The grounds of the decisions on this important subject, as reported in the law books, are not altogether consistent in principle. In some of them, it appears that the piracy occasioning, or obviously tending to, a *depreciation in the value* of the original work, is a fact on which much reliance has been placed in determining the question. In others, this circumstance has been altogether disregarded.

On the one hand it has been held, that a fair and bona fide *abridgment* of any book, is considered a new work; and however it may injure the sale of the original, yet it is not deemed a piracy or violation of the author's copyright(1). On the other hand, in the case of the *Encyclopædia Londinensis*, in which a large part of a treatise on fencing was transcribed, though there might have been no intention to injure its sale, yet as it might serve as a substitute for the original work, and was sold at a much lower price, it was held actionable, and damages were recovered(2).

There is, however, a clear distinction in the nature of these two cases, although the fact of *depreciation* might be in each the same. For the one was a case of *bona fide abridgment*, in which labor and judgment had been applied; and the other was a *wholesale compilation*, in which seventy-five pages were successively transcribed, without addition or alteration, and on which consequently no *skill or learning* had been bestowed, the exercise of which may be considered as the true criterion by which to determine the bona fide character of the abridgment or compilation(3).

(1) Brown, C. R. 451. 2 Atk. 141. (2) 1 Camp. 94.

(3) An abridgment, where the act of understanding is exercised in reducing the substance of a work into a small compass, by retrenching superfluities of language and circumstances, is a new work, useful and meritorious, and no violation of the author's property.

In the case of Mr. *Newbery's* Abridgment of Dr. *Hawkesworth's* Voyages, Lord Chancellor APSLEY, assisted by Mr. Justice BLACKSTONE, was of opinion, that to constitute a true and proper abridgment of a work, the whole must be preserved in its *sense*, and then the act of abridgment is an act of the understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader, which made an abridgment in the nature of a new and meritorious work.

This had been done by Mr. Newbery, whose edition might be read in a *fourth part* of the time, and all the substance preserved and conveyed in language as good, or better, than in the original, and in a more agreeable and useful manner.

His Lordship had consulted Mr. Justice BLACKSTONE, whose knowledge and skill in his profession were universally known, and who, as an author himself, had done honor to his country. They had spent some hours together, and were agreed, that an abridgment, when the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work: and that this abridgment of Mr. Newbery falls within these reasons and descriptions.—*Anon.* Lofft's Reports, 775. Mich. 1774.

The following cases and decisions will further elucidate the rules which govern this part of the subject.

The assigns of Dr. *Johnson* instituted a suit against the publisher of "The Grand Magazine of Magazines," for publishing *the Prince of Abyssinia*, a tale, which they had abridged, leaving out all the reflections.

The MASTER of the ROLLS observed, that the court had protected books which did not so well deserve it, as *Hoyle's Games of Whist*, &c.

The next question was, whether there had been any infringement of property? It was said to be a piracy, and not a fair abridgment;—1st. From the quantity of it which was printed. 2nd. Because it was done in such a way as not to recommend the book, but the contrary; by printing only the narrative, and leaving out all the moral and useful reflections.

But, 1st., it does not appear that one tenth part of the first volume had been abstracted.

2nd. I cannot enter into goodness or badness of the abstract. It may serve the end of an advertisement. In general, it tends to the advantage of an author, if the composition be good;—if it be not, it cannot be libelled. The plaintiffs had before published an abstract of the work in the London Chronicle, and therefore this work could not tend to their prejudice.

If I were to determine this to be elusory, I must hold every abridgment to be so(1).

In the case of Gyles v. Wilcox (in 1740), a bill was filed to stay a book entitled *Modern Crown Law*, which it was alleged was colorable only, and borrowed from Sir Matthew Hale's Pleas of the Crown,---the repealed statutes being left out, and the Latin and French quotations translated into English.

Lord HARDWICKE said, where books are colorably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment.

But this must not be carried so far. If I should extend the rule to restrain all abridgments, it would be of mischievous consequences, for the books of the learned, *les Journals des Scavans*, and several others that might be mentioned, would be brought within the meaning of this Act of Parliament.

In the present case it is merely colorable, some words out of the

In *Bell v. Walker and Debrett*, regarding "Memoirs of the Life of Mrs. Bellamy," passages were read to shew that the facts, and even the terms in which they were related, were taken frequently *verbatim* from the original work.

The MASTER of the ROLLS said, if this were a fair *bona fide* abridgment of the larger work, several cases in that court had decided, that an injunction should not be granted; but he had heard sufficient read to entitle the plaintiff to an injunction until answer and further order. 1 Brown, C. R. 451.

(1) Dodsley v. Kinnersley, Amb. 403.

Historia Placitorum Coronæ are left out only, and translations given instead of the Latin and French quotations that are dispersed through Sir Matthew Hale's works; yet not so flagrant as in the case of *Read v. Hodges*, for there they left out whole pages at a time(1).

In a more recent case (in 1801), an injunction was applied for to restrain the defendant from selling a work entitled *An Abridgment of Cases argued and determined in the Courts of Law*, &c.

It was stated that the work was by no means a fair abridgment; that, except in colorably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy *verbatim* of several of the reports of cases, and among them of the Term Reports, of which the plaintiff is proprietor; comprising not a *few* cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles, to give it the appearance of a new work.

In support of the motion, *Bell v. Walker* was cited(1).

Lord Chancellor. I have looked at one or two cases, with which I am pretty well acquainted, and it appears to me an extremely illiberal publication.

An injunction was accordingly granted(2).

SECTION IV.

Of Compilations.

It is difficult to define the exact limits to which a compiler is confined in his extracts or quotations from original authors, or from abridgments or previous compilations. In each case the peculiar circumstances attending it must be ascertained and considered.

A compilation, in a legal as well as a literary sense, is "a collection from various authors into one work;" and as the law allows this to be done, and even establishes a copyright in the compilation itself, it evidently follows, that in the exercise of the right, very considerable latitude must be granted. It seems a necessary consequence of the legality of a compilation, that the law must also sanction its being done in a complete manner, and to effect this object, the quotations must generally be both full and numerous.

Yet reasonable bounds must be set to the extent of transcripts. If an article in a general compilation of literature and

(1) 2 Atkyns, 141.

(2) Butterworth v. Robinson. 5 Vesey, 709. Yet a selection of what is material from a large body of Reports, commodiously arranged, whether alphabetical or systematic, seems an original work. Indeed the right is undisputed of selecting passages from books and reports (including entire judgments) in treatises on *particular* subjects. 2 *Evans' Coll. Stat.* 629.

science copies so much of a book, the copyright of which is vested in another person, as to serve as a substitute for it, though there may have been no intention to pirate it, or injure its sale,—this is a violation of literary property for which an action will lie to recover damages.

In the case of Roworth v. Wilkes, Lord Ellenborough said: This action is brought for prejudice to a work vested in the plaintiff, and the question is, whether the defendant's publication would serve as a substitute for it? A *review* will not, in general, serve as a substitute for the book reviewed; and even there, if so much be extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind may differ from a treatise published by itself, but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an *encyclopædia* would be a recipe for completely breaking down literary property. Here seventy-five pages have been transcribed out of one hundred and eighteen, and that which the plaintiff sold for half a guinea, may be bought of the defendant for eight-pence(1).

In the case of Mr. Wilkins's *Antiquities of Magna Græcia*, an injunction was granted against "An Essay on the Doric Order of Architecture," in which various extracts from the former work had been made; and an action directed to try whether the work was original, with a *fair use* of the other by *quotation and compilation*, which in a considerable degree was admitted.

The Lord Chancellor said, there is no doubt that a man cannot, under the pretence of quotation, publish either the whole or part of another's work, though he may use, what is in all cases very difficult to define, *fair quotation*.

Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's, that is *acknowledged;* but also much that is *not;* and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work(2).

It was urged in one of the cases by *Sir Samuel Romilly*, that in a work consisting of a selection from various authors, two men might make the same selection; but, said the Lord Chancellor, that selection must be made by resorting to the original authors, not by taking advantage of the selection already made by another(3).

(1) 1 Camp. 98. (2) Wilkins v. Aikin, 17 Vesey, 422. (3) 16 Vesey, 271.

In Trusler v. Murray, which was an action for pirating a *Book of Chronology*, it was proved, that though some parts of the defendant's work were different, yet in general it was the same, and particularly it was a literal copy, for not less than fourteen pages in succession.

Lord KENYON was of opinion, that if such were the fact, the plaintiff must recover, though other parts of the work were original. He referred to the publication of some original poems by Mr. Mason, together with others which had been before published. And the like with respect to an abridgment of *Cook's Voyage* round the World. The main question here was, whether in substance the one work is a copy and imitation of the other, for undoubtedly in a chronological work the same facts must be related. The parties having received his Lordship's opinion, it was agreed to refer the consideration of the two books to an arbitrator, who would have leisure to compare them(1).

Though copyright cannot subsist in an *East India Calendar*, as a general subject, any more than in a map, chart, &c. it may in the individual work; and where it can be traced that another work upon the same subject is---not original compilation, but a mere copy with colorable variations, the former will be protected by injunction.

Lord Chancellor ERSKINE said, if a man by his station having access to the repositories in the India House, has by considerable expense and labor procured with correctness all the names and appointments on the Indian Establishment, he has a copyright in that individual work. I have compared the books, and find, that in a long list of casualties, removals, and deaths, there is not the least variation, even as to the situation in the page. I am bound to continue the injunction(2).

In the case of the *Imperial Calendar*, in which a motion was made to dissolve an injunction,

The LORD CHANCELLOR said, the question before me is, whether it is not perfectly clear that in a vast proportion of the work of the defendant, no other labor had been applied than copying the plaintiff's work. From the identity of the inaccuracies, he said, it was impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work, the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind, if it be the fair fruit of original labor, the subject being open to all the world; but if it be a mere copy of an original work, this court will interpose against that invasion of copyright(3).

In King v. Read, the plaintiff had published a work

(1) 1 East, 363. (2) 12 Vesey, 276.
(3) Longman v. Winchester, 16 Vesey, 269.

entitled *Tables of Interest*, giving calculations for one hundred days, which was extended by a second part to one hundred and eighty-four days. The defendant afterwards published a work under a similar title, but upon a more extensive plan, containing calculations for every day of the year.

The plaintiff moved for an injunction, alleging, that though the plaintiff could not claim any copyright in the calculations which had been previously published, nor in those which went beyond his calculation, yet he was entitled to restrain the intermediate calculations; that as to these, the piracy was evident from the circumstance that errors were followed which could not be the effect of miscalculation; for instance, an error to the amount of ten shillings, in a column of sums increasing regularly by very small fractions; and that copyright must exist in such a work upon the same principle that protects books of logarithms and calculations for the purpose of navigation.

For the defendant it was insisted, that a particular subject cannot be occupied; that his work was produced by original calculation; that the calculation for the extended period would be useless unless commencing with the beginning of the year; and supposing both calculations accurate, the results for the same period must be the same, as in the cases of maps and surveys.

The Lord Chancellor directed the plaintiff to bring an action(1).

In Cary v. Faden(2), the plaintiff published a *Book of Roads* of Great Britain, comprising Patterson's book, to the copyright of which the plaintiff was not entitled, with improvements and additions, made by actual survey and otherwise.

The Lord Chancellor said, upon my inspection they are very different works. Patterson's is the original work. Corrections, improvements, and alterations have been made upon that from time to time. The plaintiff has taken a different line, having had a survey made for that purpose, to which he is very well entitled. He has made a very good map, with which it is very pleasant to travel. I think it is fair they should try their weight with the public. But what right had the plaintiff to the original work? If I was to do strict justice, I should order the defendants to take out of their book all they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson.

In another case of a *Book of Roads*, Lord Kenyon, in addition to the remarks already quoted(3), said,

That the defendants had pirated from the plaintiff's book, was proved in the clearest manner at the trial. Nine tenths at least of the alterations and additions were copied verbatim. The printed work itself was made use of by the defendants at the press, some of it clipped with scissars, with a few slips of paper containing MS. additions inter-

(1) 8 Vesey, 223. (2) 5 Vesey, 24. (3) page 129 *ante*.

spersed here and there, and some of these merely nominal and colorable. The Courts of Justice (said his Lordship) have been long laboring under an error, if an author have no copyright in any part of a work, unless he have an exclusive right to the whole book.

SECTION V.

Of Translations.

On the same principle which governs abridgments and compilations, that they constitute a species of new work, produced by *the labor and abilities of the writer*, it appears that TRANSLATIONS are also within the scope of the legislative provisions, and are protected for the same period of time.

In the case already referred to, a translation was distinguished from a reprinting of the original work, on account of the translator having bestowed his care and pains upon it(1); but the decision on that occasion turned on another point, namely, the immortality of the book.

The LORD CHANCELLOR, in the case of Wyatt v. Barnard(2), observed, that translations, if original, whether written by the plaintiff, made at his expense, or given to him, were protected like other works by the statutes.

The plaintiff in the latter case was the proprietor of a periodical work called "The Repository of Arts, Manufactures, and Agriculture." He claimed the sole copyright of the work, containing, amongst other articles, translations from the foreign languages. The defendants were publishers of another periodical work, which contained various articles copied or contracted from the plaintiff's work, without his consent, being translations from the *French* and *German* languages, &c.

The defendants, by their affidavit, stated the usual practice among publishers of magazines and monthly publications, to take from each other articles, translated from foreign languages, or become public property, as having appeared in other works.

They relied on the custom of the trade, and contended, that neither of the works was original composition, both being mere compilations; that it was never decided that a translator has a copyright in his translation, supposing (what was not proved) that these translations were made by the plaintiff himself.

The LORD CHANCELLOR said, the custom among booksellers could not control the law.

An affidavit was afterwards produced, stating, that all the articles were translated by a person employed and paid by the plaintiff, and were translated from foreign books, imported by the plaintiff at considerable expense. Upon that affidavit an order was pronounced for an injunction(3).

(1) Burnett v. Chetwood, see page 89, *ante*. (2) 3 Ves. and B. 77.
(3) See also Longman v. Winchester, 16 Vesey, 269. Wilkins v. Aikin, 17 Ves. 422.

CHAP. II.

OF PIRATING COPYRIGHT IN MANUSCRIPTS.

SECT. I.——*Of unpublished Manuscripts in general.*

Manuscripts were always protected by the common law as the property of the author, and are also comprised in the provisions made by the legislature.

In the case of Donaldson v. Beckett, the first question put to the judges was,

Whether at common law the author of any literary composition had the sole first right of printing and publishing the same for sale, and could bring an action against any person for publishing the same without his consent?

Mr. Baron Eyre held, that "the *thinking faculty* being common to all, should likewise be held common, and no more be deemed subject to exclusive appropriation than any other of the common gifts of nature. I am, therefore, said he, clearly of opinion, as to the first question, that at common law the author of a literary composition hath *no* right of printing and publishing the same for sale."

The reason given for this conclusion is evidently falacious: no author claims a property in "the thinking faculty"—he claims the *fruits* of the labor of his own mind only.

Not less than *eleven* of the judges of the land (including those who decided against some of the claims of authors) were clearly of opinion, that by the common law the author of any literary composition had the sole right of printing and publishing the same for sale, and might bring an action against any person for publishing it without his consent.

The following extracts are made in their own language, and shew the unanimity of these learned personages on this interesting point of literary property.

Nares, J. It is admitted on all hands that an author has a beneficial interest in his own manuscript.

Ashurst, J. If a man lends his manuscript to a friend, and his friend prints it, or if he loses it, and the finder prints it, an action would lie.

Yates, J. Admitted this doctrine.

Blackstone, J. When a man, by the exertion of his rational powers, has produced an original work, he has clearly a right to dispose of it as he pleases.

Willes, J. I declare it as my opinion, that an author hath an indisputable power and dominion over his manuscript.

Aston. J. An author hath a natural right to the produce of his mental labor.

Perrot, B. An author certainly hath a right to his manuscript; he may line his trunk with it, or he may print it.

Gould, J. I agree that an author hath a right at common law to his manuscript.

Smyth, L. C. B. The cases prove, and it is allowed, that literary property *is property* previous to publication.

De Grey, L. C. J. There can be no doubt that an author has the sole right to dispose of his manuscript as he thinks proper.

Lord Mansfield. It is just that an author should reap the pecuniary profits of his own ingenuity and labor.

There are several early cases in which the Court of Chancery restrained the printing and publishing of the manuscript works of authors without their consent.

One of these was that of Mr. Webb, who had his *Precedents of Conveyancing* stolen out of his chambers and printed. Another instance was that of Mr. Forester, whose *notes* had been copied by a clerk to the gentleman to whom he had lent them, and which were printed. In both cases the parties were prohibited from printing and publishing the works.

According to a recent decision of the Court of *King's Bench,* the 54th Geo. III. c. 156, does not impose upon authors, as a condition precedent to their deriving any benefit under the act, that the composition should be *first printed;* and therefore an author does not lose his copyright by selling his work in manuscript before it is printed.

Thus in the case of *White v. Geroch,* it appeared that the plaintiff was the author of a musical composition, of which he had sold several thousand copies whilst in manuscript, a year before it was printed. Upon this it was objected, that by the previous sale in manuscript, the plaintiff had lost the benefit conferred by the statute.

On the trial of the cause, Mr. Justice Bayley directed the jury to find a verdict for the plaintiff, with liberty for the defendant to move to enter a non-suit. And subsequently, on a motion being made for that purpose,

Abbott, C. J. said the object of the legislature was to confer upon authors, by the act in question, a more durable interest in their compositions than they had before. I am of opinion that the author does not lose his copyright by having first sold the composition in manuscript, for the statute 54th Geo. III. c. 156, must be construed with reference to the 8th Anne, c. 19, which it recites, and which, together with the 41st Geo. III. c. 107, were all made in pari materia for the purpose of enlarging the rights of authors. The 8th Anne, c. 19, gave to authors a copyright in works, not only composed and printed, but composed and *not printed;* and I think that it was not the intention of the legislature either to abridge authors of any of their former rights, or to impose upon them as a condition precedent,

that they should not sell their compositions in manuscript before they were printed(1).

The *Court of Chancery*, also, has lately exercised its power by restraining the use of manuscripts surreptitiously obtained.

Thus in the case of *Stephens* and *Sherwood* (Michaelmas Term, 1826). Mr. *Horne* applied for an injunction to restrain the publication of a work, which the defendant Stephens claimed as his property. His client, the plaintiff, was a Mr. Sherwood, a Parliamentary Agent, who, in the course of his business, had made various observations and notes, which he had observed in the passing of private bills through the Houses of Parliament. His clerk, *Thomas Ebbes*, who had access to these MSS. purloined large portions of them, together with many of Mr. Sherwood's opinions upon practice, &c., and published them, with certain trifling and colorable alterations, in a work entitled "Practical Instructions upon passing Private Bills through Parliament, by a Parliamentary Agent." Mr. Sherwood afterwards determined to publish a book upon the subject himself, for which purpose he wrote many notes and observations, which *Ebbes* also transcribed for the purpose of a second edition of his own work. Ebbes published his second edition, but sold the copyright to Mr. Butterworth. Stephens moved for and obtained an injunction against Butterworth. It was established by that injunction, that for all purposes of publication the first and second editions were the same.

Mr. Wright for the defendant said, he had nothing to do with Ebbes. He had only to shew that Sherwood was not entitled to the book. Ebbes might have learned all that it contained from his practice as a clerk. Sherwood's observations were not original. Three parts of the book consisted of rules and orders. There was also a book on the same subject by Mr. Ellis, in which he had no doubt he should find the source of most of Sherwood's observations. Sherwood had allowed twenty months to elapse before he applied for the injunction.

Mr. Horne said, Stephens had published the book on condition that Ebbes should receive half the profits.

The Lord Chancellor. If that fact had been stated in the case where Stephens, Ebbes, and Butterworth were concerned, there would have been no ground for the injunction. When the motion for an injunction against Mr. Butterworth was made, it stated that Stephens gave Ebbes seventy pounds for the copyright of the work, and he therefore thought that there could never be a clearer case in which an injunction might be granted. The fact, however, that Ebbes was to divide the profits with Stephens, introduced an entirely new feature into the case; and although during the present motion he was strongly impressed with the idea, that by permitting twenty months to expire, the plaintiff had abandoned his right, yet he was so impressed under the supposition that the work had been purchased by Stephens. All objections, however, were removed by the proof of this compact respecting the work between Ebbes and Stephens. The injunction must be granted.

(1) 2 Barn. and Ald, 298.

SECTION II.

Of the Manuscripts of Deceased Persons.

The manuscripts of the deceased seem in some respects to be placed on a different footing from the manuscripts of the living. The distinction has been pointed out by *Sir William D. Evans.*

During the life of a writer, the publication (he observes) may be deemed a *personal injury;* but after his death, several material questions may arise with respect to the claim of his representatives. It is taken for granted in Millar v. Taylor, that the injunctions were founded upon clear *property*. Now an executor can only bring an action on the case for some *damage* which reduces the assets, and to the extent of which assets he is accountable. But the right to prevent any person having a manuscript of the deceased, from publishing it, is no "property," which can constitute part of the *assets*, in respect of which alone he represents the deceased. The same observation will in some degree apply to the heir. Besides which, this kind of property is nowise analogous to any hereditament recognized by the law. The interpositions appear to be on behalf of the family of the writer. But it seems a legal anomaly to take notice of the family of a deceased person in any other manner than as connected with the property which constitutes real or personal assets.

The Court of Chancery, however, exercises its authority in restraining the publication of manuscripts of persons deceased. In the case of the Duke of Queensbury v. Shebbeare, before Lord Hardwicke(1), an injunction was granted against printing the second part of *Lord Clarendon's History.*

Lord Clarendon, it was stated, let Mr. Francis Gwynn have a copy of his history. His son and representative insisted he had a right to print and publish it. The court was of opinion that Mr. Francis Gwynn might have every use of it, *except the profit of multiplying in print.* It was to be presumed (as Mr. Justice Willes observed) that Lord Clarendon never intended that extent of permission when he gave him the copy. The injunction was acquiesced under, and Dr. Shebbeare recovered before Lord Mansfield a large sum against Mr. Gwynn for representing that he had a right to print. Mr. Justice Willes adduces this case as an argument for the general right of literary property, in which he is followed by Lord Mansfield, who observes, that Mr. Gwynn was entitled undoubtedly to the paper of the transcript of Lord Clarendon's History, which gave him the power to print and publish it after the fire at Petersham, which destroyed one original. That copy might have been the only manuscript of it in being. Mr. Gwynn

(1) Cited in Millar v. Taylor, 4 Burr. 2330.

might have thrown it into the fire had he pleased. But at the distance of near a hundred years, the *copy* was adjudged the property of Lord Clarendon's representatives, and Mr. Gwynn's printing and publishing it without their consent, was adjudged an injury to that property, for which, in different shapes, he paid very dear(1).

SECTION III.

Of Private Letters, Literary and General.

There is a material distinction between *literary* and *general* letters---the former being protected as the subject of copyright, whilst the publication of the latter is restrained on the ground only of *breach of contract* or *confidence*, or when they tend to the injury of private *character*, or are calculated to wound private *feelings*.

The earliest case on this subject is that of Pope v. Curl (in 1741), in which a motion was made to dissolve an injunction obtained by Mr. *Pope* against the bookseller, for vending a book called "Letters from Swift, Pope, and others."

Lord HARDWICKE. I think it would be extremely mischievous to make a distinction between a book of *letters*, which comes out into the world either by the permission of the writer or receiver of them, and *any other learned work*.

The same objection may hold against *sermons*, which the author may never intend should be published, but are collected from loose papers, and brought out after his death.

It has been objected, that where a man writes a letter, it is in the nature of a gift to the receiver.

But I am of opinion it is only a special property in the receiver; possibly the property in the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.

It has also been insisted on, that this is a sort of work which does not come within the meaning of the Act of Parliament, because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work.

But it is certain that no works have done more service to mankind, than those which have appeared in this shape upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable, for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.

The injunction, however, was continued by the Lord

(1) Millar v. Taylor, *per Lord Mansfield*.

Chancellor only as to those letters which are under Mr. Pope's name in the book, and which are written *by him*, and not as to those which are written *to him*(1).

In the case of *Lord Chesterfield's* Letters, an injunction was obtained till the hearing by his Lordship's executors against the widow of Mr. Stanhope.

Lord Apsley, according to the report, recommended it to the executors to permit the publication, in case they saw no objection to the work upon reading it, and having copies delivered to them(2). It is said, that by the register's book it does not appear that an injunction was actually granted(3). It is well known that the publication did appear, but whether upon the judgment of the executors, that they saw no objection to the work, or upon what other ground, we are not informed.

In the case of the Earl of Granard v. Dunlein(4), the executors of Lady Tyrawley obtained an injunction in the first instance against the defendant publishing *Letters to Lady Tyrawley* from different correspondents, and which he had got possession of by being permitted to reside in her house, and continuing to do so after her death.

Another case of private letters was heard by the Lord Chancellor in private, in which an injunction was granted, restraining the publication of *Letters from an Old Lady*, of a nature that made it very important to prevent the publication; but the defendant in that case, as stated by the Vice Chancellor in his judgment, had received a sum of money not to publish the letters, and the attempt to publish them was therefore a *violation of contract*(5).

In the case of the late *Dr. Paley*, who left certain manuscripts to be given to his own parishioners only, a bookseller, having obtained possession of them, was restrained from publishing(6).

But this principle does not extend to letters which are not of a literary kind. Thus in the case of Lord and Lady Percival v. Phipps and Mitford, it was stated by the bill, that *Lady Percival* had written to the defendant Mitford several letters of a private nature, upon the confidence that he would not part with them, or communicate the contents to any person, nor publish, or permit them to be published;---that Mitford had communicated them to Phipps, who had published one, and announced an intention to publish others, and on these facts an injunction was prayed. On the other hand, Phipps by his answer stated, that Mitford was confidentially employed by

(1) 2 Atk. 342.
(2) Ambler, 737.
(3) 2 Ves. and B. 21.
(4) 1 Ball and B. 207.
(5) ——— v. Eaton, 13th April, 1813. 1 Ves. and B. 27.
(6) Cited 2 Ves. and B. 23.

Lady Percival to publish authentic information relative to a subject which very much engaged the public attention,---that Phipps desired Mitford to offer his newspaper as a channel for communicating such information. This offer, it was alleged, was accepted, and the letter in question delivered to the defendant for publication, and various paragraphs were also delivered from time to time for the same purpose. Subsequently, a statement was inserted in the *News*, (which was the title of the paper) conveying intelligence as communicated by Lady Percival, which it appeared was false, and which was disavowed by her. The letters in question were written to Mitford upon similar subjects, materially tending to shew that the intelligence did come from Lady Percival, and that as she had denied being privy to the former publication, the character of Phipps, and the value of his paper, were in danger of falling into discredit with the public.

The VICE CHANCELLOR.—An injunction, restraining the publication of private letters, must stand upon this foundation, that letters, whether of a private nature, or upon general subjects, may be considered as the subject of *literary property;* and it is difficult to conceive in the abstract, that they may not be so. A very instructive and useful work may be put into that shape, as an inviting mode of publication.

Admitting, however, that private letters may have the character of literary composition, the application of that as an universal rule, extending to every letter which any person writes upon any subject, appears to me to go a great way; including all mercantile letters, all letters passing between individuals, not only upon business, but on every subject that can occur in the intercourse of private life. If in every such instance the publication may upon this doctrine be restrained, as a violation of literary property, whatever may be the intention, the effect must frequently be to deprive an individual of his defence by proving agency, orders for goods, the truth of his assertion, or any other fact, in the proof of which, letters may form the chief ingredient.

"This is the naked case of a bill to prevent the publication of private letters, not stating the nature, subject, or occasion of them, or that they were intended to be sold as a literary work for profit, or are of any value to the plaintiff. Upon such a case, it is not necessary to determine the general question, how far a Court of Equity will interfere to protect the interest of the author of private letters. The interposition of the court in this instance is not a consequence from the cases that were cited; upon which I shall merely observe, that though the form of familiar letters might not prevent their approaching the character of a literary work, every private letter upon any subject to any person, is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence

by letters, is to carry on the intercourse of life between persons at a distance from each other, in the prosecution of commercial or other business, which it would be very extraordinary to describe as a literary work, in which the writers have a copyright. Another class is the correspondence between friends or relations upon their private concerns, and it is not necessary here to determine how far such letters, falling into the hands of executors, assignees of bankrupts, &c. could be made public in a way that must frequently be very injurious to the feelings of individuals. I do not mean to say that would afford a ground for a Court of Equity to interpose to prevent a breach of that sort of confidence, independent of contract and property."

Although there may be a joint property in letters of correspondence between the sender and receiver, it does not seem by any means necessarily to follow that one of several *joint owners in a literary composition* may not exercise the right of publication. Supposing different persons to be possessed of manuscript copies of a given composition, in which no other has a paramount claim to restrain the publication, it cannot be supposed that any of them individually could prevent the publication by the others(1).

SECTION IV.

Of Written Lectures.

The means of diffusing knowledge, and the modes of instruction, vary at different periods of society. It is observable that of late years the custom has increased of communicating information by public lectures, and it seems fitting, therefore, in a work devoted to the examination of the laws relating to the protection of the fruits of intellectual labor, that a proportionate degree of attention should be paid to the questions which may arise out of the respective rights of lecturers and pupils, as well as the public generally. We shall, therefore, avail ourselves of the elaborate judgments which from time to time were delivered by the late LORD CHANCELLOR in the celebrated litigation between *Mr. Abernethy* and the proprietors of *The Lancet*, in which all the questions suggested at that time were minutely and fully considered, and which his lordship enumerated as follow :

The first question is, whether an oral lecture is within the protection of the law? Now, as far as my recollection goes, that has not yet been the subject of determination. On the other hand, if there be a lecture apparently oral, but which is nevertheless delivered by the assistance of a very good memory from a written composition,

(1) 2 Evans's Coll. Stat. 625.

the question then will be, if it could not be made out in point of law that an oral lecture or an oral sermon was within the protection of the law, whether protection is due to the written composition? Another question will be, whether this court would interfere before notice had been given that that apparently oral lecture was the delivery of matter from a written composition? And a farther question will be, whether if the oral lecture is to be protected by the fact that it is, in truth, the delivery of a written composition, it does not lie on those who insist that that circumstance gives the protection of the law to that which appears to be orally delivered, to produce and shew that written composition, in order to make out their case.

We shall take the liberty of separating the luminous judgment of his lordship into two parts---the 1st, on the copyright in lectures which were either *read* from a written composition, or delivered from the *recollection* of it; the 2nd, on the copyright in lectures *orally* delivered, of which no manuscript existed.

First, then, of *written* lectures.

Where the court is called upon to restrain a publication on the ground that it is a piracy of a composition which has been substantially reduced into writing, it is the duty of the court to see that the plaintiff produces his written composition.

The Lord Chancellor.—The very early part of this case turned entirely upon the question of property; and indeed it can be viewed only in two ways---either as a question of *property*, or a question of *trust*. In the first place, I have nothing to do with all the considerations that have been pressed on me with respect to the benefit which the public may receive from the publication, even of such lectures as those which so distinguished a man as Mr. Abernethy might publish, or other persons might publish for him; and in the next place, I have nothing to do with the moral question of how far the editor of this work has righteously possessed himself of the means of publishing it. When I say with the moral question, I mean to qualify the expression; because if I can collect that those means have been obtained either by a *breach of trust*, or by *fraud*, this court *will* have something to do with it.

In the present case, Mr. Solicitor General has viewed it, with respect to its connection with writing, in these two ways. He says, that Mr. Abernethy has a composition which one would call a copy or a writing, and which contains the whole of what this defendant has published. And then he says, if he have not such a copy, yet he delivered it as *from writing*; and, therefore, he must be understood as having some notes, which were to suggest to him from time to time what sentiments to deliver orally to the persons who attended his lectures.

Now with respect to either of those views of the case, I apprehend when this court is called on to enforce a legal right, by giving a remedy beyond that which the law gives, it is the bounden duty of this

court, be the case what it may, to see that the plaintiff *produce his written composition*, and therefore, if this case be to be put at all on the right which Mr. Abernethy is supposed to derive from his having a full and correct copy; there must be an original, or a writing which contains all that has been published in this book, or he must have a writing which is such in its nature as that, coupled with what he orally delivered, it may be taken that he has *substantially* a written composition as well as that which he delivered orally. When this court is called on to give a remedy beyond the remedy which the law gives to persons who have a legal right, *the court must know what it is proceeding on*; and if the case be put on this ground, either that there is a writing of one character or a writing of another character, *that writing must be produced*, so that the court may know what it is doing. If that writing be not produced, I must then look at the motion as an application made to me merely on the ground of an oral publication; and then the question of property will arise, coupled as it may be with the doctrine of *trust* and with the *doctrine of fraud*(1).

It is said that Mr. Abernethy is not to be looked on as holding the same character with reference to a subject of this kind as a clergyman of the church, or a professor in a University; for as I understand the affidavit which has been filed on the part of the defendant, Mr. Abernethy is represented, not only as a surgeon, but as a person *appointed* by the governors and guardians of this hospital to give lectures:---" and this deponent saith" (such is the language of the affidavit) " that the surgeons and lecturers for the time being of such hospital, are appointed by the governors of the said hospital."

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 any body 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; at Sir Robert *Chambers's* lectures also the students used to take notes; but it never was understood that those lectures could be published;--- and so 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(2).

SECTION V.

Of Oral Lectures.

An injunction will not be granted to restrain an alleged piracy of lectures delivered *orally*, when no written composition substantially the same with these lectures is produced.

(1) On these points see the next section. (2) 3 Law Journal, 209.

But persons attending an oral lecture have no right to publish it for profit.

An action upon the implied contract will lie against a pupil attending an oral lecture, who caused it to be published for profit.

The court will grant an injunction against third persons publishing lectures orally delivered, who must have procured the means of publishing those lectures from persons who attended the oral delivery of them, and were bound by the implied contract(1).

The Lord CHANCELLOR, in delivering his judgment in the case in which the preceding doctrine was held, commenced his observations as follows:

> With regard to the question of literary property, I have no right to interfere by injunction, unless I have a very strong opinion that the legal right is with the plaintiff. Now looking at all that has passed with respect to literary property, and particularly with respect to the case of *Millar v. Taylor*, which was first before the Court of King's Bench, and afterwards before the House of Lords (though there was a vast deal of argument on the question of what sort of property a man may have in his unpublished ideas or sentiments, or the language which he uses), yet I do not recollect in the course of those proceedings (particularly in the House of Lords) that any question was put to the judges that did not adapt itself to the case of *a book* or *a literary composition*; for of the questions which were there put to the judges, the first was, "whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?" The next question was, "if the author had such a right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?" The third question was, "if such an action would have lain at common law, was it taken away by the statute of Anne, and was an author by that statute precluded from any remedy except on the foundation of the statute, and on the terms and conditions prescribed thereby?"
>
> On these questions the judges of the land differed. On the first question, one of them was of opinion that at common law an author of any book or literary composition had not the sole right of first printing and publishing the same for sale, and that he could not bring an action against any person who printed, published, and sold the same, unless such person had obtained the copyright by fraud or by violence. So that although this judge was of opinion that at law the author was not the party who had the sole right of first printing

(1) Abernethy v. Hutchison, Knight and Lacey.

and publishing a composition for sale, yet he was also of opinion, that to give him a right of action against those who first printed and published the same for sale, it was necessary to shew, in order to maintain an action, that the person who had first printed and published had gotten it either by *violence or fraud.*

Now if, said his Lordship, it can be made out, as matter of contract between Mr. Abernethy and those who attend his lectures, that they should *not* be at liberty to print or publish the same, I should say then, that supposing notes of all that he delivered in his lectures to be taken, and supposing it to be a proper thing for the use of the students that that should be done, yet I never would permit a third person to make use of the delivery of those notes to that third person, for the purpose of doing that which the person delivering those notes would not himself be permitted to do. I should call that, in the sense in which a court of equity uses the word, *a gross fraud.*

If this injunction be applied for, not on what was done in *Millar v. Taylor,* but on the reasoning to be found in that case, it becomes a judge in equity to look about him before he ventures to decide the legal question. That legal question, in the shape in which it is now put, namely, with respect to an oral delivery of ideas and sentiments, has occasioned much abstruse learning; and as in the case which I have alluded to, the judges of the land in the first instance, and the House of Lords in the last instance, avoided giving any opinion upon it when it was discussed; certainly it becomes me to know what opinion a court of law would give in such a case as this, before I grant the injunction in unqualified terms.

There is another difficulty which belongs to a case of this kind, even supposing that there is the right which is contended for—I mean the difficulty there must be nine times out of ten in sustaining an action for want of proof; for if a lecture be published which has been delivered orally, and that can form the subject of an action, how is it possible, unless the court is to be satisfied with something like the substance of what was said, to prove that the printed publication was parcel of the oral publication. In this case, however, there is no difficulty on that point, which is another reason perhaps that ought to induce the court to be a little cautious in what determination it comes to. Because this editor has, in the most distinct manner, admitted in his publication—and what is admitted in his publication must be taken in this court to be true against himself---he has admitted in the publication that what he has published was orally delivered by Mr. Abernethy. The difficulty of proof, therefore, to which I have alluded, is not found to exist in this case.

At the same time *it is one thing to contend that it has not been established that a person who orally delivers lectures, has that species of property in them which may enable him to bring an action,* and after having succeeded in the action, to apply for an injunction here, either with or without an account to be kept in the mean time of the profits of the work; and *it is another thing to say, that a person who has possessed himself of the means* of publishing what another has delivered in lectures, which are afterwards to be put into writing, and which

the author (if I may so call him) may, or may not mean to publish, *has himself the copyright* of what he does so publish. That it may not be supposed I sanction that doctrine, I beg to have it understood, that I do not give any such opinion.

On the other hand, if the editor of the Lancet be not only himself at liberty to publish 5000 copies of this work, but 5000 other persons (notwithstanding his pretence of having the copyright of this publication called the Lancet) may likewise publish the work, that would go directly to destroy the value of any property which Mr. Abernethy may have in the subject. These are all the views of the case, as far as they go to the question of literary *property*.

With respect to the question of *trust*, a good deal of that must depend, not only on the nature of these lectures, and so on, and the rights and obligations abstractedly considered which those persons are under to whom they were delivered; but it must depend also (indeed very materially) on the affidavits that have been actually filed.

On a subsequent day, Mr. Abernethy made an additional affidavit, stating, "that he has given his lectures as most lecturers do, orally, and not from a written composition; but that previously to the delivery of such lectures, he had from time to time committed to writing notes of such, his said lectures, which have been increased and transposed until a great mass of writing has been collected, written in as succinct a manner as possible, with a view to exhibit the arrangement he has formed, and the facts he has collected together, with his opinions relative to certain subjects of surgery: that a considerable portion of such notes have been by, or under the direction of this deponent extended and put into writing, with a view to publication, which writings he is ready to submit to the inspection of any respectable and competent person, as a test of this deponent's accuracy in the statement made to the court in his former affidavit, and that such writings are in his possession; that at the time of delivering his said lectures, he did not read or refer to any writing before him, but that he delivers such, his lectures, orally, and from recollection of such notes and writings, and that the lectures so delivered by him, though not verbatim the same as his notes and writings, yet are in substance, arrangement, and statement of the facts substantially the same: that such lectures vary from time to time both in the language and arrangement according to circumstances, and from any new matter that may have occurred to him, by way of illustration or otherwise: that on a comparison of the written notes or lectures with those so orally delivered by him, they will, and must necessarily vary, and in like manner they will be found to vary from the lectures pirated, or alleged to be pirated, by the defendants in the publication

called the Lancet: that the composition of the said lectures so reduced into writing have cost him much time and study for a long series of years: that his duties as a surgeon to St. Bartholomew's Hospital and lecturer are entirely distinct, and that it is not a part of his duty as such surgeon to deliver lectures, but that the same are in the nature of private lectures, and are not attended by any persons unless by his permission, and are not in any way open or accessible to the public."

The case was again argued.

The LORD CHANCELLOR. If Mr. Abernethy had produced in court the writings from which he says his lectures were really delivered, so that I might myself have exercised a judicial opinion upon those writings, and have seen that his lectures, though orally delivered, were delivered from what I should say was *a literary composition*, I should have had no difficulty iu the case. If on the other hand in comparing what is said to have been orally delivered, and what has got into this book called the Lancet, with the notes, I could not accurately have referred the publication to those notes as being the same.—(I mean with those trifling literary distinctions which must exist in such cases.) I should then have known what to have done, by not applying myself to any thing but a reference to authorities. But I apprehend, that if those notes are not produced and made, (substantially made,) part of the case before me, the court has but two ways of proceeding left to it:--- the court must either refer it to the master, to enquire whether what is admitted to have been published in this book is the same as the notes, or it must decide the case by calling upon the lecturer to deliver the notes to the court itself, that the court may see whether they are the same. And it may be very inconvenient to produce those notes; so much so, that I should not be surprised if a gentleman such as Mr. Abernethy would rather suffer himself to go out of this court without a judgment, than produce the notes. But if he had gone to the master, which would have been the more private way, the master must have reported to me, and if there had been an exception taken to his report, there must afterwards have been a public production in this court. The consequence of all this is, that *I am compelled to look at the present case as that of a lecture delivered orally*. In Millar and Taylor, there is a great deal said with respect to a person having a property in sentiments and language, though not deposited on paper; but there has been no decision upon that point; and as it is a *pure question of law*, I think it would be going farther than a judge in equity should go, to say upon that, that he can grant an injunction upon it, before the point is tried.

There is another ground for an injunction, which is a ground arising out of an *implied contract*. I should be very sorry if I thought that anything which has fallen from me should be considered to go to the length of this---that persons who attend lectures or sermons, and take notes, are to be at liberty to carry into print those notes for their own profit, or for the profit of others. I have very little difficulty on that point. But that doctrine must apply either to *contract* or *breach of*

trust. Now with respect to contract, it is quite competent for Mr. Abernethy, and for every other lecturer, to protect himself, in future, against what is complained of here. There is a contract expressed and a contract implied ; and I should be very sorry to have any man understand that this court would not act as well upon a contract implied, as upon a contract expressed, provided only the circumstances of the cause authorize the court to act upon it. I have not the slightest difficulty in my own mind that a lecturer may say to those who hear him, "you are entitled to take notes for your own use, and to use them perhaps in every way except for the purpose of printing them for profit; you are not to buy lectures to sell again: you come here to hear them for your own use, and for your own use you may take notes." In the case of *Lord Clarendon's* work, the history was lent to a person, and an application was made for an injunction to stay the publication; it was said there, that there was no ground for the injunction; and it was proved on affidavit that my Lord Clarendon's son said, "there is the book, and make what use you please of it;" the *Chancellor*, however, of that day said, that he could not mean he was to print it for his profit. So with respect to letters, my Lord *Hardwicke* says in one case, that the person who parts with letters, still retains a species of property in them; and that the person who receives them, has also a species of property in them. He may do what he pleases with the paper, he may make what use he pleases of the letters, *except print them.* There he puts his jurisdiction on the ground of *property*. In other cases we find it put upon the ground of *breach of a trust*---that the letter is property, part of which *I* have retained, and part I have given to you; you may make what use of the special property you have in it you please, but you shall not make use of my interest in it; therefore you shall not print it for profit. Now if there be an express contract---for instance, if Mr..Abernethy say "Gentlemen, all of you who attend and pay five guineas for attending my lectures, may take notes of what I say, but let it be understood, that you shall not print for profit;" then in that case I should not have the least difficulty in saying, if any student afterwards did think proper to publish for profit, that there is hardly a term which this court would think too harsh for him, and it would restrain him. There is another ground, which is, whether, looking at the general nature of the subject, it is not very difficult to say, that there is not a contract which would call upon the court to restrain the parties who hear the lectures, from publishing the notes they may have taken. They may make whatever use of them they please, but they ought not to publish them. If an express contract exists, or if any contract is to be implied, either contract would be the ground of an action for a breach of contract.

With respect to trust, the question here would be, whether there is not an *implied trust* with respect to the student himself? One thing is quite clear, that if those lectures have been published from short-hand writer's notes, they have been published from short hand writer's notes taken by some student, or from short hand writer's notes taken by some intruder into the lecture room; for I do not see how it is possible that they could have been taken otherwise. If there

is either an implied contract on the part of a student, or a trust, and if you can make out that the student has published, I should not hesitate to grant the injunction. With respect to the stranger, if this court is not to be told (and certainly it has no right to compel the parties to tell) whether the power of giving the oral lectures to the public was derived from a student or not, I think it very difficult to tell me that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust.

Upon the whole, taking this case as it now stands as a case simply of oral lectures, it must be tried whether it is legal to publish them or not. Upon the question of property in language and sentiments, not put into writing, I give no opinion, but only say that it is a question of mighty importance. At present, therefore, I must refuse the injunction: but I give leave to make this very motion on the ground of breach of contract or of trust.

Afterwards the bill was amended by the introduction of allegations, that no persons had a right to attend the lectures, except those who were admitted to that privelege by the lecturer: that it had always been understood by him, and those who preceded him in the office, and those who attended the lectures, that the persons who so attended did not acquire, and were not to acquire, any right of publishing the lectures which they heard: but that the plaintiff and his predecessors respectively had and retained the sole and exclusive right of printing and publishing their respective lectures, for his and their own respective benefit: that there was an implied contract between the plaintiff and those who attended his lectures, that none of them should publish his lectures, or any part thereof: that the defendants had been furnished with the copy of the lectures which they had printed, through the medium of some person who had attended the lectures under Mr. Abernethy's above-mentioned permission; and that it was a breach of contract or trust in such person so to furnish the copy, and in the defendants, to print and publish the same.

These allegations being verified by the affidavit of the plaintiff, the subject underwent further discussion.

Lord Chancellor. Without deciding the question of literary property in this case, but merely excluding it, the point to be determined was, whether there was such a violation of contract as to sustain an action; if not, whether an injunction could be asked for. No evidence was given to shew—first, whether the defendants attended as pupils, or secondly, whether they received their report from a person guilty of a breach of trust; or thirdly, whether a short hand writer not being a pupil, gave them a copy of the lectures. It was therefore a question, whether a stranger not bound by contract could be enjoined. Various considerations would arise out of this; for a Court of Equity would be called upon to say, whether the means by which the defendants were enabled to publish the lectures, might, or

might not, be used. One view of the case which ought not be lost sight of was, that supposing the lectures to have been taken down by a pupil who afterwards communicated them to the publishers, and you could not get at the pupil, you could not maintain an action. But in that case the publishers might come under the jurisdiction of the court, upon the ground of having made a fraudulent use of that which had been communicated to them, by one who had committed a breach of trust.

The LORD CHANCELLOR on a subsequent day(1) finally delivered his judgment.

He stated, that where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected, because the court must be satisfied that the publication complained of was an invasion of the written work; and this could only be done by comparing the composition with the piracy. But it did not follow that because the information communicated by the lecturer was not committed to writing, but orally delivered, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion that whatever else might be done with it, the lecture could not be published for profit. He had the satisfaction now of knowing, and he did not possess that knowledge when this question was last considered, that this doctrine was not a novel one, and that *this opinion was confirmed by that of some of the judges of the land.* He was therefore clearly of opinion, that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short hand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling. There was no evidence before the court of the manner in which the defendants got possession of the lectures, but as they must have been taken from a pupil or otherwise, in such a way as the court would not permit, the injunction ought to go upon the ground of property and although there was not sufficient to establish an an implied contract as between the plaintiff and the defendants, yet it must be decided, that as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorise the court to say the defendants shall not publish. He had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen who had published them came by them he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted: because if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be what this court would call a

(1) June 17, 1825.

fraud in a *third* party. If these lectures had not been taken from a pupil, at least the defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures in such a manner that this court would not allow of a publication. It by no means followed because an action could not to be maintained, that an injunction ought not to be granted. One question had been, whether Mr. Abernethy, from the peculiar situation which he filled in the hospital, was precluded from publishing his own lectures for his profit; but there was no evidence before the court that he had not such right. Therefore the defendants must be enjoined in future.

The only question remaining was, whether the delay which has taken place in renewing the application, was a ground for saying that the injunction ought not to go to restrain the sale of such lectures as had been printed in the interim. His Lordship's opinion was, that the injunction ought to go to that extent, and should include the lectures already published(1).

CHAP. III.

OF PIRATING COPYRIGHT IN DRAMATIC WORKS.

SECT. I.——*Of Unpublished Plays.*

Not only is the manuscript of a dramatic author protected by the law, like every other literary composition, but even after it has been represented on the stage, the poet still retains the exclusive right of printing and publishing it.

In the case of *Macklin v. Richardson*(2), it appeared that the defendant had employed a short hand writer to take down the farce of *Love à la Mode,* upon its performance at the theatre and he inserted one act in a magazine; and gave notice that the second act would be published in the magazine of the following month.

Upon an application to LORD CAMDEN for an injunction, he directed the case to stand over until that of Millar and Taylor, which was then depending, should be determined, and after the determination, the injunction was, by the Lords Commissioners SMYTHE and BATHURST, made perpetual. *Smythe,* L. C .B. said, it has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff, but that is a mistake; for besides the advantage of the performance, there is as much reason that he should be protected in that right as any other author. *Bathurst*. "The printing it before the author, is doing him a great injury."

(1) 3 Law Journal, 209. (2) Amb. 695.

SECTION II.

Of representing published Plays.

Although a represented and *un*published play is protected from piracy by *printing*, it seems that a different doctrine prevails in regard to the *representation* of published plays.

Hence an action cannot be maintained for the *penalties* under the statute for representing on the stage the production of an author which had been previously printed and published: it being held that such representation is not a publishing within the intent of the act.

Thus in Colman v. Wathen, an action was brought for the penalty under the statute 8th *Anne*, c. 19, for publishing an entertainment called the "Agreeable Surprise." The plaintiff had purchased the copyright from *O'Keeffe* the author, and the only evidence of publication by the defendant, was the representation of this piece upon his stage at Richmond. A verdict was given for the plaintiff with nominal damages, in order to raise the question, whether this mode of publication were within the statute(1)?

Erskine contended that this was sufficient evidence for the jury to conclude that the work had been pirated, for it could not be supposed that the performers could by any other means have exhibited so perfect a representation of the work. Besides, if this were not held to be a publication within the statute, all dramatic works might be pirated with impunity, as this was the most valuable mode of profiting by them.

Lord Kenyon, C. J. There is no evidence to support the action in this case. The statute for the protection of copyright only extends to *prohibit the publication of the book itself* by any other than the author, or his lawful assignees. It was so held in the great copyright case by the House of Lords. But here was no publication.

Buller, J. Reporting any thing from memory, can never be a publication within the statute. Some instances of strength of memory are very surprising, but the mere act of repeating such a performance, cannot be left as evidence to the jury that the defendants had pirated the work itself.

It is observable in this case that the party sought redress for the injury he had sustained, not by an action for damages, but for the *penalties given by the statute*, and consequently he was bound by the express provisions it contained, which in a penal action were of course construed strictly.

In a later instance (1822), that of *Murray v. Elliston*, the Lord Chancellor sent a case for the opinion of the Court of King's Bench, in which the manager of a theatre had represented Lord Byron's tragedy of *Marino Faliero, Doge of Venice* (altered and abridged for the stage), without the

(1) 5 T. R. 245. (1) June 17, 1825.

consent of the owner of the copyright, who had previously caused the tragedy to be printed and published.

The COURT of King's Bench certified its judgment in the usual form to the Lord Chancellor, without stating the reasons on which it was founded. It will be necessary, therefore, to introduce the arguments of counsel.

SCARLETT, for the plaintiff. This question is quite different from that in *Colman v. Wathen*(1). There it turned upon the words of the statute, 8 Anne, c. 19, and the point determined was, that the acting a piece on the stage was not a publication of it within that statute. Here the question is different, for it depends not on the statute, but on the *right of property* which the plaintiff has in this work. The moment such a right is established, the consequences must follow, that any injury done to the property is the subject of legal redress. This is only one mode in which it may be injured. Unfair and malicious criticism is another, and for that an action will lie(2). Suppose this play failed of success when represented, the sale of the work would thereby be damaged. Besides, the curiosity of the public would be thereby satisfied, and so the plaintiff would be injured in the sale of the work. And whether the right of property arise from the common law, or from the statutes relative to it, is in this case immaterial. For if the statute makes a literary work property, the common law will give the remedy for the invasion of it. The only question is, whether the representation of this piece for profit, may not injure the copyright? If so, the plaintiff is entitled to the judgment of the court.

ADOLPHUS contra. In *Donaldson v. Beckett*(3), the majority of the judges were of opinion that the action at common law was taken away by 8th Anne, c. 19, and that the author was precluded from every remedy except on the statute, and on the terms and conditions prescribed thereby. The claim by the plaintiff on this occasion is at variance with this decision. For here he contends for a far more comprehensive security, and one co-existing with that given by the statute, and restraining the public in points of which the statute takes no notice. The case of *Macklin v. Richardson*(4) was very different. There the farce of Love á la Mode had never been published, and the defendant having employed a short hand writer to take it from the mouths of the actors, published it, and it was held that he could not do so. But when in Colman v. Wathen the converse of this was attempted, the court held that the action would not lie. This decision was plainly founded on the nature of copyright, the property in which is exactly the same as if but one book existed which the author permitted individuals to read on payment of a certain sum. The injury then which an author sustains by the violation of his copyright, is this; that a stranger without permission disposes of the use and possession of his book, and thereby receives the profit to which he the author is justly entitled. If then the book be not in all reasonable strictness

(1) See page 155 *ante*.
(2) Carr v. Hood, 1 Camp. 355.
(3) 4 Burr. 2408.
(4) Page 154 *ante*.

such as may be called the author's own book, as if it be a bona fide abridgment, the case of *Gyles v. Wilcox*(1) shews that the author has no remedy. Now in the present case a theatrical exhibition falls within the principle above laid down. Persons go thither not to read the work or to hear it read, but to see the *combined effect of poetry, scenery, and acting*. Now of these three things, two are not produced by the author of the work, and the combined effect is just as much a new production, and even more so, than the printed abridgment of a work. There are many instances in which works published have thus, without permission of their authors, been brought upon the stage. The safe rule for the court to lay down is, that an author is only protected from the piracy of his book itself, or some colorable alteration of it: and in that case the defendant is entitled to the judgment of the court.

The COURT afterwards sent the following certificate:

We have heard this case argued by counsel, and are of opinion, that an action cannot be maintained by the plaintiff against the defendant for publicly acting and representing the said tragedy, *abridged* in manner aforesaid, at the Theatre Royal Drury Lane, for profit(2).

CHAP. IV.

OF PIRATING UNREGISTERED BOOKS.

Although the fifth section of the statute 54 Geo. III. c. 156, requires that all books should be entered at Stationers' Hall within certain times after their publication, it is expressly provided, at the close of that section, that *no failure in making any such entry shall in any manner affect any copyright*, but shall only subject the person making default to the penalty under the act.

It may not be unimportant to state, that prior to this statute, the judges of the Court of King's Bench unanimously held that an action for damages might be maintained for pirating a work before the expiration of twenty-eight years from the first publication, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed(3).

Lord KENYON. All arguments in support of the rights of learned men in their works, must ever be heard with great favor by men of liberal minds, to whom they are addressed. It is probably on that account that when the great question of literary property was discussed, some judges of enlightened understanding went the length of main-

(1) 5 T. R. 245.
(2) *Quere* whether an *exact* representation would be permitted?
(3) Beckford v. Hood, 7 T. R. 620.

taining, that the right of publication rested exclusively in the authors and those who claimed under them for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament. And that, I have no doubt, was the right decision. Then the question is, whether the right of property being vested in authors for certain periods, the common law remedy for a violation of it does not attach within the times limited by the Act of Parliament. Within those periods the act says that the author "shall have the sole right and liberty" of printing &c. Then the statute having vested that right in the author, *the common law gives the remedy* by action on the case for the violation of it. Of this there could have been no doubt made, if the statute had stopped there. But it has been argued, that as the statute in the same clause that creates the right, has prescribed a particular remedy, *that* and no other can be resorted to. And if such appeared to have been the intention of the legislature, I should have subscribed to it, however inadequate it might be thought. But their meaning in creating the penalties in the latter part of the clause in question, certainly was to give an *accumulative remedy;* nothing could be more incomplete as a remedy than those penalties alone, for without dwelling upon the *incompetency of the sum,* the right of action is *not given to the party grieved,* but to any common informer. I cannot think that the legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded without redress. But there was good reason for requiring an entry to be made at Stationers' Hall, which was to serve as a notice and warning to the public, that they might not ignorantly incur the forfeitures or penalties before enacted against such as pirated the works of others; but calling on a party who has injured the civil property of another for a remedy in damages, cannot properly fall under the description of *a forfeiture or penalty.* Some stress was attempted to be laid on the acts passed for preserving the property of engravers in their works in which a special provision is made to meet such a case as the present and to give the same right of action as is here contended for. But it is well known that provisions of that kind are frequently inserted in Acts of Parliament pro majori cautelâ, and no argument can be drawn from them to affect the construction of other Acts of Parliament. On the fair construction of this act, therefore, I think it vests the right of property in the authors of literary works for the times therein limited, and that consequently the common law remedy attaches if no other be specifically given by the act; and I cannot consider the action given to a common informer for the penalties which might be pre-occupied by another, as a remedy to the party grieved within the meaning of the act.

Ashurst, J. In the case alluded to, of Donaldson v. Becket in the House of Lords, I was one of those that thought that the invention of literary works was a foundation for a right of property, independently of the act of Queen Anne. But I shall not enter into the discussion of that point now, as the question in the present case is much narrowed. And upon the construction of that act I entirely concur with my Lord, that the act having vested the right of property in the

author, there must be a remedy in order to preserve it. Now I can only consider the action for the penalties given to a common informer as an additional protection, but not intended by the legislature to oust the common law right to prosecute by action any person who infringes this species of property, which would otherwise necessarily attach upon the right of property so conferred. Where an Act of Parliament vests property in a party, the other consequences follow of course, unless the legislature make a special provision for the purpose, and that does not appear to me to have been intended in this case. I am the more inclined to adopt this instruction because, the supposed remedy is wholly inadeqate to the purpose. The penalties to be recovered may indeed operate as a punishment upon the offender, but they afford no redress to the injured party; the action is not given to him, but to any person who may get the start of him and sue first. It is no redress for the civil injury sustained by the author in the loss of his just profits.

Grose, J. The principal question is, whether within the periods which the exclusive right of property is secured by the statute to the author, he may not sue the party who has invaded his right for damages up to the extent of the injury sustained, and of this I conceive there can be no doubt. In the great case of Millar v. Taylor, Mr: Justice *Yates* gave his opinion against the common law right contended for in authors, but he was decidedly of opinion that an exclusive right of property was vested in them by the statute for the time limited therein. No words can be more expressive to that effect than those used by him. But it is to be observed, that the penalties given by the act attach only during the first fourteen years of the copyright, and during that time only is the offender liable for such penalties if he invade the author's right; but he is liable during the whole period prescribed by the act to make good in an action for damages any civil injury to the author. If this construction were not to prevail during the last fourteen years of the term, the author would be wholly without remedy for any invasion of his property. But there must be a remedy, otherwise it would be in vain to confer a right. I was at first struck with the consideration that six to five of the judges who delivered their opinions in the House of Lords in the case of Donaldson v. Beckett were of opinion, that the common law right of action was taken away by the statute of Anne; but upon further view it appears that the amount of their opinions went only to establish that the common law right of action could not be exercised beyond the time limited by that statute.

Lawrence, J. I entirely concur with the opinions delivered by my brethren upon the principal point, and the case of Tonson v. Collins(1) is an additional authority in support of it; for there Lord Mansfield said, that it had been always holden that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalty, but that the property was given absolutely to the author, at least during the term.

(1) 1 Black. Rep. 330.