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## Article

### Copyright at Common Law in 1774

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*As we approach Congress's upcoming reexamination of copyright law, participants are amassing ammunition for the battle to come over the proper scope of copyright. One item that both sides have turned to is the original purpose of copyright, as reflected in a pair of cases decided in Great Britain in the late 18th century—the birthplace of Anglo-American copyright. The salient issue is whether copyright was a natural or customary right, protected at common law, or a privilege created solely by statute. These differing viewpoints set the default basis of the right. Whereas the former suggests the principal purpose was to protect authors, the latter indicates that copyright should principally benefit the public.*

*The orthodox reading of these two cases is that copyright existed as a common-law right inherent in authors. In recent years, however, revisionist work has challenged that reading. Relying in part on the discrepancies of 18th-century law reporting, scholars have argued that the natural-rights and customary views were rejected. The modified account has made great strides and has nearly displaced the traditional interpretation. Using a unique body of historical research, this Article constitutes the first critical examination of the revision. Ultimately, it concludes that the revision is incorrect and that we must return to the orthodox view.*

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# Copyright at Common Law in 1774

H. TOMÁS GÓMEZ-AROSTEGUI\*

## I. INTRODUCTION

As we approach Congress's upcoming reexamination of copyright law, academics and interest groups are amassing ammunition for the battle to come over the proper scope of copyright. One item that both sides have turned to is the original purpose of copyright, as reflected in a pair of cases decided in Great Britain some 240 years ago. Both concern the very genesis of authors' rights, a topic of central importance to scholars and lobbyists. In England, these two cases are often seen as the most important and influential because they are thought to have largely exhausted the subject, with subsequent cases recycling arguments and evidence previously considered. In the United States, they garner significant scholarly attention because they were decided in the years before the adoption of the Copyright Clause of the U.S. Constitution in 1787 and the first federal Copyright Act of 1790.<sup>1</sup> Thus, unlike cases decided on the subject decades after 1790,<sup>2</sup> they offer contemporaneous evidence of what the Framers and the First Congress may have known and intended in those two instruments.

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\* Kay Kitagawa & Andy Johnson-Laird IP Faculty Scholar and Associate Professor of Law, Lewis & Clark Law School. Research at institutions in Great Britain and elsewhere was made possible by a gift from Kay Kitagawa and Andy Johnson-Laird. I thank them for their very generous support. This Article benefitted from comments received during presentations at George Mason University School of Law, George Washington University Law School, Lewis & Clark Law School, and Stanford Law School. Special thanks also go to Howard Abrams, Isabella Alexander, Lionel Bently, Michael Bosson, Kathy Bowrey, Jane Bradney, Bill Cornish, Ronan Deazley, June Ellner, Jane Ginsburg, Brendan Gooley, James Hamilton, Paul Heald, Steve Hobbs, Liz Hore, Lydia Loren, Hector MacQueen, Leigh McKiernan, Joe Miller, Ruth Paley, Julian Pooley, Sarah Rajec, Mark Rose, Simon Stern, Clare Thompson, and Lynn Williams for their comments on earlier versions of this Article or for otherwise assisting in its preparation. Any errors are mine alone. Many sources for this Article are stored in institutions in Canada, Great Britain, Ireland, and the United States. Locations are abbreviated as follows: AL=Advocates Library, Edinburgh; Bodl=Bodleian Library; BL=British Library; ERY=East Riding of Yorkshire Archives; HSP=Historical Society of Pennsylvania; KI=Hon. Society of King's Inns, Dublin; LI=Lincoln's Inn Library; LMA=London Metropolitan Archives; NAS=National Archives of Scotland; OHL=Osgoode Hall Law Library; PA=Parliamentary Archives; PRO=Public Record Office, Kew; SL=Signet Library, Edinburgh; WCRO=Warwickshire County Record Office; and WSA=Wiltshire & Swindon Archives. This Article also relies on a large number of newspapers and periodicals, the full titles of which appear *infra* in the Appendix.

<sup>1</sup> U.S. CONST. art. 1, § 8, cl. 8; Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>2</sup> *E.g.*, *Wheaton v. Peters*, 33 U.S. 591 (1834); *Jefferys v. Boosey*, 4 H.L.C. 815 (H.L. 1854).

The salient issue is whether, in the late 18th century, copyright was a natural or customary property right, protected at common law, or a privilege created solely by statute. These viewpoints compete to set the default basis of the right. The former suggests the principal purpose was to protect authors; the latter indicates it was principally to benefit the public.

The conventional view on this question, at least with respect to English law, has been that copyright was a common-law right. This view follows from our two cases. The first is *Millar v. Taylor*,<sup>3</sup> a Court of King's Bench decision from 1769, which held that a common-law right existed separate from and in spite of a statute enacted in 1710 that limited the duration of copyrights. Copyrights were therefore perpetual. The second case is *Donaldson v. Becket*,<sup>4</sup> a House of Lords decision from 1774 that overturned *Millar*. There, the House held that copyrights in published works were governed by the 1710 statute and its limited durations. And though the dispute did not require the House to decide if a common-law right predated the statute, a majority of the judges who advised the Lords opined that a right did exist before 1710, but that the statute abridged it. On the basis of these judges' views, succeeding generations have taken *Donaldson* to endorse directly or indirectly an antecedent right in authors.

This long-accepted view of *Donaldson* has garnered sharp criticism. In 1983, Howard Abrams argued that the decision had been misinterpreted due to misleading reports of the case and a misunderstanding of how the House of Lords operated. By his lights, one finds the true import of *Donaldson* not in the views of the judges, but solely in speeches delivered by a handful of Lords. And because a majority of the Lords who spoke rejected an antecedent right in published works, Abrams posits that the House of Lords actually held that copyright never existed at common law and thus that the true origin of copyright was strictly legislative.<sup>5</sup> During the last ten years, Ronan Deazley has taken the argument further. Focusing on a part of the decision that Abrams did not, Deazley argues that the House also ruled that authors never held any incorporeal rights to prevent even the unauthorized *first* publication of their works.<sup>6</sup> He thus seeks to put the final nail in the 18th-century coffin of an author's right at common law.

Their modified account has been influential, particularly with respect to common-law rights in published works. The two most important treatises on U.S. copyright law, for instance, have taken it to heart. Bill Patry cites Deazley for the proposition that the "House of Lords found that

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<sup>3</sup> 4 Burr. 2303 (K.B. 1769).

<sup>4</sup> 4 Burr. 2408, 7 Bro. P.C. 88 (H.L. 1774).

<sup>5</sup> Howard A. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1128–29, 1156–70 (1983).

<sup>6</sup> RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 191–220 (2004).

there was no common law [right] in published works.”<sup>7</sup> And though David Nimmer has yet to embrace the revised account wholeheartedly, he is heading in that direction. His treatise recites the traditional view on the matter but then states that Abrams has “convincingly argue[d] that in fact the House of Lords in *Donaldson* rejected the notion of common law copyright quite apart from any impact of the [statute of 1710].”<sup>8</sup> Many other scholars have accepted the revised account as well,<sup>9</sup> and I even counted myself among them,<sup>10</sup> until recently. Liam O’Melinn perhaps sums up the shift in thinking best when he writes, citing Abrams and Deazley, that “common law and natural law copyright are fictions” and that common-law copyright has been “fully and formally discredited.”<sup>11</sup>

This Article puts the story on a new footing or, more precisely, back on an old one. Part II first discusses why copyright’s origin remains important today, particularly in how it drives doctrinal and normative arguments. Part III then provides the necessary context for understanding *Donaldson*. Here, I briefly describe the statute enacted in 1710, commonly called the Statute of Anne, and the decision in *Millar*. Parts IV and V, which constitute the bulk of this Article, comprise an account of *Donaldson*, the historical revision of Abrams and Deazley, and my response to it. Given that our disagreement stems in large part from different understandings of the procedures and records of the case, I pay particular attention to those areas.

Ultimately, I conclude that my friends have read the record too aggressively and that they are wrong to assert that the House of Lords affirmatively rejected a common-law right. First, newly discovered evidence demonstrates that *Donaldson* was not misreported in the manner my colleagues contend. And second, no doctrine supports their contention that the Lords’ speeches, standing alone, constituted the holding of the House. Rather, the correct interpretation of the case is that the House, as a body,

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<sup>7</sup> 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 7:4 (2014); accord William Patry, *Metaphors and Moral Panics in Copyright*, 2008 INTELL. PROP. Q. 1, 7 & n.19.

<sup>8</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.02[A][2] n.12.1 (2014).

<sup>9</sup> E.g., SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 43, 200 n.17 (2001); Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 413–15, 424 (2004); Edmund W. Kitch, *Intellectual Property and the Common Law*, 78 VA. L. REV. 293, 295 n.12 (1992); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 335 (2004); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 31 (1987); Catherine Seville, *The Statute of Anne: Rhetoric and Reception in the Nineteenth Century*, 47 HOUS. L. REV. 819, 824–27 (2010); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 577–78 (2010); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1230 n.328 (1998).

<sup>10</sup> H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1221 (2008).

<sup>11</sup> Liam Séamus O’Melinn, *The Recording Industry v. James Madison, aka “Publius”: The Inversion of Culture and Copyright*, 35 SEATTLE U.L. REV. 75, 79, 103 (2011).

did not determine the origin of copyright, thus leaving the individual views of the judges and law Lords in *Donaldson*, along with those in *Millar*, as the principal guidance on the subject in England and America before 1800. And consistent with the orthodox view of copyright's origin, on the whole, those jurists favored an antecedent common-law copyright in authors.

Notably, this Article does not address what connection, if any, one can draw between *Millar* and *Donaldson* and the perception and intent of the Framers and First Congress in formulating U.S. copyright policy. Scholars have already covered that syllogistic step elsewhere, and though more could certainly be said about it, this Article is not the place to do so.

## II. DOCTRINAL AND NORMATIVE RELEVANCE

One might wonder why the origin and history of copyright law, particularly English law from the 18th century, remain relevant today. The answer is straightforward. English law continues to play a supporting role in doctrinal and normative arguments over the proper scope of copyright. In the United States, at least, there remain several areas where case law of this vintage can directly influence copyright doctrine. The common laws of the states, for instance, can protect sound recordings fixed before 1972.<sup>12</sup> And thus we still see courts citing *Millar* and *Donaldson* to assess whether to recognize a copyright in pre-1972 recordings.<sup>13</sup> Our Supreme Court has also cited 18th-century English case law when deciding whether a copyright litigant has a right to a jury trial and in setting the default, equitable remedial powers of the federal courts.<sup>14</sup> Most recently and notably, members of the Court consulted 18th-century sources on common-law copyright in deciding whether legislative restoration of copyright and increases to copyright duration were constitutional.<sup>15</sup>

Quite apart from particular doctrines, English law from this period remains important because commentators and interest groups often turn to it to support their normative arguments for how broad or narrow copyright protection should be. The issue has become especially germane as we move closer to what could soon become a comprehensive reconsideration of federal copyright law, a step recently embraced by the Register of Copyrights.<sup>16</sup> In testimony before a congressional subcommittee on intellectual property, Maria Pallante stated that the “law is showing the

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<sup>12</sup> See U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 28–41 (2011) (discussing various forms of state-law protection for pre-1972 recordings).

<sup>13</sup> E.g., *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 254–63 (N.Y. 2005).

<sup>14</sup> *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–50 (1998); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–21 (1999).

<sup>15</sup> *Golan v. Holder*, 123 S. Ct. 873, 885–86, 900–02 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 194, 196–97, 200–02, 230–33 (2003).

<sup>16</sup> Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

strain of its age and requires your attention. . . . Congress should approach the issues comprehensively over the next few years as part of a more general revision of the statute.”<sup>17</sup> The subcommittee has since held several preliminary hearings on reform.<sup>18</sup> And lest we forget, works will begin to expire and fall into the public domain in 2019, for the first time since 1998, unless Congress extends the copyright term again as it did in that year.<sup>19</sup>

Central to the upcoming debate will be the notion of property. For all the complexities of copyright’s various rationales,<sup>20</sup> property is perhaps the easiest to understand and the one that resonates the most. Although the concept is not absolute, and therefore copyright as property would not be either,<sup>21</sup> the rhetoric remains exceptionally strong. Neil Netanel explains:

Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad “sole and despotic dominion” over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose.<sup>22</sup>

Bill Patry has similarly noted that “[o]nce something is deemed property, it is irrelevant that an unauthorized use does not negatively impact the copyright owner, or even that the unauthorized use may be of great societal benefit. It is enough that property is involved and that it has been ‘taken.’”<sup>23</sup>

The potential consequences of labeling copyright as property are many. Doing so suggests, for example, that Congress cannot take

<sup>17</sup> *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Mar. 20, 2013) (statement of Maria A. Pallante, Register of Copyrights).

<sup>18</sup> E.g., *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (July 24, 2014); *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (July 15, 2014); *Music Licensing Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (June 10 & 25, 2014); *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (June 2, 2014); *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Mar. 13, 2014); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 28, 2014); *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 14, 2014).

<sup>19</sup> Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1396, 1403–04.

<sup>20</sup> See generally ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY LAW* (2011).

<sup>21</sup> Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 52–106 (2004); Alfred C. Yen, *Restoring Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 546–57 (1990).

<sup>22</sup> NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 7 (2008).

<sup>23</sup> WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 103 (2009).

copyrights without just compensation under the Fifth Amendment, that final injunctions should always be granted, that formalities for copyright should not be resurrected, and that copyrights should last forever. It can also be used to resist expanding statutory compulsory licenses, or even for scrapping current ones, and as a crutch for criminalizing more “thefts” of copyrighted works. The notion that authors hold property rights derived from their own labor additionally suggests that databases and other works created with the “sweat of the brow” deserve protection.

As a consequence, academics and others have worked hard to embrace or debunk, as the case may be, the idea of copyright as a property right. And naturally, in arguing as much, they have inquired whether copyright originally was a form of property, particularly as emanating from the common law or natural law.<sup>24</sup> This is where the turn to English history occurs.

Scholars like Abrams, and a host of others who rely on his and Deazley’s reexamination of *Donaldson*, argue that before the Copyright Clause of the U.S. Constitution in 1787 and the Copyright Act of 1790, England—the birthplace of Anglo-American copyright—had already rejected the idea that copyright was a property right inherent in authors. They then further argue that the Framers knew as much and thus had no reason to believe that authors held antecedent rights.<sup>25</sup> Copyright maximalists, on the other hand, continue to rely on the orthodox origin of copyright and argue that Framers like James Madison embraced it. They insist that “from its inception[,] copyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals’ inherent property right[s] in the fruits of their own labor.”<sup>26</sup> Statements like this and others have led copyright skeptic Bill Patry to state, somewhat exasperatedly: “[D]espite [the] rejection of copyright owners’ claims from the inception of copyright, they have a psychological block in accepting reality.”<sup>27</sup>

The reality, however, is more complicated than many assume.

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<sup>24</sup> See generally Kathy Bowrey & Natalie Fowell, *Digging Up Fragments and Building IP Franchises*, 31 SYDNEY L. REV. 185 (2009); Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006); Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005). For a discussion of the interplay between property and dignitary views of copyright in the 18th century, see Simon Stern, *From Author’s Right to Property Right*, 62 U. TORONTO L.J. 29 (2012).

<sup>25</sup> E.g., Abrams, *supra* note 5, at 1176–77; O’Melinn, *supra* note 11, at 92, 98–100, 116–20; Liam Séamus O’Melinn, *The Ghost of Millar v. Taylor* 28–32 (Nov. 1, 2013) (unpublished manuscript).

<sup>26</sup> PAUL CLEMENT ET AL., *THE CONSTITUTIONAL AND HISTORICAL FOUNDATIONS OF COPYRIGHT PROTECTION* 1 (2012); cf. Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC’Y U.S.A. 313, 318, 331–32 (2006) (discussing the 1790 Act).

<sup>27</sup> PATRY, *supra* note 23, at 124; see also *id.* at 80, 99, 112 (discussing *Donaldson*).



### III. COMMON-LAW COPYRIGHT IN CONTEXT

Much has already been written about the history of British copyright law before 1800.<sup>28</sup> Those prior works obviate the need to reexamine the subject, but a few words are necessary to help make sense of the issues discussed here.

Before Great Britain enacted the first modern-like copyright statute in 1710—often called the Statute of Anne—a patchwork of regulatory instruments prohibited copyright infringement. This regulatory framework operated (with a few gaps) from 1566 until 1695, at which time the statute then in effect, the Printing Act of 1662,<sup>29</sup> permanently expired. None of these regulations limited copyrights' durations, so while regulated no work ever fell out of protection and into the public domain, at least as we understand that term today. After the demise of the 1662 Act, many publishers claimed that the common law continued to protect their copyrights. By their lights, authors and their assigns held perpetual property rights in their works; this was, in their view, a right stemming from an author's labor.<sup>30</sup>

#### A. *Statute of Anne*

Nevertheless, publishers still campaigned for a return to statutory protection. Depending on who one believes, this occurred either because they knew that in truth they held no common-law rights or because they felt that their common-law rights, and the attendant remedies, were inadequate and that statutory penalties and forfeitures were needed. In response, Parliament enacted the Statute of Anne, which came into force on April 10, 1710.<sup>31</sup> The statute included penalties and forfeitures but its terms were limited. It protected all books first published on or after April 10 for 14 years from first publication (and “no longer”), with a possible reversion and additional term to the author of another 14 years if she was

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<sup>28</sup> Though not a comprehensive list, for England, see ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* (2010); DEAZLEY, *supra* note 6; LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* (1999). For Scotland, see ALASTAIR J. MANN, *THE SCOTTISH BOOK TRADE, 1500–1720*, at 95–191 (2000); Hector L. MacQueen, *Intellectual Property and the Common Law in Scotland c1700–c1850*, in *THE COMMON LAW OF INTELLECTUAL PROPERTY* 21 (Catherine W. Ng et al. eds., 2010); Warren McDougall, *Copyright and Scottishness*, in *2 THE EDINBURGH HISTORY OF THE BOOK IN SCOTLAND* 23 (Stephen W. Brown & Warren McDougall eds., 2012).

<sup>29</sup> Statute, 1662, 13 & 14 Car. 2, c. 33.

<sup>30</sup> *E.g.*, *THE CASE OF THE BOOKSELLERS RIGHT TO THEIR COPIES, OR SOLE POWER OF PRINTING THEIR RESPECTIVE BOOKS, REPRESENTED TO THE PARLIAMENT* (s.l.n. [c.1709]); *REASONS HUMBLY OFFER'D FOR THE BILL FOR ENCOURAGEMENT OF LEARNING* (s.l.n. [c.1709/10]).

<sup>31</sup> Statute, 1710, 8 Anne, c. 19, § 1. One part became effective March 25, 1710. *Id.* § 4.

still living at the expiration of the first term.<sup>32</sup> A legacy clause protected works published before the statute, but only for a period of 21 years from its effective date, meaning through 1731.<sup>33</sup> Less clear was whether Parliament intended to preserve a preexisting form of common-law copyright (if any such right existed). A savings clause in the statute stated:

[N]othing in this Act contained shall extend, or be construed to extend, either to prejudice or confirm any Right that the said Universities [of Cambridge or Oxford], 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.<sup>34</sup>

Also unclear was whether the statute protected works before they were first published. Although it prohibited the *printing* as well as reprinting of new books, its remedies were available only during the “[t]imes granted and limited” by the statute, meaning during the 14 years “commenc[ing] from the Day of . . . first *publishing* the same.”<sup>35</sup> Moreover, the remedies were available only if the owner had registered the book before *publication*.<sup>36</sup> Thus, any coverage for unpublished works had to be by implication.

It eventually fell to the courts of Great Britain to tackle three basic questions: (1) Did a common-law copyright exist independent of the statute? (2) If so, did an author or her assigns lose that right once a work was first published? Stated another way, did the authorized publication of a work dedicate it to the public domain? (3) And lastly, if an author did not lose the right upon publication, did the statute preempt the right or did the statute simply augment the remedies for the limited times stated therein?

#### B. *Millar v. Taylor*

The first reported case to address these issues fully was *Millar v. Taylor*,<sup>37</sup> a dispute that played out in two venues. In 1763, Andrew Millar sued Robert Taylor in the Court of Chancery for infringing a series of poems called *The Seasons*, by James Thomson. Millar sought an injunction and a disgorgement of Taylor’s profits; Taylor parried that the statutory copyrights had expired.<sup>38</sup> Sitting by designation, Baron Smythe of the

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<sup>32</sup> *Id.* §§ 1, 11. For the best treatment of this provision, see Lionel Bently & Jane C. Ginsburg, “The Sole Right . . . Shall Return to the Authors”: Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, 25 BERKELEY TECH. L.J. 1475, 1477–1549 (2010).

<sup>33</sup> Statute, 1710, 8 Anne, c. 19, § 1.

<sup>34</sup> *Id.* § 9.

<sup>35</sup> *Id.* § 1 (emphasis added).

<sup>36</sup> *Id.* § 2; see also Jane C. Ginsburg, “Une Chose Publique”? The Author’s Domain and the Public Domain in Early British, French and US Copyright Law, 65 CAMBRIDGE L.J. 636, 645 (2006).

<sup>37</sup> 4 Burr. 2303 (K.B. 1769).

<sup>38</sup> PRO C12/517/45, mm. 1–2 (Ch. 1763–1764).

Court of Exchequer ordered the parties to state a case for the Court of King's Bench to determine whether Millar could hold a copyright.<sup>39</sup> Smythe continued a previously granted injunction in the meantime, signaling that he believed there was such a thing as a copyright at common law—a view he later expressed in *Donaldson v. Becket*. But, in a turn of events that offers a sneak peek at the battle to come in *Donaldson*, that order was modified six months later by Lord Camden, who had recently become Lord Chancellor. He ordered the injunction dissolved on Taylor's petition for rehearing, thus telegraphing his pessimistic view of the case.<sup>40</sup>

The case then moved to the King's Bench where, in 1769,<sup>41</sup> the court endorsed a copyright based on property, natural justice, and reason. The majority, which consisted of Chief Justice Mansfield and Justices Willes and Aston, held that authors of literary compositions and their assigns had a right at common law to control both the first publication and any subsequent publications of their works.<sup>42</sup> This right existed independent of and beyond the terms of the Statute of Anne, which the court believed merely augmented the remedies that were otherwise available for infringement at common law and in equity. Lord Mansfield and his colleagues had, in effect, reversed Lord Camden. The lone dissenter was Justice Yates. Although he concurred that authors had a right to control the first publication of a work, so long as it was expressed in a manuscript,<sup>43</sup> Yates bristled at the idea that authors could control republication afterward. As far as he was concerned, the statute created the right in published works.

After an aborted appeal to the Exchequer Chamber, the case returned to the Chancery. Because the ruling declared that copyright in England was perpetual, the Lords Commissioners perpetually enjoined Taylor and ordered a master to assess the profits earned from infringement.<sup>44</sup>

#### IV. DONALDSON V. BECKET

It was not long before these issues were taken up again, this time by a higher tribunal. First filed in the Court of Chancery in 1771, *Donaldson v. Becket* was brought by Thomas Becket and others who claimed that they had purchased the copyrights in *The Seasons*—the same work that was at

<sup>39</sup> PRO C33/426, ff. 68<sup>v</sup>–69<sup>r</sup> (Ch. 1765).

<sup>40</sup> PRO C28/8, ff. 84<sup>v</sup>–85<sup>r</sup>, C33/426, f. 325<sup>r</sup> (Ch. 1766).

<sup>41</sup> PRO KB122/338, rot. 372 (K.B. Mich. 1766; judg. Pas. 1769, *nunc pro tunc* Trin. 1768).

<sup>42</sup> *Millar*, 4 Burr. at 2312–14, 2334–35 (Willes, J.); *id.* at 2354 (Aston, J.); *id.* at 2395–99 (Lord Mansfield, C.J.). Another account of the judges' opinions in *Millar*, which differs in some respects, may be found in SPEECHES OR ARGUMENTS OF THE JUDGES OF THE COURT OF KING'S BENCH (Leith, W. Coke 1771). For an assessment of Lord Mansfield's views in *Millar* by his legal biographer, see JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 191–94 (2004).

<sup>43</sup> *Millar*, 4 Burr. at 2355–56, 2378–79 (Yates, J., dissenting); *accord* *Tonson v. Collins*, 1 W. Black. 321, 333, 338, BL Add. MS 36,201, ff. 53<sup>r</sup>, 69<sup>r</sup>–73<sup>r</sup>, 85<sup>r</sup>–86<sup>r</sup> (K.B. 1761) (Yates arg.).

<sup>44</sup> PRO C33/433, ff. 413<sup>r</sup>–414<sup>r</sup> (Ch. 1770).

issue in *Millar*. The defendants, Alexander and John Donaldson, countered, as before, that the work was in the public domain.<sup>45</sup> Relying on *Millar*, the newly appointed Lord Chancellor, Lord Apsley, perpetually enjoined the defendants and ordered them to disgorge any profits they had earned.<sup>46</sup> Not long after, the Donaldsons appealed to the House of Lords,<sup>47</sup> which reversed, thus ending perpetual copyright in published works.

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Because my disagreement with other scholars on the proper interpretation of *Donaldson* turns crucially on the procedures of the House of Lords and on the weight to give to certain records in the case, we must turn our attention first to those procedures and records.

#### A. Procedure

An appeal<sup>48</sup> from a decree of the Court of Chancery commenced when a party filed a petition with the House of Lords. The House would read the petition and order the respondent to put in an answer (usually *pro forma*). Afterward, the House would appoint a day to hear the arguments of counsel on both sides. By standing order, the House required each side to submit printed “cases” four days in advance of the hearing.<sup>49</sup> These were not identical to the appellate briefs of today, but they did contain the background of the case and summaries of the “reasons” or arguments on either side. Drafted by solicitors, and approved by the barristers who were to argue the appeal, these briefs were simultaneously exchanged by counsel, and a sufficient number, amounting to about 250 copies from each side, would be provided to the Clerk of the Parliaments and to the Door-Keepers of the House of Lords. The latter would then distribute them to the Lords.<sup>50</sup>

At the time of the appeal in *Donaldson*, the Upper House comprised 206 eligible Lords.<sup>51</sup> Only three were “law Lords”—a term typically used at the time to describe Lords who concurrently were, or had been, judges

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<sup>45</sup> Becket v. Donaldson, PRO C12/61/24, mm. 1–2 (Ch. 1771).

<sup>46</sup> PRO C33/439, ff. 26’–27’ (Ch. 1772).

<sup>47</sup> Petition and Appeal, Donaldson v. Becket, PA HL/PO/JO/10/3/263/50 (Dec. 10, 1772).

<sup>48</sup> Proceedings on writs of error differed in some respects, but are not separately treated here.

<sup>49</sup> Standing Orders, 22 H.L. JOUR. 374, 381 (Dec. 18, 1724 & Jan. 12, 1724/5); 30 *id.* at 485 (Feb. 28, 1764).

<sup>50</sup> JOHN IMPEY, THE NEW INSTRUCTOR CLERICALIS 622 (London, Majesty’s Law Printers 4th ed. 1788); GEORGE URQUHART, THE EXPERIENCED SOLICITOR, IN PROCEEDINGS UNDER THE APPELLANT JURISDICTION OF THE RIGHT HONOURABLE THE HOUSE OF LORDS ON APPEALS AND WRITS OF ERROR 59–68 (London, W. Strahan & M. Woodfall 1773); *see also* 22 H.L. JOUR. 628 (Mar. 22, 1726/7) (table of tasks and fees). For an example of the steps a solicitor took during an actual appeal to the Lords, along with the associated costs, *see* Pearson & Loggen Solicitors, Bill Book, 1797 to 1802, LMA CLC/B/136/MS18744/013, pp. 126–29 (describing tasks and fees in *Cave v. Otway*, 1798–1799).

<sup>51</sup> M.W. MCCAILL, THE HOUSE OF LORDS IN THE AGE OF GEORGE III 99 (2009).

on one of the superior courts of England. Because the remaining “lay Lords” had little or no legal training, the House had the option of seeking legal assistance from some or all of the judges of the common law courts of England—usually four apiece from the courts of King’s Bench, Common Pleas, and Exchequer. This was not always done, and the House often decided appeals on its own. If the Lords sought assistance, they would exercise it by asking the judges one or more questions. The judges would then confer and respond on the spot or at a future date after further consultation. If the judges differed in their views, they would present their answers and underlying reasons seriatim. If they were unanimous, a single judge would typically speak for them all.<sup>52</sup> The House could accept or reject the views of the majority of the judges, but rejections were exceedingly rare.<sup>53</sup> In *Donaldson*, as we will soon see, eleven judges answered five questions each, and they were not unanimous.

After the judges said their piece it would be left to one of the Lords to move to affirm or reverse whatever decree was on appeal. The House would then debate the matter. The number of Lords present during a debate could differ greatly depending on the time of the year, interest in the case, and interest in other items on the agenda. Attendance on the day also did not guarantee attention or participation.<sup>54</sup> In any event, it was usual and expected that one or more Lords would present speeches in an effort to persuade their colleagues to vote one way or the other.<sup>55</sup> Typically, the Lord Chancellor<sup>56</sup> and other law Lords would lead the way, but the remaining members were not obligated to agree with them. Thus, James Boswell, an author and counsel in copyright cases, noted in 1778:

[A]ll the Peers [i.e., the Lords] are vested with the highest judicial powers; and, when they are confident that they

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<sup>52</sup> In these uncontroversial cases, the judge sometimes answered the question or questions without providing any underlying reasoning. *E.g.*, *Troward v. Calland* (H.L. 1796) (MacDonald, C.B.), in JAMES OLDHAM, *CASE NOTES OF SIR SOULDEN LAWRENCE 1787–1800*, at 111, 118 (2013).

<sup>53</sup> See *infra* text accompanying notes 185–188.

<sup>54</sup> In an appeal in 1703, for example, only 13 of 57 Lords voted. *Powell v. Pleydell*, 17 H.L. JOUR. 242 (H.L. 1702/3); THE LONDON DIARIES OF WILLIAM NICOLSON, BISHOP OF CARLISLE 1702–1718, at 173 (Clyve Jones & Geoffrey Holmes eds., 1985) (Jan. 15, 1702/3). In another appeal in 1721, 32 of 71 Lords voted. *Paterson v. Commissioners*, 21 H.L. JOUR. 479, Rob. 349, 354 (H.L. 1720/1). And on a writ of error in 1778, 24 of 56 Lords voted. *Horne v. Rex*, 35 H.L. JOUR. 476 (H.L. 1778); GENERAL EVENING POST (London), May 12, 1778, at 4. On the quirks and reliability of attendance lists, see Clyve Jones, *Seating Problems in the House of Lords in the Early Eighteenth Century: The Evidence of the Manuscript Minutes*, 51 BULL. INST. HIST. RES. 132, 139–43 (1978). Appearing on the attendance list indicated only that the Lord was present and noticed at the time the clerk compiled the list.

<sup>55</sup> When proposing to affirm, however, speaking Lords often refrained from articulating the reasons for doing so. *E.g.*, *Coltart v. Maxwell*, 2 Pat. App. 482, 486 (H.L. 1779); *accord Davidson v. Fleming*, 4 Pat. App. 554, 559 (H.L. 1804); *Graham v. Weir*, 4 Pat. App. 548, 554 (H.L. 1804).

<sup>56</sup> On the Lord Chancellor’s role in the House of Lords, see Ruth Paley, *The Speakership of the House of Lords, 1660–1832*, in *SPEAKERS AND THE SPEAKERSHIP* 102 (Paul Seward ed., 2010).

understand a cause, are not obliged, nay ought not to acquiesce in the opinion of the ordinary law Judges, or even in that of those who from their studies and experience are called the Law Lords. I consider the Peers in general as I do a Jury, who ought to listen with respectful attention to the sages of the law; but, if after hearing them, they have a firm opinion of their own, are bound, as honest men, to decide accordingly.<sup>57</sup>

As we will see shortly, two law Lords and three lay Lords spoke in *Donaldson*.

After the debate, the Speaker of the House (a position usually taken up by the Lord Chancellor) would formally put the question as one to reverse so as to ensure that if there was a tie in the votes the lower court's decree or judgment would stand.<sup>58</sup> The House would then vote by either a collective voice vote or a division<sup>59</sup> and then enter judgment accordingly. There seems to have been a norm, at least among the law Lords, to not vote if the law Lord was not present to hear all the arguments of counsel.<sup>60</sup>

Thus, procedurally, there were eight principal components of an appeal: (1) the initiating petition; (2) the *printed cases* of counsel; (3) the oral *arguments* of counsel; (4) the *answers* of the judges to any *questions*; (5) the reasons or *opinions* of the judges supporting their answers; (6) the *debate* of the Lords in attendance, which included the *speeches* of the Lords who chose to speak; and (7) the *vote* and (8) *judgment* of the House. Throughout this Article, I use the italicized words as terms of art.

## B. *Records*

Apart from the printed cases and other documents noted previously, appeals could generate further records. Of these, the only official memorial was the journal of the House of Lords. In the late 18th century, journal entries began as scrap notes taken by the Clerk Assistant or one of his deputies, which were then transferred to a minute book.<sup>61</sup> The Clerk of the

<sup>57</sup> 2 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, LL.D. 261 (London, C. Dilly 1791) (recalling a conversation from May 12, 1778 with Samuel Johnson). For Boswell's account of his first argument as counsel in an appeal in the House of Lords in 1772, see BOSWELL FOR THE DEFENCE 1769–1774, at 62, 112–17, 125 (William K. Wimsatt, Jr. & Frederick A. Pottle eds., 1959) (1772).

<sup>58</sup> Standing Order, 14 H.L. JOUR. 677 (Dec. 7, 1691).

<sup>59</sup> MCCAILL, *supra* note 51, at 107.

<sup>60</sup> See *Chaplin v. Bree* (H.L. 1775) (Lord Camden) (“[I] should *never* be the *first* that would introduce so fatal a precedent, should it ever come to be adopted, as giving a vote without personally attending from the beginning to the end.”), in *GAZETTEER* (London), Mar. 10, 1775, at 2. As for the lay Lords, I know of at least one case where some appeared to vote despite missing some of the arguments. *Pomfret v. Smith*, 33 H.L. JOUR. 94 (H.L. 1771); *LONDON EVENING-POST*, Mar. 9, 1771, at 4.

<sup>61</sup> MAURICE F. BOND, *GUIDE TO THE RECORDS OF PARLIAMENT* 26–27, 33 (1971); J.C. SAINTY & D. DEWAR, *DIVISIONS IN THE HOUSE OF LORDS: AN ANALYTICAL LIST 1685 TO 1857*, at 3 (1976); see

Journals would later move the minutes to a manuscript journal, which became the official record of the proceedings. Neither the minute book nor the journal recorded everything that was said. On the contrary, they usually recorded only what was done. During judicial business, this meant recording procedural maneuvers and noting when and which counsel were speaking. If the judges had been summoned, the journal would often note who had spoken and when, and their answers to any questions presented. The recorded answers were usually brief—no more than a sentence or two—because they typically contain no reasoning. Take, for example, the following question and answer from *Donaldson*:

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? . . . .”

. . . .

Mr. Baron *Eyre* was heard upon the said Questions; and,

1. Upon the First Question delivered his Opinion,

“That, at Common Law, an Author of any Book or Literary  
“Composition had not the sole Right of first printing and  
“publishing the same for Sale, and could not bring an Action  
“against any Person who printed, published, and sold the  
“same, without his Consent:”

And gave his Reasons.<sup>62</sup>

Additionally, neither the journal nor the minute book recorded any aspect of the debates among the Lords, not even which Lords had spoken. Ultimately, the journal recorded the judgment, which could vary in its length and complexity. Often it was very short, stating only that the case was reversed or affirmed.

Other records might be available—such as reports of what lawyers, judges, and Lords actually said—but they were unofficial and scarce. The absence of regular reporting stemmed largely from the fact that publishing the proceedings of the House of Lords violated parliamentary privilege. Both the House of Commons and the House of Lords claimed to hold in their corporate capacities a right to control the publication of their votes, speeches, debates, and proceedings. Violating the privilege was considered

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also BL Add. MS 35,878, f. 261<sup>r</sup> (c.1753) (“The Clerk Assistant by his Deputation . . . takes Minutes, and keeps and Methodizes the proceedings and Records.”); cf. *THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1714–1718*, at xvii–xxiii (David J. Johnson ed., 1977) (describing an earlier period).

<sup>62</sup> *Donaldson v. Becket*, 34 H.L. JOUR. 21, 24 (H.L. 1774).

contemptuous and could lead to censure, arrest, a fine, or destruction of the offending works.<sup>63</sup> One of the more high-profile reprimands occurred in 1699 when the Lords censured John Churchill, a bookseller, for publishing cases adjudged in the House of Lords.<sup>64</sup> Another occurred in 1771, when the Lords fined and imprisoned William Woodfall, a newspaper publisher, because his paper had published parts of the appeal in *Pomfret v. Smith*.<sup>65</sup>

Despite these prohibitions, by 1774 journalists had become bolder in their reporting of parliamentary proceedings.<sup>66</sup> Although doing so was still a breach of privilege, both Houses of Parliament were becoming more tolerant of the practice. Jason Peacey notes, however, that “reporting was far from assured, let alone officially welcomed or supported.”<sup>67</sup> There was, for example, no place for reporters to sit in the House of Lords—they would have to stand below the Bar of the House, if there was room—and the taking of notes was prohibited.<sup>68</sup>

*Donaldson* overcame these obstacles, and a number of unofficial accounts reached the public. Many of these sources are known to modern scholars, but some are not. And, of those that are known, their duplicative nature has not always been appreciated. Consequently, scholars sometimes treat them as if they were each independently reported by different persons who were present at the appeal. These various sources are then cited in combination to serve as corroboration for a particular point. In truth, however, on the issues most pertinent for our purposes, nearly all of the principal accounts derive from one of only two sources: the manuscript journal of the House of Lords and a newspaper account in the *Morning Chronicle*.

What follows below are the principal accounts, roughly in order of publication. Most are narratives of the proceedings, but a few are not (numbers 9, 10, and 12). A more detailed breakdown of these sources and numerous others can be found *infra* in the Appendix.

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<sup>63</sup> H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1252–53 (2010).

<sup>64</sup> 16 H.L. JOUR. 389, 391 (Feb. 24 & 27, 1698/9).

<sup>65</sup> 33 *id.* at 113–14 (Mar. 14, 1771); see also *Pomfret v. Smith*, 6 Bro. P.C. 434 (H.L. 1771).

<sup>66</sup> G.M. Ditchfield, *The House of Lords in the Age of the American Revolution*, in A PILLAR OF THE CONSTITUTION: THE HOUSE OF LORDS IN BRITISH POLITICS, 1640–1784, at 199, 204–09 (Clyve Jones ed., 1989); William C. Lowe, *Peers and Printers: The Beginnings of Sustained Press Coverage of the House of Lords in the 1770s*, 7 PARL. HIST. 241, 248–52 (1988); Peter D.G. Thomas, *The Beginning of Parliamentary Reporting in Newspapers, 1768–1774*, 74 ENG. HIST. REV. 623, 627–28 (1959).

<sup>67</sup> Jason Peacey, *The Print Culture of Parliament, 1600–1800*, in THE PRINT CULTURE OF PARLIAMENT, 1600–1800, at 1, 9 (Jason Peacey ed., 2007).

<sup>68</sup> MICHAEL MACDONAGH, THE REPORTERS’ GALLERY 287 (1913). For the layout of the House of Lords in the late 18th century, along with its location relative to the rest of the Palace of Westminster, see HONOUR, INTEREST & POWER: AN ILLUSTRATED HISTORY OF THE HOUSE OF LORDS, 1660–1715, at 203 (Ruth Paley et al. eds., 2010); DORIAN GERHOLD, WESTMINSTER HALL: NINE HUNDRED YEARS OF HISTORY 50 (1999).



1. *Morning Chronicle*—February 5 to 26, 1774.<sup>69</sup> William Woodfall, the editor and publisher of this daily London newspaper, stood below the Bar of the House of Lords each day and memorized as much of the proceedings as he was able. Over the course of several issues, he recounted the arguments of counsel, opinions of the judges, and speeches of the Lords.
2. *London Chronicle*—February 5 to March 5, 1774.<sup>70</sup> Correspondents from this thrice-weekly paper attended or otherwise obtained reports of a few arguments and two opinions. Its reports of the other arguments, opinions, and speeches stem from the *Morning Chronicle*.
3. *Middlesex Journal*—February 5 to 24, 1774.<sup>71</sup> This newspaper offered original accounts of all the counsels' arguments, but the opinions are taken from the *Morning Chronicle* and one other paper. It also reported very short but apparently original accounts of the speeches.
4. *Caledonian Mercury* and *Edinburgh Advertiser*—February 9 to March 9, 1774.<sup>72</sup> These Scottish newspapers contain original accounts of some of the arguments, opinions, and speeches. Others stem from the *Morning Chronicle*, *London Chronicle*, and one other newspaper.
5. *Sentimental Magazine* and *Town and Country Magazine*—both early March 1774.<sup>73</sup> *Donaldson* first appeared in a consolidated form in the February issues of these two magazines. These largely drew their texts from the *Morning Chronicle* and a few other papers, but the *Town and Country* contains a brief note of one opinion that seems original.
6. *Gentleman's Magazine*—early March, April, and May 1774.<sup>74</sup> This magazine spread an account across its February, March, and April issues. It mostly copies the *Morning Chronicle* and *London Chronicle*, but it also contains two original paragraphs from one judge's opinion.

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<sup>69</sup> MORNING CHRONICLE (London), Feb. 5–26, 1774.

<sup>70</sup> LONDON CHRONICLE, Feb. 5–Mar. 5, 1774.

<sup>71</sup> MIDDLESEX JOURNAL (London), Feb. 5–24, 1774.

<sup>72</sup> CALEDONIAN MERCURY (Edinburgh), Feb. 9–Mar. 9, 1774; EDINBURGH ADVERTISER, Feb. 11–Mar. 1, 1774.

<sup>73</sup> 2 SENTIMENTAL MAGAZINE 81 (London, G. Kearsley 1774) (Feb. issue); 6 TOWN AND COUNTRY MAGAZINE 97, 110 (London, A. Hamilton Jr. 1774) (Feb. issue); see also MORNING CHRONICLE (London), Mar. 1, 1774, at 1 (advertisements announcing publication of both magazines).

<sup>74</sup> 44 GENTLEMAN'S MAGAZINE 51, 99, 147 (London, D. Henry 1774) (Feb., Mar., & Apr. issues). For publication advertisements, see LONDON EVENING-POST, Mar. 1, 1774, at 2 (Feb. issue); *id.* Apr. 2, 1774, at 2 (Mar. issue); MORNING CHRONICLE (London), May 2, 1774, at 1 (Apr. issue).

7. *Pleadings Account*—early March 1774.<sup>75</sup> This stand-alone account, the first dedicated entirely to *Donaldson*, spans 39 pages. It mostly draws its material from the *Morning Chronicle*, *London Chronicle*, *Middlesex Journal*, and *Gentleman's Magazine*. But it also contains some original reporting of one of the arguments of counsel.
8. *Cases Account*—early May 1774.<sup>76</sup> This second stand-alone account spans 68 pages. It purportedly contains the “genuine” printed cases, arguments, opinions, and speeches. The compiler added credence to this boast by indicating that he drew his account from his own notes of the proceedings.<sup>77</sup> This is false. Apart from some paraphrasing, which mostly recasts the account from third to first person, and the adding of some references and documents, this narrative comes from the *Pleadings Account*. Additionally, it sometimes deduces and fabricates the answers of the judges, to the questions posed, from the opinions as they appear in the *Pleadings Account*.<sup>78</sup>

A literary magazine reviewed the *Pleadings* and *Cases Accounts* several months after their publication and criticized them as having been compiled by “blundering editors.”<sup>79</sup> The reviewer wrote:

[B]oth [books] pretend to give the Public the *genuine* arguments of the Counsel, opinions of the Judges, and speeches of the Lords . . . but the former bears evident marks of having been compiled by some illiterate hand from news paper memorials; and the latter retracts in the preface the promises [of genuineness] . . .<sup>80</sup>

9. *Burrow Report*—1776.<sup>81</sup> *Donaldson* next appeared in a collection of traditional law reports, when James Burrow published a synopsis of it at the end of his report of *Millar v. Taylor*. This report does not contain the arguments, opinions, or speeches. Rather, it primarily prints the

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<sup>75</sup> THE PLEADINGS OF THE COUNSEL BEFORE THE HOUSE OF LORDS, IN THE GREAT CAUSE CONCERNING LITERARY PROPERTY (London, C. Wilkin et al. [1774]); *see also* LONDON EVENING-POST, Mar. 8, 1774, at 2 (advertisement).

<sup>76</sup> THE CASES OF THE APPELLANTS AND RESPONDENTS IN THE CAUSE OF LITERARY PROPERTY (London, J. Bew et al. 1774); *see also* LONDON CHRONICLE, Apr. 30, 1774, at 415 (advertisement).

<sup>77</sup> CASES, *supra* note 76, sig. a2<sup>v</sup>.

<sup>78</sup> Notably, one of the publishers listed on the imprint of the *Cases Account*, “C. Wilkin,” also appears on the imprint of the *Pleadings Account*. I should also note that some of the compiler’s preface was plagiarized from elsewhere. *Compare id.* sig. a1<sup>r</sup>, a2<sup>v</sup>–a3<sup>r</sup>, with [JAMES BURROW], THE QUESTION CONCERNING LITERARY PROPERTY 2 (London, W. Strahan & M. Woodfall 1773), and 1 JAMES BURROW, REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH viii (London, J. Worrall 1766).

<sup>79</sup> 51 MONTHLY REVIEW; OR, LITERARY JOURNAL 202, 209 (London, R. Griffiths 1774).

<sup>80</sup> *Id.*

<sup>81</sup> *Donaldson v. Becket*, 4 Burr. 2408 (H.L. 1774).

manuscript journal of the House of Lords, that is to say, the answers of the judges alone, and the two are identical in all pertinent respects.

10. *Brown Report*—1783.<sup>82</sup> Josiah Brown next reported *Donaldson* as part of his multi-volume collection of parliamentary cases. Although his report appears to be of the oral arguments, it is not. He simply took the printed cases and recast them to appear as an actual argument. Brown also included the names of the judges who opined in favor of perpetual copyright, which he expressly took from the manuscript journal.<sup>83</sup>
11. *Debrett Account*—1792.<sup>84</sup> In 1792, John Debrett reprinted in his collection of parliamentary debates the speeches that appeared in the *Middlesex Journal*. Additionally, Debrett was the first to report the names and numbers of the Lords who supposedly voted for and against reversing the decree, but his report of the division was erroneous.<sup>85</sup>
12. *Printed Journal*—c.1806.<sup>86</sup> Burdened by a lengthy backlog, the House of Lords did not print its manuscript journal for 1774 until c.1806.
13. *Cobbett Account*—1813.<sup>87</sup> The last published account contains no original material and stems entirely from the *Morning Chronicle*, *London Chronicle*, *Debrett Account*, and *Printed Journal*. It also sometimes combines the accounts in ways that are contradictory.

Despite searching extensively in various libraries and Inns of Court, I have been unable to find any manuscript law reports of the proceedings.

### C. Appeal

Let us return now to the appeal itself. The House of Lords heard oral arguments in *Donaldson* over the course of four days in early February.<sup>88</sup> Afterward, the House asked the twelve judges, who had attended the preceding arguments, to offer their views on five questions, the first three of which were essentially as follows:

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<sup>82</sup> *Donaldson v. Becket*, 7 Bro. P.C. 88 (H.L. 1774).

<sup>83</sup> *Id.* at 110; see also 1 *id.* at ii–iii (describing his methods). Remarkably, Brown had served as defense counsel for the Donaldsons in the Court of Chancery in *Donaldson* and in a number of other similar suits. See, e.g., *Becket v. Donaldson*, PRO C12/64/24, m. 2 (Ch. 1771); *Rivington v. Donaldson*, PRO C12/1323/15, m. 2 (Ch. 1771); *Whiston v. Donaldson*, PRO C12/64/26, m. 2 (Ch. 1771).

<sup>84</sup> 7 THE HISTORY, DEBATES, AND PROCEEDINGS OF BOTH HOUSES OF PARLIAMENT OF GREAT BRITAIN 2–4 (London, J. Debrett 1792).

<sup>85</sup> See *infra* note 108 for an explanation of the error.

<sup>86</sup> 34 H.L. JOUR. 18–21, 23–24, 26–30, 32 (Feb. 4–22, 1774) (printed c.1806).

<sup>87</sup> 17 [WILLIAM COBBETT], THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at col. 953 (London, T.C. Hansard et al. 1813).

<sup>88</sup> 34 H.L. JOUR. 18–21 (Feb. 4, 7–9, 1774).

1. Did an author have a right at common law to prevent an unauthorized first publication of a book or literary composition?
2. If so, did an author lose that right upon first publication, or could she continue to control further publication of such a work?
3. If a right at common law existed, or hypothetically existed, did the Statute of Anne take it away or abridge it?

The third question is the most ambiguous. Given the principal issue that was at stake in *Donaldson*, it necessarily queries whether the statute preempts any common-law copyright that exists in a work once it is published. But it is less clear whether it also asked if the statute preempted any common-law protections that existed before a work was first published.

Two other questions, which I have not reproduced, restated the first three in a slightly different form.<sup>89</sup> The five questions were memorialized in writing and put to the judges.<sup>90</sup> After conferring among themselves,<sup>91</sup> the judges returned six days later and began to deliver their responses in order of ascending seniority. It took three days, spread over the course of a week. A chronology of the opinions (and other items) can be found in the Appendix. All the judges, save one, offered their views. Lord Mansfield of the Court of King's Bench, who also sat as a peer in the House of Lords, did not speak as a judge or law Lord. It is often said that he recused himself because he would effectively be defending his judgment in *Millar v. Taylor*.<sup>92</sup> But there must have been more to this given that there was no requirement that he disqualify himself in this instance.<sup>93</sup> Indeed, many observers lamented that he chose not to speak,<sup>94</sup> and one legislator, George Onslow, later suggested that a law be passed to "compel every judge to give his opinion."<sup>95</sup> Perhaps Mansfield simply did not wish on this occasion to engage in an oratory battle with his nemesis Lord Camden.<sup>96</sup>

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<sup>89</sup> The fourth question combined questions one and two, and the fifth rephrased the third. For the actual questions, see *Donaldson v. Becket*, 4 Burr. 2408 (H.L. 1774).

<sup>90</sup> PA HL/PO/JO/10/7/373, ff. 310<sup>r</sup>, 311<sup>r</sup> (Feb. 9, 1774); 34 H.L. JOUR. 21 (Feb. 9, 1774).

<sup>91</sup> MIDDLESEX JOURNAL (London), Feb. 15, 1774, at 3 ("Friday there was a meeting of all the Judges at Lord Chief Justice De Grey's, and on Sunday night another at Lord Mansfield's, to take the arguments of the Counsel into consideration.").

<sup>92</sup> *Donaldson*, 4 Burr. at 2417.

<sup>93</sup> Cf., e.g., *Bishop of London v. Ffytche* (H.L. 1783) (Earl of Mansfield) (speaking as a law Lord in the House of Lords in defense of an opinion he had given in the case below), in TIMOTHY CUNNINGHAM, *THE LAW OF SIMONY* 52, 167–74 (London, Majesty's Law-Printers 1784).

<sup>94</sup> E.g., 2 WESTMINSTER MAGAZINE 63–64 (London, W. Goldsmith 1774) (Feb. issue); WEEKLY MAGAZINE (Edinburgh), Apr. 14, 1774, at 77.

<sup>95</sup> Henry Cavendish, *Debates in the Commons*, BL Add. MS 64,869, f. 149<sup>r</sup> (Apr. 22, 1774) (transcription of shorthand notes from BL Egerton MS 255, p. 235).

<sup>96</sup> ROSE, *supra* note 28, at 99–101. For contemporaneous remarks on his silence, see Letter from the Earl of Shelburne to the Earl of Chatham (Feb. 27, 1774), in 4 CORRESPONDENCE OF WILLIAM PITT, EARL OF CHATHAM 326, 327–28 (William S. Taylor & John H. Pringle eds., London, J. Murray

To state at large the positions of all eleven judges on all the questions would be repetitious and tedious, not to mention superfluous for our purposes. Suffice it to say that the tally from the journal on the three questions indicates that the judges opined, 8 to 3, for a common-law right before first publication; 7 to 4, for a common-law right after first publication; and 6 to 5, that the statute took away any common-law right.<sup>97</sup> The seven judges who opined for a common-law copyright in published works were Justices Nares, Ashurst, Blackstone, Willes, Aston, and Gould, along with Baron Smythe. But the clerk of the House recorded two of them—Justices Nares and Gould—as also stating that the right was preempted. That meant that when combined with the judges who were against the right *ab initio*, a majority of the judges had effectively recommended reversal.

The day after the last judge said his piece, Lord Camden moved to reverse the decree. The motion being opposed, it was left to the Lords to debate the matter. Five Lords spoke before they voted. Two were law Lords: Lord Camden, who had previously served as Chief Justice of the Common Pleas (1762–1766) and then as Lord Chancellor (1766–1770), and Lord Apsley, the then-current Lord Chancellor and the person who had presided over the case in the Court of Chancery. Given the attention that scholars of *Donaldson* have rightly paid to the speeches of the Lords, and our disagreement over the weight to give to those speeches, I must say a bit more about the views of the Lords who spoke. Unfortunately, many of the printed speeches are woefully incomplete, so it is impossible to offer absolutes about what a Lord said or, even more so, did not say.

Lord Camden spoke most forcefully against the common-law right, opining that such a right had never existed and that the Statute of Anne created copyright in both unpublished and published works.<sup>98</sup> He also argued in the alternative that the statute “took away any right at Common Law for an author’s exclusively multiplying copies if any such right existed.”<sup>99</sup> Lord Apsley spoke next and certainly concurred with respect to published works, stating, as he later recalled, that “he was satisfied there never did exist a common law right.”<sup>100</sup> But there is nothing in the short reports of his speech from which to infer whether he was for or against an

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1840); Letter from Lord Townshend to J.H. Hutchinson (Feb. 25, 1774), in *THE MANUSCRIPTS OF THE DUKE OF BEAUFORT, K.G., THE EARL OF DONOUGHMORE, AND OTHERS 277–78* (London, HMSO 1891); Letter from H. Wilmot to the Earl of Denbigh (Feb. 22, 1774), WCRO CR2017/C243, p. 396.

<sup>97</sup> 34 H.L. JOUR. 23–24, 26–30 (Feb. 15–21, 1774). Although he did not speak, the views of Lord Mansfield were readily available from his published opinion in *Millar*. So were the dissenting views of the then-deceased Justice Yates. Numerically, they largely canceled each other out.

<sup>98</sup> *MORNING CHRONICLE* (London), Feb. 24, 1774, at 2; *id.* Feb. 25, 1774, at 2.

<sup>99</sup> *Id.* Feb. 23, 1774, at 3.

<sup>100</sup> *LONDON CHRONICLE*, June 4, 1774, at 534.

antecedent incorporeal right in unpublished works. It is also unclear whether Lord Apsley spoke on the issue of preemption.<sup>101</sup>

The views of the lay Lords were mixed. Lord Lyttelton, for one, was in favor of a common-law right in unpublished and published works that persisted independent of the statute.<sup>102</sup> He thus urged his colleagues to affirm the decree. The Bishop of Carlisle spoke next and stated that he did not want to linger on whether there was, previous to the Statute of Anne, a common-law right of one sort or the other. Indeed, he was “desirous of having all such [arguments] waved.”<sup>103</sup> The Bishop instead urged the Lords to deliberate on the question of preemption:

[I desire that] your Lordships deliberation [be] reduced to the *present state* of that Right *under the direction of our legislature*, which has made, or at least attempted to make, certain express regulations in it; more particularly [the Statute of Anne], which [under] . . . a fair stating and unforc’d construction of it, I apprehend to be sufficient for deciding the whole controversy.<sup>104</sup>

He could not resist stating that he had little faith in an antecedent right. Nevertheless, such a “right, whatever it were supposed to be originally, is now plainly circumscribed and subjected to certain restrictions.”<sup>105</sup>

The report of the last peer to speak, the Earl of Effingham, is largely barren. Although he rejected perpetual copyright, it is unclear whether he believed there was no copyright before the Statute of Anne, the statute preempted any such right, or both (or none) of the above. The reports indicate only that he limited his address to a principle of policy, namely, that copyright could impinge on the liberty of the press because it might prevent the publication of matters that were critical of the government.<sup>106</sup>

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<sup>101</sup> *E.g.*, MORNING CHRONICLE (London), Feb. 26, 1774, at 2. Lord Apsley’s rulings in subsequent cases are inconclusive on whether he believed in a common-law copyright in unpublished works. In a suit decided a month after *Donaldson*, Lord Apsley enjoined a defendant from printing an unpublished work until the hearing without the reports mentioning the statute. *Thompson v. Stanhope*, LI Hill MS 14, p. 41, Amb. 737, 739–40 (Ch. 1774). This might suggest he relied upon a copyright at common law or (more likely) that the reporters failed to record any mention of the statute. Four years later, while granting an injunction until answer in another case, Lord Apsley did cite the statute, stating that “as long as [works] continued to remain in manuscript, they were protected by the act of Parliament.” *Coleman v. Wheble* (Ch. 1778), in MORNING CHRONICLE (London), Feb. 4, 1778, at 2; *see also* *Coleman v. Wheble*, PRO C33/449, f. 186<sup>r-v</sup> (Ch. 1778). This too is inconclusive, however, as he might simply have concluded that the statute preempted a preexisting copyright in unpublished works.

<sup>102</sup> MORNING CHRONICLE (London), Feb. 26, 1774, at 2.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 3. The Bishop had previously expressed his views on the subject and argued against a common-law right in published works. [EDMUND LAW (BISHOP OF CARLISLE)], OBSERVATIONS OCCASIONED BY THE CONTEST ABOUT LITERARY PROPERTY 14–15 (Cambridge, T. & J. Merrill 1770).

<sup>106</sup> MORNING CHRONICLE (London), Feb. 26, 1774, at 3.

Lastly, we also know the views of the Bishop of St. Asaph, even though he did not utter a speech. He believed there never was a common-law right and that recognizing as much would disadvantage the public.<sup>107</sup>

At the close of the debate, the House voted to reverse the decree by taking a collective voice vote.<sup>108</sup> Unfortunately, the 84 Lords listed as in attendance that day were not asked to answer the same questions as the judges.<sup>109</sup> As a result, the outcome was clear, but the reasoning supporting it was not. Reversal of the decree meant that thenceforth copyrights in published works were governed by the Statute of Anne and its limited durations. Yet, was it because copyright had never existed at common law or because it no longer existed due to statutory preemption? Moreover, given that the statute did not expressly protect works while they remained unpublished, did a common-law copyright protect those works? Did the statute implicitly protect them? Or did works have to be published (and thereby fall under the statute) in order to receive protection?

#### D. Perceptions

Not surprisingly, *Donaldson* engendered confusion. I leave for Part V a more detailed discussion of how advocates and judges interpreted the decision. Here, it suffices to summarize, as a spectrum, the differing views of commentators. (1) On one end, some observers described *Donaldson* as having rejected both types of antecedent common-law rights.<sup>110</sup> Others

<sup>107</sup> 2 JONATHAN SHIPLEY, THE WORKS OF THE RIGHT REVEREND JONATHAN SHIPLEY, D.D. LORD BISHOP OF ST. ASAPH 201 (London, T. Cadell 1792) (seeming to limit his view to published works).

<sup>108</sup> 34 H.L. JOUR. 32 (Feb. 22, 1774). It is often said by scholars who rely on the *Cobbett Account* that the vote to reverse was 22 to 11. *E.g.*, Abrams, *supra* note 5, at 1158, 1164 (citing 17 COBBETT, *supra* note 87, at col. 1003). This is incorrect on two counts. First, the division Cobbett reported was 21 to 11; scholars have accidentally treated the Bishop of Litchfield and Coventry as two persons. Second, the source that Cobbett relied upon, Debrett, confused the vote in *Donaldson* with a vote on a subsequent bill to extend the statutory term for certain works. The names of the persons Debrett reported as being for or against the decree, *see* 7 HISTORY, *supra* note 84, at 4, were actually those who were for or against proceeding with the bill, *see* 34 H.L. JOUR. 232 (June 2, 1774) (rejecting the bill by employing a procedural stratagem); MS Minutes of the House of Lords, PA HL/PO/JO/5/1/121 (June 2, 1774) (recording the division as 21 to 11); EDINBURGH ADVERTISER, June 7, 1774, at 357 (listing the 32 Lords who voted); *accord* William C. Lowe, Politics in the House of Lords, 1760–1775, at 853 n.55 (1975) (unpublished Ph.D. dissertation, Emory University). In truth, as Rose correctly suspected, the vote in *Donaldson* occurred without a division. ROSE, *supra* note 28, at 102. This means that the Lords were not asked to physically divide to make their numbers more transparent than in a collective voice vote. Thus, contrary to what Debrett has led us to believe for over 200 years, we do not know the number of Lords who voted, their names, or how they each voted. The only insight we have on the collective voice vote, apart from the outcome, is a newspaper report stating that “[n]othing was heard but the word CONTENT.” EDINBURGH ADVERTISER, Mar. 1, 1774, at 132, *cited in* ROSE, *supra* note 28, at 102. Assuming this to be true, it does not mean that every Lord voted to reverse. Rather, it seems more likely that those inclined to affirm remained silent after hearing that theirs was a lost cause.

<sup>109</sup> 34 H.L. JOUR. 32 (Feb. 22, 1774).

<sup>110</sup> *E.g.*, 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 393–94 (London, T. Payne 1792); *cf.* WILLIAM KENRICK, AN ADDRESS TO THE ARTISTS AND MANUFAC-

thought it rejected only a common-law right in published works.<sup>111</sup> (2) In the middle were those who followed the lead of Justice Blackstone in his *Commentaries on the Laws of England*. He stated the holding narrowly: once a work was published it was governed solely by the durational terms of the Statute of Anne.<sup>112</sup> (3) Another approach, which was consistent with the approach taken by Justice Blackstone, was to acknowledge implicitly that the reasoning of the House was indiscernible and to then rely on the opinions or answers of the judges, the speeches of the Lords, the opinions in *Millar*, or some combination thereof to describe the law on antecedent rights. Consider the following summary:

[T]he decision in [*Millar*] . . . was overturned by this decision of the majority of the twelve Judges, and the law settled as follows. That an author had at common law a property in his work, and the sole right of printing and publishing the same, and that when printed or published, the law did not take this right away, but that by the statute 8th *Ann*, an author has no copy-right, after the expiration of the several terms created thereby.<sup>113</sup>

Notably, these early observations did not state that the House of Lords, as a body, had adjudged that there was an antecedent common-law right. Lastly, a fourth (4) posture on the other end of the spectrum emerged: namely, that the House *did* affirmatively hold that there was an antecedent copyright at common law, based in property, but that it was preempted.<sup>114</sup>

Deazley has demonstrated that the third and fourth readings have percolated through the cases and literature and come to predominate over

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TURERS OF GREAT BRITAIN 64–68 (London, Domville et al. 1774) (*semble*); but see 51 MONTHLY REVIEW, *supra* note 79, at 276, 280–81 (criticizing Kenrick as misconstruing the law after *Donaldson*).

<sup>111</sup> E.g., 1 WILLIAM THOMAS AYRES, A COMPARATIVE VIEW OF THE DIFFERENCES BETWEEN THE ENGLISH AND IRISH STATUTE AND COMMON LAW 315–18 & n.b (London, E. Brooke 1780).

<sup>112</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 407 & n.h (Oxford, Clarendon Press 7th ed. 1775); see also, e.g., 5 MATTHEW BACON & HENRY GWILLIM, A NEW ABRIDGMENT OF THE LAW 601 (London, A. Strahan 5th ed. 1798); 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 122 (London, A. Strahan & W. Woodfall 1792); 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 570 (London, W. Strahan & M. Woodfall 1780).

<sup>113</sup> 2 LEGAL RECREATIONS, OR POPULAR AMUSEMENTS ON THE LAWS OF ENGLAND 130–31 (London, J. Bew et al. [1793]); see also, e.g., EDWARD CHRISTIAN, NOTES TO BLACKSTONE'S COMMENTARIES, Bk. II, at 576–77 (Dublin, P. Byrne 1797); EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 37–42, 116–17 (Boston, Little et al. 1879); 1 WILLIAM HAWKINS & THOMAS LEACH, A TREATISE OF THE PLEAS OF THE CROWN 477 n.7 (London, T. Whieldon 6th ed. [1787]); 1 THOMAS W. WILLIAMS, AN ABRIDGMENT OF CASES ARGUED AND DETERMINED IN THE COURTS OF LAW 117–20 (London, G.G. & J. Robinson 1798).

<sup>114</sup> E.g., AN ADDRESS TO THE PARLIAMENT OF GREAT BRITAIN ON THE CLAIMS OF AUTHORS TO THEIR OWN COPY-RIGHT 14, 39–44 (London, Longman et al. 2d ed. 1813).



most others.<sup>115</sup> Whether one relies on the cumulative views of the jurists or the “holding” of the House, those readings have, in a real sense, become the conventional view of *Donaldson* and the purported origin of copyright in 18th-century England: copyright was not created by statute but originated as a property right, inherent in authors, and protected at common law.

## V. REINTERPRETATIONS OF THE ORIGIN OF COPYRIGHT

In the last fifty years, four scholars have challenged the conventional interpretations of *Donaldson*. For some, their historical reexaminations have been incidental to other scholarly objectives. These include John Whicher and Mark Rose, to whom I will return in a moment. But for two scholars in particular—Howard Abrams and Ronan Deazley—their principal aim has been to demonstrate that the true origin of copyright was statutory. In their view, the House of Lords held, as a body, that there never was any such thing as a copyright at common law after first publication. The true origin of copyright in published works was thus strictly legislative. Deazley has gone further and argued, more controversially to some, that the House also affirmatively ruled that authors held no common-law copyrights in their works before first publishing them. Thus, by their lights, the only correct view of *Donaldson* is one of the two possibilities offered by the first perspective described above.

Their argument comprises two parts. First, the official journal of the House of Lords (as reflected in the journal itself or the *Burrow* and *Brown Reports*) misrepresented the views of one of the judges. This concealed the true position of the majority and misled readers into thinking the House had adopted the reasoning of the judges. Second, in any case, the Lords’ speeches constituted the reasoning of the House and thus the law of England. The following sections recount and critique these arguments.

### A. Arguments

John Whicher was the first to argue that the *Burrow* and *Brown Reports* misrepresented the views of one of the judges—Justice Nares of the Common Pleas.<sup>116</sup> The questionable reporting relates to the third and fifth questions. On both, the *Burrow Report* recorded the judges as 6 to 5 in favor of preemption. With regard to Nares in particular, it described him as siding with the majority and opining that there was a common-law right

<sup>115</sup> RONAN DEAZLEY, *RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE* 23–97, 167–77 (2006); DEAZLEY, *supra* note 6, at 218–19; accord Seville, *supra* note 9, at 828–67. I would add, based on my own review of the cases and literature, that the second perspective is also very common.

<sup>116</sup> John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States* (pt. 1), 9 BULL. COPYRIGHT SOC’Y U.S.A. 102, 126–30 (1961). Whicher (and later Abrams after him) did not know that the two *Reports* were, in this respect, based on the manuscript journal of the House of Lords.

but that it was “taken away” by the Statute of Anne. The *Brown Report*, correspondingly, listed Nares as one of the six judges in the majority that opined against the perpetuity.<sup>117</sup> Whicher discovered, however, that the *Pleadings* and *Cases Accounts* from 1774 recorded Nares as stating that the statute did not abridge the right. Believing the accounts were written by different observers, he wrote that the “two anonymous reporters bear common witness that Justice Nares vigorously *supported* the common law right and *opposed* the idea of statutory preemption.”<sup>118</sup> Whicher thus posited that in reality a majority of the judges, 6 to 5, may have opined that copyright was perpetual. His revised tally was incidental to his thesis, and he did not go so far as to argue that the House had ruled that common-law copyright never existed. Instead, he thought the grounds were opaque.<sup>119</sup> Nevertheless, his findings served as a point of departure for others.

Howard Abrams was the first to pick things up where Whicher left off, and in a seminal article in 1983 he argued that judges, lawyers, and scholars had confounded the true holding of *Donaldson* for over 200 years. According to Abrams, students of the case have improperly relied on the judges’ answers, rather than the Lords’ speeches, and have done so partly due to the misreported tally and partly due to misunderstanding how the House of Lords operated.<sup>120</sup> On the first point, Abrams starts by noting that the most frequently cited reports of the case, the *Burrow* and *Brown Reports*, contain the judges’ answers alone.<sup>121</sup> Aggravating matters, he contends, those same reports incorrectly indicated that a majority of the judges recommended reversing the decree. Here, he accepts Whicher’s theory that Justice Nares was misreported. If Nares had been reported accurately, Abrams argues, the *Burrow* and *Brown Reports* would have shown that a majority of the judges actually advised the House that a common-law right in published works survived the statute and that therefore the House ought to affirm.<sup>122</sup> That viewpoint would then have to be reconciled with the fact the House reversed. Abrams suspects that if faced with that inconsistency, the bench, bar, and commentators might have segregated the judges’ answers from the Lords’ speeches and focused on the latter.

Decoupling the speaking Lords from the judges, he additionally argues, was something that should have been done in any event given that

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<sup>117</sup> *Donaldson v. Becket*, 4 Burr. 2408, 2410, 7 Bro. P.C. 88, 110 (H.L. 1774).

<sup>118</sup> Whicher, *supra* note 116, at 129–30 (citing PLEADINGS, *supra* note 75, at 17–18; CASES, *supra* note 76, at 35); *see also, e.g.*, PLEADINGS, *supra* note 75, at 17 (“[Justice Nares] stated to the House why he thought a Common Law right in Literary Property did exist, and why the statute of Queen Anne did not take it away.”).

<sup>119</sup> Whicher, *supra* note 116, at 126, 130.

<sup>120</sup> Abrams, *supra* note 5, at 1128–29, 1156–57.

<sup>121</sup> *Id.* at 1169–70.

<sup>122</sup> *Id.* at 1160 n.175, 1164 n.189, 1164–70, 1188 n.(a).

it was always the House, and not the judges, who decided the appeal.<sup>123</sup> Starting with the premise that the speeches of the Lords were the “law of the case,”<sup>124</sup> Abrams discusses all five Lords to varying degrees—Lord Camden at length and the others only briefly. He then extrapolates that the House of Lords as an institution “firmly rejected the existence of [an antecedent] common law copyright” and that as a consequence there was “no historical justification whatsoever for the claim that copyright was recognized as a common law right of an author.”<sup>125</sup> More recently, Abrams has reaffirmed this position: “[T]he fact is . . . the House of Lords decided the case on the ground that copyright did not exist at common law.”<sup>126</sup>

Mark Rose was next to cast a skeptical, but more reserved, eye at *Donaldson*. Rose revealed that the *Morning Chronicle* was the first to recount Justice Nares’s opinion, and that it too recorded that he was for a perpetual right after the statute.<sup>127</sup> Noting that the *Chronicle*’s publisher William Woodfall was renowned for his accuracy in parliamentary reporting, and that the stand-alone accounts, together with other newspaper tallies, confirmed Woodfall’s account, Rose bolstered the view that the Lords’ journal (and thus the *Burrow* and *Brown Reports*) should have recorded the judges as 6 to 5 for a perpetual copyright.<sup>128</sup> Somehow, the clerk in the House must have misunderstood Nares. Rose also agreed with Abrams that the mistake probably created a false sense of security that the House simply followed the recommendation of the judges.<sup>129</sup> Notably, however, Rose denies Abrams’s claim on the true reasoning of *Donaldson*. The most one can draw from the case on this point, Rose argues, was that the House left the preexistence of common-law copyrights undecided.<sup>130</sup>

This brings us to Ronan Deazley, who has buttressed and expanded Abrams’s conclusions. His outstanding work partly seeks to undercut the reasoning of the judges who supported perpetual copyright in *Millar* and *Donaldson*.<sup>131</sup> But more important for our purposes, Deazley also argues, like Abrams, that the holding in *Donaldson* has been misunderstood and perhaps manipulated over the course of 200 years.<sup>132</sup> After adopting the revised Nares tally, he likewise posits that the misreported count has led readers of *Donaldson* to wrongly believe that the judges’ answers

<sup>123</sup> *Id.* at 1160–61.

<sup>124</sup> *Id.* at 1169.

<sup>125</sup> *Id.* at 1128; *see also id.* at 1164, 1184, 1186.

<sup>126</sup> HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 1:6 n.4 (2014).

<sup>127</sup> Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 *REPRESENTATIONS* 51, 67, 81–82 n.55 (1988).

<sup>128</sup> ROSE, *supra* note 28, at 98–99, 154–58.

<sup>129</sup> *Id.* at 157–58.

<sup>130</sup> *Id.* at 102–03 & n.7; Rose, *supra* note 127, at 83 n.63.

<sup>131</sup> DEAZLEY, *supra* note 6, at 1–85.

<sup>132</sup> *Id.* at 218–19; Ronan Deazley, *The Myth of Copyright at Common Law*, 62 *CAMBRIDGE L.J.* 106, 118, 130 (2003).

“represent[ed] an accurate summary of the collective opinion of the House itself.”<sup>133</sup> He goes further than Abrams in one respect, however. Deazley argues the House also ruled there never was a common-law copyright in unpublished works. Undertaking his own review of the speeches, Deazley contends a majority of them “explicitly denied the existence of *any* common law right *ab initio*.”<sup>134</sup> He then insists, as Abrams did before him, that due to the appellate process of the time we must conclude that the House as a whole “embraced” that position.<sup>135</sup> Deazley’s expansion into unpublished works has been the most controversial part of his scholarship, but he seemed unwilling to cede the existence of an incorporeal right in these works, perhaps recognizing that to do so might be an admission that copyright still had as its origin a natural or customary right of the author.<sup>136</sup>

### B. *Response*

The widespread influence of the modified account has been well deserved; they have made a good case for it. Nevertheless, I must respectfully disagree with my colleagues. My counterpoints are several, and I believe they suffice to refute, or at least call into question, the two main points made by these scholars.

#### 1. *Justice Nares*

To start, the evidence uncovered on Justice Nares’s views is not as well supported as it has been made it out to be. Although there appear to be various narratives that support the revised view—e.g., the *Morning Chronicle*, *Gentleman’s Magazine*, *Pleadings Account*, *Cases Account*, and *Cobbett Account*—they all stem from the first of these: William Woodfall’s report in the *Chronicle*.<sup>137</sup> The two stand-alone accounts from 1774, for example, based their accounts on the *Chronicle*, either directly or indirectly. The *Pleadings Account* is taken verbatim, and though the *Cases Account* differs slightly it is clearly copied from the *Pleadings Account*. Justice Nares spoke for nearly an hour and yet the two accounts summarized his opinion in only a few paragraphs, touching the very same issues, and in nearly the same way.<sup>138</sup> It is true that the *Cases Account* adds something not seen in the *Pleadings Account* or in the *Chronicle*—individual answers to each of the five questions posed to Justice Nares—but those answers were fabricated to track what had already been

<sup>133</sup> Deazley, *supra* note 132, at 132; *see also id.* at 118, 125.

<sup>134</sup> DEAZLEY, *supra* note 115, at 20 (first emphasis added).

<sup>135</sup> DEAZLEY, *supra* note 6, at 210; *see also id.* at 217, 220.

<sup>136</sup> Deazley leaves open the possibility that unpublished manuscripts were protected at common law by a *corporeal* right stemming from ownership of the manuscript itself. *Id.* at 197–205.

<sup>137</sup> *See supra* text accompanying notes 69–87 and *infra* Appendix.

<sup>138</sup> PLEADINGS, *supra* note 75, at 17–18; CASES, *supra* note 76, at 35.

plagiarized from Woodfall. This was something the *Cases Account* compiler did when Woodfall had not already provided answers.

There are other London newspapers that agree with Woodfall's account, but they are not narratives and are, in any event, suspect. They typically summarize the judges' positions on whether copyright was perpetual. In his work on *Donaldson*, Rose relies on a number of these.<sup>139</sup> There are others as well.<sup>140</sup> Similar summaries and tallies also made their way into newspapers elsewhere in England and Ireland,<sup>141</sup> and even into the letters of persons in London coffeehouses.<sup>142</sup> Yet there is no evidence they were written by correspondents who attended the appeal on the day Justice Nares spoke. Rather, it is much more likely they copied the news from other newspapers, which was a widespread practice at the time.<sup>143</sup>

Can we conclude the *Chronicle* was the progenitor of them all? It certainly is possible. Woodfall was the first to recount Nares's opinion—an opinion Woodfall published on the morning of February 16—and nearly all the other London papers were published one or more days afterward.<sup>144</sup> It was also a regular practice of London papers to rely on Woodfall's *Chronicle* for parliamentary reporting, given his reputation in that regard.<sup>145</sup>

Much of the revised history thus depends on Woodfall's accuracy. Did he in fact report Justice Nares correctly? It is difficult to know for certain because Nares's personal papers no longer survive. Nevertheless, the weight of the evidence militates heavily against Woodfall, not for him.

For one, there are other newspaper accounts that contradict the *Chronicle*. Nearly all are from papers in Scotland that seem to have used

<sup>139</sup> ROSE, *supra* note 28, at 155; *see also* DEAZLEY, *supra* note 6, at 199 & n.40.

<sup>140</sup> *E.g.*, GENERAL EVENING POST (London), Feb. 19, 1774, at 1; MIDDLESEX JOURNAL (London), Feb. 19, 1774, at 1; WESTMINSTER JOURNAL (London), Feb. 19, 1774, at 3.

<sup>141</sup> *E.g.*, IPSWICH JOURNAL, Feb. 19, 1774, at 2; JACKSON'S OXFORD JOURNAL, Feb. 19, 1774, at 2; LEINSTER JOURNAL (Kilkenny), Mar. 5, 1774, at 1; MANCHESTER MERCURY, Feb. 22, 1774, at 4.

<sup>142</sup> Letter from J. Grove to J. Grimston (Feb. 22, 1774), ERY MS DDGR/42/31/XV.

<sup>143</sup> *See generally* Mary Ransome, *The Reliability of Contemporary Reporting of Debates of the House of Commons, 1727–1741*, 24 BULL. INST. HIST. RES. 67, 68–69 (1942); Will Slauter, *A Trojan Horse in Parliament: International Publicity in the Age of the American Revolution*, in INTO PRINT: LIMITS AND LEGACIES OF ENLIGHTENMENT 15, 21–23 (Charles Walton ed., 2011).

<sup>144</sup> We are fortunate to have specific evidence, taken from a prosecution brought against Woodfall for publishing a libelous letter in the same February 16 issue, that the paper was printed early that morning. *Case, Att'y Gen. v. W. Woodfall*, PRO TS11/24 (K.B. 1774). The *Public Advertiser* also appeared on February 16, but that paper was published by Woodfall's brother Henry Sampson Woodfall. PUBLIC ADVERTISER (London), Feb. 16, 1774, at 2. For reasons explained more fully below, *see infra* text accompanying notes 164–167, William may have been the source for the *Public Advertiser*. In any case, the report is so short that it is difficult to conclude that it supports the revisionist account. The *Gazetteer* also appeared on the 16th, but it reported only very briefly that Justice Nares had said copyright was a common-law right, which was technically true. GAZETTEER (London), Feb. 16, 1774, at 2.

<sup>145</sup> Thomas, *supra* note 66, at 627–28 (describing the extensive copying of Woodfall). A two-way street, Woodfall sometimes took to copying others. JAMES STEPHEN, THE MEMOIRS OF JAMES STEPHEN 293–94 (Merle M. Bevington ed., 1954) (recalling Woodfall's practices in the 1780s).

their own correspondents for some of their reports.<sup>146</sup> Scottish booksellers had a particular interest in the case. The appellants, Alexander and John Donaldson, were Scots and, though they were working in London at the time of the dispute, they usually printed their books in Scotland and thus stood as proxies for its entire reprint industry. Quite simply, the Scottish trade had good reasons and means for obtaining its own news.

Take, for example, the *Caledonian Mercury*. It reported on February 19 that “though [Justice Nares] was inclined to think, that authors had a right at common-law; yet he was of opinion, that right was taken away by the statute of Queen Anne.”<sup>147</sup> The *Edinburgh Evening Courant* was of the same view, noting that “Mr Justice Nares also gave his opinion for the appellants”<sup>148</sup> and that as of February 17, “five of the Judges [had given] their opinions against the perpetual monopoly, viz. Mr Baron Eyre, Mr Justice Nares, Mr Baron Perrot, Mr Justice Gould, and Mr Baron Adams.”<sup>149</sup> Last but not least, the *Edinburgh Advertiser*, which was published by James Donaldson, the son of the appellant Alexander Donaldson,<sup>150</sup> reached the same conclusion and provided readers with the following summary:

The Opinions of the JUDGES are,

For the APPELLANTS, (for the  
*limited* monopoly in books.)

COURT of COMMON PLEAS.

1. Chief Justice DE GREY
2. Sir HENRY GOULD.
3. Sir GEORGE NARES.

COURT OF EXCHEQUER.

4. Sir RICHARD ADAMS.
5. GEORGE PERROT, Esq.
6. Sir JAMES EYRE.

For the RESPONDENTS.  
(For the *perpetual* monopoly in  
books.)

COURT of KING’S BENCH.

1. Sir RICHARD ASTON.
2. EDWARD WILLES, Esq.
3. Sir W. H. ASHURST.

COURT of COMMON PLEAS.

4. Sir WILLIAM BLACKSTONE.
- COURT of EXCHEQUER
5. Lord Chief Baron SMYTH.<sup>151</sup>

It is possible, and in some instances provable, that a few Scottish papers relied on a compatriot paper.<sup>152</sup> Even so, it appears we are left with two types of accounts: those based on Woodfall and those that are not.

<sup>146</sup> For a London periodical that suggests Justice Nares was against a perpetual right, see 6 TOWN AND COUNTRY MAGAZINE 99 (London, A. Hamilton 1774) (Feb. issue).

<sup>147</sup> CALEDONIAN MERCURY (Edinburgh), Feb. 19, 1774, at 2; *accord id.* Feb. 23, 1774, at 2.

<sup>148</sup> EDINBURGH EVENING COURANT, Feb. 19, 1774, at 2.

<sup>149</sup> *Id.* Feb. 23, 1774, at 1.

<sup>150</sup> ROBERT T. SKINNER, A NOTABLE FAMILY OF SCOTS PRINTERS 1–8 (1927).

<sup>151</sup> EDINBURGH ADVERTISER, Feb. 25, 1774, at 124; *accord id.* Feb. 22, 1774, at 117; WEEKLY MAGAZINE (Edinburgh), Feb. 24, 1774, at 286.

<sup>152</sup> See Appendix *infra*.

The elephant in the room is the official record of the House of Lords. On the day that Justice Nares spoke, the Clerk Assistant Samuel Strutt,<sup>153</sup> or one of his deputies, noted in his minute book that Nares believed there was a common-law right but that the Statute of Anne preempted it:

Upon the Third Question deliver'd his Opinion, That such Action at Common Law is taken away by the Statute 8.<sup>th</sup> Anne and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.

....

Upon the fifth Question deliver'd his Opinion That this Right is impeached restrained and taken away by the Statute 8.<sup>th</sup> Anne—And gave his Reasons.<sup>154</sup>

This account was later moved to the manuscript journal without modification,<sup>155</sup> and from there to the *Burrow* and *Brown Reports*.

The exact manner in which these entries were generated is a mystery. *Donaldson* scholars have always assumed that the clerk was expected to divine the answers to the five questions that were asked of the eleven judges solely from the reasons offered by those judges in open court. But there are other possibilities. Given the number of questions posed, perhaps the judges, who had conferred twice beforehand, provided their answers in writing to the clerk and left only the opinions or reasons to be said in the House. Or perhaps each judge read his answers to the questions either before or after entering into his reasons for them. It is true that Woodfall did not systematically report the answers in his account, and thus one might argue that the answers had not been spoken aloud. But there would have been no need for him to do so, as he would have known that the clerk would memorialize the same in the minutes, as was customary. At the very least, it seems reasonable to presume that the clerk received some verification from the judges. The clerk knew his tally of the 55 answers would be relayed to and relied upon by the Lords. He thus may have shown his notes to the judges after each opinion or after all the opinions on a given day. Notably, the minutes do bear a few marks of correction for Justice Ashurst,<sup>156</sup> though admittedly the source of the correction is unknown.

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<sup>153</sup> J.C. SAINTY, *THE PARLIAMENT OFFICE IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES: BIOGRAPHICAL NOTES ON CLERKS IN THE HOUSE OF LORDS 1600 TO 1800*, at 9, 22 (1977).

<sup>154</sup> MS Minutes of the House of Lords, PA HL/PO/JO/5/1/121 (Feb. 15, 1774).

<sup>155</sup> MS Journal of the House of Lords, PA HL/PO/JO/1/145, pp. 95–96 (Feb. 15, 1774).

<sup>156</sup> MS Minutes of the House of Lords, PA HL/PO/JO/5/1/121 (Feb. 15, 1774).

There is more evidence still that Woodfall was mistaken. First are the printed cases that were distributed to the Lords before the hearing, as required by House rules. Of the nine surviving copies I have reviewed, seven have manuscript annotations dated February 22, 1774, the day the House voted, confirming the orthodox 6-to-5 tally. The copy in the Parliamentary Archives states: “NB. Six of the Judges were ag:<sup>st</sup> the Perpetuity and Five for it.”<sup>157</sup> Most of these are probably leftover cases marked and sold by the Door-Keepers—a common practice.<sup>158</sup>

The most compelling evidence stems from proceedings taken a few months after *Donaldson* on a bill in the House of Commons to protect certain works for an additional 14 years. In that context, the orthodox count was again confirmed, this time by other persons we would expect to be well informed of the appeal. In support of the bill, counsel for the booksellers of London, James Mansfield (no relation to Lord Mansfield), stated that only “five of the judges, when giving their opinion in the House of Lords,” believed that copyright was perpetual.<sup>159</sup> This report of Mansfield’s views, which also comes from Woodfall’s newspaper, is confirmed by Henry Cavendish, a member of the Commons who regularly took notes of the debates in that House. He wrote that Mansfield had said:

[F]ive Judges thought clearly in favour of the right; & of those who disputed it, two thought it had existence at Common-law, but that the Statute of Queen Anne had abrogated it. [S]o that there were seven who decided in favour of it as an original right inherent in the author . . . .<sup>160</sup>

Alexander Wedderburn, one of the barristers who argued for the London booksellers in *Donaldson*, was of the same view.<sup>161</sup> So was the written case that was submitted to Parliament in support of the bill.<sup>162</sup> And the opposition characterized the tally the same way. Arthur Murphy, who represented the Donaldsons in their appeal and in opposing the bill, wrote: “[I]n the House of Lords six of the Judges were *decisively* of Opinion, that

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<sup>157</sup> THE CASE OF THE RESPONDENTS iii<sup>v</sup> (s.l.n. 1774), PA HL/PO/JU/4/3/18; *accord* THE CASE OF THE RESPONDENTS iii<sup>r-v</sup> (s.l.n. 1774), BL 1483.dd.1(73); THE CASE OF THE RESPONDENTS iii<sup>r-v</sup> (s.l.n. 1774), BL L.3.a.1[vol. 17](132); THE CASE OF THE RESPONDENTS iii<sup>v</sup> (s.l.n. 1774), SL Session Papers F31:6; THE CASE OF THE APPELLANTS 9<sup>v</sup> (s.l.n. 1774), AL House of Lords Papers, Appeal Cases, 1772–1774; THE CASE OF THE APPELLANTS 9<sup>v</sup> (s.l.n. 1774), KI Petitions v.41[6]; THE CASE OF THE APPELLANTS 9<sup>v</sup> (s.l.n. 1774), OHL KF 223 G741, set 1, v. 2, p. 156.

<sup>158</sup> *Cf.* THOMAS OSBORNE, ADVERTISEMENT 1 (s.l.n. [c.1758]), Bodl. J.J. Book Trade Docs. No. 25 (advertising printed cases previously purchased from the estate of a Door-Keeper).

<sup>159</sup> MORNING CHRONICLE (London), May 16, 1774, at 4.

<sup>160</sup> Henry Cavendish, Debates in the Commons, BL Egerton MS 259, pp. 35–36 (May 13, 1774).

<sup>161</sup> MORNING CHRONICLE (London), Mar. 26, 1774, at 2.

<sup>162</sup> THE CASE OF THE BOOKSELLERS OF LONDON AND WESTMINSTER 2 (s.l.n. [1774]), Bodl. Carte MS 207, No. 6, Bodl. Vet. 2581.c.5(3).



the Decree against *Donaldson* ought to be reversed.”<sup>163</sup> It would be quite remarkable (and unlikely) for the clerk in the House of Lords and counsel on both sides to be mistaken on this point. Rather, this appears to be one of those many instances where a journalist has misreported legal proceedings.

So how could Woodfall have made this error? It is true that he was blessed with awe-inspiring powers of recall, leading to the *sobriquet* “memory Woodfall,”<sup>164</sup> but he was not infallible. For one, Woodfall heard four opinions on the day that Justice Nares spoke, spanning the course of about two hours, and he could not write down a single word until he returned to his establishment.<sup>165</sup> The clerk, on the other hand, could write as much as he pleased. Compounding matters, Woodfall likely had other things on his mind that day. His brother Henry, the publisher of the *Public Advertiser*, had been arrested by the House of Commons the evening before Justice Nares spoke (and remained in custody until March 2).<sup>166</sup> His offense was publishing a letter that criticized the Speaker of the Commons. According to Henry, this confinement seriously disrupted his business,<sup>167</sup> a business that William probably would have had to help shore up.

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In sum, I must respectfully disagree with the conclusions of my colleagues that the clerk misreported Justice Nares, and that the House of Lords rejected a recommendation of the judges to affirm and instead adopted the advice of the speaking Lords to reverse. In fact, it appears that both majorities agreed the House should reverse, albeit not on the very same grounds.

## 2. *The House of Lords*

As for the reasoning of the House, this is an area where I again part ways with Abrams and Deazley (but concur with Whicher and Rose).<sup>168</sup>

<sup>163</sup> [ARTHUR MURPHY], OBSERVATIONS ON THE CASE OF THE BOOKSELLERS OF LONDON AND WESTMINSTER 2 (s.l.n. [1774]), BL 215.i.4(99); see also CALEDONIAN MERCURY (Edinburgh), Mar. 21, 1774, at 1 (attributing authorship of the *Observations* pamphlet to Arthur Murphy).

<sup>164</sup> NIKKI HESSELL, LITERARY AUTHORS, PARLIAMENTARY REPORTERS 64 (2012).

<sup>165</sup> See MACDONAGH, *supra* note 68, at 268–69, 281, 287; accord MORNING CHRONICLE (London), Feb. 14, 1774, at 2 (publishing a letter from a reader remarking on Woodfall’s practices).

<sup>166</sup> 34 H.C. JOUR. 456, 526–27 (Feb. 14 & Mar. 2, 1774); PUBLIC ADVERTISER (London), Feb. 16, 1774, at 2.

<sup>167</sup> 34 H.C. JOUR. 526–27 (Mar. 2, 1774). In an affidavit in an unrelated case, Henry later recalled that “on Tuesday the 15.<sup>th</sup> day of Feby . . . being the first Day and a very few hours after this Dep.<sup>t</sup> was taken into Custody as afores.<sup>d</sup> he was in so much hurry and Confusion from the great number of persons who came to see him [in custody] and the situation he was then in, that [he] did not and could not possibly attend to any Business.” Affidavit of Henry Sampson Woodfall, Nov. 15, 1774, Att’y Gen. v. H.S. Woodfall, PRO TS11/24 (K.B. 1774).

<sup>168</sup> For other scholars agreeing with Rose that the reasoning is opaque, see ALEXANDER, *supra* note 28, at 37–38; 5 DAVID M. WALKER, A LEGAL HISTORY OF SCOTLAND 770 (1998); W.R. Cornish,

Discerning the grounds of an appeal decided in 1774 was, and remains, a pragmatic exercise that sometimes results in frustration for lawyers and judges. One has to determine the views of a court that permitted all of its members to vote on appeals, ruled without articulating reasons of the House, and restricted the publication of its own proceedings.

The most certain way to ascertain a decision's reasoning is to consult the judgment,<sup>169</sup> but judgments are rarely so transparent. Sometimes other direct evidence exists of the grounds the whole House relied upon.<sup>170</sup> But as this is not often the case, one must typically apply various means of deduction. An affirmance might suggest, for example, that the House rejected all of the dispositive grounds the appellant advanced in his printed case. A rationale might also be plain in cases of reversal or variance if there was only one possible ground for doing so. And, of course, a consistent opinion of the judges and speaking Lords offers some insight.

Unfortunately, none of these circumstances is present in *Donaldson*. The House reversed on one or more of three possible grounds: authors held no common-law rights; their rights were lost upon publication; or their rights were preempted. The opinions of the judges also differed in many respects from the speaking Lords. Making matters worse, 84 Lords attended on the day of judgment and each was entitled to vote or not as he pleased and to do so on whatever grounds he saw fit. Lysander Spooner described the difficulties in 1855: "How many of those lords, who voted for the reversal, did so in the belief that there was no copyright at common law; and how many did so in the belief that the common law copyright had been taken away by the statute, does not appear."<sup>171</sup> For all we know, the Lords adopted the suggestion of the Bishop of Carlisle to limit their thinking and deliberation to the issue of preemption. This problem is not unique to *Donaldson*. Bill Cornish recently observed that "[s]o long as the House of Lords acted as an ultimate authority in the settlement of disputes by voting rather than by articulating reasons for judgment, it was difficult to treat its decisions as settling legal rules in a general sense."<sup>172</sup>

Abrams and Deazley argue that the matter is not as complicated as it has been made out to be, and that we can and indeed must adopt the

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*The Author's Surrogate: The Genesis of British Copyright, in* HUMAN RIGHTS AND LEGAL HISTORY 254, 262 (Katherine O'Donovan & Gerry R. Rubin eds., 2000); Ginsburg, *supra* note 36, at 651.

<sup>169</sup> *E.g.*, *Dowager of Marlborough v. Strong*, 22 H.L. JOUR. 270 (H.L. 1723/4); *Barnardiston v. Rex*, 14 H.L. JOUR. 210 (H.L. 1689).

<sup>170</sup> *E.g.*, *MacCulloch v. MacCulloch*, 2 Pat. App. 33, 36 (H.L. 1759); *Gordon v. His Majesty's Advocate*, 1 Pat. App. 558, 567 (H.L. 1754).

<sup>171</sup> LYSANDER SPOONER, *THE LAW OF INTELLECTUAL PROPERTY* 212 (Boston, B. Marsh 1855).

<sup>172</sup> 11 WILLIAM CORNISH ET AL., *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 48 (2010); *accord* CARLETON KEMP ALLEN, *LAW IN THE MAKING* 220–21 (7th ed. 1964); EDWARD SUGDEN, *A TREATISE ON THE LAW OF PROPERTY AS ADMINISTERED IN THE HOUSE OF LORDS* 39–42 (London, S. Sweet 1849); *see also* Cornish, *supra* note 168, at 261–62 (applying the same concern to *Donaldson*).

speeches of the Lords as the holding in *Donaldson*. Both scholars state that “while ‘the judicial [opinions] were only advisory,’ ‘the Lords’ statements were the law of the case.’”<sup>173</sup> Neither explains precisely what is meant by this statement, but given the contexts in which it was made and the conclusions that are drawn, they appear to argue that certain rules or doctrines at the time dictated that the speeches of the Lords, when made on the winning side, constituted the reasons of the House. Stated another way, the speaking Lords decided the case, not the House as a whole, and, consequently, we must disregard the advice offered by the judges and the fact that many other Lords potentially voted on the appeal.

I believe this to be incorrect for a number of reasons. First and foremost, it is difficult in this context to consider the speaking Lords (even the law Lords) as any different from the judges given that the speeches were just as advisory as the opinions. Lords were free to side against the speakers,<sup>174</sup> and lay Lords could even cause the House to rule against the wishes of the law Lords, something that happened in years on either side of *Donaldson*.<sup>175</sup> As Edward Sugden noted many years later:

[T]he Lords are entitled to require the Judges to give them their opinions, which opinions are to instruct and guide them, although they are not binding on them. . . . Now the law Lords can both advise the House and vote in favour of their own views; but their opinions are no more binding on the House than the opinions of the learned Judges.<sup>176</sup>

The time at which the speeches were made also bears this out. The Lords spoke before the vote, not after, because the speeches served to explain why a Lord planned to vote a particular way and to urge his colleagues to do the same. Indeed, speakers would not necessarily know whether they would end up in the majority. Although the law Lords might confer among themselves before their speeches, they would not formally confer with the whole House beforehand. It thus seems hard to imagine that the speaking Lords always expected their speeches to represent the

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<sup>173</sup> DEAZLEY, *supra* note 6, at 217 (quoting Abrams, *supra* note 5, at 1169); *see also id.* at 210.

<sup>174</sup> *E.g.*, Douglas v. Hamilton (H.L. 1769), in 2 COLLECTANEA JURIDICA 386, 404 ([Francis Hargrave] ed., London, E. & R. Brooke 1792).

<sup>175</sup> *E.g.*, Hill v. St. John, 7 Bro. P.C. 353, 368, *cit.* 2 W. Black 933 (H.L. 1775) (noting that the House had affirmed even though Lords Apsley and Camden had urged it to reverse); Pomfret v. Smith, 6 Bro. P.C. 434 (H.L. 1771); LONDON EVENING-POST, Mar. 9, 1771, at 4 (noting that the House had reversed and ordered a new trial in *Pomfret* against the advice of Lords Apsley and Camden).

<sup>176</sup> SUGDEN, *supra* note 172, at 32. Sugden wrote these words at a time when the law Lords decided appeals without the rest of the House. And because the law Lords were in all but name the actual court of appeal, their views were no longer merely advisory. Nostalgic, he lamented this fact because it meant that a few law Lords could trump the views of the bulk of the judges. *Id.* at 26–33.

views of those on their side, let alone the judgment of the House,<sup>177</sup> particularly when the case was contentious and drew the opinions of the judges.

Additionally, if the speeches were thought to be paramount, one would have expected House procedures to not hinder their dissemination. And yet the opposite was true. Members of the public were not permitted to take notes of the speeches,<sup>178</sup> and no one was allowed to publish them. To be sure, speeches were sometimes published, perhaps even with the help of a Lord, but this occurred in a haphazard way and not in observance of an expressed rule that the speech would constitute the reasons of the whole House. In any case, apart from some slips, the prohibitions were very successful. At the time of *Donaldson*, there had been only one published collection of appeals and writs of error in the House of Lords.<sup>179</sup> As I previously noted, the House reprimanded the publisher.<sup>180</sup> This was done even though he omitted (with one exception) the speeches of the Lords. Thereafter, no new collection of parliamentary cases was published, whether authorized or not, until Josiah Brown gave us the first book of his multi-volume series in 1779.<sup>181</sup> With a few exceptions, he too omitted the speeches of the Lords. The next sets of parliamentary reports in 1789, 1803, and 1807 operated under similar conventions.<sup>182</sup> Indeed, it was not until 1814 that reports regularly included the speeches of the Lords.<sup>183</sup> Remarkably, apart from the judgments, the only thing the Lords' journal thought worthy of reporting publicly were the answers of the judges.<sup>184</sup>

With respect to cases decided in 1774, the most that can be said is that because the House usually ruled as the law Lords advised—be it to affirm, reverse, or vary—we should presume that the House also followed the

<sup>177</sup> Accord CHARLES MARSH DENISON & CHARLES HENDERSON SCOTT, *THE PRACTICE AND PROCEDURE OF THE HOUSE OF LORDS* 116–17 (London, Butterworths 1879).

<sup>178</sup> Cf. 1 BOSWELL, *supra* note 57, at 377 (indicating in 1772 that counsel on appeals were permitted to take notes); accord BOSWELL FOR THE DEFENCE, *supra* note 57, at 116, 180.

<sup>179</sup> [BARTHOLOMEW SHOWER], *CASES IN PARLIAMENT* (London, A. & J. Churchill 1698). On the reporting of parliamentary cases as part of reports of *other courts*, see the correspondence between Lord Hardwicke and Justice Foster of the King's Bench in MICHAEL DODSON, *THE LIFE OF SIR MICHAEL FOSTER, KNT.* 45–49 (London, J. Johnson & Co. 1811) (Feb. 2, 1761, Mar. 30 & Apr. 2, 1762).

<sup>180</sup> See *supra* text accompanying note 64.

<sup>181</sup> 1 JOSIAH BROWN, *REPORTS OF CASES UPON APPEALS AND WRITS OF ERROR* (London, Majesty's Law-Printers 1779).

<sup>182</sup> RICHARD COLLES, *REPORTS OF CASES UPON APPEALS AND WRITS OF ERROR* (Dublin, E. Lynch 1789); 1 JOSIAH BROWN & T.E. TOMLINS, *REPORTS OF CASES UPON APPEALS AND WRITS OF ERROR* (London, A. Strahan 2d ed. 1803); 1 DAVID ROBERTSON, *REPORTS OF CASES ON APPEAL FROM SCOTLAND, DECIDED IN THE HOUSE OF PEERS* (London, A. Strahan 1807).

<sup>183</sup> 1 PATRICK DOW, *REPORTS OF CASES UPON APPEALS AND WRITS OF ERROR IN THE HOUSE OF LORDS* (London, W. Clarke & Sons 1814); see also 1 JOHN CRAIGIE ET AL., *REPORTS OF CASES DECIDED IN THE HOUSE OF LORDS, UPON APPEAL FROM SCOTLAND* (Edinburgh, T. & T. Clark 1849).

<sup>184</sup> In later years, the journal also regularly reported the opinions of the judges. *E.g.*, *Croft v. Lumley*, 90 H.L. JOUR. 32–43 (H.L. 1858); *Scott v. Avery*, 88 H.L. JOUR. 165–71 (H.L. 1856); *Jefferys v. Boosey*, 86 H.L. JOUR. 299–322 (H.L. 1854); *Gosling v. Veley*, 84 H.L. JOUR. 324–40 (H.L. 1852).

reasoning of the law Lords as expressed in their speeches. Law Lords, as contrasted with lay Lords, merited special reverence due to their legal training and experience. But this presumption, if one can call it that, seems most helpful in instances where the Lords heard an appeal or writ of error without the assistance of the judges.<sup>185</sup> This follows because in cases like *Donaldson*, where the judges were summoned, we encounter a like presumption that the House usually followed the judges. About 100 years prior to *Donaldson*, Chief Justice Hale wrote the following:

[S]ince the time that the whole decision of errors have been practised in the house of lords by their votes, the judges have been always consulted withal, and their opinion held so sacred, that the lords have ever conformed their judgments thereunto, unless in cases where all the judges were parties to the former judgment, as in the case of ship money.<sup>[186]</sup> . . . [T]hough for many years last past they have had only voices of advice and assistance not authoritative or decisive; yet their opinions have been always the rules, whereby the lords do or should proceed in matters of law . . . .<sup>187</sup>

The records of the mid-to-late 18th century indicate that this largely remained true. There are very few instances where the House defied the judges. From 1730 to 1800, inclusive, the judges offered advice in 83 appeals and writs of error. But in only four do the records show the House voting in a manner inconsistent with the views of the judges; and in three of those cases the vote also went against the majority of the law Lords.<sup>188</sup>

Presumptions can fall away, of course, such as where the judges advise the House to affirm, but the law Lords urge it to reverse. In such a case, if the House reverses, one would be hard pressed to argue that the House followed the reasoning of the majority of the judges. It is thus easy to un-

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<sup>185</sup> *E.g.*, *Arthur v. Arthur*, 21 H.L. JOUR. 280, 2 Bro. P.C. 143 (H.L. 1720); *see also* Anita Jane Rees, *The Practice and Procedure of the House of Lords 1714–1784*, at 157 (1987) (unpublished Ph.D. dissertation, University of Wales) (recounting a letter regarding the appeal in *Arthur* where a visitor to the House was told that “there are three or four Lords in the House who understand the Laws very well and give attention; and the House always gives in to their opinion”) (quoting Letter from D. Forbes to Lord Grange (Apr. 1, 1720), NAS GD124/15/1197/33); 11 THE PARLIAMENTARY REGISTER 216–17 (London, J. Debrett 1783) (noting that “it was for the most part customary to leave the judgment to the Law Lords” and “very rarely it was that the lay Lords interfered” by voting against the law Lords).

<sup>186</sup> *Rex v. Hampden*, 3 How. St. Tr. col. 825 (Exch. Chamb. 1638). The case was unusual and led to judicial impeachments. D.L. Keir, *The Case of Ship-Money*, 52 L.Q. REV. 546, 546 (1936).

<sup>187</sup> MATTHEW HALE, *THE JURISDICTION OF THE LORDS HOUSE* 158–59 (London, T. Cadell Jr. & W. Davies 1796) (written c.1669).

<sup>188</sup> *Bishop of London v. Ffytche*, 36 H.L. JOUR. 683–85, 687, 2 Bro. P.C. (2d ed.) 211, 217–19 (H.L. 1783); *PUBLIC ADVERTISER* (London), June 6, 1783, at 3 (division list in *Ffytche*); *Hill v. St. John*, 34 H.L. JOUR. 443, 7 Bro. P.C. 353, 368 (H.L. 1775); *Archbishop of Armagh v. King*, 23 H.L. JOUR. 545, 1 Barn. K.B. 329, 329, *cit.* 2 Strange 837, 843 (H.L. 1730); *see also* *Foley v. Burnell*, 37 H.L. JOUR. 248–49, 4 Bro P.C. (2d ed.) 319, 328 (H.L. 1785) (voting against the judges only).

derstand why one might believe that the speeches of the Lords in *Donaldson* constituted the law of the case; it has been increasingly thought over the last fifty years that *Donaldson* fell into this category. But as I have already argued, and I hope demonstrated, *Donaldson* is not one of those cases. Rather, we have a majority of the judges and a majority of the law (and lay) Lords advising the House to reverse, which is what it then did.

The manner in which appeals were heard eventually changed in such a way as to support the rule advanced by Abrams and Deazley, but not for many years. In 1823, toward the end of Lord Eldon's tenure, it became usual for the law Lords to decide appeals without the rest of the House. A few lay peers would attend to reach the required quorum of three, but they typically would not vote.<sup>189</sup> By the late 1830s, the House counted seven law Lords among its members, and their numbers were often enough to sit without the need of lay peers.<sup>190</sup> Thus, in 1839, James Stewart wrote that "it is not now the practice of the whole body of the house to attend to its judicial business. This is usually transacted entirely by the lord chancellor, speakers, or other peers, who have at one time filled judicial situations."<sup>191</sup> Even still, it was not until 1844 that the convention was established that lay Lords should never vote on appellate matters.<sup>192</sup> It was only with these changes, combined with proper reporting, that one could expect that the Lords who spoke were the ones who decided the appeal and that their words reflected the reasoning of the House. Stated elsewhere, the speeches were no longer advisory, but became more akin to judgments of a court.<sup>193</sup>

Something also must be said of the authorities cited by Abrams and Deazley. Abrams cites only one source to support his principal thesis—that in 1774 the speeches of the Lords constituted the holding of the case—but it is unsupportive and otherwise inapposite because it speaks of a time when appellate practices in the House of Lords differed greatly.<sup>194</sup> Deazley largely relies on Abrams, but he does go further and discusses evidence

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<sup>189</sup> C.P. COOPER, A BRIEF ACCOUNT OF SOME OF THE MOST IMPORTANT PROCEEDINGS IN PARLIAMENT 409 (London, J. Murray 1828); ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976, at 19–22 (1978); see also STANDING ORDERS OF THE HOUSE OF LORDS 135–36 (s.l.n. 1825) (July 7, 1823) (requiring three Lords to attend appeals by rota).

<sup>190</sup> STEVENS, *supra* note 189, at 29–40.

<sup>191</sup> JAMES STEWART, THE RIGHTS OF PERSONS 9 (London, E. Spettigue 1839) (contrasting with the method that existed at the time Justice Blackstone published his *Commentaries* in the 1760s).

<sup>192</sup> STEVENS, *supra* note 189, at 29–34; accord 11 CORNISH ET AL., *supra* note 172, at 528–37.

<sup>193</sup> Accord TIMES (London), Sept. 5, 1844, at 4 (noting that the custom that "prevents any but law Lords [from] voting" makes the "decision of certain law Lords" the decision of the House); 60 EDINBURGH REVIEW, OR CRITICAL JOURNAL 24–25 (Edinburgh, Longman et al. 1835) ("[T]he judgment of the Lords, though technically and formally that of the whole House, is practically and substantially nothing more than the judgment of the Lord Chancellor; or of the Lord Chancellor and other law lords who have been raised to the peerage.").

<sup>194</sup> Abrams, *supra* note 5, at 1169, 1160 n.175 (citing 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 609–11 (1938) (citing Palgrave, Brown & Son v. S.S. Turid, [1922] 1 A.C. 397, 413)).

that requires our attention. As proof of the supremacy of the speeches, Deazley cites a portion of the proceedings taken in Parliament in 1774 to protect certain works for an additional 14 years.<sup>195</sup> Six days after the decision in *Donaldson*, a group of aggrieved booksellers petitioned for a bill, stating that

by a late Decision of the House of Peers, such Common Law Right of Authors and their Assigns hath been declared to have no Existence, whereby the Petitioners will be very great Sufferers, through their involuntary Misapprehension of the Law.<sup>196</sup>

The preamble of the bill similarly stated that “it hath lately been adjudged in the House of Lords that no such copy right in authors or their assigns doth exist at common law.”<sup>197</sup> From these statements, my friend concludes that “it is clear that the decision of the peers was initially understood to have dismissed any notion of a common law right,” and that the “booksellers themselves [concluded that] the House of Lords had denied that any common law copyright predated the *Statute of Anne*; the legislation had in fact created a new, temporally limited, property right in literary works.”<sup>198</sup>

Deazley’s interpretation of this language is certainly sensible. In fact, he was not the first to read it that way. Alexander Donaldson seized on the very same language in petitioning against the bill in the House of Lords.<sup>199</sup> As others who opposed the bill were wont to do,<sup>200</sup> Donaldson pressed the same arguments that he made during the appeal—including that there was no antecedent right—and he declared that the House of Lords had reached the same conclusion. As Paul Feilde, who supported the booksellers’ bill, aptly (and perhaps cynically) noted at the time: “[E]very body that supports the decision of the H of L says that at the time of making the Statute of Queen Anne, no such thing existed as Copyright at Common Law.”<sup>201</sup>

Nevertheless, another interpretation of the petition and bill is plausible. By stating that the common-law right has “no Existence” or “doth [not] exist,” the petitioners, who cared most about whether they retained perpetual copyrights after the statute, could very well have meant that the common-law right does not *now* exist rather than that the right *never* existed.

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<sup>195</sup> DEAZLEY, *supra* note 6, at 213–18.

<sup>196</sup> 34 H.C. JOUR. 513 (Feb. 28, 1774).

<sup>197</sup> An Act for Relief of Booksellers and Others, PA HL/PO/JO/10/2/53 (1774). The bill was also printed. AN ACT FOR RELIEF OF BOOKSELLERS AND OTHERS (s.l.n. 1774).

<sup>198</sup> DEAZLEY, *supra* note 6, at 217, 218.

<sup>199</sup> COPY OF ALEXANDER DONALDSON’S PETITION TO THE HOUSE OF LORDS, AGAINST THE LONDON BOOKSELLERS BILL 2 (s.l.n. 1774), HSP AB-[1774]-29.

<sup>200</sup> E.g., Diary of Jacob Pleydell-Bouverie, WSA 1946/4/2F/1/3 (May 16, 1774); Cavendish, *supra* note 160, at 90 (May 16, 1774) (Pleydell-Bouverie).

<sup>201</sup> Cavendish, *supra* note 160, at 119 (May 16, 1774).

The thrust of their written case was that they legitimately believed they held common-law rights that survived the Statute of Anne.<sup>202</sup> As a consequence, they had purchased copyrights that were outside the statutory terms and some within but at prices that presumed the rights were perpetual. To take the perpetual right away so swiftly would constitute an extreme hardship. Insisting their belief was genuine, the petitioners cited the savings clause of the Statute of Anne and said it had led them to conceive “that the Act did not affect or take away the Common Law Right supposed to be vested in the Authors of Books, and their Assigns, in Perpetuity.”<sup>203</sup> Their position was also confirmed, they noted, by the King’s Bench in *Millar*. Turning next to *Donaldson*, they observed that the House of Lords had declared the “before supposed Common Law Copy Right in Books,” meaning a common-law right that persisted after the statute, “to have no Existence.”<sup>204</sup> The petitioners stressed that their misapprehension was the more excusable because the judges in *Donaldson* nearly supported a “Common Law Copy Right . . . in Perpetuity.”<sup>205</sup> A majority of the judges had opined that a common-law right existed before the statute and “many of them” declared the statute did not abridge the right.<sup>206</sup> Notably, a similar description of the “common law right” is given in the petition and the preamble of the bill, both of which also refer to “such” right.<sup>207</sup>

Stated another way, the phrases “common law right” or “copy right” were sometimes used as a shorthand for the idea of a perpetual copyright that survived and subsisted alongside the statute.<sup>208</sup> This was how William Woodfall used the term when he reported the arguments of James Mansfield, one of the counsel who argued for the bill on behalf of the petitioners. And if we are to countenance the accuracy of Woodfall, then it appears that Mansfield himself sometimes used the words in this manner:

It has been strongly contested . . . that the petitioners were not at all mistaken respecting the non-existence of a common law right . . . . Sir, . . . it is evident that they did misconceive, and I do not wonder at it, when I recollect that the highest court of law in Westminster Hall [the Court of King’s Bench]

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<sup>202</sup> CASE OF THE BOOKSELLERS, *supra* note 162, at 1–2.

<sup>203</sup> *Id.* at 1.

<sup>204</sup> *Id.* at 2.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* In response to this point, Arthur Murphy observed that the issue was not as close as imagined: “[I]n the House of Lords six of the Judges were *decisively* of Opinion, that the Decree against *Donaldson* ought to be reversed : To those six may be added the authority of the late Sir JOSEPH YATES, Lord CAMDEN, and the Lord HIGH CHANCELLOR.” MURPHY, *supra* note 163, at 2.

<sup>207</sup> See *supra* text accompanying notes 196–197.

<sup>208</sup> E.g., *Donaldson v. Becket*, 7 Bro. P.C. 88, 110 (H.L. 1774) (Josiah Brown) (using the terms synonymously: “[Five of the judges were] *in favour* of the perpetuity, or common law right; and the other six . . . were of opinion *against it* . . .”).



equally misconceived it, and that *five of the judges*, when giving their opinion in the House of Lords, immediately previous to the late determination[,] *were also of the same sentiments . . .*<sup>209</sup>

The judges referred to, of course, were the five who thought that copyright was perpetual despite the Statute of Anne, and not the seven who believed in an original right inherent in the author.

Woodfall also reported Alexander Wedderburn as using the phrase “Common-Law Right” similarly. Wedderburn had been appointed to draft the bill submitted to the Commons and had spoken on behalf of the petitioners.<sup>210</sup> According to Woodfall, Wedderburn stated:

Three out of four Judges [in *Millar*]. . . had fully . . . convinced not only the booksellers, but at least half the public, that a Common-Law Right did exist; and even in the late decision [in *Donaldson*], the opinion of the great luminary of the law [Lord Mansfield], was supported *nearly by half the number of Judges* [i.e., by five of the judges].<sup>211</sup>

Notably, Wedderburn also purportedly described *Donaldson* as a “determination that there was no common-law right for a perpetuity . . .”<sup>212</sup>

In short, the documents that Deazley cites—the petition and the preamble to the bill—are ambiguous. It is unfortunate the petitioners were not more precise. Perhaps they did not perceive a need to be; they may have believed the reasoning was obvious to all concerned. But another possibility is that their imprecision came about by necessity. Although they undoubtedly understood that the House had rejected perpetual copyrights, the petitioners may not have known the exact reasons underlying the decision because of the single question posed to the Lords and the manner of voting.

### 3. *Perceptions Redux*

Although I doubt that the petitioners used the aforementioned words in the manner Deazley contends, he certainly is correct that some persons interpreted *Donaldson* as having rejected some type of antecedent right. Apart from the sources already noted, there were others, though many of them occurred in the course of advocacy. Advocates and judges in

<sup>209</sup> MORNING CHRONICLE (London), May 16, 1774, at 4 (emphasis added); see also Cavendish, *supra* note 160, at 35 (May 13, 1774).

<sup>210</sup> 34 H.C. JOUR. 590 (Mar. 24, 1774).

<sup>211</sup> MORNING CHRONICLE (London), March 26, 1774, at 2 (emphasis added).

<sup>212</sup> *Id.*

Scotland were particularly keen to adopt this reading of *Donaldson*,<sup>213</sup> which is no surprise given that the Court of Session had twice rejected a common-law right in published works before *Donaldson*.<sup>214</sup> Even there, some variety appeared. In one case, for example, the Solicitor General of Scotland argued on a common-law right in unpublished works stemming from an author's own labor.<sup>215</sup> And in another case, one of the Lords of Session stated that "[t]here is a literary property at common law."<sup>216</sup>

In England, the perception of *Donaldson* was decidedly different from that in Scotland. Nearly all the judges who opined on the matter adopted the second or third reading of *Donaldson*. That is to say, they recognized that the House had rejected perpetual copyright, but they then relied on the answers of the judges in *Donaldson*, the views of the jurists in *Millar*, and sometimes their own views in assessing whether an antecedent right existed.<sup>217</sup> Deazley argues that the judges taking this approach fundamentally misunderstood *Donaldson*. He labels the phenomenon the "emergence and rise of . . . the cult of *Millar* and the re-branding of *Donaldson*."<sup>218</sup> Two decisions in particular deserve our attention because Deazley identifies the first as principally responsible for causing subsequent misconstructions of *Donaldson*, and the second as perpetuating the error.<sup>219</sup>

In the first case, *Beckford v. Hood*,<sup>220</sup> the principal issue was whether copyright holders of published works were limited to the penalties contained in the Statute of Anne or if they could pursue ordinary damages at common law. Counsel for the plaintiff acknowledged that after *Donaldson* an author could not, "after publication of his work, set up a common law right" and that therefore it might appear that the common-law remedy was unavailable.<sup>221</sup> Counsel suggested, however, that the judges in *Donaldson*

<sup>213</sup> *Cadell v. Robertson*, 19–20 Mor. Dec. Lit. Prop. Appx 16, 18–19 (Sess. 1804); *Dodsley v. M'Farquhar*, 19–20 Mor. Dec. Lit. Prop. Appx 1, 3 (Sess. 1775).

<sup>214</sup> *Hinton v. Donaldson*, 1 Hailes 535, *cit.* 5 Pat. App. 505, 5 Brown's Supp. 508 (Sess. 1773); *Midwinter v. Hamilton*, 2 Kames Rem. Dec. 154, *Kilk.* 96 (Sess. 1748); *see also generally* Hector L. MacQueen, *The War of the Booksellers: Natural Law, Equity, and Literary Property in Eighteenth-Century Scotland*, 35 J. LEGAL HIST. 231 (2014).

<sup>215</sup> *Cadell v. Stewart*, 19–20 Mor. Dec. Lit. Prop. Appx 13, 13–14 (Sess. 1804); *see also* INFORMATION FOR MESS. CADELL AND DAVIES 5–9 ([Edinburgh], D. Schaw & Son Sept. 30, 1803), SL Session Papers 458:15.

<sup>216</sup> *Cadell v. Robertson*, *cit.* 5 Pat. App. 498, 498–500 n.\* (Sess. 1804) (Lord Hermand).

<sup>217</sup> DEAZLEY, *supra* note 115, at 26–55. One possible exception is Lord Eldon. On appeal from one of the Scottish cases mentioned previously, he stated that *Donaldson* had "declared that there was no right of property at common law." *Cadell v. Robertson*, 5 Pat. App. 498, 502 (H.L. 1811).

<sup>218</sup> DEAZLEY, *supra* note 115, at 53.

<sup>219</sup> *Id.* at 29–32, 53; Ronan Deazley, *The Life of an Author: Samuel Egerton Brydges and the Copyright Act 1814*, 23 GA. ST. U.L. REV. 809, 813–16 (2006).

<sup>220</sup> 7 T.R. 620 (K.B. 1798).

<sup>221</sup> *Id.* at 622. Importantly, of the six judges in *Donaldson* who opined that the statute preempted any preexisting common-law right, five also answered that the statute precluded authors from pursuing "every Remedy except on the Foundation of the said Statute, and on the Terms and Conditions

had not really concerned themselves with the “specific remed[ies]” available for infringement because they were principally focused on whether the “right of property [was] confined to that given . . . by the statute.”<sup>222</sup> Turning next to the statute, he proceeded on the idea that the legislature had created a statutory right in published works but that the penalties and forfeitures were inadequate to vindicate that right. He thus urged the court to import ordinary damages from the common law.<sup>223</sup>

The King’s Bench, which still counted Justice Ashurst among its members, unanimously held that the common-law remedy was available. The court ruled without having to ascertain the underlying reasoning of *Donaldson*. Referring to the decision, Justice Ashurst stated that the “question in the present case is much narrowed.”<sup>224</sup> Nevertheless, two of the judges did characterize *Donaldson*, and both took a narrow view of its holding. Justice Grose stated that *Donaldson* established only that the “common law right of action . . . could not be exercised beyond the time limited by th[e] statute.”<sup>225</sup> And the Chief Justice, Lord Kenyon, also thought that *Donaldson* had not rejected a common-law right ab initio. As a previously unremarked account of his opinion notes:

Lord KENYON said . . . [n]othing was more clear than at Common Law, the author of injured *civiliter* was entitled to his action . . . . With respect to the decision of the Twelve Judges, six against five in the case alluded to, of *Donaldson* against Becket, he would abstain from going into any discussion of the grounds of it. All that was necessary to state now was, that the law had been established; and some of the rights of the author at Common Law were taken away by the subsequent statutes.<sup>226</sup>

The second case, *Jefferys v. Boosey*,<sup>227</sup> is perhaps the most instructive because it ended up in the House of Lords in 1854 and provides, at its two

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prescribed thereby.” 34 H.L. JOUR. 24 (Feb. 15, 1774); see also *id.* at 27–28, 30 (Feb. 17 & 21, 1774). The sixth judge, Baron Eyre, stated that equitable remedies would additionally be available for violations of the statute, but he did not mention ordinary damages. *Id.* at 24 (Feb. 15, 1774).

<sup>222</sup> *Beckford*, 7 T.R. at 626.

<sup>223</sup> *Id.* at 622–24.

<sup>224</sup> *Id.* at 628.

<sup>225</sup> *Id.* at 629; accord *Beckford v. Hood*, LI Dampier MS L.P.B. 222 (K.B. 1798) (Grose, J.) (“The opinions of the \6/ Judges in Dom. Proc. must be \understood to be/ that after the 14 years or 28 years there is no remedy at Com[mon] Law[.]”).

<sup>226</sup> *Beckford v. Hood* (K.B. 1798), in ORACLE AND PUBLIC ADVERTISER (London), May 12, 1798, at 3. Remarkably, it appears that defense counsel may have been of the same view. He stated that “the Statutes[,] which had been made upon the subject, had taken away the rights which were vested in authors by the Common Law.” *Beckford v. Hood* (K.B. 1798), in LONDON CHRONICLE, May 12, 1798, at 3. On the reliability of newspaper reports of courts other than the House of Lords, see James Oldham, *Law Reporting in the London Newspapers, 1756–1786*, 31 AM. J. LEGAL HIST. 177 (1987).

<sup>227</sup> 4 H.L.C. 815 (H.L. 1854).

principal stages, the views of numerous judges and law Lords on the proper interpretation of *Donaldson*. At issue was whether a musical composition written by a foreigner in Milan, and published in England while the author still resided in Milan, was eligible for statutory protection under the Copyright Act of 1842.<sup>228</sup> The trial judge said no.<sup>229</sup> On appeal to the Exchequer Chamber, attended *ad hoc* by the justices of the Queen's Bench and Common Pleas, the plaintiff offered the common law as an alternative.<sup>230</sup> The lawyers on each side spun *Donaldson* in the way that suited them best.<sup>231</sup> The court opted to rule on statutory grounds and held that the statute protected foreign works. It went on to state, however, that "we are strongly inclined to agree with Lord Mansfield and the great majority of the Judges, who, in *Millar v. Taylor* and *Donaldson v. Becket*, declared themselves to be in favour of the common-law right of authors."<sup>232</sup> Importantly, the seven justices in the Exchequer Chamber did not treat the issue as having been decided by the House in *Donaldson*.<sup>233</sup>

The case eventually made its way to the House of Lords, which reinstated the original judgment.<sup>234</sup> The issue of common-law rights was again discussed by counsel, the judges who were summoned for their advice, and the law Lords. Many of the judges avoided the issue outright, and of those that did not, some inclined to the right and others against it. Nearly all of them relied on the views of the judges in *Donaldson* and sometimes those in *Millar* and other cases.<sup>235</sup> But never once did the judges or law Lords in *Jefferys* state that the House in *Donaldson* had decided the issue. On the contrary, they read the holding narrowly, as Justice Blackstone had in 1775, and they simply used the answers and opinions as guidance. Justice Erle of the Court of Queen's Bench, for example, noted that "[t]his House decided in [*Donaldson*] that the statute had restricted the right to the terms of years therein mentioned, but it left the question of copyright at common law undecided."<sup>236</sup> And Lord Brougham, one of the law Lords who was against the right, stated that "upon the general question of literary

<sup>228</sup> An Act to Amend the Law of Copyright, 1842, 5 & 6 Vict., c. 45.

<sup>229</sup> *Boosey v. Jefferys*, PRO E13/1366, rot. 63 (Exch. Pl. Mich. 1849; judg. Pas. 1850).

<sup>230</sup> *Boosey v. Jefferys*, 6 Ex. 580, 583–86, 15 Jur. 540, 540–41 (Ct. Exch. Chamb. 1851).

<sup>231</sup> 6 Ex. at 583–85, 588, 15 Jur. at 541–42, 17 Law Times 110, 110–11; *accord Jefferys*, 4 H.L.C. at 819, 823 (arg.).

<sup>232</sup> 6 Ex. at 592 (Lord Campbell, C.J.).

<sup>233</sup> 6 Ex. at 592–93, 15 Jur. at 543, 20 Law J. Exch. 354, 355; *see also* G.S., *English Copyright in Foreign Compositions*, 14 JURIST 46, 47 (Feb. 16, 1850) (noting that "the ground of that decision [*Donaldson v. Becket*] can only be surmised . . . [but] it is plain that [it] did not overrule the prior decisions as to the effect of publication" at common law).

<sup>234</sup> *Jefferys*, 4 H.L.C. at 996.

<sup>235</sup> *E.g.*, *id.* at 846–47 (Crompton, J.); *id.* at 874–75 (Erle, J.); *id.* at 883–84, 888 (Wightman, J.); *id.* at 903, 906 (Coleridge, J.); *id.* at 920–21 (Parke, B.); *id.* at 945 (Jervis, C.J.).

<sup>236</sup> *Id.* at 872 (Erle, J.).

property at common law no judgment whatever was pronounced.”<sup>237</sup>

The reports of *Beckford* and *Jefferys* do not mention the speeches of the Lords in *Donaldson*, and thus we might be tempted to conclude that the judges and law Lords were not aware of them. One could then argue that if the speeches had been known, the jurists would have characterized *Donaldson* differently. Given the nature of the publications in which the case first appeared, access to the speeches many years later might be a problem in some instances. Nevertheless, the underlying premise arguably does not hold because it is more likely than not that in *Beckford* and *Jefferys* the judges and law Lords were aware of the speeches. *Beckford* was argued before a judge who had participated in *Donaldson*, and an account of the speeches was readily available as part of a major publication on the debates and proceedings of both Houses.<sup>238</sup> The speeches later became even more accessible to all of those involved in *Jefferys* because they were reprinted once more in what had, by then, become the standard work on parliamentary debates from 1066 to 1803.<sup>239</sup> Indeed, it seems very unlikely that the law Lords, in particular, would have failed to consult this work, which was housed in the library of the House of Lords.<sup>240</sup>

In short, I view the aforementioned cases not as mistaken, as my colleague does, but as correctly assessing what was decided in *Donaldson* and what was not.

## VI. CONCLUSION

So what, then, is the correct way to describe the holding in *Donaldson*? The House of Lords held that published works were subject to the durational terms of the Statute of Anne, but the reasoning of the decision cannot be determined. In advising the House, a number of judges and Lords offered their own views of the matter, but none of them singly or in combination establishes why the House ruled as it did. Nevertheless, they do stand as guidance on what the law was at the time. In this respect, I must again agree with Lysander Spooner, who 160 years ago wrote:

[*Donaldson*] does not stand as a decision that an author had

<sup>237</sup> *Id.* at 961 (Lord Brougham); *see also id.* at 968–69.

<sup>238</sup> *See* 7 HISTORY, *supra* note 84, at i, 2.

<sup>239</sup> *See* 17 COBBETT, *supra* note 87, at col. 953.

<sup>240</sup> *See* CHRISTOPHER DOBSON, THE LIBRARY OF THE HOUSE OF LORDS: A SHORT HISTORY 5–6 (1960); MS Catalogue of the Library of the House of Lords, c.1848, PA HL/PO/LB/1/41. The *Gentleman's Magazine*, which contained a report of Lord Camden's speech and which was well known at the time to carry parliamentary debates, also was available in the Lords' Library. Catalogue, *supra*, PA HL/PO/LB/1/41. Presumably, counsel for the appellant in *Jefferys* had access to the speeches. He argued that the House in *Donaldson* had rejected an antecedent right—a position that is hard if not impossible to justify based on the judges' answers or opinions alone. *Jefferys*, 4 H.L.C. at 823 (arg.); *see also* CASE FOR THE PLAINTIFF IN ERROR 4 ([London], W. Ostell [1852]), PA HL/PO/JU/4/3/135.

*not* a perpetual copyright *at common law*; but only as a decision that, *if* he had such a right at common law, that right had been taken away by the statute.

The diversity of opinion, both among the judges and the lords, deprive this decision of all weight as an authority. The only things really worthy of consideration are the arguments urged on the one side and the other.<sup>241</sup>

As I have already noted, it was common for observers in the late 18th century to read *Donaldson* and *Millar* as predominating in favor of an antecedent right. This is not surprising. On the strict interpretation of *Donaldson*, *Millar* remained relevant. And if one combines the views of the judges and law Lords from both cases, a majority believed that there was a common-law copyright before publication, a slim majority believed it was not lost upon publication, and a majority believed the Statute of Anne preempted one or both types of antecedent rights. This is not to say that only quantitative measures matter. Undoubtedly, in the minds of some observers there is a qualitative component as well, wherein experience and reputations come into play. Nevertheless, on the whole, the orthodox origin of copyright—that authors held a natural or customary property right, protected at common law—certainly finds support in the late 18th century.

A final word. Although I disagree with Abrams and Deazley as to the true import of *Donaldson*, they do correctly point out that many modern scholars have misread the decision in the other direction by stating that the House of Lords affirmatively held that there was an antecedent right. Most instances of this phenomenon, undoubtedly, are accidental and arise from the mistaken belief that in 1774 the judges were solely empowered to decide appeals in the House of Lords, i.e., that the judges were the House. In any case, in light of the foregoing, it is hoped that this too is something that will be avoided in the future.

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<sup>241</sup> SPOONER, *supra* note 171, at 212–13; accord JOHN SHORTT, THE LAW RELATING TO WORKS OF LITERATURE AND ART 63–64 (London, H. Cox 1871).

## APPENDIX

The sections below collate—in order of the arguments, opinions, and speeches—the various reports that were published. Generally speaking, they fall into three categories: narratives (“N”), summaries (“S”), and tallies (“T”). A narrative offers some account of what was said. Many narratives are lengthy, some over 1,000 words, but others are very short. Summaries are always very brief and merely summarize the position a speaker took, e.g., that Justice Gould believed that there was a common-law right, but that the Statute of Anne preempted it. Tallies track the judges who opined for or against perpetual copyright. The number of surviving summaries and tallies are numerous. Indeed, there are so many that to list them all for every counsel, judge, and Lord would carry this Appendix to over 20 pages. Consequently, only the section on Justice Nares lists sources of all three types. For the remaining participants, I only include narratives.<sup>242</sup>

Under each speaker there are one or more main entries; each main entry contains material that is unique in some respect. In the case of lengthier narratives, we can state with confidence that the source is not only unique but original. That is to say, someone with actual knowledge of the proceedings likely created it. As the reports become shorter, however, it becomes difficult and in some cases impossible to determine if the source is based on original reporting or is merely copied from another paper.

Indentations indicate a source that is clearly derivative of the tier above it. Most derivatives are verbatim, while others truncate, paraphrase, or otherwise excerpt material. Generally speaking, I have avoided breaking down the sources beyond a single level of derivation, even in instances where I could confidently determine that a source merited as much, because to offer so much detail here would cause the Appendix to become unwieldy. There would need to be numerous second, third, and fourth tiers of derivation and indentation. I do make a few exceptions, however, for some of the principal accounts, *viz.*, the *Cases* and *Cobbett Accounts*.

If two sources are marked with an “=” that means they are so similar and close in time that it is likely that they used the same correspondents for their reports. Additionally, some newspaper reports draw from more than one source, and some newspaper issues contain more than one report. This Appendix lists the various sources in order of publication dates and times (morning, followed by evening) and otherwise alphabetically.

A full list of all the newspapers and periodicals consulted, that contain material on *Donaldson v. Becket*, appears at the end of this Appendix.

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<sup>242</sup> When time permits, I will publish a variorum report of *Donaldson v. Becket*.

## Arguments

### For the Appellants

February 4, 1774

1. Edward Thurlow, AG

- <sup>N</sup> *London Chron.*, Feb. 5
- St. James Chron. (Eve)*, Feb. 5
- Reading Mercury*, Feb. 7
- Caledonian Mercury*, Feb. 9
- Stamford Mercury*, Feb. 10
- Derby Mercury*, Feb. 11
- Edinburgh Adv.*, Feb. 11
- Newcastle Courant*, Feb. 12
- Shrewsbury Chron.*, Feb. 12
- Gent. & Lady's Weekly*, Feb. 18
- Cobbett Account*
- <sup>N</sup> *Morning Chron.* Feb. 5
- General Eve. Post*, Feb. 5
- Edinburgh Eve. Courant*, Feb. 9
- Edinburgh Adv.*, Feb. 11
- Aberdeen J.*, Feb. 14
- Gent. & Lady's Weekly*, Feb. 18
- Gentleman's Magazine*, Feb.
- Sentimental Magazine*, Feb.
- Town & Country Magazine*, Feb.
- Pleadings Account*
- Cases Account*
- Gent. & London Magazine*, Mar.
- Scots Magazine*, Mar.
- Cobbett Account*
- <sup>N</sup> *Middlesex J. (Eve)*, Feb. 5
- <sup>N</sup> *Edinburgh Adv.*, Feb. 8
- Gent. & Lady's Weekly*, Feb. 11
- <sup>N</sup> *Caledonian Mercury*, Feb. 9
- Aberdeen J.*, Feb. 14
- <sup>N</sup> *Pleadings Account*
- Cases Account*

February 7, 1774

2. John Dalrymple

- <sup>N</sup> *Gazetteer*, Feb. 8
- = *London Chron.*, Feb. 8
- General Eve. Post*, Feb. 8
- London Eve. Post*, Feb. 8
- Craftsman*, Feb. 12
- Newcastle Courant*, Feb. 12
- Edinburgh Eve. Courant*, Feb. 12
- Hampshire Chron.*, Feb. 14
- Manchester Mercury*, Feb. 15
- <sup>N</sup> *Morning Chron.*, Feb. 8
- Town & Country Magazine*, Feb.
- Pleadings Account*
- Cases Account*
- <sup>N</sup> *Middlesex J. (Eve)*, Feb. 8
- Pleadings Account*
- Cases Account*<sup>243</sup>
- <sup>N</sup> *London Chron.*, Feb. 10
- Gentleman's Magazine*, Feb.
- Town & Country Magazine*, Feb.
- Gent. & London Magazine*, Mar.
- Scots Magazine*, Mar.
- Cobbett Account*
- <sup>N</sup> *Edinburgh Adv.*, Feb. 11
- Aberdeen J.*, Feb. 21
- <sup>N</sup> *Morning Chron.*, Feb. 11
- <sup>N</sup> *Caledonian Mercury*, Feb. 12
- Gent. & Lady's Weekly*, Feb. 18

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<sup>243</sup> This account inserts an imaginary act of Parliament—An Act for the Encouragement of Planting—that Dalrymple used during argument but that was expressly omitted from the *Middlesex Journal* and *Pleadings Account*. The invented act probably circulated separately in print, for the use of the Lords, but no stand-alone copies appear to have survived. CASES, *supra* note 76, at 22–24.



*For the Respondents*

February 8, 1774

## 3. Alexander Wedderburn, SG

- <sup>N</sup> *Gazetteer*, Feb. 9  
*General Eve. Post*, Feb. 10  
*London Eve. Post*, Feb. 10  
*Craftsman*, Feb. 12  
*Edinburgh Eve. Courant*, Feb. 14  
*Stamford Mercury*, Feb. 17  
*Derby Mercury*, Feb. 18  
<sup>N</sup> *Morning Chron.*, Feb. 9  
*London Chron.*, Feb. 10  
*Cobbett Account*  
*Sentimental Magazine*, Feb.  
*Pleadings Account*  
*Cases Account*<sup>244</sup>  
*Scots Magazine*, Mar.  
<sup>N</sup> *Caledonian Mercury*, Feb. 12  
*Gent. & Lady's Weekly*, Feb. 18  
<sup>N</sup> *Middlesex J. (Eve)*, Feb. 12  
*Town & Country Magazine*, Feb.  
<sup>N</sup> *Edinburgh Adv.*, Feb. 15  
*Edinburgh Eve. Courant*, Feb. 16  
*Aberdeen J.*, Feb. 21

## 4. John Dunning

- <sup>N</sup> *Gazetteer*, Feb. 9  
*General Eve. Post*, Feb. 10  
*London Eve. Post*, Feb. 10  
*Craftsman*, Feb. 12  
*Edinburgh Eve. Courant*, Feb. 14  
*Stamford Mercury*, Feb. 17  
*Derby Mercury*, Feb. 18  
<sup>N</sup> *Morning Chron.*, Feb. 9  
*London Chron.*, Feb. 10  
*Cobbett Account*  
*Leeds Intelligencer*, Feb. 15  
*Gentleman's Magazine*, Feb.  
*Sentimental Magazine*, Feb.  
*Town & Country Magazine*, Feb.  
*Pleadings Account*  
*Cases Account*  
*Gent. & London Magazine*, Mar.  
*Scots Magazine*, Mar.  
<sup>N</sup> *Public Adv.*, Feb. 9  
*Ipswich J.*, Feb. 12  
<sup>N</sup> *Middlesex J. (Eve)*, Feb. 10  
*Public Hue & Cry*, Feb. 11  
*Pleadings Account*  
*Cases Account*  
<sup>N</sup> *Caledonian Mercury*, Feb. 12  
*Gent. & Lady's Weekly*, Feb. 18  
<sup>N</sup> *Edinburgh Adv.*, Feb. 15  
*Edinburgh Eve. Courant*, Feb. 16  
*Aberdeen J.*, Feb. 21

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<sup>244</sup> This account briefly mentions a case, *Baskett v. Woodfall*, PRO C33/417, ff. 337<sup>v</sup>–338<sup>r</sup> (Ch. 1762), that was not mentioned in the *Pleadings Account*. CASES, *supra* note 76, at 28.

*For the Appellants—Reply*

February 9, 1774

## 5. Edward Thurlow, AG

<sup>N</sup> *London Chron.*, Feb. 10= *Public Adv.*, Feb. 10*Jackson's Oxford J.*, Feb. 12*Northampton Mercury*, Feb. 14*Edinburgh Adv.*, Feb. 15*Dublin J.*, Feb. 17*Aberdeen J.*, Feb. 21<sup>N</sup> *Morning Chron.*, Feb. 10*London Chron.*, Feb. 12*Cobbett Account**Scots Magazine*, Mar.<sup>N</sup> *Middlesex J. (Eve)*, Feb. 10*Public Hue & Cry*, Feb. 11<sup>N</sup> *Caledonian Mercury*, Feb. 14<sup>N</sup> *Edinburgh Adv.*, Feb. 15*Edinburgh Eve. Courant*, Feb. 16*Aberdeen J.*, Feb. 21**Questions Posed to the Judges**

February 9, 1774

*London Chron.*, Feb. 10*General Eve. Post*, Feb. 10*London Eve. Post*, Feb. 10*St. James Chron. (Eve)*, Feb. 10*Gazetteer*, Feb. 11*Craftsman*, Feb. 12*Ipswich J.*, Feb. 12*Jackson's Oxford J.*, Feb. 12*Caledonian Mercury*, Feb. 14*Hampshire Chron.*, Feb. 14*Northampton Mercury*, Feb. 14*Reading Mercury*, Feb. 14*Edinburgh Eve. Courant*, Feb. 14*Bath Chron.*, Feb. 17*Dublin J.*, Feb. 17*Stamford Mercury*, Feb. 17*Derby Mercury*, Feb. 18*Gent. & Lady's Weekly*, Feb. 18*Newcastle Courant*, Feb. 19*Aberdeen J.*, Feb. 21*London Magazine*, Feb.*Annual Register 1774**Morning Chron.*, Feb. 10<sup>†</sup>*Edinburgh Adv.*, Feb. 15*Gentleman's Magazine*, Feb.*Sentimental Magazine*, Feb.*Town & Country Magazine*, Feb.*Pleadings Account**Cases Account**Gent. & London Magazine*, Mar.*Scots Magazine*, Mar.*Public Adv.*, Feb. 10*Middlesex J. (Eve)*, Feb. 10*Public Hue & Cry*, Feb. 11*Public Register*, Feb. 17*Morning Chron.*, Feb. 15<sup>†</sup>*Printed Journal*<sup>†</sup>*Cobbett Account*<sup>†</sup> These sources (and their derivatives) are nearly identical.

## Opinions

February 15, 1774

1. Baron James Eyre, EX<sup>N</sup>
  - Morning Chron.*, Feb. 16
  - Middlesex J. (Eve)*, Feb. 17
  - Edinburgh Eve. Courant*, Feb. 23
  - Sentimental Magazine*, Feb.
  - <sup>N</sup> *London Chron.*, Feb. 17
  - Edinburgh Adv.*, Feb. 22
  - Weekly Magazine*, Feb. 24
  - Gent. & Lady's Weekly*, Feb. 25
  - Gentleman's Magazine*, Feb.
  - Pleadings Account*
  - Cases Account*
  - Gent. & London Magazine*, Mar.
  - Scots Magazine*, Apr.
  - Cobbett Account*
  - <sup>N</sup> *Caledonian Mercury*, Feb. 19
  - Glasgow J.*, Feb. 24
  - <sup>N</sup> *Gentleman's Magazine*, Feb.
  - Pleadings Account*
  - Cases Account*
  - Gent. & London Magazine*, Mar.
2. Justice George Nares, CP<sup>S</sup>
  - Gazetteer*, Feb. 16
  - General Eve. Post*, Feb. 17
  - London Eve. Post*, Feb. 17
  - Craftsman*, Feb. 19
  - Jackson's Oxford J.*, Feb. 19
  - Westminster J.*, Feb. 19
  - Hampshire Chron.*, Feb. 21
  - Derby Mercury*, Feb. 25
  - <sup>N</sup> *Morning Chron.*, Feb. 16
  - London Chron.*, Feb. 17
  - Cobbett Account*
  - Middlesex J. (Eve)*, Feb. 17
  - Edinburgh Eve. Courant*, Feb. 23
  - Gent. & Lady's Weekly*, Feb. 25
  - Sentimental Magazine*, Feb.
  - Pleadings Account*
  - Cases Account*
  - Gentleman's Magazine*, Mar.
  - Gent. & London Magazine*, Apr.
  - Scots Magazine*, Apr.
  - <sup>S</sup> *Public Adv.*, Feb. 16<sup>245</sup>
  - Ipswich J.*, Feb. 19
  - <sup>T</sup> *Bath Chron.*, Feb. 17
  - <sup>S</sup> *Caledonian Mercury*, Feb. 19†
  - Glasgow J.*, Feb. 24†
  - <sup>T</sup> *Jackson's Oxford J.*, Feb. 19
  - =Public Adv.*, Feb. 19
  - Glocester J.*, Feb. 21
  - Northampton Mercury*, Feb. 21
  - Reading Mercury*, Feb. 21
  - Leeds Intelligencer*, Feb. 22
  - Manchester Mercury*, Feb. 22
  - Bath Chron.*, Feb. 24
  - <sup>S</sup> *Shrewsbury Chron.*, Feb. 19
  - <sup>T</sup> *Westminster J.*, Feb. 19
  - General Eve. Post*, Feb. 19
  - London Eve. Post*, Feb. 19
  - Middlesex J. (Eve)*, Feb. 19
  - St. James Chron. (Eve)*, Feb. 19
  - Hampshire Chron.*, Feb. 21
3. Justice William Ashurst, KB<sup>N</sup>
  - Morning Chron.*, Feb. 16
  - London Chron.*, Feb. 17
  - Cobbett Account*
  - Middlesex J. (Eve)*, Feb. 17
  - Edinburgh Adv.*, Feb. 22
  - Edinburgh Eve. Courant*, Feb. 23
  - Weekly Magazine*, Feb. 24
  - Gent. & Lady's Weekly*, Feb. 25
  - Sentimental Magazine*, Feb.
  - Pleadings Account*
  - Cases Account*
  - Gentleman's Magazine*, Mar.
  - Gent. & London Magazine*, Apr.
  - Scots Magazine*, Apr.
  - <sup>N</sup> *Public Adv.*, Feb. 16
  - Ipswich J.*, Feb. 19
  - Town & Country Magazine*, Feb.

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<sup>245</sup> Woodfall was likely the source for the *Public Advertiser*. See *supra* notes 144 & 167.

## 4. Justice William Blackstone, CP

There are no published opinions or narratives for Justice Blackstone. Blackstone was ill with the gout, so Justice Ashurst read his answers to the Lords.<sup>246</sup> All that remains is brief summaries and tallies, which are not reproduced here.

*Stamford Mercury*, Feb. 24

*Derby Mercury*, Feb. 25

*Newcastle Courant*, Feb. 26

*Dublin J.*, Mar. 1

*Public Register*, Mar. 1

<sup>T</sup> *Edinburgh Eve. Courant*, Feb. 19<sup>†</sup>

<sup>S</sup> *Edinburgh Adv.*, Feb. 22<sup>†</sup>

*Weekly Magazine*, Feb. 24<sup>†</sup>

*Aberdeen J.*, Feb. 28<sup>†</sup>

<sup>T</sup> *Public Adv.*, Feb. 22

*Middlesex J. (Eve)*, Feb. 22

*Jackson's Oxford J.*, Feb. 26

*Hampshire Chron.*, Feb. 28

*Leinster J.*, Mar. 5

*Public Register*, Mar. 5

<sup>T</sup> *Caledonian Mercury*, Feb. 23<sup>†</sup>

*Aberdeen J.*, Feb. 28<sup>†</sup>

<sup>T</sup> *Edinburgh Eve. Courant*, Feb. 23<sup>†</sup>

*Gent. & Lady's Weekly*, Feb. 25<sup>†</sup>

*Aberdeen J.*, Feb. 28<sup>†</sup>

<sup>T</sup> *Edinburgh Adv.*, Feb. 25<sup>†</sup>

*Aberdeen J.*, Feb. 28<sup>†</sup>

<sup>S</sup> *Town & Country Magazine*, Feb. <sup>†</sup>

<sup>T</sup> *Westminster Magazine*, Feb.

<sup>T</sup> *Scots Magazine*, Apr.

<sup>S</sup> *Burrow Report*<sup>†</sup>

<sup>T</sup> *Brown Report*<sup>†</sup>

<sup>S</sup> *Printed Journal*<sup>†</sup>

February 17, 1774

## 5. Justice Edward Willes, KB

<sup>N</sup> *Morning Chron.*, Feb. 18

*London Chron.*, Feb. 19

*Cobbett Account*

*Sentimental Magazine*, Feb.

*Pleadings Account*

*Cases Account*

*Gentleman's Magazine*, Mar.

*Gent. & London Magazine*, Apr.

*Scots Magazine*, Apr.

## 6. Justice Richard Aston, KB

<sup>N</sup> *Morning Chron.*, Feb. 18 & 19

*London Chron.*, Feb. 19 & 22

*Cobbett Account*

*Edinburgh Eve. Courant*, Feb. 26

*Sentimental Magazine*, Feb.

*Pleadings Account*

*Cases Account*

*Gentleman's Magazine*, Mar.

*Gent. & London Magazine*, Apr.

*Scots Magazine*, Apr.

*Cobbett Account*

<sup>246</sup> WEEKLY MAGAZINE (Edinburgh), Feb. 24, 1774, at 286 ("He only answered the questions in general, without going into the argument.").

<sup>†</sup> These sources agree with the manuscript journal on Justice Nares's views.

## 7. Baron George Perrot, EX

<sup>N</sup> *Morning Chron.*, Feb. 19  
*London Chron.*, Feb. 22  
*Cobbett Account*  
*Edin. Eve. Courant*, Feb. 26 & Mar. 2  
*Pleadings Account*  
*Cases Account*  
*Gentleman's Magazine*, Mar.  
*Gent. & London Magazine*, Apr.  
*Scots Magazine*, Apr.  
<sup>N</sup> *Edinburgh Adv.*, Feb. 22  
*Edinburgh Eve.*, Feb. 23  
*Weekly Magazine*, Feb. 24

## 8. Justice Henry Gould, CP

<sup>N</sup> *Morning Chron.*, Feb. 21  
*London Chron.*, Feb. 24  
*Cobbett Account*  
*Sentimental Magazine*, Feb.  
*Pleadings Account*  
*Cases Account*  
*Gentleman's Magazine*, Mar.  
*Gent. & London Magazine*, Apr.  
*Scots Magazine*, Apr.  
<sup>N</sup> *Edinburgh Adv.*, Feb. 22  
*Edinburgh Eve.*, Feb. 23  
*Weekly Magazine*, Feb. 24

## 9. Baron Richard Adams, EX

<sup>N</sup> *Morning Chron.*, Feb. 21  
*London Chron.*, Feb. 24  
*Cobbett Account*  
*Sentimental Magazine*, Feb.  
*Weekly Magazine*, Mar. 3  
*Pleadings Account*  
*Cases Account*  
*Gentleman's Magazine*, Mar.  
*Gent. & London Magazine*, Apr.  
*Scots Magazine*, Apr.  
<sup>N</sup> *Edinburgh Adv.*, Feb. 22  
*Edinburgh Eve. Courant*, Feb. 23  
*Weekly Magazine*, Feb. 24  
<sup>N</sup> *Caledonian Mercury*, Feb. 23

February 21, 1774

## 10. Chief Baron Sidney Smythe, EX

<sup>N</sup> *Morning Chron.*, Feb. 22  
*London Chron.*, Feb. 24  
*Town & Country Magazine*, Feb.  
*Weekly Magazine*, Mar. 3  
*Edinburgh Eve. Courant*, Mar. 7  
*Pleadings Account*  
*Cases Account*  
*Gentleman's Magazine*, Mar.  
*Cobbett Account*  
*Gent. & London Magazine*, Apr.  
*Scots Magazine*, Apr.

## 11. Ch. J. William De Grey, CP

<sup>N</sup> *Public Adv.*, Feb. 22  
*Middlesex J. (Eve)*, Feb. 22  
*St. James Chron. (Eve)*, Feb. 22  
*Shrewsbury Chron.*, Feb. 26  
*Hampshire Chron.*, Feb. 28  
*Reading Mercury*, Feb. 28  
*Westminster Magazine*, Feb.  
*Dublin J.*, Mar. 3  
<sup>N</sup> *Morning Chron.*, Feb. 23  
*Town & Country Magazine*, Feb.  
*Pleadings Account*  
*Cases Account*  
*Gentleman's Magazine*, Apr.  
*Cobbett Account*  
*Scots Magazine*, Apr.  
*Gent. & London Magazine*, May

- <sup>N</sup> *London Chron.*, Feb. 24  
*Weekly Magazine*, Mar. 3  
<sup>N</sup> *Edinburgh Adv.*, Feb. 25  
*Caledonian Mercury*, Feb. 26  
*Edinburgh Eve. Courant*, Feb. 26

### Speeches

February 22, 1774

- |   |  |
|---|--|
| <p>1. Charles Pratt, Lord Camden<br/> <sup>N</sup> <i>Public Adv.</i>, Feb. 23<br/> <i>London Chron.</i>, Feb. 24<br/> <i>Ipswich J.</i>, Feb. 26<br/> <i>Jackson's Oxford J.</i>, Feb. 26<br/> <i>Shrewsbury Chron.</i>, Feb. 26<br/> <i>Glocester J.</i>, Feb. 28<br/> <i>Manchester Mercury</i>, Mar. 1<br/> <i>Bath Chron.</i>, Mar. 3<br/> <i>Derby Mercury</i>, Mar. 4<br/> <i>Dublin J.</i>, Mar. 5<br/> <i>Leinster J.</i>, Mar. 9<br/> <i>Hibernian Magazine</i>, Mar.<br/> <sup>N</sup> <i>Morning Chron.</i>, Feb. 24 &amp; 25<br/> <i>London Chron.</i>, Feb. 26 &amp; Mar. 1<br/> <i>Cobbett Account</i><br/> <i>St. James's Magazine</i>, Feb.<br/> <i>Town &amp; Country Magazine</i>, Feb.<br/> <i>Edinburgh Adv.</i>, Mar. 4<br/> <i>Caledonian Mercury</i>, Mar. 7 &amp; 9<br/> <i>Pleadings Account</i><br/> <i>Cases Account</i><br/> <i>Weekly Magazine</i>, Mar. 10<br/> <i>Gent. &amp; Lady's Weekly</i>, Mar. 11<br/> <i>Gent. &amp; London Magazine</i>, Mar.<br/> <i>Gentleman's Magazine</i>, Apr.<br/> <i>Scots Magazine</i>, May<br/> <sup>N</sup> <i>London Eve. Post</i>, Feb. 24<br/> = <i>Middlesex J. (Eve)</i>, Feb. 24<br/> <i>Northampton Mercury</i>, Feb. 28<br/> <i>Reading Mercury</i>, Feb. 28<br/> <i>Edinburgh Eve. Courant</i>, Feb. 28<br/> <i>Leeds Intelligencer</i>, Mar. 1<br/> <i>Newcastle Courant</i>, Mar. 5<br/> <i>Public Register</i>, Mar. 5<br/> <i>Universal Magazine</i>, Mar.<br/> <i>Debrett Account</i><br/> <sup>N</sup> <i>Caledonian Mercury</i>, Feb. 26<br/> <i>Glasgow J.</i>, Mar. 3<br/> <i>Aberdeen J.</i>, Mar. 7</p> | <p>2. Henry Bathurst, L.C. Apsley<br/> <sup>N</sup> <i>Public Adv.</i>, Feb. 23<br/> <i>London Chron.</i>, Feb. 24<br/> <i>Ipswich J.</i>, Feb. 26<br/> <i>Jackson's Oxford J.</i>, Feb. 26<br/> <i>Shrewsbury Chron.</i>, Feb. 26<br/> <i>Glocester J.</i>, Feb. 28<br/> <i>Manchester Mercury</i>, Mar. 1<br/> <i>Bath Chron.</i>, Mar. 3<br/> <i>Derby Mercury</i>, Mar. 4<br/> <i>Dublin J.</i>, Mar. 5<br/> <i>Leinster J.</i>, Mar. 9<br/> <i>Scots Magazine</i>, May<br/> <sup>N</sup> <i>London Eve. Post</i>, Feb. 24<br/> = <i>Middlesex J. (Eve)</i>, Feb. 24<br/> <i>Northampton Mercury</i>, Feb. 28<br/> <i>Reading Mercury</i>, Feb. 28<br/> <i>Edinburgh Eve. Courant</i>, Feb. 28<br/> <i>Leeds Intelligencer</i>, Mar. 1<br/> <i>Newcastle Courant</i>, Mar. 5<br/> <i>Public Register</i>, Mar. 5<br/> <i>Universal Magazine</i>, Mar.<br/> <i>Debrett Account</i><br/> <sup>N</sup> <i>Caledonian Mercury</i>, Feb. 26.<br/> <i>Glasgow J.</i>, Mar. 3<br/> <i>Aberdeen J.</i>, Mar. 7<br/> <sup>N</sup> <i>Morning Chron.</i>, Feb. 26<br/> <i>London Chron.</i>, Mar. 5<br/> <i>Cobbett Account</i><br/> <i>Pleadings Account</i><br/> <i>Cases Account</i><br/> <i>Edinburgh Eve. Courant</i>, Mar. 9<br/> <sup>N</sup> <i>Edinburgh Adv.</i>, Mar. 1</p> |
|---|--|

<sup>N</sup> *London Eve. Post*, Feb. 26

*Bath Chron.*, Mar. 3

<sup>N</sup> *Edinburgh Adv.*, Mar. 1

3. Thomas Lyttelton, Lord Lyttelton

<sup>N</sup> *London Eve. Post*, Feb. 24

=*Middlesex J. (Eve)*, Feb. 24

*Northampton Mercury*, Feb. 28

*Reading Mercury*, Feb. 28

*Edinburgh Eve. Courant*, Feb. 28

*Edinburgh Adv.*, Mar. 1

*Leeds Intelligencer*, Mar. 1

*Newcastle Courant*, Mar. 5

*Public Register*, Mar. 5

*Universal Magazine*, Mar.

*Debrett Account*

*Cobbett Account*

<sup>N</sup> *Morning Chron.*, Feb. 26

*Pleadings Account*

*Cases Account*

<sup>N</sup> *General Eve. Post*, Mar. 10

4. Edmund Law, Bishop of Carlisle

<sup>N</sup> *London Eve. Post*, Feb. 24

=*Middlesex J. (Eve)*, Feb. 24

*Northampton Mercury*, Feb. 28

*Reading Mercury*, Feb. 28

*Edinburgh Eve. Courant*, Feb. 28

*Leeds Intelligencer*, Mar. 1

*Newcastle Courant*, Mar. 5

*Public Register*, Mar. 5

*Universal Magazine*, Mar.

*Debrett Account*

*Cobbett Account*

<sup>N</sup> *Morning Chron.*, Feb. 26

*Pleadings Account*

*Cases Account*

<sup>N</sup> *General Eve. Post*, Mar. 10

5. Thomas Howard, Earl of Effingham

<sup>N</sup> *Public Adv.*, Feb. 23

*London Chron.*, Feb. 24

*Ipswich J.*, Feb. 26

*Jackson's Oxford J.*, Feb. 26

*Shrewsbury Chron.*, Feb. 26

*Gloicester J.*, Feb. 28

*Manchester Mercury*, Mar. 1

*Bath Chron.*, Mar. 3

*Derby Mercury*, Mar. 4

*Dublin J.*, Mar. 5

*Leinster J.*, Mar. 9

*Hibernian Magazine*, Mar.

*Scots Magazine*, May

<sup>N</sup> *London Eve. Post*, Feb. 24

=*Middlesex J. (Eve)*, Feb. 24

*Northampton Mercury*, Feb. 28

*Reading Mercury*, Feb. 28

*Edinburgh Eve. Courant*, Feb. 28

*Leeds Intelligencer*, Mar. 1

*Newcastle Courant*, Mar. 5

*Public Register*, Mar. 5

*Universal Magazine*, Mar.

*Debrett Account*

*Cobbett Account*

<sup>N</sup> *Morning Chron.*, Feb. 26

*London Eve. Post*, Feb. 26

*Stamford Mercury*, Mar. 3

*Westminster J.*, Mar. 5

*Pleadings Account*

*Cases Account*

<sup>N</sup> *General Eve. Post*, Mar. 10

**Full Names of British and Irish Newspapers and Periodicals  
that Contain Material on *Donaldson v. Becket***

*England*

The Annual Register, or a View of the History, Politics, and Literature, For  
the Year 1774 (London)  
The Bath Chronicle  
The Craftsman; or Say's Weekly Journal (London)  
Drewry's Derby Mercury  
The Gazetteer and New Daily Advertiser (London)  
The General Evening Post (London)  
The Gentleman's Magazine, and Historical Chronicle (London)  
The Gloucester Journal  
The Hampshire Chronicle: Or, Winchester, Southampton, and Portsmouth  
Mercury (Southampton)  
The Ipswich Journal  
Jackson's Oxford Journal  
The Lady's Magazine; or Entertaining Companion for the Fair Sex  
(London)  
The Leeds Intelligencer  
The London Chronicle  
The London Evening-Post  
The London Magazine: Or, Gentleman's Monthly Intelligencer  
The Manchester Mercury and Harrop's General Advertiser  
Middlesex Journal, and Evening Advertiser (London)  
The Monthly Review; or, Literary Journal: From July to December 1774  
(London)  
The Morning Chronicle, and London Advertiser  
The Morning Post, and Daily Advertiser (London)  
The Newcastle Courant  
The Northampton Mercury  
The Public Advertiser (London)  
The Public Hue and Cry; or, Sir John Fielding's General Preventive Plan  
(London)  
The Reading Mercury, and Oxford Gazette (Reading)  
The St. James's Chronicle; Or, British Evening-Post (London)  
The St. James's Magazine: or Memoirs of Our Own Times (London)  
The Sentimental Magazine; or, General Assemblage of Science, Taste, and  
Entertainment (London)  
The Shrewsbury Chronicle, Or, Wood's British Gazette  
The Stamford Mercury  
The Town and Country Magazine; or Universal Repository of Knowledge,  
Instruction, and Entertainment (London)  
The Universal Magazine of Knowledge and Pleasure (London)



The Weekly Magazine; or, Polite Register of Literature, Politics and News (London)<sup>247</sup>

The Westminster Journal: And London Political Miscellany (London)<sup>248</sup>

The Westminster Magazine; or, The Pantheon of Taste (London)

*Scotland*

The Aberdeen Journal; and North-British Magazine

The Caledonian Mercury (Edinburgh)

The Edinburgh Advertiser

The Edinburgh Evening Courant

The Edinburgh Magazine and Review

The Gentleman and Lady's Weekly Magazine (Edinburgh)<sup>249</sup>

Glasgow Journal

The Scots Magazine (Edinburgh)

The Weekly Magazine, or Edinburgh Amusement

*Ireland*

The Dublin Journal, George Faulkner

The Gentleman's and London Magazine: or, Monthly Chronologer (Dublin)

Hibernian Magazine, or Compendium of Entertaining Knowledge (Dublin)

The Leinster Journal (Kilkenny), Edmund Finn

The Public Register: Or, Freeman's Journal (Dublin)

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<sup>247</sup> I was unable to review this periodical because the relevant issues appear to have perished. Should they ever reappear, an advertisement indicates that issue 5 reported the principal arguments of counsel on both sides. MORNING POST (London), Feb. 14, 1774, at 1 (advertisement).

<sup>248</sup> I was unable to locate a surviving copy of the February 26 issue of this weekly periodical.

<sup>249</sup> I was unable to locate a surviving copy of the March 4 or 18 issues of this weekly periodical.

