the publisher should insert in it the calculation of the interest of any certain sum for all the months, weeks, and days of the year, because his calculation coincided exactly with that of the same sum in the other books of calculations. No. 2.

The argument of the pursuers would put an end to every periodical publication of this sort. There is hardly a page of an Almanack, but contains something taken from larger works upon the same subjects. A newspaper is in the same situation. Magazines, Reviews, and other such productions, whose very essence consists in making transcripts from privileged books, would likewise, upon the argument of the pursuers, be at once suppressed.

It was likewise objected by the defenders, that no evidence was produced of the abstract having been entered in Stationers' Hall. On this point the pursuers held, that it behoved the defenders to instruct themselves of this fact. A certificate, however, was produced from the Librarian of the Advocates' Library, that he had received a copy of the work for the Library from Stationers Hall as having been entered there.

The Court were of opinion that there was here an evident piracy upon the work of the pursuers; and some of the Judges observed, that were it not to be found so, such practices would put an end to the property of authors altogether. The defenders had here taken the substance of the book, in an evasive way, which was hard and cruel.

An interlocutor was accordingly pronounced, granting the interdict against the publishers of the Almanack, under the penalty of £50 Sterling.

Lord Ordinary, *Kennet.* For the pursuers, *Crosbie.* Alt. *Nasmyth.*

J. W.

1804. *February* 29. CLARK *against* BELL.

No. 3.
An author is entitled to bring an action at any time within the statutory period, declaring his exclusive right of property in any book entered at Stationers' Hall, and containing prohibitory conclusions

IN 1775, James Clark published "Observations on the Shoeing of Horses;" and in 1788, he also published "A Treatise on the Prevention of Diseases "incident to Horses." Both of these publications were entered at Stationers' Hall.

Andrew Bell, in conjunction with Colin Macfarquhar, had, in the year 1770, published a Dictionary of arts and sciences, under the title of the Encyclopædia Britannica. In 1788, a third edition of this last work began to be printed in numbers. In 1791, the number with the article Farriery was published. In 1798, the whole concern was purchased by Bell.

Clark, finding that a great part of his two books was copied *verbatim* into the treatise on Farriery in the Encyclopædia, and that the plates were re-engraved for that work, brought an action, founding on the 8th of Queen Anne,

No. 3. although the demand for penalties may be cut off by the short limitations in the act of Queen Anne.

"An Act for the Encouragement of Learning," &c. concluding, that it should be found and declared, that the pursuer has the copy-right, and sole and exclusive property of the two publications above mentioned; and that neither the defenders nor any other person can lawfully reprint, &c. these works, either separately or in a Dictionary, without the pursuer's consent and authority: That it should be found and declared, the defenders have been guilty of an illegal encroachment on the pursuer's property, by the publication of his works in the Dictionary, and have incurred the penalties specified in the act of Parliament: That the defenders should be decerned and ordained to desist from farther copying, &c. or from reprinting, vending and exporting, those parts of the Dictionary in which any passages of the pursuer's works are engrossed, printed and contained: That the defenders should be decerned and ordained to deliver up to the pursuer the copies of those parts of the Dictionary which have been extracted from his publications, and which are still in their custody, or in the custody of any other person for their behoof, that the same may be damasked and made waste paper of: That the defenders ought to be ordained to make payment of the penalties incurred, in terms of the statute: And, finally, That the defenders should be ordained, jointly and severally, to make payment to the pursuer of £1000 in name of damages and expenses.

The Lord Ordinary pronounced this interlocutor, (30th June 1801:) 'Having advised the libel and defences, with the mutual memorials for the 'parties, In respect of the limitation of the action, contained in the 8th of 'Queen Anne libelled on, and that it is stated on the part of the defenders, the 'representatives of Colin Macfarquhar, and not disputed by the pursuer, that 'they have several years ago been divested of all interest in, and connection 'with, the publication called the Encyclopædia Britannica, dismisses the pro-'cess *quoad* them: And as to the other defender Andrew Bell, in respect the 'libel is laid only on the said statute of the 8th of Anne, dismisses the con-'clusion for damages: But as to the other conclusions, In respect the said 'defender declines to explain the grounds on which he denies that part of the 'libel which sets forth that various parts of the two works published by the 'pursuer, mentioned in the libel, have been copied into the Encyclopædia Bri-'tannica, contrary to the copy-right belonging to the pursuer, under the said 'statute, holds the defender as confessed thereon: And, in so far as concerns 'the conclusions of the libel, for having it found and declared, that the pur-'suer has the sole right of printing, publishing, and vending, the said works 'mentioned in the libel; and also, in so far as concerns the conclusions, that 'the defender be decerned hereafter to desist from printing, reprinting, pub-'lishing, or vending, the said two works, or any part thereof, by himself, or 'by others in his name; and that he be ordained to deliver up the whole 'sheets in his possession, or in the possession of any other person for his be-'hoof, whereon any part of the said two works published by the pursuer are 'printed, in order to be made waste; the Ordinary repels the defence founded

'on the limitation of action, contained in the said statute, and finds, declares, No. 3.
'and decerns in terms of the said conclusions; but with respect to the conclu-
'sion for penalties, supersedes consideration of the said defence founded on
'the limitation contained in the statute, until the pursuer shall have explained
'more distinctly whether he insists that any penalties have been incurred to
'which the said defences do not apply; and the Ordinary declares, that on
'this matter he will hear parties further; and supersedes extract till the third
'sederunt-day in November.'

The pursuer acquiesced in this interlocutor, as to the conclusion for penalties and damages; but Bell reclaimed, and

Pleaded: 1. The offence, if there was any, was committed when the whole copies were sold, in the year 1798, three years before this action was raised. Bell is a mere purchaser and retailer of books formerly published. Now, the act does not extend to successive purchasers of the same copy of a book, which may go through many hands before the expiry of the copy right. But, at any rate, the right of action, "for any offence that shall be committed against this "act, shall be brought, sued, and commenced, *within three months* next after such "offence committed, or else the same shall be void and of none effect." This action not having been raised for three years after the offence, is now incompetent.

2. Besides providing for the case of printing, reprinting, or importing any books without the consent of the proprietor first being obtained, the act proceeds thus: "Or knowing the same to be so printed or reprinted without the "consent of the proprietor, shall sell, publish, or expose to sale, or cause to "be sold, published or exposed to sale, any such book or books, without such "consent first had and obtained as aforesaid, then such offender," &c. In this last part of the clause, the pursuer plainly must set forth and prove, that the defender knew the books to have been printed without his consent; while, on the other hand, the defender, who prints a work, must prove the consent of the proprietor. This distinction is very reasonable. The general principle of the act is, that authors shall have a right of property in the fruits of their literary labours. Their consent, therefore, must be produced by those who print their works; but if this was equally incumbent on every bookseller, no one would be in safety to sell a new book, without having previously obtained the consent of the author. To all parties this would be inconvenient, and by being a check upon the trade of the bookseller, would in the same proportion injure the author. For these reasons, the act does not impose upon the bookseller the burden of producing the consent of the author for selling the book, unless he knew that it had been printed without such consent; and it cannot appear that the bookseller was possessed of this knowledge, unless it be proved by the pursuer.

Answered: 1. The clause of limitation applies only to actions for the punishment of the offences committed against the act by recovering the penalties im-

No. 3. posed by it; but it does not apply to those actions of a declaratory or prohibitory nature, which it also authorises for the purpose of enforcing in future the civil right, which exists for fourteen or twenty-eight years; Miller *v.* Taylor, 20th April 1769, 4. Burr. p. 2323, Beckford *v.* Hood, 11th May 1798, 7. Term. Rep. p. 620. There is a good reason why a person who is declared entitled to certain penalties, if he prosecute the violator of his right within a limited period, should not be permitted to recover these penalties, if from inadvertence or negligence he delay to prosecute till a certain period be elapsed: But after creating a right for twenty-eight years, it would be singular indeed if the Legislature should refuse to enforce this right, if three months have elapsed from the period of the infringement. A person having the address to print, publish and sell another's work, without being detected by the author for three months, is not on that account entitled to reprint it. Neither does the circumstance of his having disposed of half the copies illegally printed, give him a right to dispose of the remainder. If the person to whom he sold the copies, purchased them *bonâ fide*, he may not be liable in the penalty, but it will not entitle him to retail these copies in defraud of the author's right. He may indeed have recourse upon the printer who deceived him; but the author's exclusive privilege must be supported for the future.

2. The injury done by the publication and sale of a book, is at least equal, if not greater than the injury done by printing it. The proprietor's consent is required for both: The act does not expressly say who is bound to prove this; but it is a fixed rule, that in the enforcement of rights, if any party makes an allegation in his defence, he is bound to prove it. The author does every thing that is incumbent on him, when he proves the property of the work, and the regular entry at Stationers' Hall. If the printer alleges that he printed with the author's consent, he must prove this assertion. The burden of proving that his own averments are true, falls upon the pursuer, but he is not also bound to show that the averments of the defender are false. In the act, indeed, there is a difference between the terms of the prohibition against printing, and the prohibition against publishing or selling. The printer of an author's work without his consent, must necessarily know that it was without consent: The words "knowing the same to be printed, or reprinted without the consent of the pro-"prietor," would have therefore been superfluous; but they become necessary to complete the description of the offence of the publisher or seller, who is not the printer, to which penalties are annexed. A person may inadvertently and innocently sell the work of another printed without his consent: He may be prohibited from doing so in future; but no penalty can be inflicted, unless he has done so wilfully. The addition, then, in the terms of the prohibition, is not meant to introduce a new rule as to the *onus probandi*. The bookseller never can be deceived, as he can always learn from the entry at Stationers' Hall whether the author's consent has been given to the publication.

The Court had no difficulty upon any of the points in the judgment of the

Lord Ordinary, except in so far as it ordained the defender "to deliver up "the whole sheets in his possession, or in the possession of any other person "for his behoof, whereon any part of the said two works published by the "pursuer are printed, in order to be made waste." It occurred, that as the Lord Ordinary had superseded the question as to penalties, his Lordship must have supposed that the delivering up the sheets to be made waste formed no part of the penal provisions in it, but only followed out the declaratory and prohibitory enactments; whereas, the majority of the Court rather inclined to be of the opinion, that this made part of the penal provisions of the statute, as it implied a forfeiture; consequently, that it would be cut off by the limitation introduced as to all action for penalties. A person who had surreptitiously printed any work, where the claim for penalties was cut off, might be prevented from selling the copies during a certain period; after which, however, he might be at liberty to sell them, the right of the author having then ceased. No. 3.

The Court therefore remitted to the Lord Ordinary to hear parties further as to delivering up the sheets to be made waste, and adhered to the interlocutor *quoad ultra.*

Lord Ordinary, *Glenlee.* Act. *Reddie.* Agent, *J. Gray.* Alt. *J. Clerk.*
Agent, *J. Macfarquhar, W. S.* Clerk, *Gordon.*

F. *Fac. Coll. No. 151. p. 335.*

1804. *June* 1. CADELL and DAVIES, and Others, *against* STEWART.

No. 4.
The person to whom letters are addressed, has no right to publish them without the consent of the writer.

A Book was published at Glasgow by Thomas Stewart, bookseller, entitled, "Letters addressed to Clarinda, by Robert Burns, the Ayrshire Poet." This performance consisted of original correspondence, which had never been published, and contained a variety of letters written by Burns to a lady, who, after the death of the poet, put them into the possession of Stewart, and consented to their publication.

Soon after their appearance, Cadell and Davies, booksellers in London, and William Creech, bookseller in Edinburgh, having acquired right to all the compositions of Burns, presented a bill of suspension and interdict against the publication. An interdict was granted, and the bill was passed. When the cause came to be discussed, appearance was made by the brother of Burns, and by the curator of his children, who concurred in the application. The Lord Ordinary took the cause to report; and the suspenders

Pleaded: Whatever doubts may have arisen with regard to an author's exclusive property at common law, in a work that has been published, his property in manuscript has never been disputed. It arises both from the right which every man has to the offspring of his own labour, and also from the