June 2010

The Untold Story of the First Copyright Suit under the Statute of Anne in 1710

H. Tomas Gomez-Arostegui

Follow this and additional works at: https://scholarship.law.berkeley.edu/btlj

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38698T

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Technology Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
THE UNTOLD STORY OF THE FIRST COPYRIGHT SUIT UNDER THE STATUTE OF ANNE IN 1710

H. Tomás Gómez-Arostegui

I. INTRODUCTION

II. THE REGULATORY FRAMEWORK TO 1710

A. BEFORE THE STATUTE OF ANNE

1. Royal Privilege

© 2010 H. Tomás Gómez-Arostegui.

† Associate Professor of Law, Lewis & Clark Law School. This article was first presented during a conference at the University of California, Berkeley School of Law, celebrating the 300th anniversary of the Statute of Anne. It later benefited from comments received during an IP workshop at the University of Michigan Law School. I would like to thank Isabella Alexander, John Barnard, Hamilton Bryson, Brienne Carpenter, David Levy, Nancy Mace, Joe Miller, Mark Rose, and Simon Stern for their comments on earlier versions of this article or for otherwise assisting in its preparation. Special thanks are due to Maureen Bell, who has been incredibly generous in reviewing my article and sharing her knowledge of the book trade with me. Susanne Jenks came to my aid several times, helping me track down documents in London when I was away. Rachel Cosgrave of Lambeth Palace Library, Liz Hore and Tim Padfield of the National Archives, Andrew Mussell of Gray’s Inn, and Jane Ruddell of the Mercers’ Company were also gracious and helpful in addressing my many questions. As always, I owe much to Lynn Williams’s ability to track down difficult-to-find sources. Research at the National Archives, Parliamentary Archives, London Metropolitan Archives, Guildhall Library, British Library, Lambeth Palace Library, and Cambridge University Library was made possible by a gift from Kay Kitagawa and Andy Johnson-Laird. I thank them both for their generous support. Documents from the National Archives are crown copyrighted and reproduced here with permission.


The bill of complaint in Tonson v. Baker remains in relatively good condition today, despite being 300 years old. Nevertheless, it does suffer from a large fungal stain, making some parts of the text difficult to read under ordinary light. I would like to thank Mr. Johnson-Laird for training me in a special UV photographic technique, and Kostas Ntanos at the National Archives for permitting me to utilize it, which revealed all in the bill.
I. INTRODUCTION

Three hundred years ago, on April 5, 1710, the Parliament of the Kingdom of Great Britain enacted a statute that ushered in the modern form of copyright law. The Statute of Anne, as it is often called, promised authors of new books a copyright of fourteen years from publication, with a possible second term of the same duration.¹ A milestone, the statute was the first dedicated exclusively to copyright and the first to mention authors as beneficiaries by name. It was also the first to express (though not necessarily achieve for over sixty years) a utilitarian rationale for copyright—viz., that a

¹. Statute, 1710, 8 Ann., c. 19.
limited monopoly would be given to encourage authorship. That rationale formed the bedrock for the Anglo-American legislation that followed.

This is the story of *Tonson v. Baker*, the first lawsuit filed under the statute. Brought in the Court of Chancery three months after the statute went into effect, *Tonson* is a fascinating suit that has not received the attention it deserves. The case was never reported and as a consequence has been largely inaccessible and overlooked by those studying the field of copyright history.

*Tonson* pitted the most famous publisher of the day, Jacob Tonson Sr., a strong proponent of copyright protection, against a gang of notorious book pirates led by John Baker, a publisher known for dealing in books (many of them dangerous) on behalf of outspoken but anonymous authors, including Daniel Defoe. The dispute centered around the right to print the trial proceedings of Henry Sacheverell, Doctor of Divinity, who had been impeached by the House of Commons and tried in the House of Lords for high crimes and misdemeanors. Tonson received the exclusive right to print the trial from the Lords in March 1710, and later registered his forthcoming work pursuant to the statute in June. One month after Tonson published his account, Baker published his own book on the whole Sacheverell affair. Baker’s edition copied the trial portions directly from Tonson’s.

The suit was over soon after it started and never led to a decree or judgment. But it nevertheless remains important because, among other things, the suit offers contemporaneous evidence of how book pirates reacted to the Statute of Anne, how the greatest publisher of the period interpreted the statute immediately after its enactment, and how the Court of Chancery handled the preliminary stages of an early copyright lawsuit. It also demonstrates that, contrary to the hopes of right holders, the statute could not and did not instantaneously halt book-trade piracy. Moreover, as part of the dissection of *Tonson v. Baker* and its antecedents, other important and previously unknown facts about copyright before the arrival of the statute are revealed. We learn, for example, that Baker may have been the impetus for the parliamentary petition that led to the Statute of Anne. And we also discover that Baker convinced the Court of Chancery in another case filed just before the statute that courts of equity had no power to award the disgorgement of a defendant’s profits earned from copyright infringement.

This Article has three components. The first, and largest, reconstructs the lawsuit and the circumstances surrounding it from the ground up. The objective has been to create the fullest account possible from the surviving records. To do so properly required several trips to London to review

---

2. C9/371/41 (Ch. 1710).
materials stored at the National Archives, Parliamentary Archives, London Metropolitan Archives, Guildhall Library, and British Library, among other places. I have also consulted sources from repositories in the United States. Though the number of court records from the suit is meager, over 100 other manuscript sources, and hundreds of published primary sources, have made it possible to breathe new life into the dispute, the litigants, and even the lawyers. This account thus extends far beyond the legal machinations of Tonson v. Baker. It also embraces the London book trade of the period and includes rich portraits of the major players in this infringement drama.

The second component demonstrates why copyright history, including the Statute of Anne and Tonson v. Baker, still matters today. I use the statute and Tonson as historical examples to help critique the Supreme Court’s decision in Feltner v. Columbia Pictures Television, Inc. There, the Court held that litigants have a constitutional right to a jury trial on all issues relating to statutory damages under the Copyright Act of 1976, including on the willfulness of the infringement and the amount of the award. Though the Court reached the correct outcome, it committed some errors in its analysis of English law. Most importantly, the Court, the litigants, and the amici curiae failed to spot the easiest way to demonstrate that the 18th century analogue to statutory damages—viz., the penalties available under the Statute of Anne—could only be had at law, and was thus subject to a jury trial. The errors do not inspire confidence in the Court’s ability to investigate the historical antecedents that it often says are so important to modern doctrine.

Lastly, given the inaccessibility of Tonson, I have included an appendix in which I transcribe all the pertinent manuscript documents.

II. THE REGULATORY FRAMEWORK TO 1710

Much has already been written about the Statute of Anne and the history of British copyright law before 1800. Those prior works obviate the need to

re-examine the subject here, but it helps to summarize the regulatory framework that preceded the statute as well as the relevant terms of the statute itself. This backdrop places Tonson v. Baker in the proper context. Moreover, some of what appears below is based on new research and has not been treated elsewhere.

A. BEFORE THE STATUTE OF ANNE

It has often been said that the Statute of Anne was the first copyright statute. This is true insofar as we use the term “copyright” in its more modern sense. But the Statute of Anne was not the first system to regulate copyrights, nor was it the first statute to do so. Before 1710, there were several sources of exclusive printing rights, some regulated by statute, some not, and some that even went by the terms “copy right” or “copyright.”

1. Royal Privilege

The most established exclusive right to print was a Royal Privilege which the Crown granted on petition by letters patent and sometimes solely by license to a publisher, printer, or (less often) an author. Privileges were either work specific or gave the holder the right to print and sell a whole class of works. Most privileges were for a term of years or for the life of the grantee, but due to renewals and reversions, many privileges (especially class patents) were effectively perpetual. One of the most valuable class patents—granted to the Company of Stationers for the printing of primers, psalms, almanacs, and the like—was perpetual by its own terms.

The earliest printing-patent disputes were adjudicated in the Court of Assistants of the Company of Stationers, where they were arbitrated, as well as in the Court of Star Chamber and the Court of High Commission, where they were litigated. In the years before 1710, printing patents were also

---


6. Hunt, supra note 5, at 45.

upheld and enforced at law in the Courts of Common Pleas and King's Bench\textsuperscript{8} and as part of favorable decrees in equity in the Court of Chancery.\textsuperscript{9}

2. Parliamentary Privilege

A second exclusive right stemmed from Parliamentary Privilege, a subject that is not usually treated in works on copyright history because of its relative obscurity. This type of privilege is particularly important to the recounting of \textit{Tonson v. Baker}. Each House in Parliament—the Commons and the Lords—claimed to hold in its corporate capacity a right to control the publication of its votes, speeches, debates, and proceedings. No person was permitted to publish these matters, not even members themselves, unless expressly permitted or appointed.\textsuperscript{10}

Both Houses granted permission to print matters from their proceedings from time to time.\textsuperscript{11} In the course of doing so, the Houses often made the right exclusive to a particular person or group of persons, either by naming the person or nominating another to do so. In this way, the Houses granted a form of copyright. For example, when trials occurred in the House of Lords, the Lords sometimes ordered that the proceedings be printed and that the Lord Chancellor in his capacity as Speaker or Lord Steward should choose the printer.\textsuperscript{12} This form of privilege offered a broader protection than ordinary copyrights. Works created independently of the right holder's work were still prohibited. The printing rights recorded in the journals of Parliament state no expiration date; it is therefore unclear whether the appointed publishers were given a right to print the work \textit{ad infinitum}, for a single printing run only, until replaced by another publisher, or otherwise.

Both Houses of Parliament considered a breach of privilege to be contemptuous and punishable by some combination of censure, arrest, commitment until the end of a parliamentary session, or destruction of the

\begin{itemize}
\item \textsuperscript{8} \textit{E.g.}, Stationers v. Marlowe, 1 Lilly's Mod. Entries 63, \textit{cit.} 2 Show K.B. 261 (C.P. 1680); Stationers v. Wright, \textit{cit.} Skinner 234–35 (K.B. 1683/4).
\item \textsuperscript{9} \textit{E.g.}, Hills v. Lee, \textit{sub nom.} Hills v. Wright, C33/261, ff. 282\textsuperscript{r}–283\textsuperscript{v} (Ch. 1683/4); Stationers v. Lee, \textit{sub nom.} Stationers v. Wright, C33/262, f. 260\textsuperscript{v} (Ch. 1683/4).
\item \textsuperscript{10} \textit{E.g.}, 7 H.C. JOUR. 638 (Apr. 13, 1659); 16 H.L. JOUR. 391 (Feb. 27, 1698/9).
\item \textsuperscript{11} \textit{See generally} SHEILA LAMBERT, \textsc{Printing for Parliament, 1641–1700} (1984); Orders to Print, House of Lords, 1640–1800 (F.W. Torrington & J.C. Sainty eds., 1972), Parliamentary Archives BOOK/3371 (typescript).
\item \textsuperscript{12} \textit{E.g.}, 13 H.L. JOUR. 709 (Dec. 9, 1680); 15 \textit{id.} at 216, 272 (Feb. 6, Mar. 3, 1692/3); 16 \textit{id.} at 429 (Mar. 31, 1699).
\end{itemize}
offending books. Breaches were usually handled within one or both Houses or by a committee on privileges. Parliament regularly censured persons for printing proceedings without leave, at least when it was politically convenient to do so, but the offense was usually the publication per se, and not that the person had published matters that had already been exclusively assigned to another. This occurred, for instance, in 1698/9, when the Lords censured John Churchill, a bookseller, for publishing case reports from the House of Lords without permission. There are other examples before 1710.

3. Stationers' Copyright

A third exclusive printing right also originated from the Crown, but it stemmed from a royal charter granted in 1557 to the Company of Stationers, the guild governing printers, booksellers, and others in the book trade. Internal customs of the Company established a system whereby a Stationers' Copyright would presumptively inure to a member who had registered a book, so long as that book was not already protected by a privilege or prior registration. The exact contours of the custom and what a Stationer was required to do to obtain exclusive printing rights varied over the years. But registration was countenanced by the Star Chamber in 1637, and remained central thereafter (if not already before), as was illustrated by the following lawsuit from 1657:

[T]he usage amongst the Society of Stationers being that when a Copy is Entred in any Members Name the same Cannott be printed by any other member unless hee in whose Name it be soe Entred will dispence therewith & Authorize the Warden of the

---

15. 16 H.L. JOUR. 389, 391 (Feb. 24 & 27, 1698/9).
17. PATTERSON, supra note 4, at 55-64; Peter Blayney, The Publication of Playbooks, in A NEW HISTORY OF EARLY ENGLISH DRAMA 383, 396-405 (J.D. Cox & D.S. Kastan eds., 1997).
Company to Enter the same as that other Persons Copy that will
print it . . . .19

This custom was later incorporated in the Printing Act of 166220 and, after
the first lapse of that Act, was memorialized as an ordinance of the Company
of Stationers in 1681.21

There is some disagreement as to whether persons other than freemen of
the Company of Stationers, such as members of other guilds or authors, were
permitted to register. Some scholars have said that only Stationers could
register,22 but others have found evidence to the contrary.23 I will not
presume to address the matter for all the years in which the Company was
operating. But the period from 1675 to 1709, which is roughly the time
during which the parties in Tonson v. Baker operated before the Statute of
Anne, does require comment, if only because the lead defendant, John Baker,
was not a freeman of the Company.24 If an outsider like Baker was unable to
become a member of the Stationers' copyright "club," it would certainly
make any anti-copyright views that Baker expressed more understandable.

The ordinance of 1681 spoke of registration only by members, and the
general practice seems to have been that registration was in fact limited to
freemen of the Company; authors or members of other guilds could not
directly partake in it.25 It is true that there were exceptions, but my review of

---

19. Dring v. Leybourne, C6/134/53 (Ch. 1657). This a fascinating suit which, to my
knowledge, has not been discussed elsewhere. In 1656, William Leybourne, a Stationer,
entered two books in the register in trust for the “Author or such as hee should Nominate.”
The author, Edmund Wingate of Gray's Inn, nominated his son, Button Wingate of Gray's
Inn. Neither were Stationers. William Foster of the Middle Temple, also not a Stationer, then
purchased the copyrights from the son for 100 pounds, and the rights were later sold by
Foster to Thomas Dring, a Stationer, for an unknown sum. In April 1657, Dring sought
enforcement of the trust and an assignment of the registrations from Leybourne to himself.
Id. I found no orders in the case, but the suit may have influenced Leybourne because he
assigned both copyrights to Dring on February 23, 1657/8. See 2 A TRANSCRIPT OF THE
REGISTERS OF THE WORSHIPFUL COMPANY OF STATIONERS 1640-1708 A.D. 71, 78, 166-
67 (G.E. Briscoe Eyre et al. eds., 1913) [hereinafter STATIONERS' REGISTERS].
21. 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS LONDON
[hereinafter STATIONERS' REGISTERS].
22. BIRRELL, supra note 4, at 73; ROSE, supra note 4, at 4.
23. ADRIAN JOHNS, THE NATURE OF THE BOOK 229 (1998); PATTERSON, supra note 4,
at 65.
24. See infra text accompanying notes 251–86.
25. See 1 STATIONERS' REGISTERS, supra note 21, at 22–23 (1681 ordinance). This was
also demonstrated by annotations in the register book, see 3 STATIONERS’ REGISTERS, supra
note 19, at 4 (Sept. 24, 1675) (“Master Love being noe freeman, this is entered againe to
all the entries during the relevant period indicates that the exceptions were so few and far between that they were likely allowed only by special dispensation. Only 1.89% of the titles were registered by non-freemen.26

The Stationers’ copyright was perpetual in the sense that no work ever fell into the public domain, as we understand that term today. The same work could be held by several Stationers over the course of numerous years, even 100 years, and works were often shared in this way. This form of copyright persisted under the auspices of several Star Chamber decrees from 1566 to 1641, parliamentary ordinances and statutes during the Civil War and Interregnum from 1643 to 1660, and then under the Printing Act of 1662 after the Restoration. The Printing Act lapsed between March 1678/9 and June 1685 and then expired on May 3, 1695.27 These lapses of protection (1679–1685 and 1695–1710) constituted statutory copyright interregnums—a time when copyright was not supported by statute—and I will label them as such.

While under the auspices of the instruments noted above, the Stationers’ copyright was usually enforced in the Court of Assistants of the Company of Stationers. The Assistants served as the Company’s governing body and as a forum to mediate and arbitrate disputes among members.28 The court was also empowered to discover and seize illicit books and presses, which largely obviated the need for litigants to seek aid in the principal courts. But the statutory lapses robbed the Assistants of much of their power. Though cases could still be arbitrated during the statutory lapses, Stationers turned to the Court of Chancery, the principal equity court, to litigate their copyright

Nicholas Hooper.”); id. at 156 (May 19, 1683) (“This book is to be printed by me for Richard Bentley, he not being free of the Company it is entered in my name in trust for him.”), and elsewhere, see Letters and Papers, SP29/396, No. 167 (Sept. 19, 1677) (declaring that Daniel Major, a Stationer, had entered a book in trust for Samuel Lee because Lee was not a freeman of the Company). A 1694 ordinance of the Company also spoke of registration only by “members.” Court Book F, f. 205v (Ct. Ass. May 14, 1694).

26. The register books from July 1675 to March 1708/9 contain approximately 423 persons who registered books. See generally 3 STATIONERS’ REGISTERS, supra note 19. Of those, 385 were at the time of registration freemen of the Company; widows (some known, others suspected) of former freemen, see CYPRIAN BLAGDEN, THE STATIONERS’ COMPANY: A HISTORY, 1403–1959, at 162 (1960) (“It was an ancient custom of the City that the widow of a freeman became a freewoman.”); or persons who entered their copies in partnership with at least one freeman. The 38 persons remaining entered only 72 of the approximately 3,800 entries during that time—just 1.89%. The figures become smaller if we subtract from the list those who registered works at a time when they were apprenticed (formally or informally) to a freeman of the Company (12) and those who were related to a freeman or apprentice (5). The remaining 21 “outsiders” entered 45 titles or 1.18%. Only four of the works were registered by their authors.

27. Gómez-Arostegui, supra note 7, at 1216–18.

28. See generally id. at 1256–62.
claims—sometimes with less than optimal results,\textsuperscript{29} and at other times obtaining interlocutory injunctions that may have effectively ended the disputes.\textsuperscript{30} A few cases were also brought on the equity side of the Court of Exchequer.\textsuperscript{31} Not being supported by any statutory authority or privilege, these Chancery and Exchequer cases were typically brought under a purported copyright at common law. Some suits referred to the common law expressly, others to the customs of the trade, and still others to copyrights as a form of property. Several also alleged or argued that the suit in equity would enable a subsequent action at law for damages.\textsuperscript{32} As I will discuss later,\textsuperscript{33} all of the parties involved in \textit{Tonson v. Baker} had prior experiences litigating copyright cases in the Court of Chancery during the statutory lapses.

Notably, with one known exception that apparently never proceeded past the pleading stage,\textsuperscript{34} Stationers did not venture to the common-law courts to enforce their copyrights before the Statute of Anne. They were thus unable to argue that a copyright—one that existed independently of any statutorily supported right or printing privilege—had been fully adjudicated and expressly recognized at common law before 1710. This absence of a recognized common-law right provided some cover, though not necessarily the moral high ground, for literary-property pirates during the statutory interregnums.

B. THE STATUTE OF ANNE OF 1710

Though the Stationers put on a brave face and continued to comport themselves after 1695 as if their works remained protected in perpetuity by the customs of the Company and the common law of the realm, they also strongly agitated for the previous laws to be revived and then, upon failing in that task, lobbied for a new copyright statute to be enacted.\textsuperscript{35} Matters became particularly acute following the union of Scotland and England in 1707 and the abolition of the Privy Council of Scotland in 1708, which had been the

\textsuperscript{29} \textit{E.g.}, Pawlett v. Lee, C10/202/96, C10/209/62, C33/258, f. 85v (Ch. 1681); Pawlett v. Lee, C10/211/60, C33/262, ff. 323\textsuperscript{v}-324r (Ch. 1683/4).

\textsuperscript{30} \textit{E.g.}, Chiswell v. Lee, C10/209/24, C33/257, ff. 174v, 71r, 100r, 112v (Ch. 1681-1682).

\textsuperscript{31} \textit{E.g.}, Keble v. Parker, E112/836/804 (Exch. 1704/5); Keble v. Onley, E112/836/802 (Exch. 1705).

\textsuperscript{32} These suits—there are at least sixteen in number—are the subject of a new paper. H. Tomás Gómez-Arostegui, \textit{Copyright at “Common Law” Before 1710} (working paper).

\textsuperscript{33} \textit{See infra} Part IV.A.

\textsuperscript{34} Ponder v. Braddill, 1 Lilly’s Mod. Entries 67 (K.B. [1679/80]). Dating this case is difficult as I have yet to find the original declaration in the records. Special thanks to Susanne Jenks for pointing out that the action would have been filed in the King’s Bench.

\textsuperscript{35} DEAZLEY, \textit{supra} note 4, at 1–37; RANSOM, \textit{supra} note 4, at 76–92; Feather, \textit{supra} note 16.
primary grantor of Scottish printing privileges.\textsuperscript{36} English publishers worried about a flood of books imported from Scotland, and their Scottish counterparts worried about having no copyright protection whatsoever.\textsuperscript{37}

The Statute of Anne became effective on April 10, 1710, and created a new statutory copyright for books first published after that date. The right inured to the author of a work and her assigns and ran for fourteen years from first publication, with a possible reversion and additional term to the author of another fourteen years if she was still living at the expiration of the first term.\textsuperscript{38} A legacy clause grandfathered in previously published works for a period of twenty-one years from the effective date of the statute.\textsuperscript{39}

Most important for our subsequent discussion of \textit{Tonson v. Baker} are the remedial and jurisdictional clauses of the statute:

[If any person] shall print reprint or Import or Cause to be printed reprinted or Imported any such Booke or Bookes without the Consent of the Proprietor ... \or/ knowing the same to be \so/ printed or reprinted ... shall sell publish or expose to Sale [the same] ... Then such offender ... shall forfeit such Booke or Bookes and all and every sheet or sheets ... to the proprietor ... who shall forthwith damaske and make wast paper of them[]. And further that every such offender ... shall forfeit one penny for every sheet which shall be found in his her or their Custody either printed or printing published or exposed to sale Contrary to the true intent and meaning of this Act, the one Moiety thereof to the Queens Most Excellent Majestie ... and the other Moiety thereof to any person or persons that shall sue for the same to be recovered in any of her Majesties Courts of Record at Westminster by Action of debt Bill plaint or Information ... \textsuperscript{40}

Another clause made recovery of the penalties and forfeitures depend on entry of the book before publication in the register book of the Company of Stationers.\textsuperscript{41} Notably, one did not need to be a Stationer to register a book—a departure from prior practice. And though not expressly tied to

\textsuperscript{36} ALASTAIR J. MANN, THE SCOTTISH BOOK TRADE 1500–1720, at 122–24 (2000); see also Hector MacQueen, \textit{Intellectual Property and the Common Law in Scotland c1700–c1850}, in \textit{THE COMMON LAW OF INTELLECTUAL PROPERTY} 21 (Lionel Bently et al. eds., 2010).

\textsuperscript{37} MANN, \textit{supra} note 36, at 122–23.

\textsuperscript{38} Statute, 1710, 8 Ann., c. 19, § 1. For more on the second fourteen-year term, see Lionel Bently & Jane C. Ginsburg, \textit{"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 (2010).

\textsuperscript{39} 8 Ann., c. 19, § 1.

\textsuperscript{40} \textit{Id.} (text from the Parliamentary Archives, http://www.copyrighthistory.org).

\textsuperscript{41} \textit{Id.} § 2.
registration, the right holder was also required to deposit nine copies of the book, upon the best paper, before publication.\textsuperscript{42}

The statute applied in England, Wales, and Scotland, but not in Ireland, a fact that is also relevant to the recounting of \textit{Tonson v. Baker}.\textsuperscript{43} Moreover, the statute did not “prejudice or confirme any right that... any person or persons have or Claime to have, to the printing or reprinting any booke or Copy already printed or hereafter to be printed.”\textsuperscript{44} Some who believed in perpetual copyrights at common law for published works, including Justice Aston, thought this broad language was inserted to preserve those rights.\textsuperscript{45} Ray Patterson and Ronan Deazley have argued, however, that Parliament probably inserted the clause to preserve or, more neutrally, to not disturb the royal printing-privilege system.\textsuperscript{46} Whether the clause was intended to affect parliamentary privileges—be it the right to grant a printing privilege or the duration of any privilege so granted—is less clear, but it seems safe to assume that Parliament did not curtail its own right to grant.

Particularly revealing is the fact the House of Lords exercised its privilege during the Sacheverell affair, just two weeks before enacting the statute. And as it so happens, the Sacheverell affair was otherwise entwined with the enactment of the statute and, importantly, the first suit filed under it.

\section*{III. THE CASE WITHIN THE CASE: DR. SACHEVERELL}

At its heart, \textit{Tonson v. Baker} was a dispute about the reporting of another legal proceeding. The underlying case was the impeachment and trial of Dr. Henry Sacheverell. The doctor was a High Church advocate and religious conservative who preached not only against “all those who dissented from the Established Church, but even those adherents of the Church who favored a policy of comprehension or a moderate union between the Church and certain sects of Dissenters.”\textsuperscript{47} In two sermons in 1709, Sacheverell directed his ire at the incumbent Whig ministry of Great Britain and indirectly against Queen Anne. Under one interpretation of his sermons,

\begin{itemize}
  \item \textsuperscript{42} \textit{Id} § 5.
  \item \textsuperscript{43} Parliament and the Crown claimed superintendence over Ireland in 1710, but British legislation did not always govern it. See 2 \textsc{Justin McCarthy}, \textsc{The Reign of Queen Anne} 165--85 (1902); \textsc{Joanna Innes}, \textit{Legislating for Three Kingdoms: How the Westminster Parliament Legislated for England, Scotland and Ireland, 1707--1830}, in \textsc{Parliaments, Nations and Identities in Britain and Ireland, 1660--1850}, at 15, 19 (Julian Hoppit ed., 2003).
  \item \textsuperscript{44} 8 Ann., c. 19, § 9.
  \item \textsuperscript{45} Miller \textit{v. Taylor}, 4 Burr. 2303, 2351--52 (K.B. 1769) (Aston, J.).
  \item \textsuperscript{46} \textsc{Patterson}, \textit{supra} note 4, at 148--49; \textsc{Deazley}, \textit{supra} note 4, at 40 & n.42.
  \item \textsuperscript{47} \textsc{Abbie Turner Scudi}, \textsc{The Sacheverell Affair} 32--33 (1939).
\end{itemize}
Sacheverell had accused the Whigs of neglecting the Church of England through the secularization of government and the toleration of other religions. He also allegedly preached that the Glorious Revolution of 1688, which formed the basis for the laws under which the Queen ascended to the throne, had been illegal. 48

Sacheverell’s greatest mistake was publishing the sermons. 49 His printer, Henry Clements, printed around 40,000 of the more inflammatory sermon—The Perils of False Brethren—and subsequent printings (some of which were pirated copies) brought the total to nearly 100,000 copies in print. 50

A. IMPEACHMENT AND TRIAL OF DR. SACHEVERELL

The Whigs in Parliament did not take the insult lightly. Rather than prosecute Sacheverell in the Queen’s Bench for seditious libel, or imprison him until the end of the session for offending the dignity of the Commons, 51 the Commons resolved on December 14, 1709 to impeach him for high crimes and misdemeanors and to try him in the House of Lords. 52 Sitting as the High Court of Parliament, the Lords had more power than the Commons acting alone and could bar Sacheverell from holding religious office for life, imprison him for the same period, and impose a staggering fine. 53

The Commons created a committee to draft the charging document and manage the prosecution. Among those appointed were Spencer Cowper, the younger brother of the Lord Chancellor, and Sir Joseph Jekyll, a serjeant at law and Queen’s serjeant. 54 These two men would later, in a private capacity, represent Jacob Tonson in his suit against John Baker for infringing Tonson’s exclusive right to print the trial. Four articles of impeachment were approved and read to Sacheverell in the Upper House on January 12, 1709/10. Sacheverell then presented his written answer to the Lords on

---

48. Id. at 38–39, 45–47.
49. See, e.g., ESTC Nos. T77902, T43864.
50. GEOFFREY HOLMES, THE TRIAL OF DOCTOR SACHEVERELL 74–75 (1973). Just days after The Perils of False Brethren appeared in print the Rev. Ralph Bridges, an ally of Sacheverell, lamented the decision to publish it. “I think Dr. S[acheverell] had better have let printing his sermon... alone... It is all what he says truth, but perhaps a little too unseasonable.” Letter from R. Bridges to Sir Wm Trumbull (Nov. 29, 1709), in 1 REPORT ON THE MANUSCRIPTS OF THE MARQUESS OF DOWNSHIRE 884 (E.K. Purnell ed., 1924).
51. HOLMES, supra note 50, at 83, 88.
52. 16 H.C. JOUR. 241–42 (Dec. 14, 1709).
53. HOLMES, supra note 50, at 83.
54. Id. at 97 n.*.
January 25 and to the Commons the next day. The replication of the Commons was approved on February 2.\textsuperscript{55}

The resulting trial was a cause célèbre, largely because Sacheverell stood as a proxy for the policies of the High Church advocates and Tories in Parliament. On the other side were the contrasting policies of the Whigs, which can also be said to have been on trial.\textsuperscript{56} It is difficult to overstate the impact of the Sacheverell affair on the populace of England and elsewhere. As one contemporary noted: "[This] town is in so great a ferment at present upon the tryall of Dr. Sacheverell as I beleeve never was known. . . In short men's eyes and minds are wholly turnd upon this affaire, so that here is a sort of stopp to all businesse." Another correspondent wrote before the trial began that the "great amusement of this town is the affair of Sacheverell, about which all companys squabble and box, as they find themselves inclined."\textsuperscript{58}

The fiery issues were stoked further because the trial was held in the more public venue of Westminster Hall rather than at the bar of the House of Lords. Members of the Tory party, led by William Bromley, and some moderate Whigs insisted that all members of the House of Commons be permitted to attend the trial as a "Committee of the whole House."\textsuperscript{59} They knew this would require a much larger and more public venue than the Lords' chamber, and they hoped to capitalize on a growing perception of an iniquitous prosecution.\textsuperscript{60} These Sacheverellites also knew, and indeed probably desired, that an open venue would more likely lead to printed accounts of the trial favorable to the doctor.\textsuperscript{61} It was perhaps for that reason that the Commons ordered on February 24, 1709/10, that "nothing, that shall be said by any Member of this House, or by any Person, that shall be produced as a Witness in behalf of the Commons of Great Britain, in the Trial of Doctor Henry Sacheverell, be printed, or published, without the Leave of this House."\textsuperscript{62}

\textsuperscript{55} 19 H.L. JOUR. 32–33 (Jan. 12, 1709/10); 16 H.C. JOUR. 277, 279, 291 (Jan. 25–26, Feb. 2, 1709/10).
\textsuperscript{56} For an excellent summary of the parties' platforms between 1690 and 1715, see 1 D.W. HAYTON, THE HOUSE OF COMMONS 1690–1715, at 462–79 (2002).
\textsuperscript{57} Letter to the Countess of Lindsey (Feb. 23, 1709/10), in REPORT ON THE MANUSCRIPTS OF THE EARL OF ANCASTER 439 (S.C. Lomas ed., 1907).
\textsuperscript{58} Letter from Roger Kenyon to Mrs. Kenyon (Jan. 14, 1709/10), in THE MANUSCRIPTS OF LORD KENYON 444 (London, Her Majesty's Stationery Office 1894).
\textsuperscript{59} 19 H.L. JOUR. 58 (Feb. 6, 1709/10).
\textsuperscript{60} HOLMES, supra note 50, at 111–13.
\textsuperscript{61} See, e.g., HIGH-CHURCH DISPLAY'D 11 (London, s.n. 1711) ("The Doctor's Answer was . . . sold publickly to incense the People, and prepossess them in his favour . . . .").
\textsuperscript{62} 16 H.C. JOUR. 337 (Feb. 24, 1709/10).
Special stands had to be constructed in the Hall to accommodate the number of people expected to attend the trial. The members of the Commons were given one side of the Hall, and the Lords their own section. Seven spectator tickets were also allocated to each Lord who planned to attend the trial. Additionally, members of the public without tickets from a Lord could purchase their own at a costly three to five guineas. Though the Hall could hold about two thousand people, records suggest the trial was crowded, with spectators encroaching on seats reserved for others. The serjeant at arms had to regularly remove and arrest "strangers" who had taken seats reserved for the Commons.

William Cowper, the Lord Chancellor, presided over the trial, which began on February 27 and lasted about two weeks. The prosecution presented its case, as did Sacheverell's counsel, and Sacheverell then spoke in his own defense. The case was submitted to the Lords for their consideration and judgment in their own chamber, during which several of the Lords (in particular, the Bishops) made rousing speeches, many of which would later reach the print market. The Lords convicted Sacheverell, largely along party lines, on March 20, 1709/10. Many who voted to convict then defected or absented themselves when the sentence was considered and a proposed ban on preaching for seven years and imprisonment were rejected. Instead, on March 23, the Lords banned Sacheverell for three years, imposed no imprisonment whatsoever, and ordered his two sermons of 1709 burnt.

It did not take long for the result to reveal itself as a pyrrhic victory for the Whig ministry. Within the course of the next six months, Queen Anne prorogued the Whig-dominated Parliament numerous times, dismissed some Whig ministers, unintentionally caused others to resign (including Lord Chancellor Cowper), and dissolved Parliament on September 21. The Parliament that began on November 25 after new elections was decidedly

63. Copy of Letter of Sir Christopher Wren (Feb. 8, 1709/10), WORK 11/24/1.
64. A TRUE AND EXACT VIEW AND DESCRIPTION OF THE COURT FOR THE TRYAL OF DR. HENRY SACHEVERELL, IN WESTMINSTER-HALL ([London], John Baker 1710).
65. 19 H.L. JOUR. 77 (Feb. 23, 1709/10). Lords could attend without tickets of course.
67. Id.
68. 16 H.C. JOUR. 341–49 (Feb. 28 to Mar. 9, 1709/10).
69. 19 H.L. JOUR. 115 (Mar. 20, 1709/10).
70. Id. at 118 (Mar. 21, 1709/10); HOLMES, supra note 50, at 227–29.
71. 19 H.L. JOUR. 121–22 (Mar. 23, 1709/10).
72. SCUDI, supra note 47, at 123–24.
73. Id. at 134–35.
Historians recognize that it was the impeachment and trial of Sacheverell that played the pivotal role in the fall of the Whigs. Importantly, the hundreds of print publications that appeared during the Sacheverell affair, both those for and against the doctor and the policies he supported, also garnered much of the credit.

B. DR. SACHEVERELL AND THE COPYRIGHT STATUTE

But what of the Statute of Anne? It is easy to lose sight of the fact that Parliament had the new copyright law to consider during the same parliamentary session. The petition for leave to bring a new copyright bill had been submitted to the Commons on December 12, 1709, only days before the Commons announced its impeachment of Sacheverell. The bill was then submitted on January 11, 1709/10, the day before the Commons approved the articles of impeachment against him. The House was able to twice read and consider the bill in committee in the weeks between the impeachment and the start of the trial, but only after several delays. The third reading and passage of the bill with some amendments occurred on March 14.

The first reading of the statute in the Lords occurred on March 16, 1709/10, the same day they debated the first article of impeachment. It was then read a second time on March 24, the day after judgment in the Sacheverell affair. From then on, it did not take long to consider the statute. After some amendments, and a third reading, the Lords passed the bill on April 4. The Commons agreed to all the amendments but one, which the Lords did not resist, and the Queen assented on April 5, 1710. Notably, the effective date of the statute had to be changed from March 25 to April 10, demonstrating that passage of the bill took longer than Parliament had anticipated.

Though other reasons may have played a part in the “miserable havock” occasioned by the statute’s textual problems, neglect might help explain why the statute contained several ambiguities and errors, many of which were apparent on their face. As Gilbert Burnet, Bishop of Salisbury, noted in his

---

74. 1 HAYTON, supra note 56, at 227–30.
75. E.g., A.S. TURBERVILLE, THE HOUSE OF LORDS IN THE XVIIIth CENTURY 95 (1927) (“His impeachment is the most important turning-point in the reign of Anne.”).
78. 19 H.L. JOUR. 109–10, 123, 140–41, 143–44 (Mar. 16, 24, 1709/10; Apr. 4, 5, 1710); 16 H.C. JOUR. 394–95, 396 (Apr. 5, 1710).
79. Deazley has recounted many of the problems. See DEAZLEY, supra note 4, at 31, 47–50. I would add one more. The statute nonsensically provided that its statutory remedies
memoirs, “the great business of th[e] session, that took up most of their time, and that had great effects in conclusion, related to Dr. Sacheverel.”

As an author and a beneficiary of the statute after its enactment, Sacheverell might have lamented the indirect role he played in complicating it. Nevertheless, Sacheverell probably would have relished the second role that he played in the history of copyright. It was the printing and pirating of accounts of his trial that spawned *Tonson v. Baker*.

C. APPOINTMENT OF JACOB TONSON SR.

On the same day judgment was entered against Sacheverell, the House of Lords ordered that an account of the trial be published: “It is ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That the Lord High Chancellor of Great Britain, do give Order for the printing and publishing the Trial of Henry Sacheverell Doctor in Divinity; and that no other Person do presume to print the same . . . .” Whoever received the rights would be in an enviable position. The trial was sure to be a bestseller, and the publisher could hope to make a tidy sum.

Lord Chancellor Cowper appointed Jacob Tonson Sr. to print the trial and simultaneously forbade others from doing so. I was unable to find documentation of the appointment in the records of the Chancery, Parliament, the State Papers Domestic, or in the private diary of Lord Chancellor Cowper. We know of Tonson’s selection, however, because Tonson made sure to insert a note about it on the first leaf of nearly every edition that he printed. Though the exact date of his appointment is unknown, it likely occurred a few days after judgment.

Tonson was the most famous publisher in England at the beginning of the 18th century. Born in 1655 and made a freeman of the Company of

( penalties and forfeitures) were available during the first fourteen years of the copyright but not during the fourteen-year renewal term. This seems to have been an oversight, with the likely culprit being that the Lords added the renewal term as a last-minute amendment. Remarkably, this provision was sewn onto the original parchment roll as a separate piece.


81. Stationers’ Co., A Register of the Copies of Books MS, pp. 12–13 (1710–1746) (registration of several books under the Statute of Anne) [hereinafter Register Book MS].

82. 19 H.L. JOUR. 122 (Mar. 23, 1709/10); see also Minutes of the House of Lords MS, HL/PO/JO/5/1/45 (Mar. 23, 1709/10) (“House moved That the Tryall be printed & published/ . . . .”).

83. *E.g.*, ESTC No. T152340 sig. π 1v.

84. KATHLEEN M. LYNCH, JACOB TONSON KIT-CAT PUBLISHER 5 (1971). Lynch mistakenly states that Tonson was baptized on November 12, 1655. He was born on the
Stationers in 1677/8, Tonson published the works of John Milton, William Shakespeare, and John Dryden, among others. In addition to owning a lucrative stockpile of copyrights from which he derived most of his wealth, Tonson also owned a bookshop and in later years ran a printing house with John Watts. Tonson was well respected in the trade, and his biographers have surmised it was “unlikely that he ever published pirated works.”

I have yet to find an infringement suit in the principal courts at Westminster in which he was named as a defendant, which is not surprising. Tonson was a strong supporter of copyright, had lobbied for a new statute during the second statutory interregnum, and argued during the interregnums that works remained protected at common law.

Nevertheless, Tonson’s hands were not entirely clean as he had, in fact, been twice accused of pirating works in the Court of Assistants of the Company of Stationers, and at least once accused outside that forum.

In Saunders v. Tonson, for example, Francis Saunders accused Tonson of infringing a copyright in poems of the late Earl of Rochester, which Saunders had registered in 1690. No record of the outcome appears in the court books, but in 1691 Tonson published a collection of the Earl’s poems that contained some (but not all) of the poems Saunders claimed were his by registration and others that Saunders had not registered. Perhaps the parties settled their differences. In another dispute in 1715, the Company stopped paying dividends to Tonson and his nephew Jacob Tonson Jr. (with whom Tonson likely partnered c.1703) until they compensated the Company for

12th and baptized the 18th. See Register of Baptisms, St. Andrew Holborn, Guildhall MS 6667/4 (Nov. 1655).

88. 15 H.C. Jour. 313 (Feb. 26, 1706/7); 16 id. at 240 (Dec. 12, 1709).
89. See infra text accompanying notes 197–200. Tonson sometimes hedged his bets, however, and sought a royal privilege by license. E.g., Entry Books, SP44/353, pp. 105–06 (Dec. 3, 1705); id. SP44/353, pp. 118–19 (Feb. 5, 1705/6); id. SP44/353, pp. 508–09 (Nov. 19, 1709).
90. Court Book F, f. 146v (Ct. Ass. 1690).
91. 3 Stationers’ Registers, supra note 19, at 377 (Nov. 19, 1690).
92. Starting in 1714, Tonson began including the poems he had previously excluded. For more on Tonson’s publication of the poems, albeit without mention of this dispute, see Nicholas Fisher, Jacob Tonson and the Earl of Rochester, 6 Libr. 133 (7th Ser. 2005).
93. Lynch, supra note 84, at 108.
printing a book in violation of its right in school books.\textsuperscript{94} Lastly, in a dispute that I will revisit,\textsuperscript{95} Tonson copied engravings from a book published by John Baker, albeit without suffering more than a public shaming. These are the transgressions we know of; there may have been others.

Outside of the trade, Tonson was best known for being a founding member and principal convener of the Kit-Cat Club, a literary and political club that had been associated with the Whig party from the club’s inception.\textsuperscript{96} Several powerful Whigs were members, and the decision to seek the impeachment of Sacheverell was allegedly made in part during meetings of the club.\textsuperscript{97} Tonson’s close connections to the dominant Whig party would have played a critical role in receiving the Lord Chancellor’s appointment to print the trial. Indeed, those connections had kept him busy printing for various departments of the Whig ministry in the years leading to his appointment.

Tonson and his nephew began printing \textit{The London Gazette}, the official newspaper of the government, in 1707/8.\textsuperscript{98} In the same year, the Speaker of the House of Commons appointed Tonson and three others as the exclusive printers of the \textit{Votes of the House of Commons}.\textsuperscript{99} The \textit{Votes} was a daily sheet of the proceedings of the Commons and was, until the official journal began being published in 1742, the only official account of its decisions.\textsuperscript{100} Tonson had also worked for Lord Chancellor Cowper; he and his nephew had provided stationery for the Chancery since 1705.\textsuperscript{101} Tonson even had a prior experience printing a trial in the House of Lords. Lord Chancellor Somers, Cowper’s Whig predecessor, appointed Tonson in 1699 to print the trials of Edward, the Earl of Warwick and Holland, and Charles Mohun.\textsuperscript{102}

\begin{footnotesize}
\textsuperscript{94} In re Tonson, Court Book G, ff. 219\textsuperscript{r}, 235\textsuperscript{r} (Ct. Ass. 1714–1715).
\textsuperscript{95} See infra text accompanying notes 299–329.
\textsuperscript{96} Ophelia Field, \textit{The Kit-Cat Club} 32–34 (2009).
\textsuperscript{97} Holmes, supra note 50, at 87; Lynch, supra note 84, at 37, 61–62.
\textsuperscript{99} Lynch, supra note 84, at 111.
\textsuperscript{100} Betty Kemp, \textit{Votes and Standing Orders of the House of Commons} 2, 20 (1971).
\textsuperscript{101} Hanaper in Chancery: Declared Accounts, E351/1715B (Oct. 21, 1705 to Sept. 30, 1706); id. AO1/1396/249 (Sept. 30, 1706 to Sept. 29, 1708); id. E351/1717 (Sept. 30, 1708 to Aug. 10, 1710). Cowper had become Lord Keeper on October 11, 1705.
\textsuperscript{102} The Several Tryals of Edward Earl of Warwick and Holland, and Charles Lord Mohun, Before the House of Peers in Parliament sig. π 1\textsuperscript{v} (Savoy, Jacob Tonson 1699). On Tonson’s friendship with Somers, see Field, supra note 96, at 13–15.
\end{footnotesize}
D. Registrations and Irritations

Following his appointment, Tonson chose not to rely solely on his parliamentary privilege to protect his rights. He also opted to enter his upcoming account of the trial in the register book created by the Company of Stationers pursuant to the Statute of Anne. He registered his account twice, which was unusual, with the first entry appearing at a time when he had not finalized the title and was not yet close to completing the book for publication. The first entry was dated May 15, 1710, and was for a book entitled “The Whole proceedings, with the Speeches on both sides, at the Tryal of Dr Henry Sacheverell.”

Tonson probably felt pressured to prematurely register his book by the large number of short tracts and pamphlets relating to the trial that had quickly emerged for public consumption.

Between the impeachment and the beginning of the trial, for instance, an anonymous printer, likely Edmund Curl, published the answer Sacheverell submitted to Parliament. The text purported to be a translation of an account from the Leiden Gazette to avoid censure. In the midst of the trial, Henry Clements published a book—Collections of Passages—containing excerpts from the doctor’s answer, along with a collection of passages the doctor submitted into evidence. And on the day the Lords announced they had reached a verdict, another short tract entitled The Speech of Henry Sacheverell, D.D. upon his Impeachment at the Bar of the House of Lords was anonymously advertised. The latter two publications were noticed by the House of Lords, and it ordered on March 23 that Clements and any other offender be arrested and brought to the bar of the House. The House of Commons, having been offended as well, then ordered that Clements’s Collections of Passages be burnt.

The action of the two Houses was largely ineffective. Numerous other books and pamphlets continued to appear after the trial concluded. Abigail Baldwin, for example, advertised on April 7, 1710 that she was offering for sale “The Bishop of Salisbury’s Speech in the House of Lords on the First

103. Register Book MS, supra note 81, at 24.
104. E.g., ESTC No. T21971.
105. F.F. Madan, A Critical Bibliography of Dr. Henry Sacheverell 49–50 (W.A. Speck ed., 1978) (concluding that the reference to the Leiden Gazette was fictitious).
106. The Post Boy (London), No. 2313, Mar. 9–11, 1709/10, at 2; e.g., ESTC No. T79.
107. The Post Boy (London), No. 2317, Mar. 18–21, 1709/10, at 2; e.g., ESTC No. T49659.
108. 19 H.L. Jour. 122 (Mar. 23, 1709/10).
109. 16 H.C. Jour. 383–84 (Mar. 24, 1709/10).
Article of the Impeachment of Dr. Henry Sacheverell."\textsuperscript{110} Benjamin Bragg announced that he was selling for six pence a book containing the speech of Sacheverell at the bar of the House of Lords, along with reflections thereon by an anonymous commentator.\textsuperscript{111} And on May 2, 1710, an anonymous advertisement by the "Booksellers of London and Westminster" announced a broadsheet that listed the Lords and members of Parliament who had supported Sacheverell during the proceedings.\textsuperscript{112} That these publications appeared without censure from Parliament, which was not in session after April 5, may have further stirred Tonson to first register in mid-May.

Tonson’s second registration occurred on June 3, 1710.\textsuperscript{113} He had by that time settled on the title of his book and was nearly ready to publish it.

Ironically, the first advertisements for Tonson’s book were specious. The following appeared in the June 10 issue of \textit{The Daily Courant}:

\begin{quote}
Next Tuesday will be Publish’d,  
The Tryal of Doctor Henry Sacheverell before the House of Peers for high Crimes and Misdemeanours. Price 7 s.

At the same time will be Publish’d,  
An Impartial Account of what pass’d most Remarkable in the last Session of Parliament relating to the Case of Dr. Henry Sacheverell, Done on such another Paper and Letter, and may therefore be bound up with the Tryal of the said Doctor. Printed for Jacob Tonson at Gray’s-Inn-Gate. Price 1 s.\textsuperscript{114}
\end{quote}

Similar advertisements appeared in other newspapers as well.\textsuperscript{115}

None of the advertisements had been sanctioned by Tonson, which he soon made clear in an advertisement appearing in \textit{The Daily Courant} on June 12:

\begin{quote}
Whereas on Saturday last an Advertisement brought by an unknown Person was inserted in the News-Papers, That the Tryal of Dr. Henry Sacheverell wou’d be publish’d on Tuesday next; and that at the same time wou’d be publish’d an Impartial Account of
\end{quote}

\textsuperscript{110} \textit{THE DAILY COURANT} (London), No. 2638, Apr. 7, 1710, at 2; \textit{e.g., ESTC} No. T171992.
\textsuperscript{111} \textit{THE DAILY COURANT} (London), No. 2639, Apr. 8, 1710, at 2; \textit{see ESTC} No. T34905.
\textsuperscript{112} \textit{THE POST BOY} (London), No. 2335, Apr. 29 to May 2, 1710, at 2; \textit{see ESTC} No. T21300.
\textsuperscript{113} Register Book MS, \textit{supra} note 81, at 36.
\textsuperscript{114} \textit{THE DAILY COURANT} (London), No. 2693, June 10, 1710, at 2.
\textsuperscript{115} \textit{e.g., THE POST=MAN} (Old Bailey), No. 1895, June 8–10, 1710, at 2; \textit{THE TATLER} (London), No. 183, June 8–10, 1710, at 2.
what pass'd most remarkable in the last Session of Parliament relating to the Case of Dr. Henry Sacheverell, and therefore might be bound up with the Tryal of the said Doctor, printed for Jacob Tonson at Gray's-Inn-Gate. This is to give Notice, That no such Book is printed or to be publish'd by Jacob Tonson, but his Name without his knowledge is put to a Spurious Pamphlet which contains only an imperfect Extract of the Journals of the Houses of Lords and Commons relating to the said Dr. Henry Sacheverell ; and that the Tryal of the said Dr. Henry Sacheverell only, without the said Extract, is printed for Jacob Tonson, and will be publish'd on Thursday next.116

The next day, Tonson announced that the culprit was Abel Roper. Roper had, according to Tonson, entered the Impartial Account in the register book of the Company of Stationers.117 This was true. Roper’s signature can be seen in the register beneath an entry dated June 12, 1710.118

Roper responded through a proxy—John Morphew—in The Post Boy of June 13, a newspaper that Roper published.119 Morphew, a trade publisher and bookseller supporting Tory interests, announced that he would be selling the Impartial Account, and he took umbrage at Tonson’s advertisement:

This is to give Notice that Mr. Jacob Tonson, who caus'd the said Advertisement to be inserted in the Courant, could not have seen the said Impartial Account, &c. for neither is it pretended to be printed for Jacob Tonson at Gray-Inn-Gate; nor is it, as Mr. Tonson has falsely and maliciously asserted, an imperfect Extract of the Journals of the Lords and Commons; but as perfect and impartial an Account as is alleg'd in the Title; as any Person will judge, who is pleas'd to peruse it.120

What happened next illustrates the sharp practices of the time. In the same column of that very issue, an advertisement appeared announcing that the Impartial Account had just been printed for Jacob Tonson at Gray's-Inn-Gate. Moreover, every London edition of the Impartial Account—and there were numerous impressions—listed Tonson and not Roper or Morphew on the imprint.

120. THE POST BOY (London), No. 2353, June 10–13, 1710, at 2.
The sixteen-page *Impartial Account* was, as Tonson alluded to, largely a reproduction of his daily sheets of proceedings in the House of Commons.\(^{121}\) Thus, most of it concerned the impeachment rather than the trial. In this respect, the *Impartial Account* infringed the printing privilege that the Commons had granted to Tonson. But the account went further and recounted certain proceedings not in the daily sheets, such as trial deliberations that would be subject to the privilege granted by the House of Lords. More irksome, Roper spun the facts to favor Sacheverell, which would have astonished no one, least of all Tonson. Roper was a committed Tory, as his polling shows.\(^{122}\) Indeed, a contemporary later acknowledged that the *Impartial Account* was "[s]uppos’d to be Printed and Publish’d by Abel Roper, as a design’d Vindication of the Doctor."\(^{123}\)

The *Impartial Account* must have irritated Tonson, and Roper was eventually called to account for his breach.\(^{124}\) But Tonson's more immediate concern was preparing his own full account of Sacheverell’s trial.

E. PUBLICATION OF JACOB TONSON'S TRYAL

The exact day on which Tonson made his book\(^{125}\) (Fig. 1) available to the public has become a bit muddled. White Kennett, an opponent of Sacheverell, wrote in 1715 that Tonson's book became available on April 11, 1710.\(^{126}\) Had Kennett been correct, it would have made for an interesting back story. Being the day after the Statute of Anne went into effect, one could have surmised that Tonson waited to publish his book until just after the effective date to ensure it was eligible for the potentially longer term of twenty-eight years, rather than twenty-one years under the legacy clause. Kennett, however, was mistaken.

---


123. White Kennett, The Wisdom of Looking Backward 27 (London, J. Roberts 1715). An annotated copy of the *Impartial Account* at Yale describes it in contemporary hand as a "Pamphlet falsly intituled, for it is in many particulars a more False and Partial Account." Beinecke, Brit Tracts 1710 Im7.

124. See infra text accompanying notes 147–50.

125. The Tryal of Dr. Henry Sacheverell, Before the House of Peers, for High Crimes and Misdemeanors (London, Jacob Tonson 1710); see ESTC No. T152340.

126. Kennett, supra note 123, at 27.
THE TRYAL OF
Dr. Henry Sacheverell,
BEFORE THE
HOUSE of PEERS,
FOR
High Crimes and Misdemeanors;
UPON AN
IMPEACHMENT
BY THE
Knights, Citizens and Burgesses in Parliament Assembled, in the Name of themselves, and of all the Commons of Great Britain: Begun in Westminster Hall the 27th Day of February, 1727; and from thence continu'd by several Adjournments until the 23d Day of March following.

Published by Order of the House of Peers.

LONDON:
Printed for Jacob Tonson, at Gray's Inn Gate in Gray's Inn Lane. MDCCX.
Tonson claimed in *Tonson v. Baker* that he first “published” the book on June 5, 1710.\(^\text{127}\) Though publication is typically synonymous with making a work available to the public, he probably was referring to publication for Parliament. Tonson was obligated to provide sufficient numbers in folio to both Houses so that each member and Lord could have a copy if they desired.\(^\text{128}\) Arthur Maynwaring, for instance, a member of the House of Commons and a close friend of Tonson,\(^\text{129}\) probably received his copy on or soon after June 5. In a quasi-fictional set of letters, published together in a small tract, Maynwaring purportedly wrote on Thursday, June 15, 1710 to a correspondent in the country that he had “last Week” sent him a copy of the trial.\(^\text{130}\)

If a report in a Dutch journal is to be believed, Tonson initially planned to distribute the folio edition to Parliament only, and to sell a smaller and cheaper octavo edition to the public.\(^\text{131}\) If so, Tonson soon changed his mind, probably because Parliament had been prorogued on April 5, 1710, and few members of Parliament were still in London in June.\(^\text{132}\) The first notice announcing that the folio was “This Day . . . Published [Thursday, June 15]” for public consumption appeared in *The London Gazette*, a newspaper printed, as I already noted, by Tonson and his nephew.\(^\text{133}\) The folio seems to have


128. This information comes from a separate lawsuit brought by Thomas Wibergh, serjeant at arms of the House of Commons, against Tonson. See *Wibergh v. Tonson*, C10/324/12, m. 2 (Ch. 1711/2). Wibergh alleged that Tonson failed to provide 558 copies of the book in folio for Wibergh’s distribution to House members, and that with respect to the books Tonson did deliver, Tonson had failed to bind them in calves leather with gilt lettering as expected. Wibergh also sued Tonson at law and had him arrested. *Id.* It appears that neither the suit nor the action proceeded much further. I am indebted to Joyce Brodowski for bringing this related suit to my attention. See Brodowski, *supra* note 4, at 319–20.


130. *Arthur Maynwaring, Four Letters to a Friend in North Britain, upon the Publishing the Tryal of Dr. Sacheverell* 1–6 (London, s.n. 1710).


132. *Wibergh*, C10/324/12, mm. 1–2.

133. *The London Gazette*, No. 4704, June 13–15, 1710, at 2; accord *id.* No. 4703, June 10–13, 1710, at 2; *The Daily Courant* (London), No. 2696, June 14, 1710, at 2. Tonson had also advertised his book as being published “this Month” in the May edition of a monthly magazine. 12 *The History of the Works of the Learned* 316–17 (London, H. Rhodes et al. 1710). But we do not know the month in which the magazine was actually slated to appear and thus whether by “this Month” Tonson meant May or June.
then made its way to bookshops in Oxford by June 18, as a diary entry by Thomas Hearne suggested. That the folio was offered to the public, and not just to Parliament, is made clear by the fact it was advertised with a price. Members of the Commons and the Lords were not required to purchase their own copies. Instead, records indicate that Tonson hoped for a bulk payment directly from the Treasury. A copy of the folio in the Madan collection at the British Library, which is inscribed “15 June 1710 price 7s.” and “R Symervell” on its first leaf, is further proof the folio was sold to the public. No member or Lord of Parliament went by that name in 1710.

The base price for Tonson’s folio was seven shillings, and in the context in which it was advertised it appears that binding the book was charged separately. For one, the advertisement failed to state that binding was included. Moreover, though not necessarily dispositive, Tonson himself stated in response to a related suit that the Tryal copies he provided to the members and Lords of Parliament were “Stiched in Sheets and not bound.” That so many other works were advertised as suitable for being bound up with the Tryal also suggests the book was not necessarily bound when sold. Because binding of the book in calves leather was an extra expense, it would have added at least two shillings to the retail price. When one included the speeches of the Bishops, which customers often desired and therefore purchased separately for eight pence in folio to supplement the

---

135. Wiberg, C10/324/12, m. 2 (but he claimed he had not been paid). The method by which publishers were compensated seems to have fluctuated. In c.1714, on an unrelated matter, Tonson acknowledged he would only be paid by the Treasury for copies of reports printed for the House of Commons if the sale of the reports to the public was insufficient to cover the costs of the printing run. See Treasury Papers, T1/179A, No. 50 (c.1714). But in subsequent years, Tonson and his nephew seem to have been paid for reports regardless of the recoupment of costs. Treasury Papers, T1/233, No. 19 (Jan. 25, 1720/1 & Dec. 20, 1721); Treasury Order, Yale Osborn MS Box 15093 (Sept. 19 & 30, 1721). Notably, the Treasury distinguished the ordinary printing of the daily votes and proceedings of the Commons from reports and special proceedings. For the former, the Treasury declined to pay the publisher at all. Treasury Papers, T29/26, pp. 242, 283 (July 29, 1729 & Jan. 7, 1729/30).
136. British Library Sach. 446(1).
137. THE LONDON GAZETTE, No. 4703, June 10–13, 1710, at 2.
138. Wiberg, C10/324/12, m. 2.
Tonson's book would have cost at least ten shillings. In today's currency, that would amount to approximately thirty-seven pounds. Tonson's *Tryal* came in at 335 pages in folio of principal text, though the last page is numbered 327. In their rush to prepare the first edition for printing, Tonson's compositors forgot to number eight of the pages.

The *Tryal* began its account with the first day of the trial on February 27, and therefore did not discuss the process of impeachment in the Commons. The book reads like a transcription of what was said during the trial. It includes the arguments of counsel on both sides, documents that the clerk read into evidence, the speech of Sacheverell, the judgment and sentence imposed, and certain post-judgment motions in which the doctor sought to arrest the judgment.

Who actually wrote the account? One can only speculate today, as Tonson's personal papers relating to the *Tryal* have not survived. But it seems unlikely Tonson employed his own shorthand writers during the trial to keep track of the proceedings, though this later became a common practice. Records in the National Archives state that the Treasury compensated (and thus likely hired) two shorthand writers for the duration of the trial. Additionally, had Tonson hired those writers or hired additional writers in anticipation of a forthcoming appointment as the publisher of the trial, he probably would have mentioned that fact in *Tonson v. Baker*. Other evidence suggests that Tonson may have also received the opening statements of some participants in writing.

After Tonson's book went on sale, the market continued to be inundated with other accounts of the trial. Two days later, for example, John Baker announced that he had just published a detailed account of certain post-trial debates that did not appear in Tonson's *Tryal*. Baker stressed that "[t]his true

---

140. *The Daily Courant* (London), No. 2699, June 17, 1710, at 2; see ESTC No. T22851.

141. A copy of the second, corrected printing of Tonson's *Tryal* in folio is held in the Parliamentary Archives. It is bound in leather with gilt lettering on its spine and omits the speeches of the Bishops. A contemporary hand indicates its price was 10s. Parliamentary Archives LGC/9/2/1. It is unclear whether this price included binding.

In *Wibergh v. Tonson*, Wibergh claimed that Tonson wanted as much as "fifteen shillings or some such sume" for each folio bound in calf letter with gilt lettering on the spine to be delivered to the House of Commons. C10/324/12, m. 1. Tonson denied "he Charged or ever expected to be paid Fifteen Shillings per book for such [558] Tryall." *Id.* at m. 2.

142. Treasury Entry Books, T53/21, p. 83 (May 18, 1711); Treasury Order Books, T60/8, p. 59 (May 24, 1711 & June 7, 1711).

143. *See Holmes, supra* note 50, at 181.
Copy is only to be had of J. Baker. In the nature of a supplement, Baker’s *Proceedings* was only eight pages. It seems that Tonson thought little of it, as he never filed a grievance in any forum. But he might have acted otherwise had he learned on that day that Baker would later incorporate the shorter tract into a fuller account of the trial.

Most of the other tracts that appeared were also short (ten to thirty pages) or broadsheets. Though many technically infringed Tonson’s parliamentary privilege, it appears he was not seriously concerned about them, as he again filed no claims. None of the tracts purported to be an account of the whole trial, and besides there were too many to stop them all. Any effort to shut down even a few would have been futile given the short length of these works. It would have been easy for one printer to pick up a baton dropped by another and reprint a tract. Moreover, Tonson’s principal biographer, Kathleen Lynch, believes Tonson probably welcomed many of these pamphlets because they often advertised that they were suitable for binding alongside Tonson’s own edition of the trial.

Indeed, apart from Parliament’s action against Clements, which likely was done sua sponte because of his insolence in printing a tract during the trial, I know of only one other short-work publication that was pursued in the months following the trial: Roper’s *Impartial Account*. The *Post Boy* announced in early July that “[w]e are inform’d, that Abel Roper is bound over, for Printing and Publishing a Book, entitul’d *An Impartial Account of what pass’d most Remarkable in the last Session of Parliament, relating to the Case of Dr. Hen Sacheverell*.” Henry Boyle, Secretary of State for the Northern Department, had ordered Roper arrested, probably following a complaint from Tonson. Roper was released upon executing a penal recognizance of 100 pounds to ensure his subsequent appearance in the Queen’s Bench “to answer to such matters as shall be objected against him.” Unfortunately, what became of Roper’s breach is unknown, and it may have simply ended with this recognizance.

---

149. Entry Books, SP44/77, p. 97 (July 3, 1710).
150. On the use of arrests and recognizances as a means of press control, see *Laurence Hanson, Government and the Press* 1695–1763, at 28–29, 62 (1967).
Though Tonson may have been able to ignore some of the shorter accounts on the market, he undoubtedly would have taken notice of full-length accounts of the trial. One such account was produced by John Baker, and I will come to that in a moment. But before I do, there remains the matter of an Irish reprint that may have been an unauthorized reprinting of Tonson’s *Tryal*. If so, it would have been an early example of a difficulty that copyright holders from Great Britain would confront on a regular basis and yet another annoyance for Tonson.

On June 24, nine days after Tonson began selling his *Tryal* to the public in London, the following appeared in *The Dublin Intelligence*:

* The *Tryal* of Doctor Henry Sacheverell, Published by Order of the HOUSE of PEERS, containing in the London Original Eighty six Sheets; is now Re-Printing with all Expedition in Dublin, and will contain upwards of Seventy Sheets. It being so very large, ‘tis design’d not to Print many more than what shall be Subscribed for: Therefore Subscriptions are desired to be hastned in. The Book will be afforded to Subscribers for Six Shillings each, paying down one half, and the other on Delivery; and to others for Seven Shillings; All well Bound in Calves Leather. Subscriptions are taken in Dublin by E. Dobson, P. Campbell, J. Gill, T. Servant, J. Pepyat, and J. Hyde, Booksellers; [and listing other subscription locations throughout Ireland].\(^\text{151}\)

The book that ultimately appeared in Dublin on August 10, 1710\(^\text{152}\) (Fig. 2) was nearly identical to Tonson’s with the exceptions that it was printed on smaller folio paper with smaller type, so its pagination differed; it omitted the order stating that Tonson had been appointed the sole printer of the trial; some paragraph breaks differed in one section of the account; it contained a one-page index to its contents; and it appended four speeches of the Bishops from the debates. The additions were touted in the table of contents at the end of the book.\(^\text{153}\)

---

151. FRANCIS DICKSON, *THE DUBLIN INTELLIGENCE*, No. 646, June 24, 1710; *see also id.* No. 648, July 1, 1710; *THE DUBLIN GAZETTE*, No. 541, June 24–27, 1710, at 2.

152. *THE TRYAL OF DOCTOR HENRY SACHEVERELL, BEFORE THE HOUSE OF PEERS, FOR HIGH CRIMES AND MISDEMEANORS* (Dublin, A. Rhames & F. Dickson 1710). Relying on advertisements, Madan and Speck state that the reprint was published on August 26, see MADAN, *supra* note 105, at 138, but my personal copy of the Dublin edition has a contemporary annotation by the original owner that dates the book “10 August 1710.”

153. *TRYAL*, *supra* note 152, at tbl. (“Note, This Table, and the four Speeches at the latter end, were not in the London Edition.”).
Figure 2: Dublin reprint of Tonson’s *Tyrall*
I have qualified my statement that the Irish reprint may have been an illicit comprint because it remains plausible that Tonson authorized it. The conventional wisdom for many years was to presume that all Irish reprints in the 18th century were unauthorized until express evidence from the British copyright holders proved otherwise.154 Scholars presumed as much because the Statute of Anne did not apply in Ireland and because numerous booksellers and authors in London and Dublin, mostly in the mid-to-late 18th century but even in 1710, discussed actual or potential business losses due to Irish reprints.155 In the last fifty years, however, scholars have discovered in correspondence and imprints new evidence of collaborations between English publishers and their Dublin counterparts.156 The presumption of unauthorized copies is therefore no longer as strong as it once was, but it is not entirely dead. Even in the face of this new evidence, Mary Pollard has noted that “[a]ttempting to sell London copy in Dublin was probably not a particularly common practice.”157

In the matter of the *Tyal*, circumstantial evidence suggests that Tonson could have collaborated with the Dublin publishers in 1710. Three one-sheet pamphlets appeared in Dublin in 1708 and 1709 bearing imprints with Tonson’s name alongside Francis Dickson’s, one of the printers of the Dublin *Tyal*. Each pamphlet relates to the war in the Low Countries and the imprints all state the following or something like it: “*London, Printed by J. Tonson at Grays-Inn Gate. DUBLIN, Re-Printed by Francis Dickson at the UNION Coffee-House on Cork-Hill.*”158 Dickson was a committed Whig partisan and was printing the votes of the House of Commons in Ireland, just as Tonson was in Great Britain.159 It remains unclear, however, whether Dickson named Tonson to describe an actual affiliation or merely to credit the source.


158. ESTC No. T229489; see also ESTC Nos. T221096, T29214.

The other potential proof of collaboration is that the Tonsons subsequently worked with John Hyde, one of the publishers of the reprint. In late 1708, the Tonsons had published the London edition of Matthew Prior’s *Poems on Several Occasions.* Correspondence between Prior and Jonathan Swift—the former a client of Hyde—indicates that ten years later in 1719 Hyde arranged with the Tonsons to print the poems in Dublin. Unfortunately, one cannot consider this working arrangement, coming nine years after the 1710 printing of the *Tryal,* dispositive of a collaboration on the *Tryal* itself. The Tonsons may have simply resigned themselves to deal directly with Hyde in spite of an act of unauthorized printing in 1710. Sadly, whether the Dublin reprint was authorized or not seems to be a fact that will forever be lost to history.

Importantly, if the Irish reprint was unauthorized, there seems to be little Tonson could have done about it. Because the Statute of Anne did not apply in Ireland, the Dublin publishers were free under the statute to reprint and sell the book without having to pay any copyright holders for the privilege of doing so. It also is unclear whether Tonson could have enforced his parliamentary privilege to stop an illicit Dublin reprint. Precedent for such a maneuver did not appear until 1736, and there is no evidence in the records of the two Parliaments suggesting that Tonson had tried. The journals of the Commons and Lords in Great Britain, along with the concomitant journals for Ireland, make no mention of the Dublin reprint.

The reprint would have devastated Tonson’s ability to sell his *Tryal* in Ireland. The reprint sold to subscribers for six shillings six pence (the six pence having been added later for including the Bishops’ speeches), already bound in calf leather. Tonson’s edition comparably equipped sold for at least ten shillings in London. When one adds the expense of shipping books from London to Ireland, Tonson’s edition would probably have cost even more in Ireland, thus effectively shutting him out of that market.

Notably, it seems unlikely that Tonson would have competed with the reprint in London. The Statute of Anne by its own terms prohibited the

160. ESTC No. T75652.
importing of books written in English into Great Britain without the consent of the proprietor. But that is incidental. Many considered the provision to be toothless, and others believed (wrongly) that the statute did not prohibit importing books from Ireland, leading Parliament to later enact a more comprehensive statute, with greater penalties, in 1739. Rather, finding the Dublin reprint in London was unlikely because the book's printing run was mostly limited to subscribers. Additionally, cost overruns on the book, mentioned in Dublin newspapers, made it improbable that imports would threaten sales in Great Britain.

In any case, if Tonson was in fact irritated by the June 24 announcement of a forthcoming Irish reprint, things were about to get worse.

G. Publication of John Baker's Compleat History

This Day is published, A Compleat History of the whole Proceedings of the Parliament of Great Brittain against Dr. Henry Sacheverell, with his Tryal before the Peers for High Crimes and Misdemeanors The Reasons of those Lords that entered their Protests, and the Speeches of several Lords before judgment was given. N.B. Besides the Speeches of the Bishops of Salisbury, Oxon, Lincoln and Norwich, it contains those of several other Peers, not printed with the Tryal [published by Jacob Tonson] nor with any of the other things that are bound with it; its printed in 8vo on very good Paper and New Letter, Pr. Bd in Calves Leather, 5 s. Printed for J. Baker at the Black Boy in Pater Noster Row: Any Gentleman that buys it of him, shall have his Money returned if he dislikes it, and will return it in 3 Days.

The preceding advertisement appeared in the July 6–8 issue of The Post-Man, and it must have given Tonson reason to worry. Baker's book (Fig. 3) was, in many ways, a fuller account of the proceedings. Apart from recounting the trial itself, Baker's Compleat History also included accounts of the impeachment proceedings in the House of Commons and of certain pre-trial motions (Baker copied this portion of his book almost verbatim from

165. Statute, 1710, 8 Ann., c. 19, §§ 1, 7.
166. POLLARD, supra note 155, at 71.
167. Id. at 74.
170. THE POST=MAN (Old Bailey), No. 1897, July 6–8, 1710, at 2.
Abel Roper's *Impartial Account*;\(^{172}\) the speeches of the Bishops of Salisbury, Oxford, Lincoln, and Norwich; a fuller account of post-trial matters taken from Baker's *Proceedings*; and, in one variant, the separate speech of Lord Haversham and an index. None of the above appeared in Tonson's folio edition of the *Tryal*. When combined with the fact Baker's book was published in a more compact 502-page octavo edition, and was already bound, it made for a much better value; hence, no doubt, the money-back guarantee. Its price of five shillings in 1710 would amount to about nineteen pounds today.

The text of Baker's book, along with the bibliographical evidence, suggests that Baker produced his book in two parts, employing two separate teams of compositor and printer to copy one half each of Tonson's *Tryal*. This was probably done to help rush the book to market.

The *Compleat History*, for instance, is paginated in two parts. The first half is numbered 1 to 232 and covers the impeachment and an account of the trial through the sixth day. The book then resets the numbering to 1 and continues to page 256 (or page 264 in the variant with Lord Haversham's speech). This second half comprises the remainder of the trial, the speeches of the Bishops during the post-trial debates, and Baker's own fuller account of other post-trial matters. Perhaps Baker gave one team pages 1 to 186 of Tonson's *Tryal* to copy and another pages 187 through 327. Each part would be set by the respective compositors and printed. Because the compositor of the second part might not know the exact page on which the compositor of the first part would finish, the second part had to restart with page 1.

The collation of the book also suggests that the work was undertaken by two printers. In the 18th century, books were printed by hand press on "large sheets of paper with a number of pages on each side, which were later folded up to make groups of leaves."\(^{173}\) These sheets, after being folded, had to be arranged in the correct order, and "to this end each sheet was signed on the first page with a letter of the alphabet so that they could readily be arranged in alphabetical order."\(^{174}\) The alphabet was modified slightly—A to Z, but omitting I or J, U or V, and W—and once those had been exhausted, the letters would be repeated with the same omissions thusly, Aa to Zz, then Aaa to Zzz, and so on. Had the *Compleat History* been undertaken at a single printing house, one would have expected a collation akin to A–Z, followed by Aa–Kk or the like. Instead, the first half of the book, paginated 1 to 232,

---

\(^{172}\) A fact that he later admitted. *See infra* text accompanying note 372.

\(^{173}\) PHILIP GASKELL, A NEW INTRODUCTION TO BIBLIOGRAPHY 51 (1972).

\(^{174}\) Id.
Figure 3: John Baker's *Compleat History*
ends prematurely at P and then just as the pagination resets to 1 for the second half of the book, so does the signature, starting at Aa.  

Let us turn now to the text of the trial as it appears in Baker’s book. It also suggests that different printers produced each half of the book, but more important for our purposes is its similarity to Tonson’s account. The two books differ, but not in many respects. Indeed, anyone who compares them will quickly conclude, as Tonson undoubtedly did, that Baker had copied the trial portions of his book from Tonson’s and had not employed his own shorthand writers at the trial.

The changes Baker made in the first part of his trial account were mostly superficial. The paragraph breaks were, with a few exceptions, copied verbatim. Baker’s compositor (likely working with a markup of Tonson’s Tryal) then changed the narrative from first person, which is how it appeared in the Tryal, to third person. A few other words were changed sporadically throughout. The biggest changes were that Baker moved his recital of the articles of impeachment, and Sacheverell’s answer thereto, to the preliminary matters of his book, rather than embedding them in the trial portion as Tonson had. He also chose not to reproduce the text of Sacheverell’s two sermons and he abridged several of the documents the clerk had read into evidence, all of which appeared in full in Tonson’s Tryal. A few other minor omissions in this part seem to have been by mistake rather than design.

The second half of Baker’s account saw changes similar to the first, but the style of composing it further suggests that it had been prepared separately. As with the first half, this part copied the text almost verbatim, changing, once again, the presentation from first person to third person. But the compositor of the second half was not as concerned about staying true to all the paragraph breaks, and he regularly combined shorter paragraphs into larger ones. A few introductory and closing sentences for each day of the trial were also omitted or editorialized. The most significant change from Tonson’s text was that Baker chose not to reproduce two acts of Parliament and two proclamations, all of which had appeared in full in Tonson’s edition.

IV. TONSON V. BAKER

Tonson did not wait long to take action against Baker. He immediately hired Marmaduke Horsley to solicit a suit in the Court of Chancery. Horsley had five months prior been admitted to Gray’s Inn and called to the bar.  

175. 8vo, A—Q⁸ P⁴ Aa—Oo⁸ Pp⁴ Qq⁸ Rr⁴ Ss–Tr⁴.  
176. THE REGISTER OF ADMISSIONS TO GRAY’S INN, 1521–1889, at 357 (London, Hansard Pub’g Union, Ltd., Joseph Foster ed., 1889); 2 THE PENSION BOOK OF GRAY’S
But it appears he had already been practicing as a solicitor, given that his marriage to Judith Roberts at Gray's Inn Chapel in 1697 listed him as a "lawyer." Horsley thus has the honor of being the first lawyer to file a lawsuit under the Statute of Anne.

Horsley drafted a bill of complaint (Fig. 4) and filed it on July 8, 1710. As with other bills of the period, it was written on parchment and deposited in one of the divisions of the Six Clerks' Office. It also followed the pattern typical of copyright complaints. It set forth the plaintiff's right and how the defendants had infringed it, and then requested a discovery of material matters, an injunction, and a writ of subpoena ad respondendum.

I will turn to the particulars of the claim in a moment, but I will first treat the other players in the case—the three defendants. Each of them has an interesting story. Two tussled with Tonson before, and John Baker in particular clashed with Tonson and his nephew over disputed copyrights...

---

INN 1669–1800, at 153 (Reginald J. Fletcher ed., 1910) (calling him six days after admitted). The manuscript Pension Order Book indicates that Horsley was called to the bar by grace rather than by standing. Pension Order Book, Gray's Inn MS PEN/1/2 (Feb. 10, 1709/10) ("Ordered that Mr Mar'd' Horsley a Member of this Society be Admitted to the Barr ex gratia.").

177. REGISTER, supra note 176, at lv.
before *Tonson v. Baker*. The narratives below also provide a snapshot of the book trade just before the Statute of Anne through the eyes of these defendants, all of whom were very active in the trade.

### A. THE DEFENDANTS

The first defendant of course was John Baker; his name was on the imprint. The others—John How and Henry Hills Jr.—were added to the bill with interlineations, meaning Tonson must have discovered their involvement after the bill was engrossed but before Horsley submitted it to the court. No allegations in the bill are specifically directed to any of the defendants; they are instead alleged to have acted in concert. Tonson identifies Baker as a “bookseller” and How and Hills as “printers.” That Tonson named three defendants instead of one is to be expected, as it would have been obvious to Tonson that Baker had not worked alone. Baker was a trade publisher, not a printer, and though not specifically mentioned in the bill of complaint, the division of labor in the printing of the book would have been immediately apparent to Tonson.

Apart from Baker, whose involvement was obvious, we are left to wonder why Tonson named How and Hills as the printers from among the roughly sixty others working in London at the time. I suspect that Tonson had informants in the trade who, on this occasion, provided the information he desired. But he may have also used circumstantial evidence to point himself in the right direction. Unfortunately, conjecture is all that remains for us today.


It would have come as no surprise to the trade that Tonson sued Henry Hills Jr. for copyright infringement. Hills was the son of Henry Hills Sr., one of the holders of the office of King’s Printer during the reigns of Charles II and James II and a respected member and former master of the Stationers’ Company. But the apple fell far from the tree, and Hills Jr. was destined to become the most despised printer in London in the early 1700s.

---

179. *Id.* at l. 11.
181. *Cf.* Letter from an Informant to Jacob Tonson Jr. (Aug. 29, 1734), British Library Add. MS 28,275, f. 319 (concerning the pirating of Shakespeare’s *The Merry Wives of Windsor*).
Hills Jr.'s career had an inauspicious start. His first known venture in printing, which occurred in India in 1674 under the auspices of the East India Company, was a failure.\textsuperscript{183} Having brought only English type to India, Hills found himself unable to print works in the local language. Accused of mismanaging the accounts as well, he returned in disgrace to London in 1679 and then became a freeman of the Company of Stationers by patrimony.\textsuperscript{184}

Nothing in his early history indicates a predilection toward piracy. Indeed, it appears Hills respected copyrights when first starting out. He registered several works for copyright in the 1680s, for example, including six during the first statutory interregnum.\textsuperscript{185} But his life and career took a turn for the worse in 1688. He accepted a job as messenger of the press—a police-like position whose task was to enforce censorship licensing—which probably made him few friends among Stationers and authors.\textsuperscript{186} More importantly, his father largely disinherited him for refusing to convert to Roman Catholicism. Hills Sr.'s lucrative share in the patent for the office of King's Printer, which could have offered a steady stream of income to his first son, went instead to Hills Jr.'s stepmother and his younger siblings.\textsuperscript{187}

Hills did not break out as a pirate until after he unsuccessfully petitioned to recover a share of the patent. He alleged that his siblings' shares were forfeited on account of being Papists, and he thus prayed in 1691 and 1698 that the King might grant him "the said Forfeitures & forfeited Shares of the remaining term" of the patent.\textsuperscript{188} The petitions were taken under advisement, but it appears that they were never acted upon. Hills's younger brother Gilham continued to be named as a plaintiff, and as a holder of the patent, from 1696 to 1725 in over forty lawsuits brought for infringement.\textsuperscript{189} Though it may be only a coincidence, perhaps it was Hills's inability to secure the patent that led him to the book-trade piracy for which he became known.

\textsuperscript{183} J.B. Primrose, \textit{A London Printer's Visit to India in the Seventeenth Century}, 20 LIBR. 100, 100–03 (4th Ser. 1939).
\textsuperscript{184} \textit{Id.} at 102–03; MCKENZIE, supra note 85, at 79, No. 2128 (freedom of the Stationers' Company).
\textsuperscript{185} 3 STATIONERS' REGISTERS, supra note 19, at 134–35, 190, 218, 270, 276, 293, 316, 333, 362, 394 (registrations from 1682/3 to 1691).
\textsuperscript{186} \textit{See, e.g.,} Entry Books, SP44/337, p. 392 (Feb. 11, 1687/8); \textit{id.} SP44/56, p. 406 (Feb. 22, 1687/8); \textit{id.} SP44/338, pp. 448–49 (Sept. 2, 1689); Court Book F, f. 105r (Ct. Ass. 1688).
\textsuperscript{187} Will of Henry Hills Sr., PROB 11/398, f. 45r (will Dec. 10, 1688; probate Jan. 21, 1689/90); Entry Books, SP44/238, pp. 228–29 (June 9, 1698).
\textsuperscript{188} Entry Books, SP44/238, pp. 228–29 (June 9, 1698); \textit{see also} \textit{id.} SP44/235, p. 171 (Aug. 13, 1691).
\textsuperscript{189} H. Tomáš Gómez-Arostegui, Register of Copyright Infringement Suits and Actions From c.1560 to 1800, http://www.oldcopyrightcases.org.
Hills’s disrespect of the supposed printing rights of others before the Statute of Anne was notorious. According to John Nichols, compiler of *Literary Anecdotes of the Eighteenth Century*, Hills had become infamous for pirating “every good Poem or Sermon that was published.” Richmond Bond, in his study of Hills’s practices, recounts the pejoratives Stationers and authors directed at Hills in the early 1700s: John Castaing stated in November 1709 that Hills was “Notorious for Pyrating Booksellers Copies, to their exceeding Loss”; John Dunton called him an “ARCH-PIRATE, and hard’ned Wretch” in 1710; and Adam Addlestaff in the same year complained that authors who “hope[d] to reap the Fruit of their Labours, by communicating to the World the Product of their Brain, [were] immediately set upon by a Gang of Pyrates, with H.H. for Captain, who rob[bed] them of their Cargo.”

Chancery records confirm that Hills was enough of an irritant to have been sued three times for infringement in 1706 and 1708. In one suit, Hills suffered the humiliation of being sued by his own brother for infringing the patent for the office of the Queen’s Printer. The other two suits were based on a purported common-law copyright.

Notably, Jacob Tonson was the plaintiff in one of those suits. The circumstances of the case bear recounting in some detail because they further illuminate Tonson and Hills’s views on literary property in the years just before the Statute of Anne and *Tonson v. Baker*.

In *Tonson v. Hills*, Tonson claimed to have purchased from an author the “Originall Coppy and Coppy right or propriety of Coppy” of *An Epistle from the Elector of Bavaria to the French King: After the Battel of Ramillies*. Tonson published the poem without having previously registered it with the Stationers’ Company. Unable to cite the customs of the Company, Tonson relied directly on a copyright at common law. He posited that “according to the Lawes & Customes of this Realme [he] ought to have the sole Impression and first utterance [i.e., sale] of the sayd Book and of all Coppyes of the

190. 8 Nichols, supra note 162, at 168.
192. British Library Harley 5995 No. 84.
196. Rogers v. Hills, C5/342/64 (Ch. 1708); Tonson v. Hills, C8/623/33 (Ch. 1706).
197. C8/623/33, m. 1 (Ch. 1706).
198. See ESTC No. T62160.
Tonson further alleged that Hills had printed the same work, save for the absence of a title page and dedication. And because Hills had printed his with “Smaller Character” on “Course paper,” and had paid “Nothing for the Coppy of the sayd booke or Poem,” Tonson alleged that Hills was able to “very much undersell” Tonson’s edition of the poem.

In his answer, Hills professed ignorance of whether Tonson had bought anything from the author, and whether as a consequence Tonson had the sole right to print the work according to the laws and customs of the realm. He confessed, however, that he had paid nothing for the work, and criticized Tonson for printing his edition in folio, large character, and large margins. According to Hills, this “unreasonably . . . swelled or raised up [the poem] to so great a rate or price as twelve pence a peice.” Hills admitted it was his goal that the “people of this Kingdome . . . should have the said poem for a little money.” He confessed to printing 1,500 copies, 1,000 of which had already been sold to street hawkers who offered them for half a penny. Hills then stated he had only made ten shillings thus far.

Unfortunately, the orders in the case reveal little about the outcome. The Master of the Rolls permitted Hills to proceed in forma pauperis and assigned as his barrister none other than Spencer Cowper. Moreover, even though Tonson had requested an injunction in his complaint, he never moved for one in open court and thus never obtained one. Perhaps he was wary of pressing a claim based on an unconfirmed right at common law. The infringement may have been of relatively little consequence and not worth the risk of testing the right. Notably, one month after Hills filed his answer, Tonson and several other booksellers petitioned Parliament for a new copyright statute. One must wonder whether Hills was the impetus.

199. Tonson, C8/623/33, m. 1. That Tonson limited his own right to distribute the work to its first sale may, perhaps, imply an early understanding and application of what we now call the first-sale or exhaustion doctrine.

200. See ESTC No. N66101.

201. Tonson, C8/623/33, m. 2 (Ch. 1706/7).

202. This claim is consistent with his mantra, which appeared in the early 1700s on the imprints of pirated pamphlets, that he had printed them for the benefit of the poor. As one commentator noted, it made for a “good slogan, even if ‘the Poor’ meant Henry Hills himself.” Mildred L. McCracken, Henry Hills, Pirate Publisher: The Significance of his Pamphlets 1 n.2 (June 1942) (unpublished Ph.D. dissertation, University of Texas).

203. Tonson, C33/308, f. 139v (Ch. 1706/7).

204. For injunction prerequisites, see Gómez-Arostegui, supra note 7, at 1228-33, 1235-36.

205. 15 H.C. JOUR. 313 (Feb. 26, 1706/7). The expense of the petition was borne in part if not in toto by the Stationers’ Company. Court Book G, f. 138v (Ct. Ass. Mar. 1, 1706/7).
Nothing more occurred in the case after Hills answered, and sometime later in 1708 Tonson reissued the epistle as part of a larger collection in folio.  

Tonson must have had other reasons to suspect that Hills should be named as a co-defendant in Tonson v. Baker, apart from Hills’s reputation as a pirate and their previous clash. Chief among them was probably that Hills had worked with John Baker before. For how long, we do not know. It was not common for a trade publisher like Baker to identify in the imprints of his books which printer he had utilized. We do know, however, that Hills and Baker had worked together in December 1709 when they printed and published a pirated compilation of the periodical The Tatler. They also seem to have partnered, at least informally, when Baker published Hudibras. Ironically, the best evidence of their collaborations appears in the register book created by the Company of Stationers following the Statute of Anne. Hills entered several books after 1710, including two in partnership with John Baker on June 12 and October 4, 1710. Though the Compleat History was not among them—Baker registered that book in his name alone—Tonson may have nevertheless relied on the June partnership as evidence of Hills’s close association with Baker and his involvement in the Compleat History.

Hills never responded to the complaint in Tonson v. Baker and was dead by 1712. After his death, The Evening Post advertised his illicit stock and noted there would “never be any of the same, or any in the like manner, reprinted after these are gone, there being an act of Parliament to the contrary.” A large part of his old stock was purchased by Thomas Warner, who later began a partnership in 1716 with our John Baker in Paternoster Row. Though it is sometimes presumed that the Statute of Anne was responsible for halting Hills’s piratical ways, the book trade may have actually had his death to thank for that.

2. John How

Tonson also named John How as a defendant in Tonson v. Baker. How never responded to the suit either, and thus we have no admission of his

---

206. ESTC No. N27926.
207. Bond, supra note 182, at 266.
208. See infra text accompanying note 302.
209. Register Book MS, supra note 81, at 40, 54, 76, 97.
211. 1 NICHOLS, supra note 162, at 72.
212. Edward Solly, Henry Hills, the Pirate Printer, in 11 THE ANTIQUARY 151, 152–53 (London, Elliot Stock 1885). This article should be used with caution as it contains errors.
purported role in printing the *Compleat History*. We do know, however, that How had previously partnered with Baker on other books, just as Henry Hills Jr. had. In 1707, a "J. How" worked with John Baker at the Sun and Moon in Cornhill. Moreover, soon after the Statute of Anne was enacted, but before Baker published his *Compleat History*, John How registered two copyrights in partnership with Baker (then at Paternoster Row). We also know that How dealt in at least two other books with Baker in 1710. This information, and other bits that have since been lost to history, likely helped point Tonson’s compass in How’s direction.

John How had a sharp streak in him, much as Hills had, but How’s character was not as clear cut. How was both a pirate and a champion of copyright, which makes his purported involvement here most interesting.

How became a frequent defendant in Chancery starting a few years after he completed his apprenticeship in 1680. In 1682, Edward Atkins and others sued him for infringing the patent for law books. And in the same year, the Stationers’ Company sued How for violating its patent for printing primers, psalms, almanacs, and the like. In both cases, interlocutory injunctions were entered against him. In 1684, Blanch Pawlett sued How and his brother Job during the statutory interregnum for infringing what Pawlett alleged was a copyright in Richard Allestree’s *The Whole Duty of Man*, but it appears the suit was ultimately unsuccessful. How was then ordered arrested in 1684 for printing dangerous works, and then narrowly avoided being sued in 1685 for printing *The XV Comforts of Rash and Inconsiderate Marriage*. He was not sued again, apparently, until 1703, when the holders of the office of King’s Printer named him as a person who had violated their patent.

214. ESTC No. T61370. For more on the Sun and Moon shop and John Baker’s affiliation with it, see infra text accompanying notes 281–85.
215. Register Book MS, supra note 81, at 35, 36.
216. *See* ESTC Nos. N13670, T22305. The latter book was published anonymously, but an upset author identified the culprits as “John How, Printer, and John Baker, Bookseller.”
217. MCKENZIE, supra note 85, at 73, No. 1957 (freedom of the Stationers’ Company).
224. Bill v. How, C5/592/21 (Ch. 1703). What he was doing in the interim years, or not doing, is not readily apparent. *See* PLOMER, *supra* note 119, at 162. He was still working,
The seemingly incorrigible How also ran into trouble with Daniel Defoe. How printed an unauthorized collection of Defoe’s works in 1703, a time when Defoe was trying to maintain a low profile with the government. Defoe had recently been convicted and imprisoned for publishing an anti-government tract that had been read literally, though he had in fact intended it sarcastically. Defoe complained about How’s collection, albeit without expressly naming him, in Defoe’s own corrected edition of the collection. He labeled How a “Piratical Printer, as such are very rightly called, who unjustly print other Mens Copies.” Defoe complained again later that it was a “most aggravated Theft . . . as it was invading his Right.”

How apparently grew tired of being a pirate, and being pirated himself, because he urged Parliament to enact a new copyright statute not long afterward. Deazley believes that How was the author of a one-sheet pamphlet dated c.1706 and entitled Reasons Humbly Offer’d for a Bill for the Encouragement of Learning, and Improvement of Printing. The author complained of “divers Persons having of late taken upon them[elves] to Reprint very Uncorrectly such Copies [of others].” Towing a utilitarian line, the pamphlet claimed that copyright protection was necessary to help “Propagat[e] the most useful Parts of Knowledge and Literature.”

Three years later, How wrote the short tract Some Thoughts on the Present State of Printing and Bookselling in which he again urged Parliament to “secure Property in Books by a Law.” The practices of publishers and printers during the statutory interregnums had become chaotic. Most everyone, How claim-
ed, pirated the works of others, but he lamented that the wealthy publishers had become very good at it: "[T]he great Traders can make what Impressions of Books they please, and can vend them with as much Ease and Privacy as they printed them."\textsuperscript{234} How further protested that whereas the wealthy publishers could pursue the poorer ones in court, the converse was not always true. Notably, he twice complained of the practices of Henry Hills Jr.\textsuperscript{235}

Recognizing he would be labeled a hypocrite, How responded as follows:

Some People perhaps will ask how long I have been of this Opinion, and why I did not practice it sooner? In Answer to which, I say 'tis not my Opinion now, for I act against my Principle, and am herein an Occasional Conformist,\textsuperscript{236} made so by the Practice of some of the greatest Men of the Trade, and not by the Byass of a vitious Inclination; and I hope by this Means to discourage some from proceeding in this Way, by animating others to engage heartily in the good Work of securing Property by a Law . . . .\textsuperscript{237}

This frankness is consistent with John Dunton’s assessment, made four years earlier, that How was "Generous and Franck, and speaks whatever he thinks; which, in Spight of the HIGH-FLYERS, has given him an Honest Character."\textsuperscript{238} In essence, How was claiming that the market had forced him to pirate, but he was also admitting, quite frankly, that piracy was now doing him more harm than good. He was pledging to conform if the rest of the market would, and this, he posited, would only be possible with the enactment of copyright legislation. The remainder of How’s tract contained specific legislative proposals.\textsuperscript{239} Chief among them was that he wanted copyright enforcement to occur in a specialized tribunal that could move quickly and more economically.\textsuperscript{240}

It is vexing that How would choose to infringe a book so soon after the Statute of Anne. Perhaps he was unhappy with the statute’s final form. The statute still called for enforcement in regular courts, a costly venture, thereby retaining a system that disadvantaged the less wealthy traders.

\textsuperscript{234} Id. at 4.
\textsuperscript{235} Id. at 10, 12.
\textsuperscript{236} A reference to those who only occasionally took communion in the Church of England in order to qualify for public office under the Test Acts of the 17th century.
\textsuperscript{237} Id. at 11.
\textsuperscript{239} How, supra note 233, at 11–16.
\textsuperscript{240} Id. at 13–15.
If his activities in the years after Tonson v. Baker are any indication, How remained recalcitrant. He was sued at least twice after Tonson.

In 1716, How was sued for printing the new version of the psalms of David.\textsuperscript{241} The suit is fascinating because it was probably the first brought by an author for a work protected under the legacy clause of the Statute of Anne.\textsuperscript{242} How admitted he had printed the book around four years prior for booksellers, including John Baker, and he invoked the statute in his own defense, claiming he was free to print the psalms because the authors and co-owners of the copyright in the work had failed to register it.\textsuperscript{243} The Court of Chancery read the statute and overruled the demurrer as an interlocutory matter, assuring How and a co-defendant that by answering they would not “Subject themselves to the penaltyes in the [statute].”\textsuperscript{244}

In another suit, also filed in 1716, How was sued by the King’s Printers, including by Henry Hills’s brother Gilham, for violating their patent.\textsuperscript{245} The Court of Chancery enjoined How from printing Bibles in violation of the patent,\textsuperscript{246} and nearly two years later, in July 1718, ordered him imprisoned for breaching the injunction.\textsuperscript{247} He died not long after in September 1719,\textsuperscript{248} robbing us of further exploits in the book trade.

3. John Baker

We come now to John Baker, the only defendant who revealed himself on the imprint of the Compleat History. Compared to Jacob Tonson, who has

\begin{itemize}
\item \textsuperscript{241} Stationers v. White, C11/749/6, m. 1 (Ch. 1716).
\item \textsuperscript{242} The plaintiffs’ book was NAHUM TATE & NICHOLAS BRADY, A NEW VERSION OF THE PSALMS OF DAVID (London, Company of Stationers 1696). Tate, Brady, and the Stationers’ Company each owned shares in the work. (Partnership with the Company was necessary because the work, as a psalm, fell within the Company’s patent. See supra text accompanying note 6. Had Tate and Brady published the book on their own, they would have exposed themselves to a suit. See, e.g., Stationers v. Partridge, 10 Mod. Rep. 105 (K.B. 1712).) Though Tate was dead by the time the suit was filed in 1716, Brady was still alive and was named as a plaintiff alongside the Stationers’ Company and several others.
\item \textsuperscript{243} Stationers, C11/749/6, m. 2, C11/751/16 (Ch. 1716–1716/7). Notably, it appears that Nahum Tate considered suing Baker as early as December 1711. Tate offered “to Contribute to the Charge of prosecuting a Suite against” Baker for publishing the psalms without Tate’s permission. Court Book G, f. 196r (Ct. Ass. Dec. 20, 1711); \textit{cf. also} ESTC No. T91872.
\item \textsuperscript{244} Stationers, C33/328, f. 37r (Ch. 1716). For more on registration as a prerequisite for copyright protection, see infra note 407.
\item \textsuperscript{245} Baskett v. How, C11/2610/12 (Ch. 1716).
\item \textsuperscript{246} Id. at C33/327, f. 2r (Ch. 1716).
\item \textsuperscript{247} Id. at C33/329, f. 385r (Ch. 1718).
\item \textsuperscript{248} Register of Burials, St. Benet Gracechurch, Guildhall MS 5671 (Sept. 16, 1719).
\end{itemize}
been treated to four separate studies of his life and businesses,\textsuperscript{249} relatively little is known of Baker. He left a shorter paper trail than Tonson, which is not surprising given the circles in which they traveled. Whereas Tonson's closest associates ran the country, Baker's did not. Apart from that deficit, previous attempts by scholars to outline Baker's practices and to correctly identify him as part of larger studies on the book trade have also been hampered by the lack of online resources that are available today, such as the English Short Title Catalogue, Early English Books Online, Eighteenth Century Collections Online, and the British Book Trade Index.\textsuperscript{250} Making matters worse, John Baker was an extremely common name in London. Thus, those who have traced Baker have rightfully been unsure of his guild affiliation, if any,\textsuperscript{251} and of where and when he first began working in the London book trade.\textsuperscript{252}

Baker could conceivably have been a Stationer, given the nature of the work he performed. A John Baker was admitted to the freedom of the Company of Stationers and the City of London in April 1694, after serving as an apprentice to Brabazon Aylmer.\textsuperscript{253} There was also a John Baker who bound himself as an apprentice to Henry Playford in March 1701/2, though he was never freed.\textsuperscript{254} But one did not need to be a member of the Company to work as a bookseller or publisher. Rules regulating the book trade had sometimes required as much from booksellers, but they were gone by 1695.\textsuperscript{255} Apart from those industry-specific rules, only those engaged in manual

\textsuperscript{249}. See generally HARRY M. GEDULD, PRINCE OF PUBLISHERS (1969); LYNCH, \textit{supra} note 84; G.F. PAPALI, JACOB TONSON, PUBLISHER (1968); Sturges, \textit{supra} note 87.


\textsuperscript{251}. KARL TILMAN WINKLER, \textit{HANDWERK UND MARKT} 384 n.85, 395 n.131 (1993).

\textsuperscript{252}. PLOMER, \textit{supra} note 119, at 14–15; Treadwell, \textit{supra} note 213, at 109, 111–12.

\textsuperscript{253}. MCKENZIE, \textit{supra} note 85, at 5, No. 105 (company freedom); List of Freemen 1681–1699, LMA COL/CHD/FR/03/02/001, No. 90 (Apr. 1694) (freedom of the City).

\textsuperscript{254}. D.F. MCKENZIE, \textit{STATIONERS' COMPANY APPRENTICES} 1701–1800, at 275, No. 6412 (1978). There were other John Bakers who were members of the Company, but they either predeceased our Baker or continued to work long after he died.

\textsuperscript{255}. The Printing Act of 1662 largely limited bookselling to members of the Company, those who were otherwise brought up in the book trade, or those specially licensed. Statute, 1662, 13 & 14 Car. 2, c. 33, §§ 7, 20. For a time, the Company also exerted stronger controls on bookselling by non-Stationers as a consequence of a new Charter obtained in 1684. The Charter was withdrawn in 1688 and declared void in 1690, so the new powers were short lived. Michael Treadwell, \textit{The Stationers and the Printing Acts at the End of the Seventeenth Century}, in \textit{4 THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN} 755, 768–69 (John Barnard et al. eds., 2002); Cyprian Blagden, \textit{Charter Trouble}, 6 \textit{BOOK COLLECTOR} 369, 374–75 (1957).
occupations were supposed to have apprenticed in their occupational field. Baker neither made his own paper, printed his own books, nor bound them; he merely arranged for others to do so and sold the goods wholesale and retail. As a retailer in the City of London, Baker was required by the custom of the City to be a freeman of a guild and of the City itself. But he could just have easily been a member of a guild unrelated to the book trade. Or he might have even skirted joining for as long as he could get away with it.

The recent work of genealogist Cliff Webb, who has indexed the apprenticeship records of nearly sixty City companies in the last fifteen years, coupled with the use of additional indices and records, has now made it possible to determine John Baker's guild affiliation. The first piece of the puzzle comes from a libel case brought in 1713 against Daniel Defoe in which Baker testified. Baker identified himself as a bookseller on Paternoster Row, but provided no guild affiliation. Fortunately, a chap named William Boreham testified in the same case that he was Baker's apprentice. Working backward from that testimony, and utilizing Webb's indices and others, a single match appears among the apprenticeship records. On April 26, 1710, a William Boreham of London had become an apprentice to a John Baker of the Company of Upholders (i.e., upholsterers).

If there was any doubt as to whether our Baker is the Upholder identified here, it is dispelled by Baker's own freedom records. Baker was made a freeman of the Upholders' Company by patrimony on April 26, 1710, meaning that his father (also named John) was an Upholder. No additional biographical information is provided in the Company records, but the freedom records of the City of London are more complete. To qualify for admission by patrimony, Baker was required to produce six men to swear that he was born to a freeman of the City, and that his birth occurred after

256. WILLIAM BOHUN, PRIVILEGIA LONDINI 115–19 (London, D. Brown & J. Walthoe 1702). Even this requirement seems to have waned by the reign of Queen Anne.
258. See J.R. Kellet, The Breakdown of Gild and Corporation Control over the Handicraft and Retail Trade in London, 10 ECON. HIST. REV. 381, 385–86 (1958) (noting that the custom had lost much of its punch in the early 1700s, leading to an ordinance in 1712 reconfirming it).
260. Information of John Baker, KB33/5/5, f. 3r, SP34/21, ff. 30r–32r (Apr. 10, 1713).
261. Information of William Boreham, KB33/5/5, f. 4r, SP34/21, f. 32r–32v (Apr. 10, 1713).
his father had himself become free. Tellingly, two of Baker's guarantors were Stationers, one of whom was his regular partner John How. Baker was later elected to the livery of the Upholders' Company in April 1712, and accepted it in May 1712, which made him eligible to vote in City parliamentary elections. But he was not otherwise active within the Company.

Notably, Baker bound one other apprentice—one who appears, by fate or coincidence, to have spawned another rebellious bookseller and who thus bears mentioning. A William Carnan, originally of Reading, bound himself to Baker in 1713. Though I have found no dispositive evidence, this might be the William Carnan who later became the printer and publisher of The Reading Mercury newspaper. If so, it was Carnan's son, Thomas, who returned to London to work in the trade in the mid-18th century and became the firebrand who busted the Company of Stationers' 160-year-old patent for the printing of almanacs.

So how and when did Baker come to work in the book trade? It has previously been presumed that he started selling books at Mercers' Chapel in Cheapside in 1702 or 1703. A John Baker did begin selling books at that location in February 1701/2 after marrying its proprietor Mary Fabian. But this was not our Baker. The marriage license allegation between Baker and Fabian demonstrates that in February 1701/2, Baker was thirty years old. Our John Baker, who we know was married to Shirley Baker née

264. Freedom Admission Paper, LMA COL/CHD/FR/02/00268, No. 121 (Apr. 1710); see also List of Freemen, 1700–1712, LMA COL/CHD/FR/03/02/002, No. 278 (Apr. 1710).
266. Upholders' Co., Presentments, 1704–1772, Guildhall MS 7142/1, p. 59 (Sept. 9, 1713); Inland Revenue Book of Stamps: Apprenticeships, IR1/2, f. 122v (Oct. 5, 1713).
267. K.G. BURTON, THE EARLY NEWSPAPER PRESS IN BERKSHIRE, 1723–1855, at 100–03 (1954). As a publisher of several newspapers, Baker would have provided Carnan excellent training on periodical publication. But because Baker was not a printer, Carnan would have obtained that training elsewhere. This is not outside the realm of possibilities, given that Baker died three and a half years after Carnan was bound to him, meaning that Carnan was likely turned over to another master in London or he moved back to Reading.
269. See sources cited supra note 252.
271. Register of Marriages, Mercers' Hall Chapel, RG4/4436, p. 17 (Feb. 1701/2). Fabian took over the shop from her previous husband, Stationer and bookseller, Thomas Fabian c.1698.
Palmer at the time of his death in 1717, had married his wife in October 1703. Their marriage allegation, which I learned of thanks to the notes of book-trade historian Michael Treadwell, indicates that the Baker on Paternoster Row was twenty-four years old and a bachelor when he married; his admission paper to the City of London further shows that he was thirty in 1710. These were two different men.

It seems likely that the Baker at Mercers’ Chapel was the Stationer who had apprenticed to Brabazon Aylmer and was freed in 1694. It would have behooved Mary Fabian to marry another Stationer after her previous husband died. To do otherwise would have meant forfeiting the copyrights entered in her husband’s name, at least under ancient regulations of the Stationers’ Company. Moreover, many apprentices were twenty-one years old when freed, and Baker would have been around that age in 1694. Baker also had other connections to Aylmer, including, among other things, having published a book previously held by him. In any case, this doppelgänger appears not to have been much of a businessman, as he lost his lease on the shop in Mercers’ Chapel in late 1715, after falling £35 in arrears on rent.

So if our Baker did not start working as a bookseller at Mercers’ Chapel as previously thought, when did he do so? He was certainly not the Baker who began working for Henry Playford in March 1701/2. That Baker’s father was named Thomas. Rather, the bibliographical evidence and contemporaneous newspaper accounts suggest that our Baker probably started working in the trade as a bookseller in early 1707 when he joined Richard Burrough at a bookshop called the Sun and Moon in Cornhill. Though Burrough was a Stationer, he never bound Baker as an apprentice.

---

273. Treadwell, supra note 213, at 111 (citing Administration of John Baker, PROB 6/93, f. 73r (Apr. 27, 1717)); see also Register of Burials, St. Mary of Islington, f. 118v (Apr. 16, 1717).
274. Register of Marriages, All Hallows London Wall, Guildhall MS 5087 (Oct. 29, 1703).
276. See sources cited supra note 264.
278. See ESTC Nos. R216401, T118815. Additionally, before he was at Mercers’ Chapel, Baker seems to have sold books near the King’s Arms in Little Britain. The one book we know he sold there has advertisements for books offered by Aylmer. See ESTC No. R218994.
280. McKENZIE, supra note 254, at 275, No. 6412.
282. McKENZIE, supra note 85, at 127, No. 3416.
Burrough's name mysteriously disappears from the tax assessments for the property and from the trade entirely c.1708, cutting short whatever working relationship they enjoyed. Baker then operated, apparently alone, out of a shop in Grocers-Alley in the Poultry from 1708 to 1709. And starting in mid-1709, he moved to the Black-Boy on Paternoster Row.

The fact Baker was unaffiliated and then an Upholder is important because it pits him as the ultimate outsider. Not being a Stationer, he was never eligible to directly participate in the registration system that predated the Statute of Anne (as delicate and underutilized as it admittedly was during the second statutory interregnum). Nor could he have taken advantage of the Company's communal culture which, when functioning properly, would have shielded unregistered works. Conversely, the fact he was unable to partake in the advantages of membership also meant he was free of its disadvantages. Baker would not have been subject to the jurisdiction of the Company and its ordinances. Though the Company's powers had been weakened by the lapse and then expiration of the Printing Act of 1662—exhibits A and B were its inability to constrain the likes of Henry Hills Jr. and John How—it could sometimes still exert pressure on its members. Baker would have operated outside those customs. Further cementing his status as an outsider, Baker probably entered the trade in 1707, meaning that he was brought up having never worked with the statutory copyrights that existed before 1695.

Predictably, Baker showed considerable disdain for the purported copyrights of others. This was especially evident during the statutory copyright interregnum before the Statute of Anne. He brazenly printed the works of others and clashed more than once with Jacob Tonson.


285. See, e.g., THE DAILY COURANT (London), No. 2392, June 24, 1709, at 2; see also James Raven, Location, Site, and Succession: The Bookshops of Paternoster Row Before 1800, in THE LONDON BOOK TRADE 89, 97, 118 (Robin Myers et al. 2003) (identifying book shops on Paternoster Row before 1800 and offering the probable location of Baker's shop).

That the John Bakers at the Sun and Moon and Grocers-Alley shops are the same is suggested by the fact A Collection of Divine Hymns and Poems on Several Occasions was printed for J. Baker at the Sun and Moon in 1707, and then reprinted for J. Baker in Grocers-Alley in 1709. See ESTC Nos. T167210, T125422. Other works connect him to Paternoster Row. Lay Baptism Invalid was printed for J. Baker at the Sun and Moon in 1708, and then reprinted for J. Baker on Paternoster Row in 1709. See ESTC Nos. N19355, N11639. Similarly, The New Metamorphosis was printed for R. Burrough and J. Baker in 1708, and then reprinted for J. Baker on Paternoster Row in 1709. See ESTC Nos. N41653, T116537.
From the start, in 1707, Baker began working with Edmund Curll, a pirate whose infamous reputation later surpassed that of Henry Hills Jr.\textsuperscript{286} Like Baker, Curll was not a member of the Stationers' Company.\textsuperscript{287} Their inaugural publication appears to have been Matthew Prior's \textit{Poems on Several Occasions}, a work in which Jacob Tonson Sr. claimed to hold the copyrights.\textsuperscript{288} Tonson responded in the press, as he was wont to do, that "all the Genuine Copys of what Mr. Prior has hitherto written, do of right belong, and are now in the hands of Jacob Tonson, who intends very speedily to publish a correct Edition of them."\textsuperscript{289} Tonson did not sue Curll or Baker. He instead published his own authorized edition in 1708, albeit with a 1709 imprint.\textsuperscript{290}

Whether this was Tonson's first run-in with Baker is not known, but it would not be his last. He confronted Baker at least twice more before 1710.

In June 1709, for instance, the Tonsons published a six-volume collection of William Shakespeare's plays.\textsuperscript{291} Soon after, it was announced in \textit{The Daily Courant} that a seventh volume with poems by Shakespeare would soon be published, and it is clear from the advertisement that John Baker was involved.\textsuperscript{292} Baker took subscriptions in July,\textsuperscript{293} and when the volume was finally published under the imprint of Edmund Curll,\textsuperscript{294} the advertisements indicated it could be purchased at Baker's shop at the Black-Boy.\textsuperscript{295} Notably, Curll's volume criticized Tonson's as including plays that could not be attributed to Shakespeare, simply to "swell the Volume and the Price."\textsuperscript{296} It appears, however, that Tonson could not (and thus probably did not) claim the copyrights to the works in Curll's volume.\textsuperscript{297} Tonson shrugged off the en-

\begin{thebibliography}{9}
\bibitem{286} Paul Baines & Pat Rogers, Edmund Curll, Bookseller 27–28, 315 (2007).
\bibitem{287} Pat Rogers & Paul Baines, \textit{Edmund Curll, Citizen and Liveryman: Politics and the Book Trade}, 62 PUB. HIST. 5, 5–7 (2007) (Curll was a member of the Company of Cordwainers).
\bibitem{288} Baines & Rogers, \textit{supra} note 286, at 27–28; Lynch, \textit{supra} note 84, at 79.
\bibitem{289} \textit{The Daily Courant} (London), No. 1491, Jan. 24, 1706/7, at 2.
\bibitem{290} \textit{See} source cited \textit{supra} note 160.
\bibitem{291} Alfred Jackson, \textit{Rowe's Edition of Shakespeare}, 4 LIBR. 455, 455 (4th Ser. 1930); \textit{see} ESTC No. T138296.
\bibitem{292} \textit{The Daily Courant} (London), No. 2392, June 24, 1709, at 2 ("N.B. To make the Notes as perfect as possible, any Gentleman that will please to communicate any thing of that kind, shall receive a Gratification from J. Baker at the Black Boy in Pater-Noster-Row.").
\bibitem{293} \textit{Id.} No. 2410, July 15, 1709, at 2.
\bibitem{294} \textit{The Works of William Shakespear, Volume the Seventh} (London, E. Curll 1710).
\bibitem{295} \textit{The Daily Courant} (London), No. 2455, Sept. 6, 1709, at 2.
\bibitem{296} Works, \textit{supra} note 294, at ii.
\bibitem{297} Don-John Dugas, \textit{Marketing the Bard} 159, 162 (2006).
\end{thebibliography}
croachment and later worked with Curll (but not Baker) to issue a new nine-volume edition, one that carefully omitted the criticism of Tonson.

In late 1709, Baker clashed again with Tonson and his nephew in a dispute that unambiguously turned on a copyright. The dispute bears recounting in detail because it became particularly unpleasant and suggests an additional motivation, other than money, for Baker's subsequent decision to pirate Jacob Sr.'s Tryal. It also has never been discussed before and reveals interesting tidbits about copyrights before the Statute of Anne.

The book at issue was Samuel Butler's Hudibras, which had first been published in three parts with imprints dated 1663, 1664, and 1678, respectively. The book was immensely popular and went through many editions. In early May 1709, five years after the series had last been printed, a new edition in octavo was published by a syndicate of publishers. One of them was George Wells, a right holder who held a copyright share in part two, and another was Thomas Horne, who held the entire copyright in part three.

Baker seized an opportunity to publish a budget, pocket edition in octodecimo on November 21, 1709 (Fig. 5a). In addition to copying the text, Baker added original engravings to his edition, which he touted as "about 20 Cuts designed and engraven by the best Masters, with the Authors Effigies taken from the Original." A handbill, probably distributed the first few days of December 1709, noted that Baker's edition was available at his shop at the Black-Boy and at the shop of Henry Hills Jr. in Black-Fryers.

As it turns out, Tonson's nephew, most likely in partnership with Tonson himself, had purchased George Wells's copyright share in Hudibras just one month prior on October 22, 1709, as part of a larger purchase of over 300

298. LYNCH, supra note 84, at 131–32; see ESTC No. T26042.
300. THE POST=MAN (Old Bailey), No. 1738, Apr. 30 to May 3, 1709, at 2 ("Just published a new Edit."); see ESTC No. T1717.
301. THE POST=MAN (Old Bailey), No. 1819, Nov. 17–19, 1709, at 2 (book available on Monday, November 21st); see ESTC No. T117165.
HUDIBRAS!

The First Part

Written
In the Time of the
Late Wars.

Corrected and Amended.
With Several
Additions and Annotations.

Adorned with Cuts.

LONDON:
Printed for JOHN BAKER,
at the Black-Boy in Pater-noster-
Row. 1710.

Figure 5a: Title page of the first part of Baker's Hudibras
HUDIBRAS:
IN THREE PARTS.
Written in the Time of the
LATE WARS.
Corrected and Amended:
WITH ADDITIONS.

To which is added
Annotations to the Third PART,
With an Exact
INDEX to the Whole;
Never before PRINTED.

Adorn’d with CUTS.

LONDON:
Printed for R. Chiswel, J. Tonson, T. Horne,
and R. Wellington. MDCCX.

Figure 5b: Title page of Tonson's Hudibras
copyrights for 100 pounds. Whether the Tonsons and their partners had previously planned to publish their own pocket edition I do not know (it seems unlikely), but Baker’s edition forced them to do so:

Whereas there is lately published by John Baker an Edition of a Book, Entituled, Hudibras, in three Parts ; which Book is very Uncorrect, and printed upon bad Paper, and by a Person, having no Right to the Copy thereof : This is therefore to give Notice, That there is now in the Press, and will be speedily publish’d with great Care, a very Correct and Curious Edition of the said Book in a small Pocket Volume ; Printed upon Extraordinary Paper, and with a new Brevier Letter, after the same manner with the best Elzever Editions ; with several Cuts design’d and engrav’d by the best Hands : To which will be added Annotations to the 3d Part, never before printed. This Edition will be printed for Jacob Tonson, and the rest of the Proprietors in the Copy, and will be sold for Paper and Print.

The Tonson edition that subsequently appeared (Fig. 5b) in late January 1709/10 was as small as Baker’s, included an index not present in Baker’s edition, annotations to the third part (as promised), and copies of the engravings that first appeared in Baker’s book. The Tonsons’ obvious intention was to return the favor and undercut Baker’s sales.

Baker’s response did not pull any punches. He distributed two handbills soon after the Tonsons advertised their pocket edition in November. In one, Baker claimed the “false Insinuations of Mr. Jacob Tonson . . . [were] design’d only to hinder the Sale” of his book. Baker doubted Tonson would sell his edition at cost, as was claimed, given that Tonson had “always imposed on the World by extravagant Prizes, wide Matter, and large Characters.”

303. Folger Shakespeare Library MS S.a.160 (Oct. 22, 1709). Jacob Sr. is not named as a purchaser in the assignment, but evidence indicates that he owned half of Jacob Jr.’s share in Hudibras, along with half of the other 300 plus copyright shares purchased by his nephew from Wells. This follows because when Jacob Sr. transferred all of his copyrights to his nephew before retiring c.1722, he included “all that half part or share in the Several Copies of books parts or shares in Copies of Books which were purchased of George and Mary Wells.” Rosenbach Museum & Library EMs 417/10 (Sept. 17, 1718). Though it is unclear when Jacob Sr. obtained his share in Hudibras and the other works, it seems safe to conclude it occurred at the time of the initial purchase. I suspect that he probably put up half or more of the purchase money. Accord DUGAS, supra note 297, at 133.


305. See id. No. 4643, Jan. 21–24, 1709/10, at 2 (publication); see ESTC No. T1919.


307. British Library Harley 5995 No. 167; see also id. No. 81 (identical in all material respects).
second handbill continued the attack, claiming that Tonson generally sold his books at a 25% premium over other booksellers because of the expensive formats Tonson unnecessarily favored. These accusations, though perhaps true in other instances, were specious here. But because Tonson’s edition had not yet been published, Baker probably sought to mislead the public into thinking that Tonson’s latest book, when released, would be expensive like the others. Hoping to direct the public to his own book, Baker offered to sell his at five shillings bound in three volumes, or four shillings if bound in one volume. Importantly, Baker also questioned how it was that Tonson and his partners had any more right to print the book than anyone else.

After Tonson’s book went on sale in January 1709/10, and Baker had a chance to review it, Baker criticized the workmanship. He alleged that Tonson “made Gross Blunders in the Printing Part” and noted that the engraving of Butler in particular seemed “to be taken from an Original Chimney-Sweeper”—by which Baker likely was referring to the darkness of the portrait. Moreover, “notwithstanding [Tonson’s] Boasting” of new cuts, Baker complained that Tonson had “Coppyed all the Cutts from John Baker’s” and did so poorly. Having reviewed both books—courtesy of private collector Andy Johnson-Laird—I can confirm that the Tonsons and their partners did copy the engravings (Figs. 6a, b), but the claim they did so badly was exaggerated. In any case, Baker hoped that “all Gentlemen [would] compare them before they buy, and give Encouragement to that which deserves best.” He then promised to sell his “as cheap as” Tonson’s.

Baker was sued on December 15, 1709 for infringing a common-law copyright in Hudibras, but not by the Tonsons. Rather, it was Thomas Horne who led the charge, claiming that Baker had infringed the copyright in part three that Horne’s father received from Samuel Butler in 1679. Additionally, just three days before filing the complaint, Horne, along with Jacob Tonson, Richard Chiswell (who also held a share in Hudibras), and thirteen other booksellers, petitioned Parliament to enact new copyright legislation. The timing may only be a coincidence, but Baker was probably

---

308. Id. No. 132.
309. Id.
311. Horne v. Baker, C5/290/70, m. 1 (Ch. 1709). A subpoena for Baker had issued on December 3, 1709. Id. at C33/313, f. 90v (Ch. 1709).
312. See 3 STATIONERS’ REGISTERS, supra note 19, at 86–87 (Aug. 4 & 8, 1679) (assignment and registration of part three). Thomas Horne later registered the book in his own name on March 5, 1694/5. Id. at 452. Notably, Horne and his counsel make no mention of these registrations in the bill of complaint brought against Baker.
313. 16 H.C. JOUR. 240 (Dec. 12, 1709).
Figure 6a: An engraving from Baker's *Hudibras*
Figure 6b: An engraving from Tonson's *Hudibras*
the straw that broke the camel's back, and thus he may deserve much of the credit for triggering what would eventually become the Statute of Anne.

The lawsuit over *Hudibras* reveals a nastiness in Baker that almost makes one feel sorry for his opponents. Horne alleged that Baker, working with John How, Edmund Curll, and others, had threatened him with financial "ruin." According to Horne, Baker was being indemnified by his partners, and those partners had "raisd or are to raise a [litigation] fund" and would "expend great summes[,] they being many and [m]e but one." Horne then claimed that he had received an anonymous letter stating that he would be undersold on *Hudibras*. More ominously, Baker also threatened that he would print other works supposedly held by Horne in order to "vanquish" him.

Baker demurred to the complaint on January 9, 1709/10 and, as we will soon see, scored a major victory—one that probably emboldened him to continue to infringe copyrights after the enactment of the Statute of Anne.

During the demurrer hearing on May 10, 1710, which came after the statute went into effect, the parties argued over the purported copyright and the type of relief sought. Spencer Cowper, representing Baker at the hearing, acknowledged that "the late \Act/ of parliament doth prohibitt us," but he stressed that the "booke [was] printed before the Act" and that Horne had no right to challenge its printing. Horne's barrister, Sir Joseph Jekyll, countered that the statute did not affect Horne's copyright, and that the principal thrust of the bill was to obtain discovery to support an action at law:

[T]he Act lately made Doth not take away our right & our Bill is to have a Discover[y] [of] what agreements have been made about printinge & Sellinge our Booke to enable us to bring an action for evadinge our propertye for they vend the Books by obscure persons & not in publique shoppes for then could send any person to buy the Books[.]  

Cowper retorted on behalf of Baker with several points: (1) Horne could have "noe action" at law, presumably because the infringements had occurred before the statute and could only be supported by a non-existent copyright at common law; (2) even if Horne could have an action for the

---

315. *Id.* at m. 2 (Ch. 1709/10).
316. It is unclear from the record why it took so long for the demurrer to be heard. It might have been because the Lord Chancellor was occupied with the Sacheverell affair.
317. *Id.* at C37/853 (Ch. Cause Book May 10, 1710).
318. *Id.*
infringement of a copyright at common law, the Chancery should “not enforce a Discovery to make evidence”; and (3) that the suit was for more than just discovery, but for relief in equity as well.319 Turning to the relief, the parties then disagreed on whether the Lord Chancellor had the power to discover and disgorge the profits that Baker had earned.

A report of the hearing prepared by William Melmoth of Lincoln’s Inn, one of Horne’s counsel, sheds more light on the argument and suggests that the Lord Chancellor was most concerned about the remedy and discovery sought, rather than the copyright per se, as it makes no mention of a disputed copyright at common law.320 The Lord Chancellor stated: “To make the defendant account for the profits of what he has sold, is going too far; for the injury that the plaintiff has sustained ought to be the measure of the damage, & not the profit, which the defendant has made.”321 The remedy of ordinary damages was to be had at law. But he then refused to permit a discovery of Baker’s sales and printing arrangements even insofar as the discovery was to be used to “recover greater damages at law.” The Lord Chancellor explained:

I dont know, that this Court ever went so far: Suppose a trespass was done, would you come here against the trespasser to discover how many Cattle he put in to the land, & what damage he has done! I am not willing to carry this matter so far, especially now the late act of parliament has given another remedy in respect of the property in Coppies of Books.322

According to the official court minutes, Lord Chancellor Cowper ended the hearing by first suggesting that he would be open to revisiting the matter if Horne and his counsel could find relevant precedent: “Cur[ :] Lett itt be contynued & if can find a parralell case as this is where hath releife hath [sic] been given may apply to the Court[.]”323 The next entry in the minutes indicates that the court then granted the demurrer without costs. The two

319. Id.
320. A prior case also suggests that the Lord Chancellor might have felt comfortable proceeding in Hudibras on a copyright at common law. In December 1709, he had no difficulty, at least as an interlocutory matter, addressing infringement in a suit involving a copyright at common law. Wellington v. Levi, C33/314, ff. 54v–55r (Ch. 1709).
322. Id.
323. Horne, C37/853.
statements are not necessarily inconsistent, but it may have been that the
Lord Chancellor became less equivocal.\textsuperscript{324}

It is debatable whether the case also implicated the legacy clause of the
Statute of Anne. Horne had not moved for an interlocutory injunction, and
as a consequence no court order prevented Baker from selling *Hudibras* after
April 10, 1710, if in fact he had not already sold his copies before then. The
arguments at the hearing suggest, however, that the parties were mostly (if
not only) concerned about common-law transgressions. Baker’s counsel,
Cowper, all but stated as much. Though Jekyll’s statements are less clear, it
seems probable, given his discovery request, that he too was limiting himself
to a claim based on a copyright at common law. To request a discovery to
enforce a penalty under the Statute of Anne would have been frivolous.\textsuperscript{325}

And though the Lord Chancellor rejected Jekyll’s request for a discovery to
enable an action for damages, with some indignation I might add, that
request was at least sensible. Bills seeking similar discovery had been brought
under a common-law copyright and related contexts before.\textsuperscript{326} The fact the
Lord Chancellor was unaware of parallel cases and had asked (at least
initially) for precedent further suggests the case did not implicate the statute.
It would have been odd to ask for precedent under a statute that was only
one month old and of which the Lord Chancellor would have likely already
been aware. Moreover, he stated that the injury that Horne had sustained
would be the proper measure of recovery, a statement that would be
inconsistent with expecting the plaintiff to recover a penalty.

Though the suit had not been brought under the Statute of Anne, and
probably did not implicate it, the ruling may have nevertheless encouraged
Baker. He probably inferred that the remedial rulings would apply equally to
suits filed under the statute. The court had refused to create a new monetary

\textsuperscript{324} The part of the manuscript asking for precedent has two diagonal lines stricken
through it. Typically a strikeout in this context means that the in-court ruling has been trans-
ferred to the C33 order-and-decree book. But there are no relevant orders in the C33 book.

\textsuperscript{325} See infra text accompanying note 399.

\textsuperscript{326} E.g., Herringman v. Clerke, C33/257, f. 608*, C33/259, ff. 427*, 278*-279* (Ch.
1682–1682/3) (copyright at common law; overruling a demurrer and repeated objections to
a discovery request designed to enable an action for damages at law); Keble v. Onley, British
Library Add. MS 22,610, f. 13* (Exch. 1705/6), reprinted in \textit{EQUITY CASES IN THE COURT OF
EXCHEQUER 1660 TO 1714}, at 556, 556–57 (W.H. Bryson ed., 2007) (copyright by “custom”;
overruling a demurrer and enforcing a discovery request; damages to be recovered at law not
equity); Stationers v. Lee, \textit{sub nom. In re The Company of Stationers, 2 Chan. Cas. 66, 66,
C33/258, f. 138* (Ch. 1681) (copyright by letters patent; overruling a demurrer to a discovery
request to support an action at law). The same objection was overruled in cases involving the
trading patent of the East India Company. East India Co. v. Evans, 1 Vern. 305, 307–08
(Ch. 1684/5); East India Co. v. Sandys, 1 Vern. 127, 129–30 (Ch. 1682/3).
remedy in equity for infringement of a common-law copyright—a disgorgement of the defendant's profits. Thus, a plaintiff hoping to obtain reparation for past harms would have to resort to an action at law for damages and, according to Lord Chancellor Cowper, would have to do so without the benefit of any useful discovery in equity—a significant hardship on plaintiffs. From these rulings, it would not have been much of a stretch to infer that the Lord Chancellor would also refuse a disgorgement of profits in a suit brought under the statute. When seen in this light, the ruling in Horne may further explain Baker's willingness to infringe Tonson's Tryal so soon afterward.

I found no order on the demurrer in the order-and-decree book, which suggests that Horne informed Baker soon afterward that he was voluntarily abandoning the suit. To hazard a guess, Horne wanted to avoid a precedent. One must wonder whether the Tonsons had urged him to drop it as well.\(^\text{327}\)

As for why Baker did not sue the Tonsons and their partners for infringing his engravings, that is easier to discern. Engravings were not protected by statute until 1735,\(^\text{328}\) and Baker had not sought a royal privilege to protect them, which he could have done.\(^\text{329}\) It also would have been against his interests to claim a common-law copyright in the engravings. To do so would have only strengthened the claim against him. Thus, whether the Tonsons and Horne perceived it or not, the decision to copy Baker's engravings was not only a shrewd business tactic but a shrewd legal one as well.

\*
\*
\*

It must have taken substantial moxie to pit oneself against Jacob Tonson Sr., the greatest publisher of the day. Baker's peers shared this assessment and he became the conduit of the outspoken. Daniel Defoe, for example, had selected Baker to be his primary publisher for tracts large and small c.1709 because of Baker's recalcitrance.\(^\text{330}\) And when the printer of Defoe's periodical, the Review, was kidnapped by a mob in 1710, Defoe also replaced him with Baker, stating:

> [W]e have now remov'd [the Review] from the usual Place of Publication, and put it into Hands, that will not be bias'd, terrify'd, or any way prevail'd upon to keep it back; and from henceforward,

\(^327\) It appears that it was not until 1737 that the Chancery began to award prevailing copyright plaintiffs a disgorgement of the defendant's profits. See Deazley, supra note 4, at 65–69 (citing Gay v. Walker, sub nom. Baller v. Watson, C33/369, ff. 315v–316v (Ch. 1737)).
\(^328\) Engraving Copyright Act, 1735, 8 Geo. 2, c. 13.
\(^329\) See Rogers, supra note 5, at 139.
\(^330\) Novak, supra note 225, at 458.
Defoe must have valued this characteristic above all others, as he would have had to overlook Baker's propensity to ignore the purported copyrights of others. Defoe was a great champion of copyright before the 1710 statute.\footnote{331}

Other authors and copyright holders also chose Baker as their publisher, and he became one of the most active trade publishers of his period.\footnote{332} A trade publisher was one who regularly arranged for the publication and distribution of English books, pamphlets, and periodicals on behalf of others. Unlike other publishers who usually held the copyrights in the works they published (such as Tonson), trade publishers, when acting as such, did not. The property was instead held by another person who, for purposes of concealment or convenience, preferred to publish their works under the imprint of another. Concomitantly, trade publishers might not front the capital for the work; that might be borne by the client. Often, an incidental role of a trade publisher was to deflect the initial inquiries of authorities away from his clients; the fact Baker was arrested numerous times for printing seditious works indicates he did so successfully.\footnote{334} In Tonson v. Baker, as we will shall soon see, it appears that Baker acted for himself rather than as a trade publisher for someone else.

\*\*\*\*\*

So why did Baker choose Tonson's Tryal to pirate? Money, for one. Any account of the Sacheverell trial was sure to be a best seller. The subject matter also was not much of a stretch for Baker, as he already specialized in religious and political works.\footnote{335} Yet, it also seems more than possible that the seed for Baker's Compleat History could have been planted by spite. What better way to skewer an opponent than to steal what should, by all

\begin{tabular}{l}
331. D\textsc{aniel} D\textsc{eoffe}, A\textsc{review} of\textsc{the} State of\textsc{the} British Nation 50, Apr. 25, 1710 (London, s.n. 1711), reprint\textsc{ed} in 17 DEFOE'S REVIEW 50 (Arthur W. Se\textsc{cord} ed., 1938). \\
332. ROSE, supra note 4, at 34–41; DEAZLEY, supra note 4, at 31–36. \\
333. On trade publishers generally, see Treadwell, supra note 213, at 100–04, 114–17. For Treadwell's discussion of John Baker, see id. at 106, 111–14. \\
334. For some of his arrests and penal recognizances, see Entry Books, SP44/78, p. 65 (Oct. 22, 1709); id. SP44/78. p. 63 (Nov. 11, 1709); id. SP44/77, pp. 95, 93 (May 23 & 24, 1710); id. SP44/77, pp. 129, 126 (Oct. 12 & 16, 1711); id. SP44/77, pp. 151, 153 (July 2 & 17, 1714); id. SP44/79A, p. 12 (Aug. 21, 1714). \\
335. See Don-Joh\textsc{n} D\textsc{ugas}, The London Book Trade in 1709 (Part One), 95 PAPERS BIBLIOGRAPHICAL SOC'Y AM. 31, 50 (2001) (analyzing the specializations of persons in the book trade in 1709).
\end{tabular}
expectations, be an excellent source of trade profit? Baker was certainly not
in it to promote another viewpoint of the trial, despite the fact he had
incorporated Abel Roper’s pro-Sacheverell Impartial Account into the Compleat
History. For one, Roper and Baker disliked each other.336 But more impor-
tantly, Baker was likely anti-Sacheverell himself. He supported the Whigs,337
and he published periodicals with a Whig viewpoint. Apart from Defoe’s
Review in 1710, he published The Protestant Post Boy starting in 1712, and The
Medley in 1712.338 Baker may have inserted the Impartial Account as much to
skewer Roper as Tonson, though it seems more likely here that he included
the work to offer the fullest account possible of the Sacheverell affair.

B. THE COPYRIGHT CLAIM

Now that we have some sense of the parties, their prior working
relationships and disputes, their views on copyright before the Statute of
Anne, and even their possible motivations for infringing Tonson’s Tyal, let
us return to the merits of Tonson v. Baker. The sections that follow discuss the
copyright claimed by Tonson, the infringement, and the proceedings in the
Court of Chancery. Because the case never passed the pleading stage, I also
offer my thoughts on how the case might have turned out had it proceeded.

1. The Copyright

Tonson’s bill relied on two forms of copyright. The first stemmed from
the Lord Chancellor’s decision to appoint him to print the trial. That
appointment, Tonson alleged, was exclusive and “forbid any other person”
from printing the same.339 Second, Tonson alleged he had registered the book
with the Company of Stationers before its publication on June 5 “[a]ccording
to the late Act of parliament Intitled an Act for Encouragement of
Learning.”340 Notably, Tonson did not, and could not, allege that he had
deposited nine copies of the Tyal with the Company, as the statute required
him to do.341 In any case, by virtue of combining both rights, Tonson
summarized that he was entitled to the “Sole Right and Liberty of printing of
the said Tryall for the Term of fourteen yeares to Comence from the time

336. See The History of Doctor Sacheverell 11, 25–26 (London, A. Baldwin
1711).
337. LONDON POLITICS, supra note 122, at 68 (John Baker, upholder, polling record of
1713).
338. See generally W.R. & V.B. MCLeOD, GRAPHICAL DIRECTORY OF ENGLISH
340. Id. at ll. 6–8.
341. See Register Book MS, supra note 81, at 24, 36.
of the first publication.” Additionally, he sought injunctive relief for a period of only fourteen years.

The last two statements are fascinating. First, they implicitly acknowledge that insofar as there previously had been no durational limit on parliamentary printing rights, the Statute of Anne seemingly created one. More importantly, Tonson’s position seems to contradict a mantra later used by booksellers in the mid-to-late 18th century—after Tonson was dead—that not only were copyrights separately protected as a matter of common law in perpetuity before the Statute of Anne, but the passage of the statute did not affect those common-law rights. Here we have the most eminent copyright holder of his day—someone who believed in a perpetual copyright at common law before the statute and had lobbied for a statute securing those rights—appearing to acknowledge that copyright durations were limited after the statute.

It would have been uncontroversial to ask for an injunction without any mention of a durational limit, and yet Tonson seems to have gone out of his way to expressly foreclose a term that could exceed the statutory term. This evidence requires us to question the view of some historians, formed years later, that the publishers who agitated for the statute had “certainly not anticipated” that it would lead to term limits.

One might be tempted to attribute these two statements to Horsley, Tonson’s solicitor. But given Tonson’s experience and sophistication, and particularly his understanding of copyrights, I am not inclined to do so. Had Tonson believed otherwise, he could have instructed Horsley to omit them.

2. The Infringement

Turning to infringement, Tonson alleged that the Compleat History had been “Coppied out of one of the printed Coppies [of the Tryal] . . . printed by and for your Orator.” He acknowledged that Baker’s book was not identical to his, but he nevertheless argued that it was the “Same in Substance & Effect as that printed by and for your Orator.” Baker’s book had been published in “Smaller Character or print,” for example, and the titles

342. Tonson, C9/371/41, m. 1, ll. 9–10.
343. Id. at ll. 38–44.
345. 2 George Haven Putnam, Books and Their Makers During the Middle Ages, 1500–1709, at 472 (New York, G.P. Putnam’s Sons 1897). But see A.S. Collins, Authorship in the Days of Johnson 54 (1927) (“It seems hardly credible that ‘the trade’ in 1710 can have believed that this perpetuity was any longer theirs at law . . . .”).
346. Tonson, C9/371/41, m. 1, l. 29.
347. Id. at l. 29.
348. Id. at l. 16.
differed. With respect to the content, Tonson posited that the variations were immaterial: "[They] have caused Some little variacion or Difference tho not materiall in every Sheet of the book soe by them printed or . . . sold." The variations are not laid out in detail, rather, Tonson simply states that some words were "transposed and misplaced on purpose" and "what Alterations and Addicions" were made thereto were "false and Erroneous and [did] misrepresent many of the proceedings at the said Tryall." I have already been through both books, and described the differences between them, and Tonson cannot be said to have exaggerated his claim. In any case, he concluded that the above variations were designed to "elude and Evade the [Statute of Anne] and the fforfeitures and penaltyes therein Contained."

Naturally, Tonson further alleged that Baker's version would "Spoil and hinder the sale of the said Tryall printed by and for your Orator." Tonson had the twice-the-price folio edition to consider, as Baker's octavo would certainly undercut it. And though not mentioned in the complaint, Tonson undoubtedly worried about the sale of his own octavo edition of the Tryal that he had been preparing for the press. Tonson's octavo would also have to compete with Baker's, and Baker had already beat him to the market.

3. The Proceedings

As I previously noted, Tonson's solicitor Marmaduke Horsley filed the bill of complaint on Saturday, July 8, 1710. Horsley then handed a brief of the case to two barristers for the purpose of seeking a temporary restraining order (TRO). The two chosen to represent Tonson were Sir Joseph Jekyll and Spencer Cowper. Having two barristers was not unusual on motions of importance, and having one as eminent as Jekyll meant the motion would take precedence over those of nearly every other counsel; precedence would have been critical on a motion seeking immediate relief.

Both barristers were quite accomplished. Jekyll was called to the bar in 1687 and created a serjeant at law in 1700. He also happened to be a close associate of Tonson. As John Barnard has pointed out, Jekyll was one of the

---

349. Id. at l. 27.
350. Id. at ll. 30–31.
351. See supra Part III.G.
352. Tonson, C9/371/41, m. 1, ll. 22–23.
353. Id. at l. 23.
first subscribers, and a patron, of Dryden’s *Virgil*, which Tonson published in 1697.\footnote{356} The subscription was a costly five guineas, and one of the plates of the book was dedicated to Jekyll. Spencer Cowper was no slouch either. The younger brother of the Lord Chancellor, Cowper was called to the bar in 1693.\footnote{357} Both Jekyll and Cowper were also members of the House of Commons during the Sacheverell affair and managers of the prosecution.\footnote{358}

To obtain the TRO, Tonson’s counsel had to obtain a certificate from the Six Clerk’s office showing he had filed a complaint. Moreover, given how quickly the TRO was requested after the complaint, Tonson had to prove by affidavit that he held a copyright in the work and that the defendants had infringed it.\footnote{359} The motion itself would be made *ex parte* in open court and without the written motions we are accustomed to today. If granted, the TRO would last until the defendants had put in a “full and perfect” answer, after which counsel could move to convert the TRO into a preliminary injunction.\footnote{360}

The TRO hearing occurred on Tuesday, July 11. The motion was fifth on the calendar, following motions by Sir Thomas Powys who by virtue of being a prime serjeant at law had precedence over Jekyll.\footnote{361} Lord Chancellor Cowper was hearing motions that day, but the minutes (Fig. 7) indicate he recused himself when Jekyll began to argue *Tonson v. Baker*: “Mr Serjeant Jekyll pro Querente moves for an Injunction to stay their Printing Dr Sacheverells Tryall[.] Cur[:] move this before the Master of Rolls.”\footnote{362} Cowper did not recuse himself because his younger brother was on the case. Spencer regularly argued in front of the Lord Chancellor, including in the very case that preceded *Tonson*\footnote{363} and during the demurrer hearing on *Hudibras*. Rather, the Lord Chancellor must have felt uncomfortable ruling on the motion because he had appointed Jacob Tonson as the publisher of the trial. As a consequence, the case was heard by the Master of the Rolls, John Trevor.

\footnote{357} ARTHUR R. INGPE, THE MIDDLE TEMPLE BENCH BOOK 236 (1912).
\footnote{358} *See supra* text accompanying notes 54–55.
\footnote{359} Gómez-Arostegui, *supra* note 7, at 1229.
\footnote{360} *Id.* at 1235–36, 1229–30.
\footnote{361} SAINTY, *supra* note 355, at 34 & n.1 (Powys).
\footnote{362} *Tonson v. Baker*, C37/860, f. 2r (Ch. 1710).
\footnote{363} *Pye v. Gorge*, C37/860, ff. 1r–2r (Ch. 1710).
Unfortunately, the affidavits in the case have not survived, and we therefore no longer have the sworn evidence that supported Tonson’s case. But the order on the TRO (Fig. 8) has endured, and it indicates that Jekyll and Spencer Cowper parroted the arguments of the complaint. The order recites the appointment of Tonson by the Lord Chancellor and notes that Tonson registered the book before publication, as required by the Statute of Anne. By virtue of the foregoing, Tonson allegedly “became intitled to the sole right of/ Printing the said Tryall for fourteen yeares.”364 The Master of the Rolls next reviewed the now-lost affidavit of Tonson which showed, according to the court, that Baker’s “booke [wa]s the very same in Substance with very little difference or variation from the tryall of Doctor Henry Sacheverell printed by the plaintiff.”365 The court then enjoined the defendants, their agents, and workmen from printing or selling Baker’s Compleat History until they answered and the court took other order to the contrary.366

It is unclear how soon after the hearing Baker received notice of the TRO, but presumably Tonson’s counsel served it quickly. Baker’s most immediate response was to register his book the following day, July 12, with the Company of Stationers, where he also deposited nine copies as required by the Statute of Anne.367 The move seems to have been more reactive than proactive, given that the registration came after publication and thus Baker was too late to obtain the statutory remedies under the Statute of Anne. It is unclear whether Baker nevertheless believed that his book still might be protected by the statute, albeit without its statutory remedies, despite having registered the work after publication.368

364. Tonson, C33/314, f. 375r, ll. 10–11 (Ch. 1710).
365. Id. at ll. 16–17; see also id. at C37/860, f. 7r (Ch. 1710) (“Affidavit of Jacob Tonson read.”).
366. Id. at C33/314, f. 375r, ll. 19–25.
367. Register Book MS, supra note 81, at 48.
368. See infra note 407 and accompanying text.
The next day, Tonson advertised that he would soon be publishing his own octavo edition and he further warned that Baker's book was unlawful:

N. B. There is an Imperfect Copy of the said Tryal lately Published by one J. Baker, under the Title of *A Compleat History of the whole Proceedings of the Parliament of Great Britain against Doctor Sacheverell: And the High Court of Chancery having granted an Injunction prohibiting the Publishing, Selling and Exchanging the said Book, Notice is hereby given to prevent all Persons from incurring the Penalty of the said Injunction.\(^{369}\)

The legal warning was designed in part to warn those subject to the injunction—viz., bookselling agents of the defendants. But it also sought to bring others within the scope of the Statute of Anne. By informing the trade that Baker's *Compleat History* was a piracy, Tonson made it easier to sue others under the statute for selling a book "*knowing the same to be . . . printed*"

---

without the consent of the proprietor of the book.\textsuperscript{370} Placing such a notice in *The London Gazette*, as Tonson did, ensured its large circulation.\textsuperscript{371}

Baker placed his own advertisement in *The Evening Post*. Given the date on the issue, July 11–13, it is unclear whether he submitted the advertisement before or after receiving notice of the TRO. In any case, it differed slightly from what Baker had advertised before, mostly in that he admitted to incorporating Abel Roper’s *Impartial Account*:

\[
\text{Just publish’d} \\
\text{|||* A compleat History of the whole Proceedings of the Parliament of Great Britain against Dr. Henry Sacheverell, with his Trial before the House of Peers for High Crimes and Misdemeanors, the Reasons of those Lords that enter’d their Protests, and the Speeches of several Lords before Judgment was given. N.B. This History has in it, besides the Trial at large, The Impartial Account, the Bishops Speeches, the Debates of the Lords, and the Lords Proceedings above-mention’d. Printed in 8vo, on fine Paper and new Letter. price 5 s.}^\textsuperscript{372}
\]

The timing of the remaining process is a bit uncertain. But it appears Baker soon obtained the services of Richard Shelley as his solicitor and Samuel Mead as his barrister in Chancery. Shelley had previously defended Baker in the lawsuit over *Hudibras*. Originally of Lewes, Sussex, Shelley was a member of the Middle Temple and called to the bar in 1690.\textsuperscript{373} Though admitted as a barrister, it is not unusual that he took up soliciting duties here.\textsuperscript{374} Mead was also admitted to the Middle Temple and was called to the bar in 1699.\textsuperscript{375} David Lemmings’s study of barristers has shown that Mead was one of the most prolific and sought after barristers in Chancery.\textsuperscript{376} Mead had also been appointed to aid Baker on *Hudibras*,\textsuperscript{377} though he never argued at the demurrer hearing in the case.

\begin{itemize}
\item \textsuperscript{370} Statute, 1710, 8 Ann., c. 19, § 1 (emphasis added).
\item \textsuperscript{371} See English Gazette Account, June 1–13, 1710, SP34/12, pp. 126–27 (print run 8,500).
\item \textsuperscript{372} The *Evening Post* (London), No. 143, July 11–13, 1710, at 2.
\item \textsuperscript{373} 1 STURGESS, supra note 355, at 210.
\item \textsuperscript{374} Regrettably, his will gives no inkling of his practice. Will of Richard Shelley, PROB 11/553, f. 288\textsuperscript{v} (will Mar. 8, 1710/1; codicil May 11, 1716; probate Aug. 11, 1716).
\item \textsuperscript{375} 1 STURGESS, supra note 355, at 236.
\item \textsuperscript{376} See LEMMINGS, supra note 354, at 142, 291. Mead later moved to Lincoln’s Inn and died a rich man in 1733. The Records of the Honorable Society of Lincoln’s Inn: Admissions from A.D. 1420 to A.D. 1799, at 374 (s.l.n. 1896). His will dispersed over £1.6 million in cash (converted to present-day values). Will of Samuel Mead, PROB 11/658, f. 26\textsuperscript{v} (will Apr. 14, 1731; codicil Aug. 25, 1731; probate Mar. 31, 1733).
\item \textsuperscript{377} Horne v. Baker, C33/313, f. 90\textsuperscript{v} (Ch. 1709).
\end{itemize}
Baker was not required to pay either lawyer because he successfully petitioned the court to certify him *in forma pauperis.* Neither the petition nor the supporting affidavit survives, but this is no loss, as their contents would have been pro forma. Baker was required to swear that after paying all debts and excluding his wearing apparel he was worth less than five pounds. Whether that was indeed his net worth is difficult to say. Petitions of this sort seem to have been granted unless cause was shown against them, and Tonson did not move to dispauper Baker. Thus, Baker's request may not have reflected his true net worth. On the other hand, it may have been that Baker was so invested in the publication of his *Compleat History* that he owed more to his creditors at the time than he had money on hand.

Probably encouraged by his victory on *Hudibras,* Shelley had submitted a demurrer on Baker's behalf on July 15. Some of it is rote, and the document is relatively short compared to demurrers that appear in other copyright cases. But the few punches it throws are fascinating. Its principal thrust was that the court lacked jurisdiction to hear the case under either the Statute of Anne or the order of the House of Lords.

Shelley first tackled the statute. Whether Baker was "guilty of any offence against the said Act of parliament" was, according to Shelley, "only inquirable and determinable in a Court of Law and not in a Court of Equity." He also challenged the court's ability to award the remedies under the statute by positing that the penalties under the statute were recoverable only in "her Majestys Courts of Record at Westminster" and therefore could not be had in Chancery or "any other Court of Equity." Shelley then argued that the court could not compel Baker to discover information that could later be used to obtain the penalty in the common-law courts.

Turning to the order of the House of Lords, Shelley argued that insofar as Tonson's right was linked thereto, the infringement of that right should be left to the decision of the Lords: "The only question founded upon that must be whether this Defendant has been guilty of a breach or Contempt of that Order which is a thing inquirable and determinable not in and by this Honorable Court but only in and by the House of Lords who made that Order." As he had done with the statute, Shelley complained that the

---

379. **William Bohun,** *Cursus Cancellariae: or, the course of proceedings in the High Court of Chancery* 487–89 (Savoy, J. Nutt 1715); *The Practice of the High Court of Chancery* 31–32, 34 (London, Bernard Lintott 1706).
380. *Tonson,* C9/371/41, m. 2, ll. 11–13 (Ch. 1710).
381. *Id.* at ll. 8–10.
382. *Id.* at ll. 13–15.
discovery sought could be used to determine whether he had breached the order.

Shelley never pressed the demurrer to a hearing, and it was therefore de facto overruled.383 Nothing further occurred in the case. Baker did not answer, and Henry Hills Jr. and John How never responded at all. As a consequence, the TRO previously entered, which was to last until the defendants had answered, technically remained in effect for an indefinite period of time. Unlike injunctions for the stay of lawsuits in other courts, which automatically dissolved after three terms,384 injunctions of this sort did not. Moreover, the rule that a TRO would automatically be dissolved nisi causa fourteen days after the filing of a response, applied only where the defendant's response was an answer.385

So what happened? One can only speculate. Tonson could have moved to force Baker to answer and for Hills and How to do the same. But having obtained his TRO, Tonson was not required to proceed further until the defendants answered. They did not, so he did not. Perhaps he felt the TRO would suffice or, less likely, the parties settled their differences. What is known for certain is that Tonson published his octavo edition on July 29,386 and on August 1–3, probably in retaliation, Baker advertised his book once more.387 But, as far as I have been able to discover, Baker never again advertised his Compleat History in any newspapers. Moreover, the book did

383. See Gómez-Arostegui, supra note 7, at 1242 & n.234.
385. 1 PRAXIS ALMAE CURIAE CANCELLARIAE: BEING A COLLECTION OF PRECEDENTS 508 (London, A. Roper 2d ed. 1704); BOHUN, supra note 379, at 441.

Lord Keeper Heneage Finch wrote in his personal manual of chancery practice c.1673–1675 that “[w]here the bill charges no matter necessary for the plaintiff’s defence at law, there injunctions till answer are to be dissolved as well upon filing pleas or demurrers as putting in of answers.” LORD NOTTINGHAM’S “MANUAL OF CHANCERY PRACTICE” AND “PROLEGOMENA OF CHANCERY AND EQUITY” 147 (D.E.C. Yale ed., 1965) (c.1673–1675). He believed that the “old distinction between answer and plea and demurrer as to this purpose ought to cease.” Id. From the context in which this statement was made, however, it appears that he was speaking of injunctions to stay actions at law. If he was hoping to create a principle of general application, he did not succeed. See BOHUN, supra note 379, at 443 (noting that an injunction “until answer and further order?” would be dissolved nisi causa after the filing of a plea or demurrer only if the plea or demurrer had been granted); cf. also Osborn v. Cowper, Mos. Rep. 198, 198 (Ch. 1729) (plea treated as an answer by order of the court at the plea hearing).

387. THE EVENING POST (London), No. 152, Aug. 1–3, 1710, at 3.
The lawsuit was probably affected by the long vacation after Trinity term. The last case heard in the Court of Chancery during the summer was on August 13, 1710, and before that date cases were heard only sporadically. The court only began hearing cases again in earnest in mid-October 1710. Much of the legal community in London would have decamped to the country during the vacation, and Tonson himself may have taken leave of the city. This suspension could have hurt Baker and his agents because the injunction would have still been in place during that time. The market for Baker’s book would have fallen off greatly by the time court sessions resumed. Thus, Tonson’s TRO might have been nearly as effective as a final injunction, and it might not have been worth it for Baker to continue the fight.

If the demurrer had been heard by the court, would the court have granted it? It is impossible to know for certain, but if the pre-statute cases and the cases that followed are any indication, it seems unlikely. Though some of Shelley’s arguments had merit, the court may have allowed the suit to proceed with conditions.

Shelley’s argument that the Court of Chancery had no jurisdiction to adjudge infringement under the Statute of Anne would probably have failed. The statute did not proscribe equity jurisdiction in toto, and the cases supported jurisdiction. In suits brought under a purported common-law copyright, for instance, before the statute was enacted, the court (including Lord Chancellor Cowper) had no qualms about addressing infringement when deciding whether to continue an interlocutory injunction. Years later, in cases brought under the statute itself, the court continued to address infringement at interlocutory stages of litigation and also went so far as to adjudge infringement in cases that resulted in decrees for final injunctions.

388. BOOKS PRINTED FOR J. BAKER AT THE BLACK-BOY IN PATER-NOSTER-ROW (s.l.n. c.1711).
389. C37/862 (Ch. Trin. Term 1710).
394. Sael v. Leadbeater, sub nom. In re Leadbetter, 4 Ves. Jun. 681, 681 (Ch. 1799); Carnan v. Paterson, C33/465, ff. 449r–450r (Ch. 1786); Trusler v. Evans, sub nom. Trusler v. Cummings, C33/440, f. 284r (Ch. 1773).
395. Mason v. Murray, C33/452, ff. 486r–487r (Ch. 1779); Nicoll v. Simpson, C33/430, ff. 251r–252r (Ch. 1768); Millar v. Taylor, C33/426, f. 60v– (Ch. 1765) (The Complaint); Gay
It was only if a dispute arose over the right or title in the work that the court sometimes felt compelled to refer that issue to a court of law to be determined. This was true in cases brought under printing patents and purported copyrights at common law prior to the statute as well as in cases brought under the statute.

Shelley’s arguments regarding the statutory remedies were much stronger but might not have led to dismissal. As I discuss in greater detail below, his first argument—that the Chancery was without jurisdiction to award the statutory penalties—was undoubtedly correct. Suffice it to say, the penalties could only be recovered in the law courts at Westminster. This would not, however, have prevented the Chancery from hearing the case and granting injunctive relief. Besides, Tonson’s bill did not ask for the Chancery to award the penalties.

Shelley was also right to argue that the court could not compel Baker to provide information that might then lead to an award of the statutory penalties in one of the common-law courts. A rule prohibiting self-incrimination of this sort was already well established in equity by 1710. But once again, this argument would not necessarily have led to dismissal of the suit. A plaintiff could avoid dismissal by waiving the right to pursue, in a subsequent action at law, the penalties or forfeitures available by statute. Typically, a plaintiff would do so by waiving in the bill of complaint the right to pursue the penalties. Indeed, this later became routine in cases brought under the Statute of Anne. Tonson’s solicitor failed to do this, but the court might have allowed him to amend the complaint to add a waiver or required him to disclaim, under pain of contempt and an injunction, the penalties under the Statute of Anne.

---

396. Stationers v. Parker, C33/288, f. 202v (Ch. 1696/7) (printing patent); Pawlett v. Lee, C33/262, ff. 323v–324v (Ch. 1683/4) (copyright at common law).
397. Beckford v. Hood, C33/497, f. 583v–v, C33/500, f. 33r (Ch. 1797); Millar v. Taylor, C33/426, ff. 68r–69r (Ch. 1765) (The Seasons).
398. See infra Part V.
399. See infra Part V.
400. See Gómez-Arostegui, supra note 7, at 1243, 1271–72.
401. Cf. Gosling v. Walthoe, C33/331, f. 83v (Ch. 1718) (overruling plea and requiring a pledge not to pursue penalties under a copyright by letters patent); Knaplock v. Curil, C33/339, f. 12v–v (Ch. 1722) (reminding the plaintiff not to pursue the penalties under the Statute of Anne despite having already waived the penalties in the bill of complaint). If a plaintiff reneged on a waiver and later sought the penalties at law, the Chancery could enjoin
Less clear is whether the arguments described above would have applied to the extent that Tonson’s right was based on the order of the House of Lords. Would the Chancery have held that only the Lords could hear a claim based on a violation of their privilege? The Lords certainly had jurisdiction to hear complaints of this type and had been known to claim exclusive jurisdiction over certain types of privileges (typically those protecting members). Yet the Lords had never claimed an exclusive jurisdiction to adjudicate the infringement of a printing privilege granted to another.

Notably, in several cases after *Tonson*, the Chancery did not hesitate to rule on claims based in whole or in part on special printing privileges. In *Manby v. Owen*, for instance, the court granted an interlocutory injunction based solely on the breach of a printing privilege that had been granted by the Lord Mayor, and the court then decreed a perpetual injunction in the same case based on the privilege and the Statute of Anne. In *Batburst v. Kearsley*, the court granted an interlocutory injunction in a case involving a parliamentary printing privilege identical to the one at issue in *Tonson*. The complaint had made no mention of the statute. The issue was then treated in a reported case in 1807, *Gurney v. Longman*, where the Lord Chancellor seemed content to adjudge the infringement of a parliamentary privilege, though not necessarily its validity.

This invites the further question of how to classify *Tonson v. Baker*. Would the court have considered the case to depend on the Statute of Anne, on the privilege granted by the House of Lords, or both? Relatedly, could the claim under the statute have proceeded even without the order from the Lords? Arguably, Tonson was only made the “author” or assignee of the work by virtue of the order. But putting that wrinkle aside, he had registered the work before publication—which some litigants early on believed was required to obtain a copyright (including, it seems, Jacob Tonson) —and Baker’s
account of the trial was undoubtedly copied from Tonson's. Resort to the parliamentary privilege for protection (rather than as evidence of standing) may have only become essential if Baker had produced his trial account independently, such as by hiring his own writers. But as that had not occurred, it seems that Tonson could have stood on the statutory infringement alone.

To be sure, on this very same point, the court in Gurney ostensibly held the contrary in 1807. There, the Chancery broadly stated that the right to print a trial in pursuance of an order of the House of Lords should not be considered a form of literary property under the Statute of Anne, but as arising solely from the parliamentary privilege awarded to the plaintiff. Yet, upon closer inspection, including a review of the original records in Gurney, it becomes clear that the case is materially distinguishable. The plaintiffs in Gurney were shorthand writers who obtained the exclusive right to print the trial of Lord Melville. As they were preparing to take their book to market, the defendants published their own account. The defendants' account was

Chancery, unsuccessfully, on other occasions. E.g., Nicoll v. Simpson, C33/430, ff. 251v–252v (Ch. 1768), reported in THE ANNUAL REGISTER 105 (London, J. Dodsley 1768) (decreeing a final injunction and a disgorgement of the defendant's profits despite the fact the work was registered approximately two months after the plaintiff's first publication). In Millar v. Taylor, the majority thought that the unimportance of registration to the Chancery meant that the court was not operating under a statutory copyright but under a copyright at common law. 4 Burr. 2303, 2319, 2348 (K.B. 1769). Justice Yates disagreed. Id. at 2380 (Yates, J., dissenting). After statutory copyright prevailed in Donaldson v. Becket, 4 Burr. 2408, 2 Bro. PC 129, 17 Cobb. Parl. Hist. col. 953 (H.L. 1774), the Chancery continued to doubt whether registration was required for copyright protection and asked for the issue to be resolved at law. E.g., Rippon v. Crosby, C33/494, f. 202v (Ch. 1796), reported in THE MORNING CHRONICLE (London), No. 8250, Mar. 18, 1796, at 3; Beckford v. Hood, C33/497, f. 583v, C33/500, f. 33r (Ch. 1797). When the King's Bench reached the issue in 1798, it held that registration was required only if one sought to recover the penalties or forfeitures provided under the statute, but not for statutory protection itself and thus for other remedies such as damages at common law. See Beckford v. Hood, 7 T.R. 620, 627 (K.B. 1798); see also Tonson v. Collins, 1 Black. W. 321, 330 (K.B. 1761) (Mansfield, C.J.) (obiter dictum). Conversely, in Scotland, the Court of Session had taken a different view and in effect had held that registration was required for copyright protection. E.g., Midwinter v. Hamilton, 2 Kam. Rem. 154, 158–59 (Sess. 1748); Payne v. Anderson, Law Steuart Craigie 524, 527–28 (Sess. 1787). The House of Lords later agreed with the King's Bench in a case appealed from Scotland, thus settling the split of authorities in Great Britain. Cadell v. Robertson, 5 Paton's App. Cases 493 (H.L. 1811).


409. Gurney v. Longman, C13/2079/51, m. 1 (Ch. 1806).
based on the work of their own shorthand writers. Therefore, the defendants were not alleged to have copied the plaintiffs' work, as occurred in Tonson, and the plaintiffs could not, and did not, invoke the statute. It thus seems that the holding in Gurney might best be characterized as obiter dictum.

Interestingly, in 1716, the Tonsons had encountered a situation similar to that presented in Gurney and opted to forgo a Chancery suit, instead pursuing their claim in Parliament. Lord Chancellor Cowper had appointed Jacob Tonson Jr. to print the trial of George Earl of Wintoun in the House of Lords. Before Tonson's book became available on April 19, Edmund Curl and his partners published their own abbreviated tract of the trial on April 10. Curl's version was not a copy of Tonson's trial, but was instead based on a different account prepared for publication in the Leiden Gazette. Triggered by Tonson's complaint, Curl and his confederates were hauled before the House of Lords and punished for breach of the privilege.

It is difficult to avoid hindsight distortion when one stands 300 years away from an event, and I have tried my best to keep that in mind in offering my views. It is truly a shame that Tonson v. Baker did not proceed, as the case could have explored numerous issues under the Statute of Anne immediately after its passage. Among other things, the Chancery, or a common-law court by referral from the Chancery, could have discussed how the statute interacted with other privileges, whether deposit of a book was required for protection under the statute, and whether Baker's changes to the trial were fair or not. It could have also broached the issue, had it been raised, of whether a work had to be "original"—i.e., independently created—and if so, whether Tonson's work qualified given that all of what he published in his account originated from the speeches, and thus authorship, of others. Instead, it took many years before these issues were addressed by courts.

410. Id. at C13/2084/12 (Ch. 1807).
411. It is often assumed that Jacob Sr. received this appointment. See RALPH STRAUS, THE UNSPEAKABLE CURLL 65 (1928); Sturges, supra note 87, at 26. But the register book indicates that Jacob Jr. claimed it. Register Book MS, supra note 81, at 234 (Apr. 19, 1716).
412. THE DAILY COURANT (London), No. 4522, Apr. 18, 1716, at 2.
413. THE FLYING=POST (London), No. 3786, Apr. 7–10, 1716, at 2.
414. BAINES & ROGERS, supra note 286, at 76–79.
C. POSTSCRIPT

In the fall of 1718, a few years before his retirement, Tonson assigned all of his copyrights to his nephew Jacob Tonson Jr. The transfer listed many of the titles by name, including works by John Dryden, John Milton, and Matthew Prior. Other works were incorporated by referring to previous copyright assignments. The rest were assigned with a catch-all clause: Tonson assigned to his nephew “all and every other Copies Shares or parts of Copies of books whatsoever which doth of right belong unto the said Jacob Tonson the Elder at the time of the sealing and delivery hereof.” This assignment undoubtedly included the rights to The Tryal of Dr. Henry Sacheverell, and many years later Jacob Jr. still claimed to own the copyright in the work.

Jacob Jr. never saw a market for republishing the Tryal as a stand-alone work, but he instead made it part of a new multi-volume collection of notable State trials that he published in partnership with several booksellers and printers. The first edition appeared in 1719, and a second, which included the speeches of the Bishops for the first time, appeared in 1730. Jacob and his partners quarreled over allegations of irregular accounting, leading to years of litigation. Jacob died in November 1735 while the suit was pending, predeceasing his uncle by just over three months; Jacob Sr. died in March 1735/6. For those who are curious, Marmaduke Horsley, the pioneering solicitor, was dead and buried by January 23, 1722/3. It appears he was struck with a sudden illness. His will, which said he was of “weak body,” was very short and was signed less than a week before he died.

The Tryal lived on in subsequent editions of the Complete Collection of State Trials up through its final official publication in 1812. The last edition that

416. Rosenbach Museum & Library EMs 417/10 (Sept. 17, 1718). Jacob Sr. assigned the last of his printing rights, viz., his half share of certain public-office printing, to his nephew in October 1722. Folger Shakespeare Library MS C.c.1 No. 60 (Oct. 12, 1722).
417. See Vincent v. Walthoe, C11/779/47, m. 2 (Ch. 1733) (mentioning the copyright).
418. ESTC No. T108672.
419. ESTC No. T108500.
421. LYNCH, supra note 84, at 173–74.
422. Register of Burials, St. Dunstan in the West, Guildhall MS 10350 (Jan. 23, 1722/3).
424. 15 A COMPLETE COLLECTION OF STATE TRIALS, AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS cols. 1–522 (London, Longman,
bore a Tonson name on the imprint—that of Jacob Tonson III and Richard Tonson, both the sons of Jacob Jr.—had appeared in 1742.425

As far as is known, the Tryal was never blatantly copied again without authorization of the proprietors. The closest candidate appeared in 1711, under the title High Church Display'd.426 The work was based in part on Tonson's Tryal, but it was much abridged and it reorganized the trial so that the speeches were grouped together by order of the articles of impeachment, rather than in strict chronological order. In hindsight, it is likely that this was a fair abridgment and permissible under the Statute of Anne, but it undoubtedly infringed Tonson's parliamentary privilege.

An account of the “trial at large” was then supposed to have appeared in 1737, as part of a new weekly magazine, but it never materialized.427 Instead, or coincidentally, a 164-page abridged copy of Baker's Compleat History appeared that year under an anonymous imprint.428

The copier had become the copied. Had Baker still been alive, I am sure that he would have appreciated the irony. It certainly makes for an interesting end to a fascinating story.

V. A DOCTRINAL LESSON

Most historians will be quick to point out that history for the sake of history is a noble cause. I agree, of course, and not simply because I do not wish to bite the hand that feeds me. Tonson v. Baker unquestionably holds an important place in the history of copyright. It was the first lawsuit filed under the Statute of Anne and it pitted some of the most interesting and complicated characters of the London book trade against one another. On those grounds alone, Tonson deserved a full and critical account, and this Article could very well have ended here. But copyright history can, and often does, matter for so much more when legal rules are at issue. It can, for one, serve as a historical crutch to support normative arguments.429 But it can also affect doctrinal outcomes. I have previously argued, for example, that

Hurst, Rees, Orme & Brown, T.B. Howell ed., 1812). Apart from the Bishops' speeches, this edition also included Abel Roper's Impartial Account, which immediately preceded the Tryal.
425. ESTC No. T148933.
426. HIGH-CHURCH DISPLAY'D (London, s.n. 1711).
English copyright history and practices c.1789 can be profoundly important today when deciding whether to grant injunctive relief or compensatory remedies in lieu thereof.\textsuperscript{430}

In this section, I wish to explore the doctrinal significance of copyright history to the constitutional right to a jury trial. The subject of my critique is the Supreme Court's decision in \textit{Feltner v. Columbia Pictures Television, Inc.}\textsuperscript{431} There, the Court held that the Seventh Amendment guarantees a right to a jury trial for all issues relating to an award of statutory damages under § 504(c) of the Copyright Act of 1976.\textsuperscript{432} Using the Statute of Anne and \textit{Tonson v. Baker} as contemporary foils, I aim in the pages that follow to demonstrate that \textit{Feltner} would have been much easier to decide if the Court had more fully understood the history of copyright litigation and the practices of the equity courts. Several errors in the Court's opinion will also be highlighted.

The facts of \textit{Feltner} are familiar to any student of U.S. copyright law.\textsuperscript{433} The plaintiff owned copyrights in several television programs and licensed them for broadcast on Elvin Feltner's television stations. The stations did not pay the royalties due, and the plaintiff terminated the license. Feltner then brazenly broadcast the programs and was sued for infringement. Judge Edward Rafeedie granted partial summary judgment for the plaintiff on liability and held a bench trial on statutory damages. He then awarded $8.8 million over the objection of Feltner who argued, for purposes of awarding statutory damages, that he was entitled to a jury trial under the Seventh Amendment on the willfulness of his infringement and the amount of the award. The Ninth Circuit affirmed in relevant part,\textsuperscript{434} but Feltner pressed his case to the Supreme Court with the help of the future Chief Justice of the United States, John Roberts. The Court sided with Feltner, but it was a hollow victory because on remand the jury held him liable for $31.68 million.\textsuperscript{435}

The reasoning of the Supreme Court tracked its usual approach in deciding cases under the Seventh Amendment. The principal objective was to determine whether the statutory-damage remedy was more akin to an action at law or a suit in equity around the year 1791—the year the Seventh

\begin{itemize}
\item \textsuperscript{430} H. Tomás Gómez-Arostegui, \textit{Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases}, 78 FORDHAM L. REV. 1661 (2010); Gómez-Arostegui, \textit{supra} note 7.
\item \textsuperscript{431} 523 U.S. 340 (1998).
\item \textsuperscript{432} 17 U.S.C. § 504(c) (1988).
\item \textsuperscript{434} \textit{Id.} at 297.
\item \textsuperscript{435} Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1189–91 (9th Cir. 2001).
\end{itemize}
Amendment became operative.\textsuperscript{436} Whereas courts of law heard claims with the aid of a jury, the equity courts operated without one. This task required the Court to look to English law and, insofar as probative material was available, law from the states and the newly established legislature and judiciary of the United States.

Undertaking that review, the Court noted that \S\ 504(c) had several analogues in the late 18th century. Starting with English law, the Court stated that a common-law right of first publication in manuscripts had been recognized in England by the middle of the 17th century.\textsuperscript{437} This type of right, the Court alleged, was subject to a recognized remedy in damages that "w[as] tried in courts of law in actions on the case."\textsuperscript{438} The Court then turned to the Statute of Anne which, the Court posited, was enacted to protect published books. The Court's analysis of the statute was as follows:

Under the Statute of Anne, damages for infringement were set at "one Penny for every Sheet which shall be found in [the infringer's] custody, either printed or printing, published, or exposed to Sale," half ("one Moiety") to go to the Crown and half to the copyright owner, and were "to be recovered... by Action of Debt, Bill, Plaint, or Information." \S 1. Like the earlier practice with regard to common-law copyright claims for damages, actions seeking damages under the Statute of Anne were tried in courts of law. See Backford v. Hood, 7 T.R. 621, 627, 101 Eng. Rep. 1164, 1167 (K.B. 1798) (opinion of Kenyon, C.J.) ("[T]he statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it.").\textsuperscript{439}

Lastly, the Court examined state and federal legislation in the United States. Twelve states had enacted copyright statutes between 1783 and 1786, and according to the Court each "provided a cause of action in damages" and "none made any reference to equity jurisdiction."\textsuperscript{440} The Court took this to mean these remedies were only recoverable at law, where they would be heard by a jury, and cited one state-law case as an example of this principle in action.\textsuperscript{441} The Court then noted that the federal Copyright Act of 1790 mimicked the English practice: for published works, the statute provided a

\textsuperscript{436} Feltner, 523 U.S. at 347–48.
\textsuperscript{437} Id. at 349 (citing Stationers v. Patentees, Carter 89 (C.P. 1666) (should be H.L. 1669)).
\textsuperscript{438} Id. (citing Millar v. Taylor, 4 Burr. 2303, 2396–97 (K.B. 1769)).
\textsuperscript{439} Id. at 349–50.
\textsuperscript{440} Id. at 350.
\textsuperscript{441} Hudson v. Patten, 1 Root 133 (Conn. Super. 1789).
penalty to be recovered by an "action of debt in any court of record,"\textsuperscript{442} and for unpublished manuscripts it entitled the owner to a "special action on the case [for damages] . . . in any court having cognizance thereof."\textsuperscript{443} The Court cited no federal or state cases applying the 1790 Act,\textsuperscript{444} but instead cited cases that had asked juries to assess a similar penalty for published works under the Copyright Act of 1831.\textsuperscript{445}

In all, the Court spent over eight pages demonstrating why the statutory-damages provision of § 504(c) was a legal remedy rather than an equitable one. The Court's efforts are laudable and it reached the correct outcome. But the Court made some mistakes regarding English copyright and common law and thus missed an opportunity to more easily and correctly dispatch the argument that the relief was equitable. Those errors and omissions would not have occurred if the Court had been better apprised of English legal history. First, I will treat the errors, which though largely incidental must still be corrected. I will then turn to the omission. I will expend much more space than the Court would have had to. Notably, the principles discussed below exist independently of \textit{Tonson v. Baker}, and thus could have been discovered and applied without knowledge of the case. Nevertheless, as we will soon see, one principle in particular, which the Court omitted entirely, also appears in \textit{Tonson}.

In the first of its errors, the Court cited \textit{Stationers v. Patentees} for a proposition that it does not support. \textit{Stationers} did not hold or otherwise state in 1666, as the Court alleged, that the "common law recognized" an author's right to prevent the unauthorized publication of her manuscript. It appears

\textsuperscript{442} Act of May 31, 1790, ch. 15, § 2.
\textsuperscript{443} \textit{Id.} § 6.
\textsuperscript{444} The Court did not cite and perhaps was unaware of a case decided under the 1790 Act in the Circuit Court of the District of New York in 1798. The case is \textit{Morse v. Reid} and it appears in \textsc{5 Collections of the Massachusetts Historical Society for the Year MDCCXCVIII} 123 (Boston, Samuel Hall 1798). The district court granted a final injunction and ordered the disgorgement of the defendant's profits, but did not purport to award the plaintiff the penalties under the 1790 Act. \textit{Id.} at 124; \textit{see also} \textit{John D. Gordan, Morse v. Reid: The First Reported Federal Copyright Case}, 11 \textsc{Law \& Hist. Rev.} 21 (1993).
\textsuperscript{445} \textit{Kilty v. Green} is another case that went unmentioned by the Court. \textit{4 H \& McH.} 345 (Md. Gen. 1799). There, the plaintiff sued in an action of assumpsit for the infringement of a copyright he had registered under the 1790 Act. The issue was whether the plaintiff could recover from the defendant "the sum of money for which the said [infringing] 101 copies . . . were sold." \textit{Id.} at 346. Though that would have been an interesting remedy indeed, the Maryland court did not reach the issue. It held that the plaintiff's work was uncopyrightable because it was merely a collection of statutes. It also does not appear that the plaintiff sought the penalties available under the 1790 Act.
\textsuperscript{445} \textit{Feltner}, 523 U.S. at 352.
the Court misunderstood the following sentence: "No man can print a book till it be licensed." The word "license" referred not to obtaining a license from the author to publish, but to obtaining a pre-publication allowance from the censorship authorities. To be sure, authors did come to hold a right to prevent the unauthorized publication of their manuscripts, but this concept was not, as far as is known, applied in equity until 1732 and was not recognized by a common-law court until 1769 in obiter dictum.

In another part of its analysis, the Supreme Court also improperly relied on Beckford v. Hood. According to the Court, the Statute of Anne provided "damages" of a penny a sheet, half of which would go to the Crown and the other to the copyright owner. The Court then cited Beckford for the proposition that the "damages" remedy under the statute was available in a court of law in an action on the case. Beckford, however, said nothing of the sort. The issue in Beckford was whether a copyright owner could bring an action for a remedy outside the terms of the statute. The King's Bench held

446. Stationers v. Patentees, Carter 89, 91 (H.L. 1669).
448. Webb v. Rose, C33/358, ff. 308–309 (Ch. 1732) (Jekyll, M.R.); see also Millar v. Taylor, 4 Burr. 2303, 2397–98 (K.B. 1769) (Mansfield, C.J.) ("Before 1732, the case of piracy before publication never existed: it never was put, or supposed. There is not a syllable about it to be met with anywhere. . . . The cases in Westminster-Hall, all relate to the copy of books after publication by the authors."). In an earlier case from 1721, the Chancery enjoined the translation of a work that had previously been printed by the proprietor for private circulation only. Burnett v. Chetwood, 2 Mer. 441, 442–43 (Ch. 1721). For a discussion of whether this might be the first pre-publication suit acted upon in equity, see Simon Stern, From Author's Right to Property Right 11–13 (working paper). Notably, there is an earlier suit where similar relief was sought. Burnet v. Took, C11/15/4 (Ch. 1716).
450. 7 T.R. 620 (K.B. 1798).
451. See supra text accompanying note 439. Incidentally, the latter part of this statement is incorrect. The statute does not specifically provide that the other half would go to the copyright owner. Rather, it would go to whoever sued for the infringement. In practice this was always, as far as is known, the copyright owner, but recovery could in theory be had by any common informer. See Gómez-Arostegui, supra note 7, at 1270.
that an action on the case for *ordinary damages*—rather than an action on the statute for the penalties—could be brought in a common-law court.\textsuperscript{452}

More important than the errors is a glaring omission in the Court’s analysis of the Statute of Anne. The principal reason why the penalties under the statute were only available at law, and not in equity, went entirely unnoticed by the Court. By its own terms, the statute made the penalties recoverable only in “any of her Majesties *Courts of Record* at Westminster by Action of debt Bill plaint or Information.”\textsuperscript{453} But neither the Court, the litigants, nor the amici curiae inquired into whether “courts of record” was a term of art and, if so, what meaning Parliament, courts, and litigants would have ascribed to it from 1710 through 1791. Indeed, the Court thought the phrase so unimportant that an ellipsis was substituted for it when quoting the Statute of Anne.\textsuperscript{454} That was unfortunate. A cursory examination of English legal history would have revealed that courts of equity were not courts of record. This was also demonstrated in *Tonson v. Baker*.

The term “court of record” was not meant to include every court that kept a record of its proceedings. Several characteristics of a court of record held sway at one time or another, including a court: (1) whose record was considered conclusively authentic; (2) that enrolled its records on a parchment roll in Latin; (3) that had the power to fine and imprison; (4) whose judgments could be appealed by writ of error; and (5) that strictly followed the course and precedent of the common law.\textsuperscript{455} Many of these criteria were questionable when posited, often because they had been twisted to suit the needs of a proponent or opponent of the court under consideration.\textsuperscript{456} Others became obsolete in the course of time.\textsuperscript{457} Yet long after these criteria were uttered, the labels attributed early on to certain courts as being “of record” and other courts as “not of record” persisted in many areas.

\begin{itemize}
\item \textsuperscript{452} *Beckford*, 7 T.R. at 627–29. Even that holding has an interesting back story. See Gómez-Arostegui, *supra* note 7, at 1275–77.
\item \textsuperscript{453} See *supra* note 40 for the text of the statute (emphasis added).
\item \textsuperscript{454} See *supra* text accompanying note 439.
\item \textsuperscript{455} 5 *William Holdsworth*, *A History of English Law* 157–61 (3d ed. 1945).
\item \textsuperscript{456} *Id.* at 160; see also 6 *Jeremy Bentham*, *The Works of Jeremy Bentham* 185 (Edinburgh, William Tait, John Bowring ed., 1843) (criticizing authenticity standards).
\item \textsuperscript{457} For example, from 1651 to 1660, and from 1733, all court proceedings were ordered to be in English. *See* An Act for Turning the Books of the Law, and All Proces and Proceedings in Courts of Justice, Into English (Nov. 22, 1650), 2 *Acts & Ordinances of the Interregnum*, 1642–1660, at 455, 456 (C.H. Firth & R.S. Rait eds., 1911) (eff. 1651 to 1660); Statute, 1731, 4 Geo. 2, c. 26 (eff. Mar. 25, 1733).
\end{itemize}
The four regular courts at Westminster Hall—the King's Bench, Common Pleas, Exchequer, and Chancery—all qualified to some extent as courts of record, but while some were exclusively so, others were hybrids.

The King's Bench and Common Pleas, for example, were always understood to be courts of record. These were the principal common-law courts in England and satisfied the criteria noted above. The penalties under the Statute of Anne, and subsequent copyright statutes with similar language, were unquestionably available in the King's Bench and Common Pleas. Had the stakeholders or the Court in *Feltner* investigated English copyright law further, they would have discovered a handful of reported cases in which litigants pursued the statutory remedies in these two common-law courts. Indeed, these cases could have been cited independently of the "court of record" issue.

The Courts of Exchequer and Chancery, on the other hand, were hybrid courts. Each had multiple sides to its judicial business, some of which occurred in a court of record and some of which occurred in a court not of record. I treat the development of each court and side below. But given the greater doctrinal importance of the Court of Chancery to our system of laws in the United States, I will say more of its development than I do of the Exchequer.

### A. COURT OF EXCHEQUER

The Court of Exchequer's judicial business first developed at law and heard claims relating to its officers and the royal revenue. Plea rolls exist in the Exchequer from 1236. On a separate procedural and clerical track, the court began to develop an equitable jurisdiction in the mid-16th century to better enable it to collect revenue for the crown. The jurisdiction on the law and equity sides later expanded to claims that indirectly affected the revenue, and later still, through the use of fictional allegations, to most civil claims at law and in equity. With some exceptions, the records on the

---

463. *Equity Cases*, *supra* note 326, at xi–xii.
common-law side before 1733 were all in Latin, while those on the equity side were in English. 464

When Sir Edward Coke called the Exchequer "an ancient court of record" he was referring to its law side. 465 The equity side was no court of record. Thomas Wood, author of a major treatise on the laws of England, stated as much when describing the courts that sat in Westminster. The Exchequer, he wrote in 1724, was a court of record, "[e]xcept [for] the Equity-side." 466 A similar comment was made by Giles Jacob in 1733: "[T]he Court of Equity, like the Chancery, is no Court of Record." 467 And in c.1809, Jeremy Bentham wrote that "[a]s to the Court of Exchequer, being a sort of motley court, one side of it a law side, the other an equity side, it must, according to principle, be neither a court of record only, nor a court not of record only, but both together." 468

I know of no copyright cases having been brought in the Exchequer for the penalties under the Statute of Anne, but in light of the foregoing it appears clear that any such claim would have been brought on the law side and not on the equity side. This meant it would have been heard by a jury. 469

B. COURT OF CHANCERY

The Court of Chancery also began as a common-law court but unlike the Court of Exchequer, it always conducted the vast majority of its adjudication on the equity side. The law side originated in the Chancery's ancient practice

464. BRYSON, supra note 462, at 90.
466. THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 472 (Savoy, E. Nutt et al. 3d ed. 1724).
467. GILES JACOB, THE COMMON LAW COMMON-PLAC'D 160 (Savoy, E. Nutt et al. 2d ed. 1733).
468. 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 630 n.* (London, Hunt & Clarke, John Stuart Mill ed., 1827) (c.1809).
469. The Exchequer suits under the Statute of Anne, of which I am aware, were brought on the equity side for injunctive relief and disgorgement of the defendant's profits, and not for the penalties under the statute. E.g., Longman v. Forster, E112/1746/4924 (Exch. 1791); Forster v. Longman, E112/1724/4329 (Exch. 1788); Rennett v. Haxby, E112/1718/4152 (Exch. 1785); Longman v. Rennett, E112/1718/4165 (Exch. 1785); Longman v. Fielding, E112/1684/3268 (Exch. 1783); Rennett v. Longman, E112/1758/5277 (Exch. 1780).
of issuing the original writs that were required to initiate an action in the Courts of King's Bench and Common Pleas. 470 The original writ was a form letter drafted by the office of the Chancery in Latin. The letter issued in the name of the King, stated the cause of the plaintiff's complaint, and commanded the defendant to satisfy the claim or appear in the King's Bench or Common Pleas to defend himself. 471 Gradually the writs became templates, to be reused in like cases, and they were collected by the Chancery in a register of writs for that purpose. The Chancery thus initiated the process of litigation at law but did not decide the case.

The court also developed a limited adjudicative role at common law. Due to a jurisdictional privilege, the officers and employees of the Chancery could not sue or be sued in any other court. 472 Any action at law had to be brought by or against these officials in the Court of Chancery where the Chancellor would then follow the rules and procedures of the common-law courts. If there was an issue of fact to be decided, the case was transferred to the King's Bench to have that issue tried by a jury. 473 In some cases, the Chancellor also sought the assistance of a law judge. 474 A limited set of other areas also fell under the common-law jurisdiction of the Chancellor, including the revoking and amending of any letters patent that had previously been enrolled in the Chancery. 475 Because proceedings on this "petty bag" side of the court typically generated records in Latin, many called it the Latin side. 476

The equitable jurisdiction of the Chancery began to develop in the 13th century, largely because of the rigidity of the original writ system, and it adjudicated equitable claims in its own right by the 14th century. 477 Cases were presented by bill, where the plaintiff recited the facts and the wrong and prayed for the Chancellor to do what was right. Bills were recorded on pieces of parchment rather than on "rolls." And though the earliest pleadings were first submitted to the court in French or Latin, by the middle of the 15th century.


471. A.H. Marsh, History of the Court of Chancery 17 (Toronto, Carswell 1890).


475. See generally Jones, supra note 472, at 891–92, 897–99.

476. E.g., 1 A General Abridgment of Cases in Equity 129 (Savoy, Henry Lintot 4th ed. 1756); Dominius Rex v. Cary, 1 Vern. 131, 131 (Ch. Petty Bag 1682).

century they were in English. The orders and decrees, which survive beginning in 1544, were recorded in English on paper in register books. The equity side of the court was thus sometimes referred to as its English side. Additionally, because the court operated according to “conscience,” and not by the strict course of the common law or even its own precedent, observers accused it of arbitrariness and hardly worthy of being a court of record. Though this was true during the court’s early periods, in the course of time, equity generally followed the common law and in cases where it did not, equity developed its own body of precedents just as the law courts had.

The prevailing view in England, long before and after the Statute of Anne was enacted, was that the equitable side of the Court of Chancery was not a court of record. There was an early disagreement by the common-law judges in the 15th century on the extent to which the Chancery qualified, but the Chancery's designation on the equity side soon settled. John Hales stated it was not of record in 1514. And by the time of Elizabeth I, it was clear that the Chancery was not on the “same footing as King’s Bench or Common Pleas [because it] had not achieved general recognition as a court of record.” The same was true in the reign of James I, with the greatest advocate for this view being Coke, whose dislike of the equity side of the Chancery was notorious. He wrote in c.1630 that though the law side of the Chancery was of record, the equity side was not: “[T]he court of chancery . . . which proceedeth according to the course of the common law, as in case of [jurisdictional] priviledge . . . is a court of record, but as to the proceeding by English bill in course of equity, it is no court of record . . .”

Indeed, the distinction was so fundamental that it was nearly always mentioned in the most important works on the laws and judiciary of England. Wood, for instance, described the distinction in every edition of his

---

479. The early register books did have some Latin scattered throughout, however. E.g., C33/1 (Ch. 1544). Final decrees were sometimes enrolled in the Chancery on parchment in C78.
480. BAKER, supra note 477, at 109–11.
Institute on the Laws of England from 1720 to 1772, a book that practitioners often recommended to aspiring lawyers. Every treatise on the Court of Chancery to discuss whether the court was of record recognized the distinction as well.

Copyright litigants understood that the “Courts of Record at Westminster” referred to in the Statute of Anne excluded the equity side of the Chancery, and that the statutory penalty was only available in the common-law courts. Describing the practice of the English courts in copyright cases, the counsel for Daniel Midwinter and others in a Scottish suit remarked in 1747 that the penalties under the statute were only recoverable “at Law.” Moreover, a decision in the same case in Scotland noted that “every action that can be commenced in pursuance of [the Statute of Anne] must go before the Courts of common law, and be determined by a jury.” Consistent with this understanding, Justice Willes stated in Millar v. Taylor in 1769, albeit with an agenda favoring a copyright at common law, that “a bill in Chancery is not given [by the statute]; and consequently could not be brought upon this Act.”

We can also see this principle at work in Tonson v. Baker. As the demurrer demonstrates, Baker’s counsel Richard Shelley was fully aware of this limitation and hoped to be the first to make use of it in a case invoking the Statute of Anne. Shelley acknowledged that the statute imposed “certain penalitys” on persons who printed a book without the consent of the proprietor of the copyright. He demurred to this relief, however, in large part because the penalitys [are] by the same Act to be recovered in any of her Majestys Courts of Record at Westminster by Acction of Debt Bill.
plaint or Information[,] And there is nothing in the said Act that
gives this Honorable Court or any other Court of Equity a
Cognisance of any thing done in breach thereof . . . .

Notably, the statute that had previously governed copyrights, the Printing
Act of 1662, expressly excluded the Chancery from the courts in which pen-
alties could be recovered. The penalties were solely to be had "by Action of
Debt Bill Plaint or Information in any of his Majesties Courts of Record held
at Westminster called the Kings Bench Common Pleas or Exchequer."493

The only case I know of in Chancery that awarded one of the statutory
remedies—albeit not the penalties—was Knaplock v. Curll in 1722.494 There,
the court decreed after a full hearing that the defendant was to present the
infringing books to a master in ordinary so that the said "Master do see the
same Damasked."495 I have previously posited that insofar as this order was
made pursuant to the Statute of Anne it was erroneous.496 But perhaps the
court felt it was able to do so because, strictly read, the language of the
statute only limited recovery of the penalties to courts of record. Or perhaps
the court took solace in an earlier case involving a copyright by letters patent
where the court had ordered the defendant's infringing books damasked,
though admittedly that had been done at the suggestion of the defendants.497
In any case, the order in Knaplock was an anomaly, and I have yet to find any
similar order emanating from the Chancery in any other infringement case.498

It was not until 1843 that we learn of litigants arguing that a court of
equity should be considered a court of record under the copyright statutes,
but the Court of Chancery did not need to reach the question.499 The concept
was then shaken in another context in 1846,500 and eventually it no longer
mattered. In 1854, a statute empowered the common-law and equity courts
with the powers normally reserved to the other, and in 1873–1875 the Judi-
cature Acts abolished the Courts of Chancery, King's Bench, Common Pleas,
and Exchequer as separate institutions, and merged them into a single High

492. Id. at ll. 8–10.
494. C33/339, f. 12r–s (Ch. 1722).
495. Id.
497. Hills v. Lee, sub nom. Hills v. Symons, C33/261, f. 640r (Ch. 1684). If in fact the
court even knew of this order.
499. Colburn v. Simms, 2 Hare 543, 558–59 (Ch. 1843).
500. See Heming v. Swinnerton, 1 Coop. t. Cott. 386, 413–18 (Ch. 1846); Francis
Russell, A Treatise on the Power and Duty of an Arbitrator 57–58 (London, V.
& R. Stevens et al. 2d ed. 1856); see also Lister v. Lister, 2 H & T.W. 174, 175–76 (Ch. 1850).
Court of Justice as the court of first instance in England. These changes do not take away from the fact, however, that for the entire time the Statute of Anne was in effect, courts of equity were not "courts of record" within the meaning of the statute and therefore that the penalties had to go to a jury.

But what about U.S. copyright law? Looking back at the 1790 Copyright Act, we can see that the penalties under the Act were also only available by an action of debt in any "court of record." Yet, once again, the *Feltner* Court did not inquire whether the term excluded courts of equity. Had it done so, the Court would have discovered the answer to be more complicated on this side of the pond. The legislative history of the 1790 Act is meager, and it is unclear whether Congress intended the concept to differ from the English approach. Referring to federal courts generally, Justice Story stated in 1840 that they were all courts of record, regardless of whether sitting at law or in equity, but he offered no citation for his assertion and it can probably be best characterized as an extra-judicial fiat. Additionally, the general practices of the state courts c.1790, which were also permitted to hear claims under the 1790 Act, cannot be easily discerned today. With some exceptions, most state courts did not decide whether to treat their equity courts as being of record until the mid-19th century, at which time most said that they were. So in the end, one cannot really fault the Court for choosing to ignore the "court of record" language of the 1790 Act.

This doctrinal lesson, though of no consequence in a case that already reached the correct outcome, nevertheless demonstrates that courts and litigants must take history more seriously. It would be far too strong to call the outcome in *Feltner* dumb luck. But given the several errors in the Court's

---

opinion, and the failure to recognize that equity courts in England were not "courts of record," it seems fair to call the outcome fortuitous. Additionally, it bears repeating that the Court had reversed the Ninth Circuit Court of Appeals, which had, along with several other courts, concluded that statutory damages were equitable in nature and thus that the constitutional right to a jury did not attach.\textsuperscript{507} Those courts had little to no sense of the relevant history despite the fact the Supreme Court had held many years before that a historical inquiry was important to determining the right to a jury trial.\textsuperscript{508} Courts must demand more from litigants and of themselves. If they are not willing to do so, then courts must discard the historical inquiries altogether.

VI. CONCLUSION

I feel privileged to have had the opportunity to write about \textit{Tonson v. Baker} 300 years after the suit was filed—an amazing coincidence indeed—and to have been able to demonstrate the doctrinal relevance of copyright history to modern cases. It is a testament to the wonderful work done by archivists in England and elsewhere that so many records survive relating to \textit{Tonson} and the circumstances surrounding it. Though \textit{Tonson} has been overlooked in the past due to its inaccessibility, I am hopeful that the case can now take its rightful place in the annals of copyright history.

VII. APPENDIX: TRANSCRIPTION OF DOCUMENTS

The following pages transcribe, in chronological order, the surviving records in \textit{Tonson v. Baker} that were of any legal consequence. The second and third entries are from printed sources, but the remaining sources are all from manuscripts. I have transcribed every textual marking. I have silently expanded any contractions but otherwise left the spelling, capitalization, and punctuation (or lack thereof) unchanged. Interlineations are represented with two slash marks, e.g. `\insert/`, in the place where the scribe sought to insert the new text. Strikethroughs are represented as one would expect. I have also separately numbered [in brackets] every line of principal text in the lengthier documents to improve our ability to refer to them. Additionally, I have inserted footnotes where appropriate to clarify points of interest.

\begin{footnotes}
\end{footnotes}
Minutes of the House of Lords, HL/PO/JO/5/1/45
Parliamentary Archives
Adhuc 23° Martij 1709[/10]

... [Left margin]: L Chancellor to Print Tryall
House moved That the Tryall be printed & That the Lord
Chancellor to give order therein . . . .

[2]
19 Journal of the House of Lords, p. 122
[23 March 1709/10]
[Left margin]: Doctor Sacheverel's Trial to be printed.
It is ORDERED, by the Lords Spiritual and Temporal in Parliament
assembled, That the Lord High Chancellor of Great Britain, do give Order for
the printing and publishing the Trial of Henry Sacheverell Doctor in Divinity;
and that no other Person do presume to print the same; and further, that the
last mentioned Resolution and Order agreed on this Day be printed at the
End of the said Trial.

[3]
The Tryal of Dr. Henry Sacheverell, Before the House of Peers, for
High Crimes and Misdemeanors sig. π 1’ (London, Jacob Tonson
1710)
[n.d.]
In Pursuance of an Order of the House of PEERS, of the Twenty Third Day
of March 1709/10, I do Appoint Jacob Tonson to Print the Tryal of Doctor
Henry Sacheverell, and do Forbid any other Person to Print the same.

COWPER C.

[4]
A Register of the Copies of Books, 1710 to 1746, p. 24
Archives of the Company of Stationers
Shares May 15th 1710
Jacob Tonson The Whole Then entred for his Copy, a Book called
The Whole proceedings, with the Speeches on both sides, at the Tryal of Dr
Henry Sacheverell, printed by order of the House of Peers.

/s/ Jacob Tonson

[Right margin]: vjs\textsuperscript{509}

[5]

A Register of the Copies of Books 1710 to 1746, p. 32
Archives of the Company of Stationers

[Shares] June 3d [1710]

Jacob Tonson The whole

Then entred for his Copy, The Tryal of Dr Henry Sacheverell before the House of Peers, for High Crimes & Misdemeanors, upon an Impeachment, by the Knights, Citizens & Burgesses in Parliament assem’bled, in the Name of themselves, & of all the Commons of Great Britain: begun in Westminster Hall the 27th day of February 1709/10 & from thence continued by several adjournments until the 23d day of March following, Published by order of the House of Peers

/s/ Jacob Tonson

[Right margin]: vj

\textsuperscript{509} This signifies that the work was not previously published or registered.

\textsuperscript{510} This signifies that the Stationers' Company received six pence as a registration fee.
Bill of Complaint, C9/371/41, m. 1
The National Archives (TNA)

8° Julij 1710

To the Right Honorable William Lord Cowper Baron of Wingham Lord high Chancellor of Great Brittain

Suffeild 8 per 1726 (1)

[1] Humbly Complaining sheweth unto Your Lordshipp your Orator Jacob Tonson of London Bookseller That on the Twenty third day of March last past Itt was Ordered by the Lords Spirituall and Temporall in parliament Assembled That the Lord high Chancellor of Great Brittain doe give Order for the printing and publishing the Tryall of henry Sacheverell Doctor in Divinity and that noe other person doe presume to print the same And that in pursuance of the said Order your Lordshipp was pleased to Order and Appoint your Orator to print the said Tryall of the said Doctor Henry Sacheverell and to forbid any other person to print the same And your Orator in pursuance of your Lordshipps Order and Appointment did proceed to print or cause to be printed very Considerable Quantities and Numbers of the said Tryall which cost your Orator very Considerable Summes of money And your Orator before the said Tryall was published entered the Title of the said Tryall of the said Doctor Henry Sacheverell in the Register book of the Company of Stationers of London According to the late Act of parliament Intitled an Act for Encouragement of Learning by vesting the Coppyes of printed bookes in the Authors or purchasors of such Coppyes duering the times therein menconed And thereby and by Virtue of your Lordshipps said Order and Appointment your Orator is possessed of interested in and Intitled to the said Tryall and has the Sole Right and Liberty of printing of the said Tryall for the Terme of ffourteen yeares to Comence from the time of the first publication thereof which was the fifth day of June last past And your Orator well hoped noe other person would have Attempted to print or Reprint the same But now soe it is may it please your Lordshipp that John Baker of London Bookseller \John How of London printer & Henry Hills of London Printer/ Combineing and Confederating together with diverse persons at present to your

511. John Suffeild was the Six Clerk in Chancery chosen by Jacob Tonson's counsel.
512. This is a contemporary cataloging reference. Each set of pleadings in the C9/371 bundle contains a similar reference, with the set number appearing in the parenthesis (n).
Orator unknown whom when their names are discovered your Orator prays may be added partyes to this Bill with Apt words to Charge them and every of them to defeat and defraud your Orator of the benefit and Right of printing and reprinting the said Tryall and of the profitt and Advantage to be made thereby and by selling vending and disposeing of the same he the said Baker and his Confederates or some or one of them without the leave privity or Consent of your Orator have or hath lately printed or Caused to be printed in some other place or places in or about the City of London or elsewhere many hundred or other Great Quantities and Numbers of the said Tryall in Smaller Character or print than those printed for your Orator or else he the said John Baker \John Howe & Henry Mills [sic]/ and their Confederates some or one of them did by him and themselves and their Agents or Correspondents give Order and Direction for the printing Causeing or procureing to be printed the said Tryall in some place or places beyond the Seas and for paying the Charges thereof or of some part thereof And for Importing great Numbers of printed Coppyes of the said Tryall into England which have been accordingly imported in his or their name or names or in the name or names of his or their Correspondents some or one of them or in some false or fictitious name or names but for to the use and upon the Account of the said John Baker \John How & Henry Hills/ and their Confederates some or one of them And the said John Baker \John How & Henry Hills/ and their Confederates have uttered published sold Exchanged disposed of and Exposed to sale or threaten or intend to utter sell Exchange dispose off and Expose to sale great Quantities and Number of Coppyes of the said Tryall soe by them some or one of them printed or imported without your Orators leave or Consent and in Order to elude and Evade the said Act of parliament and the forfeitures and penalties therein Contained and to Spoil and hinder the sale of the said Tryall printed by and for your Orator they have called the said book a Compleat History of the whole proceeding of the parliament of Great Brittain against Doctor Henry Sacheverell with his Tryall before the house of peers for high Crimes and Misdemeanors the Reasons of those Lords that entered their protests and the Speeches of Severall Lords before Judgment was given London printed and sold by J. Baker at the Black boy in pater noster Row One thousand seven hundred and tenn and have caused Some little variacion or Difference tho not materiall in every Sheet of the book soe

513. Though not apparent from my transcription, the possessive pronouns used to refer to the defendants were changed. Pronouns referring to one defendant (e.g., his) were rubbed out and replaced with plurals (e.g., their).
by them printed or imported uttered sold and Exposed to Sale from the Tryall printed by and for your Orator and have Caused Some immateriall imperfect and false Addicions to be made thereto but such book is the Same in Substance & Effect as that printed by and for your Orator as aforesaid and Copied out of one of the printed Coppies thereof printed by and for your Orator and only Some words transposed and misplaced on purpose to Elude and Evade the said Act of parliament And what Alterations and Addicions there are made thereto are false and Erroneous and doe misrepresent many of the proceedings at the said Tryall And by such Management practice and Contrivance they have much hindered the Sale of the said Tryall printed by and for your Orator which is a very great Detriment and Injury to him he haveing been at great Expence and Charges in printing the Same Correctly All which Actings and doings of the said John Baker / John How & Henry Mills [sic]/ and the Rest their Confederates are Contrary to all Justice Equity and good Conscience and tend to your Orators manifest wrong and Injury In Tender Consideracion whereof and for as much as your Orator can’t prevent or hinder the printing selling disposing distributing & Exposeing to Sale the said book and is Intirely remedilesse in the premisses Save by the Aid and Assistance of your Lordshipp in this Honorable Court To the End therefore that the said John Baker / John How & Henry Mills [sic]/ and their Confederates when discovered may upon their Severall Corporall Oathes true perfect and distinct answer make to all and Singular the premisses as fully plainly and particularly as if the Same were herein over again repeated and Interrogated And that they and their Agents Servants and Accomplices may by the Injunction of this Honorable Court be Enjoyned and prohibited from printing reprinting or importing uttering Selling disposing distributing Exchangeing and Exposeing to Sale the said book Intituled a Compleat History of the Whole proceedings of the parliament of Great Brittain against Doctor Henry Sacheverell with his Tryall before the house of peers for High Crimes and misdeamenors the Reasons of those Lords that entred their protest and the Speeches of Severall Lords before Judgment was given London printed and Sold by J. Baker at the Black boy in pater noster Row One thousand seven hundred and tenn or any Copyy thereof or of the said Tryall of the said Doctor Henry Sacheverell or any other book or bookes being or purporting to be the Same in Substance Sheet or Sheets part or parts of the said Tryall printed or imported or to be printed or imported within the said Term of fourteen yeares without the leive

514. Stricken text illegible.
licence or Consent of your Orator And that your Orator may have Such further and other releif in the premisses as the nature of his Case requires and as is Agreeable to Equity and good Conscience May it please Your Lordshipp to grant unto your Orator her Majesties most gracious Writt or Writts/ of Subpoena to be directed to the said John Baker \John Howe & Henry Mills thereby Comanding them at a Certain day and under a Certain pain therein to be limited personally to be and appear before your Lordshipp in this Honorable Court then and there to Answer all and Singular the premisses and further to stand to and abide such further order and Decree of this Honorable Court as to your Lordshipp shall seem meett And your Orator shall ever pray &c

Marshall

/s/ Marmaduke Horsley

[7]

Bill Booke Anno 1710, TNA IND1/2149

Termino Trin 1710

... Suff: Marshall Tonson contra Baker & alios Immediate

[8]

Hearing on Temporary Restraining Order, TNA C37/860, ff. 1', 2'

[1]

Martis 11° Die Julij 1710

Lord Chancellor Second General Seal

Mr Keck after

Sr Richard Holford Trinity Terme

1710

...
Mr Srt Jekyll\textsuperscript{520} pro Querente moves for an Injuncon to stay theire Printing Dr Sacheverells.Tryall.

Cur move this before the Master of Rolls

\textbf{[9]}

\textbf{Hearing on Temporary Restraining Order, TNA C37/860, f. 7'}

\textit{[Martis 11$^\circ$ Die Julij 1710]}

\textbf{[Master of the Rolls]\textsuperscript{521}}

Mr Srt Jekyll pro Querente \textbf{Vernon}\textsuperscript{523}

Affidavit of Jacob Tonson read

The Order of the House of Peers read

Cur take an Injuncon

\textbf{[10]}

\textbf{Temporary Restraining Order, TNA C33/314, f. 375'v}

\textit{Martis 11 Julij [1710]}

\textbf{[Left margin]: T—\textsuperscript{524} 525}

\textbf{Keck}

\textbf{Holford}

\textbf{Jacobus Tonson Querente Johannes Baker Johannes } \textbf{How & Henricus Hills Defendants}

\textsuperscript{520}. Sir Joseph Jekyll served as the lead barrister for Jacob Tonson on this motion.

\textsuperscript{521}. The Master of the Rolls was John Trevor.

\textsuperscript{522}. Spencer Cowper served as the second barrister on this motion.

\textsuperscript{523}. Thomas Vernon appears to have stood pro forma but did not argue.

\textsuperscript{524}. This signifies that the surname of the first named plaintiff begins with the letter T.

\textsuperscript{525}. Master of the Rolls.
Upon Opening of the matter this present day unto this Court by Mr Serjeant Jekylls & Mr Cowper being of the plaintiffs Councell Itt was alleadged that on the 23th of March last Itt was ordered by the Lords Spirituall & Temperall in Parliament assembled That the Lord Chancellor &c should give order for the printing the Tryall of Doctor Henry Sacheverell and that noe other person should presume to print the same that in persuance of such order the Lord Chancellor was pleased to appoint the plaintiff to print the said Tryall and that noe other person should presume to print the same that the plaintif persuant to that order did at very great expence print considerable numbers of the said Tryall and before the same was published entred the title of in the Register booke of the Company of Stationers according to the late Act of Parliament for encouragimgent of learning and thereby became intitled to the sole right of Printing the said Tryall for fourteen yeares but the Defendants without the plaintiffs leave or privity have lately printed & sold great number of Bookes intitled a Compleat History of the whole proceedings of the Parliament of great Britaine against Doctor Henry Sacheverell with his Tryall before the house of Peers for high Crimes & Misdemeanners the reasons of those Lords that entred their protests Lords that entred their protests and the speeches of severall Lords before Judgment was given printed for the Defendant Baker which booke is the very same in Substance with very little difference or variation from the tryall of Doctor Henry Sacheverell printed by the plaintiff as by Affidavit appeares and is a great hindrance to the Sale of the tryall printed by the plaintiff for releife wherein the plaintiff has exhibited his Bill into this Court as by Certificate appeares and therefore Itt was prayed That an Injuncion may be awarded against the said Defendants to enjoine them their Agents & Workmen from printing or exposing to Sale any of the said Booke intitled a Compleat History of the whole proceedings of the parliament of Great Britaine against Doctor Henry Sacheverell with his Tryall before the house of Peers for high Crimes & Misdemeanners the reasons of those Lords that entred their protests and the speeches of Severall Lords before Judgment was given printed for the Defendant Baker untill the said Defendants shall answer the plaintiffs Bill and this Court take other order to the Contrary which this Court held reasonable & doth order the same accordingly/

EG

526. Edward Goldsborough was a deputy to Thomas Lord Jermyn, the Registrar of the Court of Chancery, and was the person who entered this order in the register book.
[11]
A Register of the Copies of Books 1710 to 1746, p. 48
Archives of the Company of Stationers

John Baker
Shares

Then entred for his Copy, a Book called A compleat History of the whole Proceedings of the Parliament of Great Britain against Dr Henry Sacheverell; with his Tryal before the house of Peers for High Crimes, & Misdemeanor, the Reasons of those Lords that entred their Protests, & the Speeches of several Lords before Judgment was given.

Received 9. /s/ John Baker

[Right margin]: vj

[12]
Demurrer, TNA C9/371/41, m. 2

[15 July 1710]
Highlord

The severall Demurrer of John Baker one of the Defendants to the Bill of Complaint of Jacob Tonson Complainant

[1] This Defendant by protestation not acknowledgeing or confessing all or any the Matters and things in the said Bill contained to be true in such sort manner and fforme as the same are therein and thereby sett forth and alleadged Doth demurr in Law thereto and to all Discovery and Releif thereby sought And for Cause of such his Demurrer saith That by the Act of parliament in the Bill mentioned and whereby the Complainant claimes title to the Tryall in the same Bill mentioned and to the sole Right and Liberty of printing the same for the terme of fourteen years in the Bill likewise mentioned certain penaltys in the same Act mentioned are imposed on such person or persons as shall print or reprint or cause to be printed

527. This signifies that the Stationers’ Company received nine copies of the book for deposit as required by the Statute of Anne.
528. John Highlord was the Six Clerk in Chancery who was assigned to John Baker.
or reprinted published or exposed to Sale any Book without the Consent of such person or persons as is or are the proprietor or proprietors thereof according to the same Act the pecuniary part of which penaltys is by the same Act to be recovered in any of her Majestys Courts of Record at Westminster by Action of Debt Bill plaint or Information And there is nothing in the said Act that gives this Honorable Court or any other Court of Equity a Cognisance of any thing done in breach thereof Nor ought this Defendant in a Court of Equity to be obliged to discover whether he has been guilty of any offence against a penal Statute But whether he has been guilty of any offence against the said Act of parliament is only inquireable and determinable in a Court of Law and not in a Court of Equity And as to the order of the House of Lords in the Bill mentioned The only question founded upon that must be whether this Defendant has been guilty of a breach or Contempt of that Order which is a thing inquireable and determinable not in and by this Honorable Court but only in and by the House of Lords who made that Order And all the discovery sought by the Bill is only whether this Defendant and the other Defendants in the Bill named or any of them have or hath been guilty of a breach of the said Act of parliament or of the said Order of the House of Lords neither of which are or is examinable determinable/ cognizable or relievable in this Honorable Court The which and for many other Errors Defects and Insufficiencies of and in the said Bill this Defendant doth demurr in Law thereto and to the discovery and releife/ thereby sought And humbly prays the Judgement of this Honorable Court thereupon and to be hence dismissed with his Costs.

Birk: Cheveley/s/ Richard Shelley

529. The first name is probably John Birkhead who was a Sworn Clerk working within John Highlord's Six Clerks division. The second name is Jerningham Cheveley who at the time was either a waiting clerk working under Birkhead, or was already a Sworn Clerk, and would have been the one to physically accept the filing of the demurrer. Cheveley, "of the six clerks office," was later admitted to Lincoln's Inn. See 1 RECORDS OF THE HONORABLE SOCIETY OF LINCOLN'S INN, supra note 376, at 383 (Feb. 1718/9). Cheveley is also named in Highlord's cause book, as can be seen in the Appendix item that follows this one.

530. Richard Shelley was Baker's solicitor in Chancery.
Termino Sancti Trinitatis Anno Domini 1710

... Suff Marshall
Chevely Jacob Tonson q. Johannes Baker Def mor 531 15 July 1710

[14] IFP Certification, TNA C33/314, f. 421v
Lunae 17 Julij [1710]

[Left margin]: T+ 532
pauper

Jacobus Tonson Querente Johannes Baker Defendant The Defendant in respect of poverty whereof Affidavit is made this day admitted by the right Honorable the Master of the Rolles to defend this Suite in forma pauperis and Mr Mead 533 & Mr Shelley are assigned for his Councell & Mr Hightlord for his Sixe Clerke RP 534

---

531. Moratur in lege (demurrer). Thanks to Hamilton Bryson for deciphering this abbreviation.
532. This signifies that the surname of the first named plaintiff begins with the letter T.
533. Samuel Mead was Baker's barrister.
534. Richard Price was also a deputy to the Registrar of the Court of Chancery and was the person who entered this order in the register book.