperable Difficulty. Admitting ideas liable to exclusive Appropriations, and thus to become Objects of Property; in treating of them as such, how would you class, how arrange them? Would you recount them as simple, complex, combined, or multifarious? . . . or would you resort to Truth and common Sense, and say they are not to be classed, arranged, defined, or ascertained? They are not subject to Alienation, Transmission, Grant, or Delivery; and yet they are Objects of Property, to the exclusive Right of appropriating which, Men are clearly entitled by the Common Law, and by every Principle of natural Justice.

For, my Lords, upon a Supposition that Ideas are produced by a thinking Faculty, *common to all Men*, it becomes a Question whether it is consonant to the Principles of natural Justice, to appropriate that to the exclusive Benefit of *one or a few*, which was designed as a common Gift distributed to *all.*

If, my Lords, the Notion of a Common Law Right should be reprobated, such Reprobation carried with it an explicit Answer to the latter Part of the *first* and to the *second* Question: There being no Common Law Right, "*An Author could not bring his Action against any Person for publishing his literary Composition without his Consent.*"…

Previous, my Lords, to the Invention of Printing, the Idea of a Common Law Right, has not been suggested; and subsequent to the Invention of this useful Art, so little Notion had Authors of a Right at Common Law to exclusive Appropriation, that before the Institution of the Stationers Company, they had Recourse to the Legislature for a License, Grant, Patent, or Privilege; after the Institution of the Stationers Company the only Mode thought of to secure the Appropriation of a Literary Composition was, by an Entry in the Records of that Company, and the Person in whose Name the Book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being so much as mentioned on these Occasions. . . .

Consider, my Lords, a Book precisely upon the same Footing with any other mechanical Invention. In the Case of mechanic Invention, Ideas are in a manner embodied, so as to render them tangible and visible;

We may summarize Eyre's view as follows:

Question 1: Does an author have a monopoly right under common law?
A: No.
Question 2: Is the author's right terminated upon printing and publishing?
A: Yes; terminated.
Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne? A: Conditional, yes.
Question 4: Does common law give the author and his assigns sole rights to his works?
A: No; does not give sole rights.
Question 5: Were those sole rights taken away by the Statute of Anne?
A: Yes; taken away.

As we can see, Eyre almost entirely supports the assertions of the Donaldson side. His view is that a book is "a Transcript of Ideas" and therefore that the two cannot be distinguished from one another; ideas cannot be monopolized, so therefore there can be no right of possession to a book.

The next judge to present his ideas was George Nares. Nares asserted that literary property existed in common law, and that the Statute of Anne *did not* take the right to that property away from authors. This view was favorable to Dunning's defense of the Becket side. Authors held the right to profit from their own manuscripts before publication, he declared, and it did not make sense to argue that such rights disappeared as soon as a manuscript was published. He holds that the Statute of Anne did not take away all

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a Book is no more than a Transcript of Ideas; and, whether Ideas are rendered cognizable to any of the Senses, by the Means of this or that Art, of this or that Contrivance, is altogether immaterial: Yet every mechanical Invention is common, whilst a Book is contended to be the Object of exclusive Property! . . .

The Exactitude, my Lords, of the Resemblance between a Book and any other mechanical Invention, form various Instances of Agreement. There is the same Identity of intellectual Substance; the same spiritual Unity. In a mechanic[al] Invention the Corporation of Parts, the Junction of Powers, tend to produce some one End. A literary Composition is an Assemblage of Ideas so judiciously arranged, as to enforce some one Truth, lay open some one Discovery, or exhibit some one Species of mental Improvement. A mechanic Invention, and a literary Composition, exactly agree in Point of Similarity; the one therefore is no more entitled to be the Object of Common Law Property than the other; and as the Common Law is entirely silent with respect to what is called Literary Property, as antient [sic] Usage is against the Supposition of such a Property; and as no exclusive Right of appropriating those other Operations of the Mind, which pass under the Denomination of mechanical Inventions, is vested in the Inventor by Common Law; for these Reasons, I declare myself against the Principle of admitting the Author of a Book, any more that the Inventor of a Piece of Mechanism, to have a Right at Common Law to the exclusive Appropriation and Sale of the same.

I am of Opinion, my Lords, in Answer to the *third* Question, ... and in Answer to the *fifth* Question, I am of Opinion, ... for every Principle of a Common Law Right is effectually exploded, by the Adoption of the Word "*vest*" in the Title, the Words "*taken the Liberty*" in the Preamble, and the Mode of Expression used in the *first* Clause of the Act, of giving an Author an exclusive Property for fourteen Years, *and no longer*. (*Cases of the Appellants*, pp. 32–34)

the rights afforded under common law but merely supplemented them. Speaking for nearly an hour, Nares presented his views, which may be summarized as follows:

Question 1: Does an author have a monopoly right under common law?
A: Yes.
Question 2: Is the author's right terminated upon printing and publishing?
A: No; not terminated.
Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne?
A: Yes; taken away.
Question 4: Does common law give the author and his assigns sole rights to his works?
A: Yes, it does.
Question 5: Were those sole rights taken away by the Statute of Anne?
A: Yes; taken away.

In his support of common law copyright, Nares differs from Eyre, but he is in agreement on the fifth question, believing that the Statute of Anne did take away the perpetuity of common law copyright.[102]

The next to take the stand was Judge William Henry Ashurst, who confirmed the precedent of the *Millar v. Taylor* case and supported the Becket side. Ashurst's points were as follows:

> The Claim of Literary Property, my Lords, is warranted by the Principles of natural Justice and solid Reason. Making an Author's intellectual Ideas common, means only to give the Purchaser an Opportunity of using those Ideas, and profiting by them, while they instruct and entertain him; but I cannot conceive that the Vendor, for the Price of Five Shillings, sells the Purchaser a Right to multiply Copies, and so get Five Hundred Pounds.
>
> Literary Property, my Lords, is to be defined and described as well as other Matters, which are tangible. Every Thing is Property that is capable of being known or defined, capable of a separate Enjoyment, and of Value to the Owner. Literary Property falls within the Terms of this Definition. According to the Appellants, if a Man lends his Manuscript to his Friend, and his Friend prints it, or if he loses it, and the Finder prints it, yet an Action would lie (as Mr. Justice *Yates* admitted) which shews that there was a Property beyond the Materials, the Paper and Print. A Man, by publishing his Book, gives the Public nothing more than the Use of it. A Man

102 Deazley notes a "discrepancy in the records" of Nares's opinion on Question 3 and Question 5. See Deazley 2004, p. 199.

> may give the Public a Highway through his Field, and if there is a Mine under that Highway, it is nevertheless his Property. It hath been said, that when the Bird is once out of the Hand, it becomes common, and the Property of whoever catches it; this is not wholly true, for there is a Case upon the Law Books, where a Hawk with Bells about its Neck had flown away; a Person detained it, and an Action was brought at Common Law against the Person who did detain it; a Book, with an Author's Name to it is the Hawk, with the Bells about its Neck, and an Action might be brought against whoever pirated it. (*Cases of the Appellants*: 35–36)

Upon summarizing Ashurst's judgment, we find that it was virtually the opposite of Eyre, who supported the Donaldson side:

Question 1: Does an author have a monopoly right under common law?
A: Yes.
Question 2: Is the author's right terminated upon printing and publishing?
A: No; not terminated.
Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne?
A: No; not taken away.
Question 4: Does common law give the author and his assigns sole rights to his works?
A: Yes; does give sole rights.
Question 5: Were those sole rights taken away by the Statute of Anne?
A: No; not taken away.

The next to speak was to have been Blackstone, but he was suffering from a bad spell of gout and could not appear in court. A document presenting his opinion was read out to the court. Blackstone, of course, believed in the existence of common law copyright; his answers were exactly the same as Ashurst's.

Thus far, four judges had presented their views, and—putting aside the details for the moment—three of them were in favor of the bookseller's prerogative to perpetual copyright and one was opposed. All could see that the deliberations were leaning in favor of the Becket side. It was decided that the other judges would be heard from two days hence, on the 17th.

17 February 1774 (Thursday): On this day, the views of five of the justices were presented. The first to stand was Edward Willes. In the *Millar v. Taylor* case, Willes had been a member of the Millar camp; he was among the advocates of "perpetual copyright." Judge Willes first explained that copyright is the asset of individuals; a right of possession obvious to anyone. The content of a book belongs to its author, he declared, and even if it is published, that

ownership is not lost. An author has the right to make copies precisely because his right to a book falls under common law. Although it is said that the assertion of such rights only began with the advent of printing technology, without printing technology, copies could not be easily made. To label such assertions "monopoly" was "odious," Willes said.

Willes's argument continued: in common law, he said, a book's first printing/publishing and sales are the monopoly of the author. Even after publication, an author holds exclusive and perpetual right to the production of copies of his book. Since this right is his according to common law, it is not removed by criticism, by restrictions, or by the Statute of Anne. Through this law, authors would not be excluded from legal recourse. Willes's judgment came down, as for Ashurst, on the side for Becket, giving the same responses as Ashurst regarding the five questions.

The next judge to speak was Richard Aston. Aston had been Millar's ally, along with Willes, in the *Millar v. Taylor* case. His speech is as follows:

> I agree with the three Judges who have spoke before me, that it is a Property, and that it belongs to an Author independent of any statutary Security. It is not necessary, for any Man to advert either to the *Grecians* or *Romans* to discover the Principles of the Common Law of *England*. Every Country hath some certain general Rules which govern its Law; our Common Law hath its Foundation in private Justice, moral Fitness, and public Convenience; the natural Rights of every Subject are protected by it, and there does not exist an Argument amounting to Conviction, that an Author hath not a natural Right to the Produce of his mental Labor. If this Right originally existed, what but an Act of his own can take it away? By Production he only exercises his Power over it in one Sense; when one Book is sold it never can be thought that the Purchaser hath possessed himself of that Property which the Author held before he published his Work. A real Abandonment on the Part of the first Owner must take Place, before his original Right becomes common.
>
> In all Abandonments, [barrister for Taylor in the *Millar v. Taylor* case] Judge *Yates* hath defined, my Lords, that two Circumstances are necessary; an actual relinquishing the Possession, and an Intention to relinquish it; in the present Case neither can be proved. Many Manuscripts have not been committed to the Press till Years after they were written, the Possession of them for a Century does not invalidate the Claim of the Author or his Assigns. With Regard to mechanical Instruments, because the Act against Monopolies hath rendered it necessary for the Inventors of them to seek Security under a Patent, it can be no Argument that in Literary Property there should be no Common Law Right. I think it would be more liberal to conclude, that previous to the Monopoly Statute, there existed a Common Law Right, equally to the Inventor of a Machine, as to the Author of a Book. . . .
>
> With Regard to the Statute of Queen *Anne*, my Lords, it is no more that a

> temporary Security, given by the Legislature to the Author, enabling him to recover Penalties, and bring a Matter of Complaint against any Person who printed upon him to a more certain issue than by an Action at Common Law. (*Cases of the Appellants*: 39)

So Aston's view was similar to that of Ashurst except on Question 2.[103] Comparing the speeches of Willes and Aston, we find that Willes's argument from the viewpoint of history and Aston's from the viewpoint of ownership rights supported the Becket side, respectively. In the scheme in which Willes took up history and Aston ownership, their presentations were the same as in the *Millar v. Taylor* case. It may have been that they argued for common law copyright in this way by pre-arrangement.

When the six justices through Aston had finished their arguments, the only one of them supporting the Donaldson side was Eyre, and the five others stood behind the Becket side. Everyone thought that the matter was virtually settled, but then Justice George Perrot stood to express his view. Perrot stated views in support of Donaldson, turning against the tide of the arguments thus far presented; he spoke forcefully, at length, and with great care.

"The Argument for the Existence of a Common Law Right, and the Definition of Literary Property, as chattel Property, is, my Lords, in my Idea exceedingly ill-founded and absurd," Perrot began. An author certainly has a right to his manuscript, but after publication, anyone can publish it. In the past, he said, "no Idea was entertained of an Author's having any Claim to the exclusive Right of printing, what he had once published."

An author, like the inventor of a machine, Perrot observed, makes his ideas available to the public, but it has never been heard that the purchaser of one of his machines does not have a right to make another after its mode. "The Right of exclusively making any Mechanical Invention is taken away from the Author or Inventor by the Act against Monopolies of the 21st of *James* the First," stated Perrot. When a book is published and sold, it cannot be said that there is an "implied contract" between the author and purchaser. "The Purchaser buys the Paper and Print, the corporeal Part of his Purchase; and he buys a Right to use the Ideas, the incorporeal Part of it."

Perrot continued, "Respecting the Statute of Queen *Anne*, my Lords, I am perfectly convinced that it is the only Security that Authors or Booksellers have. That it gives a Right for fourteen Years to the Holders of Copies, and after that Period the Right reverts to the Authors for fourteen Years longer. I declare that all the metaphysical Subtlety or Definition which the ablest Logician can muster, cannot give any other Sense to the Words "for the Encouragement of Learning, and for vesting a Right in Authors," in the Title to the Act, than a Creation of a Property, not a further Security for one." (*Cases of the Appellants*: 40–41)

Thereupon, Perrot read out the entire text of the Statute of Anne and following

103 Deazley points out that three of five records show "yes" to Question 2. Deazley 2004, pp. 200–201.

each paragraph, discoursed upon its meaning. He fiercely criticized the booksellers for asserting that their rights to books were perpetual, and, citing numerous precedents, concluded his argument saying, "there was no Right at Common Law previous to the 8th of Queen *Anne*, and that if there was, that Statute entirely and effectually took it away." (*Cases of the Appellants*: 42)

Perrot's answers to the questions, thus, were not much different from—nearly the same as—those of Eyre.

Question 1: Does an author have a monopoly right under common law?
A: No.
Question 2: Is the author's right terminated upon printing and publishing?
A: No.
Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne?
A: Yes.
Question 4: Does common law give the author and his assigns sole rights to his works?
A: No; does not give sole rights.
Question 5: Were those sole rights taken away by the Statute of Anne?
A: Yes; taken away.

There having been few opinions favorable to Donaldson up to that point, Perrot's speech injected new heat into the discussion.[104]

The next up was Gould. His responses were roughly the same as Nares. Although basically favorable to the Becket side, he took the position that the Statute of Anne had removed the perpetuity of common law copyright. Gould's speech is notable for his ideas about monopoly on books, stating that,

> [A]n author had a right at common law to his manuscript previous to publication, and he thought that right should continue to him under certain restrictions after publication; as public convenience was one of the elements of the common law, that should be consulted by an author or printer after publication; he was glad therefore to hear it stated, that the respondents always kept a certain number of the book upon which the present appeal was grounded, ready for those who chose to purchase. . . . [I]f this was not the case, it might be urged that the claim was a monopoly detrimental to the public.... if a book was kept out of print for an unreasonable time, it was a kind of abandonment of property in the original possessor. (*Parliamentary History of England*, vol. 17: 984–85)

104 According to Deazley, some accounts of the discussion say that Perrot answered with "Yes" to Questions 1 and 2. After comparing numerous records, he concludes that Perrot did reject the idea of common law copyright. Deazley 2004, pp. 201–202.

Gould thus argued that bookstores always had to keep copies in stock of a book they had an exclusive right to print in order to respond to the demands of readers—to let books fall out of print for a long period of time would therefore be detrimental to the public, and in violation of common law. No doubt he wanted to say that those who monopolized the cultural assets of books had to fulfill the responsibilities that went with that monopoly.

The available record does not preserve much of the statements made by Gould and Richard Adams, who spoke next. Five judges spoke on this day, so the remarks of these two might indeed have been brief. Alternatively, if their opinions had already been more or less expressed by others and were repetitions of what had been said before, the record may have been abbreviated.

Adams gave an academic explanation of the distinctions between patents, privileges, and grant of the Crown. Citing numerous examples going back into the early history of books, he made it clear that the right to literary property was not a right under common law and that prior to the Statute of Anne, authors and booksellers had no guarantees of anything but for patents. His answers to the questions were as follows:

Question 1: Does an author have a monopoly right under common law?
A: No.
Question 2: Is the author's right terminated upon printing and publishing?
A: No.
Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne?
A: No.
Question 4: Does common law give the author and his assigns sole rights to his works?
A: No; does not give sole rights.
Question 5: Were those sole rights taken away by the Statute of Anne?
A: No.

Adams was thus in favor of Donaldson.[105] At this point in the proceedings, the score was three for the Donaldson side and six for the Becket side, with the Becket side still holding the advantage. The judges who had yet to speak were the chiefs of the three courts: Sydney Stafford Smythe (Court of Exchequer), William De Grey (Court of Common Pleas), and Lord Mansfield (Court of King's Bench). Their arguments were to be presented from the following Monday.

105 Deazley writes that, although some the accounts state that Adams responded "No" to all the questions, he is convinced from his detailed study of the evidence that Adams was opposed to common law copyright. See Deazley 2004, pp. 202–203.

21 February 1774 (Monday): According to custom, the schedule of the day's deliberations was read out. On this day and the next, the chief justices of the three courts, who had not yet given their opinions on the five questions, would state their cases.

First up was Chief Justice Smythe, whose position turned out to be just the same as that of Judge Aston. He stated that publishing meant selling books to buyers and did not involve giving over the right to copy books to the person who purchased such books. In his view the Statute of Anne neither limited nor took away common law copyright. Taking up again the example given by Aston of the mine found under a public highway, arguing vigorously that it is perfectly possible for there to be private ownership behind things in the public sphere. It is unreasonable, Smythe also argued, that even if an author found misprints in a "pirate edition" he would be unable to have them corrected. Giving the exact same answers as Aston, Smythe was entirely on the Becket side.

Next, Chief Justice De Grey gave his opinion. De Grey was inclined to favor the Donaldson side. According to the *Parliamentary History of England* record, De Grey, diverging from the views of the other judges who stood behind Donaldson, judged that authors held sole rights to their books in common law. However, he reported that, upon studying the records of common law cases, he had found no precedents recognizing literary property. The Statute of Anne gave "general rights" to the authors and their assigns, and those rights were to be protected under the purview of the Court of Chancery. Successive lord chancellors, however, had believed that all cases of this kind of suit have been left unsettled. De Grey said it should be treated as an entirely new issue. De Grey's responses to the questions were as follows:[106]

Question 1: Does an author have a monopoly right under common law?
A: Yes.

Question 2: Is the author's right terminated upon printing and publishing?
A: No.

Question 3: Was the right to sue for rights under common law taken away by the Statute of Anne?
A: Yes.

Question 4: Does common law give the author and his assigns sole rights to his works?
A: No; does not give sole rights.

Question 5: Were those sole rights taken away by the Statute of Anne?
A: Yes; taken away.

106 According to Deazley, some of the recorded responses were "Yes" to Question 2. Deazley 2004, pp. 204–205.

Silence and a Momentous Speech

22 February 1774 (Tuesday): Now the only justice whose opinion had not been heard was Chief Justice of the Court of King's Bench Lord Mansfield. All the members of the House of Lords and the members of the audience waited with great anticipation to hear what he would say.

But, as the record shows, Lord Mansfield did not express an opinion. Not only did he refuse to speak on the matter; he left his position on the five questions unanswered.

The reason remains unexplained. Lord Mansfield had been closely involved with countless copyright-related cases, including the *Millar v. Taylor* case, in the course of his long career. He could have given an even more expert view of the issues than any of the other justices. If he had cared to speak, no doubt he would have supported the Becket side, consistent with the decision he had handed down in the *Millar v. Taylor* case.

Lord Mansfield's silence must have startled the barristers on the Donaldson side. Thurlow had firmly stood behind Donaldson, but privately he must certainly have been quite anxious about how Lord Mansfield would counter his defense. Thurlow later expressed his respect for Lord Mansfield as follows:

> Lord Mansfield was "a surprising man; ninety-nine times out of a hundred he was right in his opinions and decisions; and when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it. He was a wonderful man."[107]

Thurlow must have considered himself that one person in one hundred who would know when Lord Mansfield made a mistake. Whatever the case, it was then clear that the majority of the other justices supported the Becket side. Seeing that, perhaps Lord Mansfield thought that all was well; he need say no more. His decision in the *Millar v. Taylor* case had been placed on the table for discussion; at this juncture when his own judgment was to be deliberated, perhaps his silence was an expression of his deference to the discretion of his peers. Or perhaps he simply did not want to reply to the questions of his long-time rival Lord Camden. Or, perhaps, he was beginning to feel regret that his decision had in fact been in error.

The reason, in any case, is not known, and Lord Mansfield remained silent. The result, then, was that four of the justices supported Donaldson and seven supported Becket. Looked at in terms of the three courts, three justices from the Court of King's Bench (excluding Lord Mansfield) supported Becket, three justices of the Court of Common Pleas other than Chief Justice De Grey supported the Becket side, and three justices of the Court of Exchequer other than Chief Justice Smythe supported the Donaldson side. The responses can be organized as follows:

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107 Foss 1864, p. 343.

Question	For Donaldson	For Becket
Q1	3	8
Q2	3	8
Q3	5	6
Q4	4	7
Q5	5	6

Counted in terms of individual questions, the Becket side came out ahead on all questions. In some records there are discrepancies in the accounts given. John Feather's analysis gives the tally for Question 4 as 5 to 5 with one unclear and for Question 5 as 7 to 4.[108] Richard Tompson, who analyzed the "Burrow's Reports"[109] gives 10 answers in support of Becket for Question 1, stating that of these, 8 responses recognized even the right to sue.[110] If Lord Mansfield were to have come out in support of Becket, the results would have changed, and might have affected the decision.[111] Still, the proceedings in the court were in favor of the Becket side at this stage. There was a good possibility that the House of Lords would confirm the booksellers' claim to "perpetual copyright."

Then Lord Camden, who had until then had sat quietly listening to the discussion, stood and, one eye on the silent Lord Mansfield, delivered his historic speech that would pulverize all the preceding arguments in favor of "perpetual copyright."

Lord Camden began by commending the Lord Chief Justice (De Grey) for his able supervision of the debate, declaring that "the Duty I owe to this House, will not suffer me to remain silent"[112] on "so important a Question [as] is to be determined." He was quick to castigate the arguments presented by Becket's side, which he called "founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the grossest Tyranny and Usurpation; the very last Places in which I should have dreamt of finding the least Trace of the Common Law of this Kingdom." He dismissed the efforts of the Becket side to establish "something like a Common Law Principle" and its other arguments as "that heterogeneous Heap of Rubbish, which is only calculated to confound your Lordships, and mislead the Argument."

Lord Camden then set forth the background:

108 Feather 1994, p. 91.
109 *English Reports*, vol. 98, pp. 257–67.
110 Tompson 1992, p. 35.
111 Shirata 1998, p. 191.
112 We may assume that he made this remark pointedly before the silent Lord Mansfield.

> After the first Invention of Printing, the Art continued free for about fifty Years; . . . but as soon as its Effects in Politics and Religion were felt, all the crowned Heads in *Europe* at once seized on it, and appropriated it to themselves. Certain it is, that in *England*, the Crown claimed both the Power of licensing what should be printed, and the Monopoly of Printing. Two Licences were granted to those who petitioned for them. An Author not only was obliged to sue for a Licence to print at all, but he was also obliged to sue for a second Licence that he might print his own Work.[113]

The King, once having laid claim to the right of printing, secured those rights under various patents and charters, and then, said Lord Camden,

> . . . to secure his Monopoly, he combined the Printers, and formed them into a Company, then called the Stationers Company, by whose Laws, none but Members could print any Book at all. They assumed Power of Seizure, Confiscation and Imprisonment, and the Decrees of the Star-chamber confirmed their Proceedings. These Transactions, I presume, have no Relation to the Common Law; and when they were established, where could an Author, independent of the Company, print his Works, or try his Right to it? Who could make head against this arbitrary Prerogative, which stifled and suppressed the Common Law of the Land? Every Man who printed a Book, no matter how he obtained it, entered his Name in their

113 **Original**: AFTER, my Lords, what the Lord Chief Justice hath so ably enforced, there will be little Occasion for me to trouble your Lordships; nor will the present State of my Health, and the Weakness of my Voice, allow me to exert myself, were I ever so much inclined; but the Nature of my Profession, and the Duty I owe to this House, will not suffer me to remain silent, when so important a Question is to be determined. The fair Ground of the Argument has been very truly stated to you by the Lord Chief Justice; I hope what was Yesterday so learnedly told your Lordships, will remain deeply impressed on your Minds.

The Arguments, my Lords, attempted to be maintained on the Side of the Respondents are founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the grossest Tyranny and Usurpation; the very last Places in which I should have dreamt of finding the least Trace of the Common Law of this Kingdom: and yet, by a Variety of subtle Reasoning and metaphysical Refinements, have they endeavoured to squeeze out the Spirit of the Common Law from Premises, in which it could not possibly have Existance.

They began, my Lords, with their pretended Precedents and Authorities, which they endeavoured to model in such a Manner, as to extract from them something like a Common Law Principle, upon which their Argument might rest. I shall invert the Order, and first of all lay out of my Way the whole Bede-role of Citations and Precedents which they have produced; that heterogeneous Heap of Rubbish, which is only calculated to confound your Lordships, and mislead the Argument. After the first Invention of Printing, the Art continued free for about fifty Years; I mean to lay no Stress upon this; I mention it only historically, not argumentatively; for as the Use of it was little known, and not very extensive, its want of Importance might protect it from Invasion; but as soon as its Effects in Politics and Religion were felt, all the crowned Heads in *Europe* at once seized on it, and appropriated it to themselves. Certain it is, that in *England*, the Crown claimed both the Power of licensing what should be printed, and the Monopoly of Printing. Two Licences were granted to those who petitioned for them. An Author not only was obliged to sue for a Licence to print at all, but he was also obliged to sue for a second Licence that he might print his own Work. (*Cases of the Appellants*, p. 48)

Books, and became a Member of their Company: then he was complete Owner of the Book. Owner was the Term applied to every Holder of Copies; and the word Author does not occur once in all their Entries. All Societies, good or bad, arbitrary or illegal, must have some Laws to regulate them. When an Author died, his Executors naturally became his successors. The Manner in which Copy-Right was held, was a kind of Copy-hold Tenure, in which the Owner has a Title by Custom only, at the Will and Pleasure of the Lord. Two sole Titles by which a Man secured his Right was the royal Patent and the License of the Stationers Company; I challenge any Man alive to shew me any other Right or Title; Where is it to be found? some of the learned Judges say the Words *or otherwise* in the Statute of Queen *Anne* relate to a prior Common Law Right; To what Common Law Right could these Words refer? At all the Periods I have mentioned, the Common law Rights were held under the Law of Prerogative. It was the general Opinion that there was no other Right, and the corrupt Judges of the Times submitted to the arbitrary Law of Prerogative. In the Case of the Stationers Company against *Seymour*, all the Judges declared that Printing was under the Direction of the Crown, and that the Court of *King's Bench* could seize all Printers of News, true or false, lawful or illicit. But if it was made Use of to protect Authors, what was this Protection? a Right derived under a Bye Law of a private Company; a Protection similar to that which we give the great *Mogul*; when we want any Grant from him, we talk submissively, and pay him Homage, but it is to serve our own Purpose, and to feast him with a Shadow that we may attain the Substance. In short, the more your Lordships examine the Matter, the more you will find that these Rights are founded upon the Charter of the Stationers Company and the royal Prerogative; but what has this to do with the Common Law Right? never, my Lords, forget the Import of that Term. Remember always that the Common Law Right now claimed at your Bar, is the Right of a private Man, to print his Works for ever, independent of the Crown, the Company, and all Mankind. In the Year 1681 we find a Bye Law for the Protection of their own Company and their Copy Rights, which then consisted of all the Literature of the Kingdom; for they had contrived to get all the Copies into their own Hands. In a few Years afterwards the Revolution was established, then vanished Prerogative, then all the Bye Laws of the Stationers Company were at an End; every Restraint fall from off the Press, and the old Common Law of *England* walked at large. During the succeeding fourteen Years, no Action was brought, no Injunction obtained, although no illegal Force prevented it; a strong Proof, that at that Time there was no Idea of a Common Law Claim. So little did they then dream of establishing a Perpetuity in their Copies, that the Holders of them finding no Prerogative Security, no Privilege, no licensing Act, no Star-chamber Decree to protect their Claim, in the Year 1708 came up to Parliament in the Form of Petitioners, with Tears in their Eyes, hopeless and

forlorn; they brought with them their Wives and Children to excite Compassion, and induce Parliament to grant them a *statutary* Security. They obtained the Act. And again and again fought for a further legislative Security . . .

What are the Foundations of this Claim in the *English* Common Law? Why, in the first Place, say the Respondents [Becket's side], every Man has a Right to his Ideas.—Most certainly every Man who thinks, has a Right to his Thoughts, while they continue his; but here the Question again returns; when does he part with them? When do they become *publici Juris*? While they are in his Brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public Discourse? Will he claim the Breath, the Air, the Words in which his Thoughts are cloathed? Where does this fanciful Property begin, or end, or continue? Oh! say they, the Ideas are marked in black and white, on Paper or Parchment—now, then, we get at something; and an Action, I allow, will lie for Ink and Paper: but what says the Common Law about the incorporeal Ideas, and where does it prescribe a Remedy for the Recovery of them, independent of the Materials to which they are affixed? I see nothing about the Matter in all my Books; nor were I to admit Ideas to be ever so distinguishable and definable, should I therefore infer they must be Matters of private Property, and Objects of the Common Law? But granting this general Position, we get Footing but upon one single Step, and new Doubts and Difficulties arise whenever we attempt to proceed. Is this Property descendible, transferrable, or assignable? When published, can the Purchaser lend his Book to his Friend? Can he let it out for Hire as the circulating Libraries do? Can he enter it as common Stock in a literary Club, as is done in the Country? (Every Thing of this Kind, in a Degree, prejudices the Author's Sale of the Impression.) May he transcribe it for a Charity? Then what Part of the Work is exempt from this desultory Claim? Does it lie in the Sentiments, the Language, and Style, or the Paper? If in the Sentiments, or Language, no one can translate or abridge them. . . .

If there be any thing in the World, my Lords, common to all Mankind, Science and Learning are in their Nature *publici Juris*, and they ought to be as free and general as Air or Water. They forget their Creator, as well as their Fellow-Creatures, who wish to monopolize his noblest Gifts and greatest Benefits. Why did we enter into Society at all, but to enlighten one another's Minds, and improve our Faculties, for the common Welfare of the Species? Those great Men, those favoured Mortals, those sublime Spirits, who share that Ray of Divinity which we call Genius, are intrusted by Providence with the delegated Power of imparting to their Fellow creatures that Instruction which Heaven meant for universal Benefit; they must not be Niggards to the World, or hoard up for themselves the common Stock. We know what was the Punishment of him who hid his Talent, and Providence has taken Care that there shall not be wanting the noble Motives and Incentives for Men for Genius

to communicate to the World those Truths and Discoveries which are nothing if uncommunicated. Knowledge has no Value or Use for the solitary Owner; To be enjoyed it must be communicated. *Scire tuum nihil est, nisi te scire, hoc sciat alter*.[114] Glory is the Reward of Science, and those who deserve it, scorn all meaner Views; I speak not of the Scribblers for bread, who teize the Press with their wretched Productions; fourteen Years is too long a Privilege for their perishable Trash. It was not for Gain, that *Bacon*, *Newton*, *Milton*, *Locke*, instructed and delighted the World; it would be unworthy such Men to traffic with a dirty Bookseller for so much a Sheet of letter-press. When the Bookseller offered *Milton* Five Pounds for his Paradise Lost, he did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Posterity would pay it.

Some Authors, my Lords, are as careless about Profit as others are rapacious of it, and what a Situation would the Public be in with-regard to Literature, if there were no Means of compelling a second Impression of a useful Work to be put forth, or wait till a Wife or Children are to be provided for by the Sale of an Edition. All our Learning would be locked up in the Hands of the *Tonsons* and the *Lintots* [Lintons] of the Age, who would set what Price upon in their Avarice chose to demand, 'till the Public became as much their Slaves, as their own Hackney Compilers are.

Instead of Salesmen, the Booksellers of late Years have forestalled the Market, and become Engrossers. If therefore the Monopoly is sanctified by your Lordships Judgement, exorbitant Prices must be the Consequence; for every valuable Author will be as much monopolized by them as *Shakespeare* is at present, whose Works which he left carelessly behind him in Town, when he retired from it, were surely given to the Public if ever Author's were; but two Prompters or Players behind the Scenes laid hold of them, and the present Proprietors pretend to derive that Copy from them, for which the Author himself never received a Farthing.——

I pass over the flimsy Supposition of an implied Contract between the Bookseller who sells, and the Public which buys the printed Copy; it is a Notion as unmeaning in itself as it is void of a legal Foundation. This Perpetuity now contended for is as odious and as selfish as any other; it deserves as much Reprobation, and is become as intolerable. Knowledge and Science are not Things to be bound in such Cobweb Chains; when once the Bird is out of the Cage—*volat irrevocabile*—*Ireland*, *Scotland*, *America* will afford her Shelter, and what then becomes of your Action? If the Legislature had intended to make the Right in Question perpetual, they would have taken Care that the Remedy should be so too. (*Cases of the Appellants*: 48–55)

114 "Your knowledge is nothing when no one else knows that you know it."

The Reversal

"Weak of voice" though he might claim to be, Lord Camden did exert himself in an extended speech replete with the force of his convictions. Those listening could not but be moved by the clarity of his argument and the passion of his words. The hall fell quiet, and then, a leading figure in this controversy, Lord Chancellor Apsley, spoke:

> I declare, I made the Decree entirely as of Course, in Pursuance of the [Lord Mansfield's] Decision upon the Right in the Court of *King's Bench*, and as what I decreed, as a Chancellor, was merely a Step in the Gradation to a final and determinate Issue in the House of Peers, I am totally unbiased upon the Question, and therefore can speak to it as fairly from my own Sense of it, as any one of the Judges, or any of the Lords present. (*Cases of the Appellants*: 55)

The Lord Chancellor went on to admit, in detailed terms, that the prerogatives claimed by the Stationers' Company were implausible, concluding "I am therefore clearly of Opinion with the Appellants [Donaldson's side]."[115] It was as clear a declaration overturning the decision of the previous court as could have been made.

Then Lord Thomas Lyttelton (1744–1779) stood to object. Admitting that he was not knowledgeable in law, he nevertheless was opposed to Lord Camden's view. Author's rights of ownership were "sacred" and "deserving of Protection." He agreed on the "infinite Importance to every Country" of the cultivation and encouragement of the arts and sciences; in places where "Men of Letters are best protected, the People in general will be most enlightened, and where the Minds of Men are enlarged, where their Understandings are equally matured in Perception and in Judgment," there, he declared, the arts and sciences would become well established. If authors have rights to their work in perpetuity it "is a lasting Encouragement," but making the right of copying common to all would be like widening the bed of a river so much as to finally dry up its sources.[116]

Lord Lyttelton stated, "I am of Opinion, that the [Lord Chancellor Apsley's] Decree should be affirmed."[117] Lyttelton was only thirty years of age at that time, having only

115 *Cases of the Appellants*, p. 55.

116 **Original:** I own I have no great Acquaintance with the Quirks and Quibbles of the Law. I speak to the Matter merely as a Question of Equity; I cannot enter into a delusive, refined, metaphysical Argument about Tangibility, the Materiality, or the corporeal Substance of Literary Property; it is sufficient for me, that it is allowed such a Property exists. Authors, I presume, will not be denied a free Participation of the common Rights of Mankind, and their Property is surely as sacred, and as deserving of Protection, as that of any other Subjects. It is of infinite Importance to every Country, that the Arts and Sciences should be cultivated and encouraged; where Men of Letters are best protected, the People in general will be most enlightened, and where the Minds of Men are enlarged, where their Understandings are equally matured in Perception and in Judgment, there the Arts and Sciences will take their Residence. . . . If Authors are allowed a Perpetuity, it is a lasting Encouragement; making the Right of multiplying Copies common to all, is like extending the Course of a River so greatly, as finally to dry up its Sources. (*Cases of the Appellants*, pp. 55–56)

117 *Cases of the Appellants*, p. 56.

the previous year succeeded to his late father's seat in the House of Lords. We cannot but think that, perhaps by virtue of his youth and inexperience, he spoke spontaneously, not really reading the general direction of the discussion. The backdrop for his statement, coming just as the discussion had nearly reached a conclusion, cannot be understood simply by following the record of the discussion. It is to be found, rather, in the text of Thomson's *The Seasons,* where the romance between Lyttleton's own parents is mentioned, giving their names, in one of the verses in "Spring." This anthology is a book that has very special meaning to this young member of the House of Lords. In any case, his remarks may have generated some ripples in the House, but they did not have the power to really change the direction of the debate.

Finally, Edmund Law (Bishop Carlisle, 1703–1787) and Lord Howard of Effington (d.u.) took the stand, both of them strongly opposed to giving the booksellers perpetual access to copyright.

Lord Mansfield, ultimately, did not say anything to the very end. Although like Lord Chancellor Apsley, his decision was being questioned, and although he knew the background of the discussion on copyright better than anyone else, this man puzzlingly made no effort to exercise his famous "silver tongue" throughout the entire proceedings.

The trial was then concluded and a vote was held among the members of the House of Lords. The *Parliamentary History* records the vote at 23 members for the Donaldson side to 11 for the Becket side. However, there are other accounts stating that 84 members cast votes that day and that the vote was 22 to 11, so the evidence is not conclusive. Some scholars believe that the vote was taken by a voice vote.[118] Whatever the case, Donaldson and his son won and the booksellers' claim to "perpetual copyright" was withdrawn. For Lord Mansfield, it was one of only six cases overturned in a higher court from among the countless decisions he had made during his career.[119]

With this decision, the booksellers' dreams of inexhaustible profits were dashed once and for all. It is said that the people of Edinburgh celebrated in the streets, playing music and waving flags, at news of the decision.[120] The 1 March 1774 edition of the *Edinburgh Advertiser* recorded the joy of the court victory and the passions of the debates as follows:

> This question, which has been litigated for more than thirty years, is now happily determined, both in England and Scotland, and authors are now in a better situation in Great Britain, than in any other country. In other countries they are obliged to take out patents for fourteen years, at a considerable expence; whereas, in Britain, they have a standing patent (the statute of Queen Anne) for 14 and 28 years, without any expence.

118 Rose 1993, p. 102.
119 Fifoot 1977, pp. 46–47.
120 Skinner 1928, p. 16.

> No private case has so much engrossed the attention of the public, and none has been tried before the House of Lords, in the decision of which so many individuals were interested. During the whole time of its duration in the House of Lords, (three weeks including adjournments, and eight days debate) a great number of peers were present, and paid the greatest attention. (*Edinburgh Advertiser*, 1 March 1774)

Although expressed in a somewhat roundabout manner, according to this article, the *Donaldson v. Becket* decision had clarified that a patent for up to twenty-eight years was granted to authors free of charge—in other words, their "patent" would expire in twenty-eight years.

Where Donaldson and his son were when they heard of the decision is not known, but there is a good possibility that James was in Edinburgh since he published the extra-edition announcement in the *Edinburgh Advertiser*. Alexander Donaldson was living in London at the time, so he was no doubt present in the court itself and heard the decision firsthand, where he would have been able to celebrate with Thurlow and Dalrymple. One can also speculate that the modest publisher and the noble Lord Camden exchanged satisfied glances across the chamber, communicating their shared pleasure in having achieved their common objective, but that remains in the realm of the imagination.

The London booksellers found their proud arguments, which had held sway for so many years, crushed by the House of Lords. They were not the type, however, to be easily cowed. Within six days, on 28 February, they had already presented a petition for a new copyright protection law, with 87 signatures, to the House of Commons.[121] A committee was formed by the House of Commons to consider the petition and Thurlow, Dunning, and Wedderburn presented opinions. A new "Bill for the Relief of the Booksellers" was drawn up and presented in the House. The actual content of the new bill is not recorded. The booksellers of Edinburgh, Glasgow, York and elsewhere countered with their own petition opposing such a bill. On 10 May at the "Second Reading" of the bill in the House of Commons, Dalrymple spoke, representing those opposed to the bill.

At the 13 May Hearing of Council, a barrister named William Mansfield spoke.[122] Taking the side of the monopolist booksellers, he argued that the booksellers' copyright should be longer than that specified in the Statute of Anne, and he criticized Donaldson and his lawyers. Stating that the Donaldson edition of *Homer* as translated by Alexander Pope (1688–1744) removed 23,851 lines of notes from the original book, he found fault with the quality of "pirate editions." He decried the House of Lords, calling the decision

121 *Parliamentary History of England*, vol. 17, pp. 1078–1110; Walters 1974.

122 This is not the Lord William Mansfield who figured in the copyright cases discussed above but another person of the same name. Shirata believes they are the same person (Shirata 1998, p. 194), but Tompson states that they are different (Tompson 1992, p. 41). The *Parliamentary History of England* records the name of the man who spoke on 13 May 1774 as "Mr. Mansfield," rather than "Lord Mansfield," so I will follow the thesis that they are different individuals.

of that highest court of law in Westminster "misconceived."[123] Then, judging from the fact that Donaldson had apparently sought to sell out his pirate editions before the Court of Chancery impounded his merchandise, he said "it is evident he [Donaldson] thought, as well as the petitioners, that there did exist a common law right."[124] This William Mansfield's argument seeming to have had its effect, the new bill was passed in the House of Commons. Upon being presented in the House of Lords, however, it faced the thoroughgoing critique of Lord Camden and Lord Chancellor Apsley as before, and it was thrown out. This confirmed that the booksellers' claim to a "perpetual copyright" to the works they had published, based on the notion that it had existed in common law, would not be recognized.

Impact of the Decision on Authors and Booksellers: Samuel Johnson's View

Already by the eighteenth century, a complex distribution system made up of several levels of intermediaries had taken shape. Thanks to this system, local bookstores could obtain books popular in London, but the more intermediaries were involved, the more costly the book. For example, *Life of Johnson* records the distribution routes and intermediary margins for Johnson's *Dictionary* in a letter of 1776. The retail price was 20 shillings, while the original cost of the *Dictionary* was 7 to 8 shillings. The printer, looking to make a profit of 6 to 7 shillings, sold the books to a primary agent in London, Mr. Cadell for 14 shillings. He also added one free copy for each 25 Cadell ordered. Cadell kept 1 shilling's margin for himself and sold the books to wholesale bookseller Edward Dilly (1732–1779) for 15 shillings. Dilly, in turn, sold the books for 16 shillings and six pence to local booksellers. The price on the *Dictionary* was 20 shillings.[125]

Looking at this example of book distribution we can see that Cadell is clearly an extra link in the distribution chain. Cadell was Millar's successor and executor of his estate. Big booksellers like Cadell not only profited by monopolizing the printing of books but also from their distribution. Johnson's description of Cadell was as one "who runs no hazard, and gives no credit." [126] He was no doubt a very savvy businessman.

What did Johnson think of Donaldson? It appears that Johnson took an interest in Donaldson from the time the latter set up shop in London. While Johnson was rather critical of Donaldson's strategy, he was opposed from the outset to the claims to "perpetual copyright" advanced by Millar and his cohorts. Boswell records a conversation between Johnson and the lawyer George Dempster (1732–1818) on 20 July 1763.

123 *Parliamentary History of England*, vol. 17, pp. 1097–1098.
124 *Parliamentary History of England*, vol. 17, p. 1098.
125 Boswell 1998 (1791), pp. 679–80.
126 Boswell 1998 (1791), p. 679.

> Johnson, though he concurred in the opinion which was afterwards sanctioned by a judgement of the House of Lords, that there was no such right, was at this time very angry that the Booksellers of London, for whom he uniformly professed much regard, should suffer from an invasion of what they had ever considered to be secure: and he was loud and violent against Mr. Donaldson. . . . Now Donaldson, I say, takes advantage here, of people who have really an equitable title from usage; and if we consider how few of the books, of which they buy the property, succeed so well as to bring profit, we should be of opinion that the term of fourteen years is too short; it should be sixty years.' DEMPSTER. 'Donaldson, Sir, is anxious for the encouragement of literature. He reduces the price of books, so that poor students may buy them.' JOHNSON, (laughing) 'Well, Sir, allowing that to be his motive, he is no better than Robin Hood, who robbed the rich in order to give to the poor.'
>
> It is remarkable, that when the great question concerning Literary Property came to be ultimately tried before the supreme tribunal of this country, . . . Dr. Johnson was zealous against a perpetuity; but he thought that the term of the exclusive right of authors should be considerably lengthened. He was then for granting a hundred years. (Boswell 1998 [1791]: 309–310)

When Donaldson and Becket were battling it out in the Scotland Court of Session, Samuel Johnson was doubtless discussing the case with his friends. On 8 May 1773, he is recorded as saying:

> 'There seems (said he,) to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual; but the consent of nations is against it, and indeed reason and the interests of learning are against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain its circulation. No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world, therefore, whatever valuable work has once been created by an authour, and issued out by him, should be understood as no longer in his power, but as belonging to the publick; at the same time the authour is entitled to an adequate reward. This he should have by an exclusive right to his work for a considerable number of years.' (Boswell 1998 [1791]: 546–47)

He is in favor, therefore, of a good balance between security of public access to work and the handing over of adequate reward to the author. Every author who had the experience of being exploited by big booksellers as Johnson did was careful thereafter to defend

his own profits. We can only admire Johnson for his faithful pursuit of the "general good." Johnson's interest in copyright was not only out of his interest in economic profit. He believed that the author should retain the copyright in order to be able to correct its misprints and errors and to revise it according to the advance of scholarship. If the text became the property of someone else, it might not be possible for an author to ever put out a revised or expanded edition.

But if the right to copy had been different from that determined in the Statute of Anne, Johnson might have been able to publish more frequent revisions of his *Dictionary.*[127] The first edition of the *Dictionary* came out in 1755 and the copyright was held by booksellers until 1783, the year before Johnson died. The final revised edition prepared by Johnson himself was the fourth edition published in 1773. If the copyright had belonged to Johnson himself, readers of his day might have been able to obtain a more perfected dictionary—at least we may be allowed to speculate.

Like other men of culture and members of the nobility, Boswell and Johnson took a close interest in the *Donaldson v. Becket* case. Boswell, who had defended Donaldson in the 1773 *Hinton v. Donaldson* case in Scotland's Court of Session, was naturally on Donaldson's side. Just before the Donaldson's case was heard in the House of Lords, Boswell had published through the Donaldson bookstore a 37-page booklet detailing the points at issue in the *Hinton v. Donaldson* case. It was an open effort to appeal to public opinion in support of Donaldson.[128]

In a letter by Johnson dated 7 February 1774, we find: 'The question of Literary Property is this day before the Lords. Murphy drew up the Appellants' case, that is, the plea against the perpetual right. I have not seen it, nor heard the decision. I would not have the right perpetual."[129] The case had begun in the House of Lords on February 4, so Johnson's information is slightly delayed, but in those days a three-day lag was actually quite short.

According to the 20 July 1763 conversation with Dempster quoted above, Johnson concurred with the decision of the House of Lords. He continued to maintain interest in issues of copyright after the decision, which Boswell records in several places. In 1775, mentioning a case in which an author received only one third of the profits from the sale of his book and had been forced to sign over the copyright for 99 years in the contract with the bookseller, Johnson is said to have remarked: "I wish I had thought of giving this to Thurlow, in the case about Literary Property. What an excellent instance would

127 Reddick 1996, pp. 172–73.

128 Deazley assumes that Donaldson petitioned the House of Lords to adjourn the session for a month in order to make sure that Boswell's book would come out in the meantime. Deazley 2004, pp. 194–95; Rose 1993, pp. 95–96.

129 Boswell 1998 (1791), p. 557.

it have been of the oppression of booksellers towards poor authours!"[130] He also notes how even in 1779, the work of a famous poet was still under the control of "the several booksellers who had the honorary copy right [sic], which is still preserved among them by mutual compact, notwithstanding the decision of the House of Lords against the perpetuity of Literary Property."[131] In other words, there was apparently some skepticism about the effectiveness of the House of Lords decision stating that copyright was not perpetual. Indeed, at least in book distribution in London, the role of the monopolist booksellers must have been quite dominant. Regardless of the House of Lords decision, it was unlikely that the business practices that the London booksellers had agreed upon among themselves would suddenly be changed.

The 1774 decision opened up a place for what had been called "pirate publishing," but I do not think it fundamentally changed the practices of the publishing world of England. After all, the copies that would no longer be called "pirate editions" were only of those works that had been in print for more than the number of years stipulated in the Statute of Anne; recently written works in fashion were securely under the protection of the Statute. What this suggests is that as far as society's understanding went, copyright only needed to be protected "during the times therein mentioned" in order to serve the "encouragement of learning" as enshrined in the Statute of Anne.

130 Boswell 1998 (1791), p. 613.
131 Boswell 1998 (1791), pp. 1008–1009.