RECENT ENGLISH CASE.

House of Lords.

CAIRD *v.* SIME.

A professor in a university, orally delivering class-room lectures of his own composition, does not so communicate them to the public as to entitle any one to republish them without his permission.

APPEAL from second decision of the Court of Sessions.

The opinion of the Lord Chancellor sufficiently states the point.

Robertson, Q. C., S. G. of Scotland, *Sir H. Davey*, Q. C., *F. W. Clark*, Q. C., for appellant.

Lorimer and *MacClymont*, for respondent.

LORD HALSBURY, L. C.: My Lords, in this case I have had much greater difficulty in dealing with the question of form than with the substantial question between the parties which it was intended to raise by this appeal. It is, I think, manifest that the interlocutor does not comply with the provisions of the Judicature Act of 1825, and I cannot but regret that the suggestion of Lord RUTHERFORD CLARK was not adopted, by which that which was fact would have been found as fact, and the question of law, which alone under that statute is open to your Lordships to review, would have been left to be determined. Nevertheless, although with some doubt, I have come to the conclusion that your Lordships may treat the questions of fact as having been determined, and the questions of law as sufficiently severed from those questions of fact to enable your Lordships to pronounce a final judgment between the parties.

My Lords, the question which it was intended to raise was the legal right of the respondent to publish, in the form of a pamphlet, certain literary compositions of the appellant, which were orally delivered to the students of the University of Glasgow attending his class. A majority of the court has determined that the pamphlet in question is a reproduction of the appellant's literary composition; and I do not stop to discuss what some of their Lordships appeared to have considered important, that in respect of certain particulars it was a blundering and unsuccessful reproduction of the appellant's work. I confess I am unable to understand what place such topics find in the argument.

Assume an unlawful reproduction of an author's literary work, it does not become less an injury to the legal right because the reproducer has disfigured his reproduction with ignorant or foolish additions of his own. It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his own unpublished literary productions. It is further incapable of denial that that proprietary right may still continue, notwithstanding some kind of communication to others. The case of private letters, which though conveniently described by the word "private," involve publication of a certain kind to others than the author of them, is an illustration of a communication which does not permit the infringement of the proprietary right which could be involved in their unauthorized general publication. The doubt which I have entertained in the course of the argument has been whether the extent and degree of publication in the case now under debate was not a question of fact which should have been determined on the evidence before the court, and which if it had been determined, would not have been opened to your Lordships to review. But as I have said, I have come to the conclusion that in the form in which it has arisen it may be treated as a question of law, that is to say, whether on the agreed state of facts such a publication as is proved here must as a matter of law deprive the author of the literary composition in question of his proprietary right, and whether the fact that he is professor of moral philosophy, teaching in his class-room by the literary composition which is now the subject of debate, makes his delivery of that literary composition necessarily public to the whole world, so as to entitle any one who heard it to republish it without the permission of its author.

Now, my Lords, I have designedly used the phrase "literary composition" to avoid the ambiguity of the word "lecture," because I think the word "lecture" involves an assumption which may give rise to error. If by it is signified a lecture delivered on behalf of the university, and so to speak as the lecture of the university itself, as the authorized exposition of the university teaching, I can well understand that by the nature of the thing, from the circumstances of its delivery, and the object with which it was delivered, it would be impossible to say

that it was intended by those on whose behalf the professor was lecturing, or by himself, to limit the right of communication to others. Whether that limitation of the right arises from implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person speaks a speech to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation. But without using any phrase which by force of its ordinary meaning implies either a kind of publication, or involves a limitation of the right of publication, what are the facts here as found by the majority of the court? A teacher is in his classroom with his students. For the purpose of teaching them he uses a composition of his own, in this case called "The Law of Moral Philosophy." Suppose it had been exercises in grammar, arithmetic, or foreign language. The object and purpose is to teach the students, to enable them to become proficients in the various subjects of which the teacher is the professor. The student is entitled to avail himself of the teaching. The object is to make him a good grammarian, a good arithmetician, or a proficient in the particular language that is taught. But could it be contended that by reasons of such communication to such students each of them was entitled to publish the professor's exercises, dialogues, dictionary, or the like?

My Lords, it seems to me that it might be, and indeed there is some suggestion here that it is, contrary both to the spirit and meaning of what is called a lecture that students should be supplied with some mode of answering questions on the subject of their lectures without that process of mental digestion which is intended to form the substance of the teaching. Illustrations might be infinitely multiplied in which the whole purpose of a professor's teaching might be rendered nugatory by the unauthorized reproduction of his mode of teaching.

The ground on which I have been able to come to the conclusion that the particular form of literary composition, and the degree of communication which is established to a limited class, may be treated as a question of law is, that it appears to have been decided, that notwithstanding the professor's desire to pre-

vent such reproduction, and contrary to his intention, the delivery of his lecture—of his composition—to a limited class of students, operates as matter of law to make his composition public, and to prevent his enforcing any proprietary right.

My Lords, I am not aware of any university regulation, or any bargain with its professors, which either expressly or impliedly enforces on the professors the making public of their literary compositions, of whatever class these compositions may be, and whether merely educational and intended for the use of their students or intended for mere general diffusion. I am disposed to think, although it does not become necessary to discuss it in the present case, that if a professor had entered into a specific bargain to make public the lectures which he was delivering to his students, but, contrary to that bargain, had enforced on his students the condition of secrecy, though the university which employed him on that express bargain might be at liberty to seek their remedy against him for a breach of his undertaking, it would not necessarily make public that which the lecturer himself had neither expressly nor impliedly communicated for general reproduction.

My Lords, I doubt whether any of the cases which have been brought to your Lordships' attention do more than establish the two propositions which, as I have said, cannot now be in debate. The application of the principles laid down in these cases is what gives rise to the matter now in discussion. I do not think it very important to consider what was the ultimate result of Mr. Abernethy's appeal to Lord ELDON, because the ground of Lord ELDON'S decision, as originally given, seems not to have been affected if an arrangement between the parties, as seems probable, put an end to the litigation.

With respect to the act, 5 & 6 Will. IV, ch. 65, I am not prepared to say that I can obtain any light from its provisions. I had at one time an impression that there was something in the nature of a declaration by the legislature that lectures delivered in a university or a public school or any public foundation were to be assumed to be so published as for the future to become public property; and if that were assumed to be the construction of the statute, a serious question would arise as to what were lectures within the meaning of that statute. But I am now satisfied that

the language of the statute has been adopted by the legislature for the purpose of not interfering in any way with the law existing on the subject. Possibly it may be that the difficulty of defining what should be a lecture may have occurred to the author of the statute, or the impolicy of affecting to lay down a rule where many circumstances of convenience as to modes of instruction, and so forth, might be appropriately left to the university authorities, may have produced the legislation which in fact exists. At all events, I can derive no assistance from a statute which professes to leave the law as it is without professing to give any hint of what it assumes the law to be.

I am therefore of opinion that the appellant ought to succeed, and I concur in the suggested form of judgment which has been prepared by my noble and learned friend, Lord WATSON and I move your Lordships accordingly.

LORD WATSON. [Omitting detailed statement.] The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has with his consent been communicated to the public. Since the case of *Jeffreys* v. *Boosey*, 4 H. L. Cas. 815, was decided by this House in the year 1854, it must be taken as settled by law, that upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide is whether the oral delivery of the appellant's lectures to the students attending his class is in law equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. "He has," as was said by Lord BROUGHAM in *Jeffreys* v. *Boosey*, 4 H. L. Cas. 962, "the undisputed right to his manuscript; he may withhold or he may communicate it, and communicating it, he may limit the number of persons to whom it is imparted, and impose such restrictions as

he pleases upon their use of it. The fulfillment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." He cannot print and sell without publishing his work, but he may legitimately impose restrictions which will prevent its publication, whether the communication be made by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right depends upon its being either matter of contract or an implied condition, that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit and for the information of the public at large.

Upon that principle it was decided in *Macklin* v. *Richardson*, 2 Amb. 694, that the fact of a play having been acted for several years in a public theatre with permission of the author did not imply an abandonment of his right, and that he was therefore entitled to restrain its publication from notes taken by a short-hand writer who had paid for admission to the theatre. On the other hand, I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons, or selection or restriction of his hearers, has, as the Lord President observes in this case, "abandoned his ideas and words to the use of the public at large, or, in other words, has himself published them."

The main argument addressed to your Lordships for the respondent was to the effect that a professorship in a Scotch university, being *munis publicum*, and the occupant of the office being under an obligation to receive into his class all comers having the requisite qualification, his lectures are really addressed to the public, and at all events that there is no room for inferring that the students are taught under an implied condition that they shall not print and publish his lectures, either for their own profit or otherwise. I do not think it can be disputed that, as stated by Lord SHAND, this is the first occasion in the history of the Scottish universities on which any such right as that now claimed has been asserted. If the claim be well founded, there can be no copyright in a lecture which has been once delivered in the class-room. Yet it is the fact that professors and their representatives have been in frequent use to publish lectures which had been annually delivered for years before such publi-

cation, and have enjoyed, without objection or challenge, the privilege of copyright. That has been notably the case with our great academic teachers of moral and mental philosophy, from Dr. Thomas Reid, who was appointed to the chair now held by the appellant in 1763, to the late Sir William Hamilton. I concede, that although such may have been the prevalent understanding in Scotland as to the professor's right, this is not a case in which it can be said that *communis error facit jus;* but I agree with Lord SHAND'S observation, that in these circumstances effect ought not to be given to the respondent's argument unless he can make it clear "in principle or authority that the law gives him the right he claims."

In the court below there was a good deal of discussion as to the practical result of deciding this case one way or another. I am afraid that I do not estimate so highly as some of the learned judges the advantage of having the professor's lectures printed and subjected to the criticism of public opinion. The capable critics are a small, and by no means unanimous, section of the community; and I doubt whether the governing body of the university or the professor would derive any assistance from their strictures, whilst experience has shown that the public who are interested in it are not ignorant of the character of university teaching. An original thinker and able teacher very soon attracts a large class, and *vice versa.* I certainly do not appreciate the advantage to the public of furnishing (which is the professed object of the respondent) the appellant's students with a "crib," an aid to knowledge forbidden in well-regulated educational institutions, which, as the Lord Chancellor has already pointed out, supersedes the necessity of intellectual effort and neutralizes the benefit of the professor's tuition. There appeared to me to be some force in the suggestion of the appellant's counsel, that if it be now held for the first time that delivery of his lectures is publication, the professor may in future (contrary to his present practice) hesitate to communicate his best and most original thoughts to his class before they have been matured and given to the world by himself. But I do not think these observations, however important they may be in themselves, are decisive of the present question.

[His Lordship then reviewed at length *Abernethy* v. *Hutchinson,* 1 H. & T. 28, and continued:]

I do not think that students of moral philosophy in the University of Glasgow, or in any other Scotch university, either are, or can with propriety be said to represent the general public; of course, they are, each and all of them, members of the public, but they do not attend the professor's lectures in that capacity. They must be members of the university, and they must further comply with its regulations and make payment to the professor of the usual fee, in return for which they receive from him a ticket or certificate of their enrollment as students for the session; and without observing these preliminaries, they would have no right to enter his class-room during the lecture hour. The relation of the professor to his students is simply that of teacher and pupil; his duty is, not to address the public at large, but to instruct his students; and their right is to profit by his instruction, but not to report or publish his lectures. It appears to me that the learned judges whose opinions are adverse to the appellant have attributed undue weight to the circumstance that the appellant's office is *munis publicum*. That it is so is an undoubted fact, but according to my apprehension, the question which your Lordships have to decide depends, not upon that fact, but upon the duty which the appellant's office requires him to fulfill. The nature of the duty incumbent upon a professor in an English university is thus described by Lord ELDON, in *Abernethy* v. *Hutchinson*, 3 L. J. (Ch.) 209; 1 H. and T. 28: "Now if a professor be appointed, he is appointed for the purpose of giving information to all his students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures." So far as I know, there is no difference whatever between the position of a Scotch and that of an English university professor, so far as regards their relations to the students whom they teach; and no point of difference has been suggested, either in the court below or by the respondent's counsel. The fact of his being a public official lays the appellant under an obligation to the state as well as those who pay for their instruction, to teach efficiently, and to the best of his abilities; it does not affect the nature of his obligation, and cannot alter the relation between him and his students.

Lord FITZGERALD dissented.

The above case involves a very interesting question in the law of literary property. With regard to the protection afforded by a statutory copyright, the law may be said to have been promptly settled, but for a long time there was a difference of opinion as to how far it would or could protect the property of an author in an uncopyrighted writing or literary work, and as to the effect of statutes of copyright upon the legal status of literary property. From early times in the history of the legislation in which the difference was manifested, it was maintained on the one side that, whatever may have been the right of an author to keep his literary work to himself, so long as he allowed no one to have a copy thereof, yet when once he had allowed a copy to become public, even in a limited sense, whatever right he had to prevent the multiplication, printing, or distribution of further copies was derived solely from statute, in other words, as is sometimes said, that there was no common law copyright after publication. On the other hand, it was maintained that such a right did exist at common law and that statutes of copyright merely provided or added a penalty or remedy for the violation of a known right.

The right of an author to keep secret his writing and to prevent its unauthorized publication before publication by himself is acknowledged universally and does not seem to have ever been seriously questioned: *Bartlette* v. *Crittenden*, 5 McLean 32; *Wheaton* v. *Peters*, 8 Pet. 591; *Jones* v. *Thorne*, 1 N. Y. Leg. Obs. 408; *Woolsey* v. *Judd*, 4 Duer. 379; *Tompkins* v. *Halleck*, 133 Mass. 32; but the question whether after publication any right of prevention existed at common law first came up in the carefully considered cases of *Millar* v. *Taylor*, 4 Burr. 2303 (769) and *Donaldson* v. *Benedict*, Id. 2409, which was dependent on *Millar* v. *Taylor*. *Millar* v. *Taylor* arose upon an unauthorized publication of Thompson's "Seasons" after the work, which was not copyrighted, had been published by a person authorized by the poet. In the King's Bench Lord MANSFIELD and WILLES and ASTON, JJ., were of opinion that at the common law a copyright existed, the ground of decision being that publication by an author gave nothing but the right of perusal, the publication and sale of copies of the book being likened to the giving to the buyers of so many keys to a gate or so many tickets to an opera, which were only given to the recipients themselves and would not entitle them to forge other keys or tickets. The learned judges also held that this right was not abrogated by the statute of 8 Anne (the British Copyright Act). YATES, J., dissented, and after stating the position of the majority of the court said: "To this the answer is, I think, easy and evident. If the author had not published his work at all, but only lent it to a particular person, he might have enjoined that particular person that he should only *peruse* it * * * because in that case the author's copy is his own, and the party to whom it is lent contracts to observe the conditions of the loan, but when the author makes a general publication of his work he throws it open to all mankind.

"That is, then, very different from the case of giving keys or tickets to particular persons. The very condition of giving them is the exclusion of all *other* persons, and these keys or tickets give the party to whom they are given no property to the land they pass through or to the opera house. They are given them for a particular time, and to give them a

transient admission, a temporary privilege only. It is like an author lending his manuscript to particular friends who still retains the right over it to recall it whenever he pleases. But when an author prints and publishes his work he lays it entirely open to the public as much as when an owner of a piece of land lays it open into the highway. Neither the book nor the sentiment it contains can afterwards be recalled by the author. Every purchaser of a book is the owner of it, and as such he has a right to make what use of it he pleases." In 1873 the same question involved in *Millar* v. *Taylor* and *Hinton* v. *Donaldson*, Hailes 535, came before the Lords of Council and Session, by whom the decision of the King's Bench was treated but with scant respect. Lord AUCHLINCHEK saying, "The question is interesting, and never received judgment but once in England, and there, too, the judges differed *nil tam absurdum quod non dicendo fit probabilis*," and Lord HAILES, the reporter, adds with great frankness, "Lord AUCHLINCHEK told me that he had read the report of Burrow, that he understood Judge YATES' opinion but not the others. Now," said he, "when I meet a thing that I do not understand, I conclude it to be nonsense." Lord MONBODDO, it is true, agreed with the King's Bench, but the court ruled contrary to the cited decision. Lord AUCHLINCHEK said, "If once a man speaks out a sentiment he communicates it to his hearers and it is theirs forever." The Lord Justice CLERK said, "After a man has once given his copy to the public there is no principle in the common law which can limit the use of that copy," and the Lord President said, "The Act 8th Anne is absurd if a prior common-law right had been established." So the court held that there was no common-law copyright. In the next year the House of Lords considered the matter, the case coming to it on an appeal from the Court of Chancery (the great seal having been at the time of the decision in that court in commission, the commissioners being SMYTHE, B., and ASTON and BATHURST, JJ.), which, on the authority of *Millar* v. *Taylor*, granted an injunction in the case of *Donaldson* v. *Beckett*. The case is reported in 4 Bur. 2409. The Lords sent for the judges and submitted to them *inter alia* the following, (*a*) whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law?

This question was answered in the affirmative by SMYTHE, L. C. B., and NARES, ASHURST, BLACKSTONE, WELLES, ASTON, and GOULD, JJ., and in the negative by DE GREY, L. C. J., and EYRE, ADAM, and PERROTT, B. B.

(*b*) Whether this right was impeached or restrained or taken away by the statute of 8 Anne? Upon this the judges decided as follows: in the affirmative, DE GREY, L. C. J., NARES, and GOULD, JJ., EYRE, PERROTT, and ADAM, B. B.; in the negative, by SMYTHE, L. C. B.; ASHURST, BLACKSTONE, WELLES, and ASTON, JJ.

(*c*) Whether the remedy was confined to that given by the statute. This was answered—aye, DE GRAY, L. C. J.; NARES and GOULD, JJ.; EYRE, PERROTT, and ADAM, B. B.; no, SMYTHE, L. C. B., ASHURST, BLACKSTONE, WELLES, and ASTON. The result of the opinions was, therefore, that a copyright existed at common law, that this right was abridged by the statute of Anne, and that no remedy for its notation or means of

enforcing it existed other than those given by the statute; the House, thereupon, on motion of Lord CAMDEN, seconded by the Lord Chancellor (BATHURST), reversed the decision of the commissioners. In 1798, in *Beckford* v. *Hood*, 7 D. & E. 620, the common-law right was so far recognized that an action for damages was sustained for an unauthorized publication made within the time limited by the statute of 8 Anne, although the requirements of the act had not been complied with. From the foregoing review it will be seen that the professional opinion was quite evenly divided; but in the great case of *Jefferys* v. *Boosey*, 4 H. of L. 815, the matter was finally settled, after a full discussion, and after hearing the judges, of whom ten delivered opinions, six for and four against the common-law right. The House decided that after publication no common-law right existed; opinions were delivered by Lords BROUGHAM and St. LEONARDS. The former said: "The right of the author before publication we may take to be unquestioned, and we may even assume that never was, when accurately defined, denied. He has the undisputed right to his manuscript—he may withhold it—he may communicate it, and communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. * * * Whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; so long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it, but when he made the work public he resembled that donor, after he had abandoned it, who could not directly prohibit passengers or exact from them a consideration for the use of it."

Previous to this decision, the Supreme Court of the United States had decided that the common law of Pennsylvania did not recognize copyright after publication, and that the Act of Congress was not the sanctioning of an existent but the creation of a new right. In this judgment, MARSHALL, C. J., STORY and MCLEAN, JJ., concurred; from it THOMPSON and BALDWIN, JJ., dissented. JOHNSON, J., was absent, and it does not appear from the report whether DUVALL, J., sat.

It may then be taken as settled (1), that until publication the author of a literary work has the right to withhold it from publication, and may enjoin or recover damages for an unauthorized publication; (2) that after publication his rights are only such as are secured to him by the copyright statute.

This brings us to the consideration of the question more immediately involved in the principal case, viz.: What is "publication"? in other words, when will an author be held to have so far presented his work to the world at large that his control over it has ceased—when to have thrown it into the common stock of the world's possessions beyond the power of reclamation?

An author has an undoubted right to lend his manuscript to another person, and where there is no intent that the other shall be permitted to print or circulate it there is no publication—this was held as long ago as the case of the *Duke of Queensberry* v. *Shebbeare*, 2 Eden 329 (1757), and can hardly be said to be at all questioned—and any attempt to print is enjoinable, not only as a violation of the author's property right, but also as a breach of confidence and good faith, and it is worthy of notice that

two of the judges who in *Donaldson* v. *Beckett* thought that no action lay at common law to enforce an author's copyright, excepted cases in which a copy had been obtained by fraud or violence. The delivery of a manuscript for a particular purpose, although that purpose contemplated the communication of the contents to certain other persons, will not amount to publication. Thus in *Bartlette* v. *Crittenden*, 4 McLean 300; 5 McLean 32 (1847, 1849), where a teacher of bookkeeping allowed written copies of his manuscript to be taken by his pupils for their instruction and for use in teaching others, it was held that there was no publication, and an attempt to print and sell copies was enjoined. A work may even be delivered to be printed without such act amounting to a setting at large where such is not the intention. See *Prince Albert* v. *Strange*, 2 De G. & Sm. 652 (1848-9), affirmed in 1 M. N. & G. 25 (1849). A more intricate question arises when the act claimed to constitute publication does not consist in printing or in delivering a manuscript, but in the performance or recital of a composition intended to be recited, as a play or a lecture. The course of decision upon this subject is very interesting, and there has been a wavering of authority with regard to it, though we think the law has now become tolerably settled. The question has arisen most frequently in litigation with reference to the right to produce plays, and has incidentally drawn with it the question of what is a violation of an author's right in an uncopyrighted literary work. The earliest case we find is *Macklin* v. *Richardson*, 2 Amb. 694 (1771), which, in spite of a doubt attempted to be thrown upon it in *Keene* v. *Clarke*, 5 Robt. 38, is law at the present day. Macklin was the author of a farce, "Love *a la* Mode," which was acted in 1760 and the following years, but only by his permission, and from the performance of which he derived a revenue by way of royalty. The defendants employed Mr. Gurney to take the piece in shorthand and published in their magazine a portion thereof, promising the rest in a future issue. The court granted an injunction, holding that the performance of the piece did not amount to a setting it at large. In 1793 a new point was taken, and in *Coleman* v. *Wathen*, 5 D. & E. 245, where there was no evidence of printing or copying, the court held that the mere fact of the unauthorized performance of a piece—in this case a copyrighted one—was not evidence of a literary piracy, BULLER, J., saying, "Reporting anything from memory can never be a publication within the statute. Some instances of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself."

This case, it is thought, is not now of authority and rests entirely upon a false basis, probably arising from the failure of the court to recognize a distinction between *publishing* in the sense of setting at large for the general public use of something which the publisher has originated or acquired by assignment from the originator, and publication in the sense of the giving to the public or to a portion of it, for profit, that which belongs not to the publisher but to the author or his assignee, so as to interfere with the profits legitimately demanded by the author or assignee.

In this country we do not find any traces of the consideration of the question until about 1857, in the litigation which arose over the produc-

tion of "Our American Cousin." It came first before the United States Circuit Court for Pennsylvania, E. D., in *Keene* v. *Wheatley*, 9 Am. L. Reg. 33, and CADWALADER, J., thus defined publication: "A publication of such a composition is an act which renders its contents in any mode or degree an addition to the store of human knowledge. Every communication of a knowledge of such contents or of any primary result of mental development, unless confidential, is more or less a publication." At the same time he recognized the law to be that restrictions might be thrown about a communication which would prevent its being regarded as a publication in the broad general sense, and held that every violation of a condition expressed or implied in a limited publication as to the diffusion of the knowledge communicated would be redressed as a breach of good faith; but he further held that a public stage performance, given with the author's assent, to which any one purchasing a ticket might claim admission, was such a publication as would permit the play, if uncopyrighted, to be afterwards enacted by any person without responsibility therefor to the author. The learned judge, in the course of his opinion, gave utterance to a dictum (possibly suggested by *Coleman* v. *Wathen*) which, although now overthrown, has been extensively followed—to the effect that a person might lawfully repeat or re-enact so much of a play as he had acquired by the exercise of his memory alone, but not what he had acquired by the use of notes taken stenographically or otherwise. This dictum, which rests on the theory that a man presenting a play in public must expect that the audience will remember at least a part of it, but cannot expect that any person will write down what is said by the actors, although it proceeds from a really great judge, of a class which is most unfortunately small in number, does not seem to be well founded, for the matter to be considered is not how the author expects the audience to get a knowledge of his play, but what *use* he may reasonably expect to have made of that knowledge; he may reasonably expect that they will talk over and criticise the play, and perhaps, even, that some gifted person may "go through" certain parts of it for the amusement of friends in a parlor, but not that any one will represent it in its entirety or in any essential part so as to deprive the author or his assignee of the profits they might expect from future performances. The same question, and with reference to the same play, came before the Supreme Judicial Court of Massachusetts in 1860 in *Keene* v. *Kimball*, 16 Gray 545, and the court held that while a public performance was not such a publication as would permit the play to be afterwards presented by any one, yet there was no right after such performance to prevent an unauthorized representation; the court also followed Judge CADWALADER'S dictum, for while it said, "If persons by frequent attendance at a theatre have committed to memory any part or the whole of the play, they have a right to repeat what they have heard to others. We know of no right of property in gestures, tones, or scenery which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish;" it also said, "we do not in this decision intend to intimate that there is any right to repeat phonographically or otherwise, a lecture or other written discourse which its author declaims before a public audience, and which

he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained." Again, in *Keene* v. *Clarke*, 5 Robt. 38 (1867), *Keene* v. *Wheatley* and the dictum therein were followed, and ROBERTSON, C. J., delivering the opinion, denied that there was any understanding which could be regarded as a condition of admission that a play should not be memorized and reproduced, and spoke of the propriety of printing such a restriction upon the tickets if it were desired to prevent such use being made of access to the theatre, saying, "Such precautions are necessary to protect the exclusive right to an uncopyrighted production, otherwise they would stand on the same footing as if they were copyrighted." In the same year the United States Circuit Court for Illinois, N. D., recognized the rule that performance was not publication, but as it appeared that the plays before it had been printed abroad an injunction was refused: *Boucicault* v. *Wood*, 2 Bissell 34. In *Crowe* v. *Aiken*, 2 Id. 208 (1878), the same court held that a mere performance was not publication and enjoined a production where a copy of a play had been obtained from notes surreptitiously taken; at the same time, while the court hesitated, it did not dissent from the memory dictum, the case not calling for a decision upon its correctness, but DRUMMOND, J., after stating the law to be that performance did not constitute a dedication to the public at large, added "except possibly so far as those who witness its performance can recollect it, and that the spectators have not the right to secure its reproduction by phonographic or other verbatim report independent of memory." In 1872, in *Palmer* v. *De Witt*, 47 N. Y. 532, it was held that a public performance would not authorize the presumption of the abandonment of property so as to allow a printing.

So far we have a straining, as it were, to get away from the position originally taken that a performance was an abandonment, unless that effect were guarded against by notice, and a growing doubt as to the correctness of the memory dictum. In 1878 a subordinate court in New York held that a performance would not justify an unauthorized subsequent performance; *French* v. *Maguire*, 55 How. Pr. 471, and in 1882 in *Tompkins* v. *Halleck*, 133 Mass. 32, the Supreme Judicial Court of Massachusetts deliberately reversed its action in following *Keene* v. *Wheatley*. A copy of "The World" had been made from memory, and the play was represented therefrom; the case presented, therefore, precisely the features passed upon actually or hypothetically in *Keene* v. *Wheatley*. In delivering the opinion of the court granting an injunction, DEVENS, J., said: "The theory that the lawful right to represent a play may be acquired through the exercise of memory but not through the use of stenography, writing, or notes is entirely unsatisfactory. The public, it is true, as said in *Keene* v. *Kimball*, 'acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public.' But the question is as to the extent of that dedication * * * the mode in which the literary property of another is taken possession of cannot be important. * * * In whatever mode the copy is obtained, it is the use of it for representation which operates to deprive the author of his right."

Turning now to the decisions upon the kindred composition—the lecture—the result will be found to have

been worked out similar to that which in the case of the play was soon arrived at—viz.: that the delivery of a lecture is not such a publication as will authorize its printing by one of the audience to whom it has been delivered. An injunction seems to have been issued in 1771 in *Cullen* v. *Lowndes*, restraining the publication of Prof. Cullen's lectures without the assent of the author, but the first fully reported case we have upon the subject is *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209, begun in 1824. In that case Dr. Abernethy had delivered lectures in a professional capacity, and *The Lancet* began the publication thereof. The doctor applied to Lord ELDON for an injunction. It was agreed before him *inter alia* that the lectures were delivered in a public capacity and hence were public property. The Chancellor, though with characteristic caution he doubted as to whether the lecture fell within the definition of *literary* property, had no doubt as to the position above mentioned and said: "Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him and it is his duty to do that, but I have never yet heard that anybody could publish his lectures nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years if there had been such a right as that: we used to take notes at his lectures; and at Sir Robert Chambers' lectures, also, the students used to take notes, but it never was understood that those lectures could be published: and with respect to any other lectures in the University it was the duty of certain persons to give those lectures, but it never was understood that the lectures were capable of being published by any of the persons who heard them." As to the other matter, the case was allowed to stand over to permit the plaintiff to produce his manuscript. Dr. Abernethy made affidavit that he did not strictly read his lecture, but delivered orally from written notes carefully prepared from time to time, containing the results of his study and experience. Lord ELDON the next year (1825) granted an injunction, but it would seem from a reading of the case to have gone rather on the ground that the notes from which the publication was made having been taken by a student, it was a breach of an implied condition upon which the note taker was permitted to hear the lecture, than on the ground of literary property. The question then seemed to rest in England until *Nicols* v. *Pitman*, L. R. 26, Ch. D. 374 (1884). In that case the plaintiff had delivered the discourse before a workingman's college. It was delivered orally, but had been previously written; the audience was admitted by ticket. The defendant took the lecture in short-hand and printed it. An injunction was issued. KAY, J., referring to the opinion of Lord ELDON in the Abernethy case, said: "I take his meaning to be this, that where a lecture of this kind is delivered to an audience, especially where the audience is a limited one admitted by ticket, the understanding between the lecturer and the audience is, that whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes they like for their own personal purposes but they are not at liberty having taken those notes, to use them afterwards for the purpose of publishing the lecture for profit."

The same question, slightly modified, arose in the United States in *Miller's Appeal*, 15 W. N. C. 27 (1884).