party takes a right from another he cannot question it. I do not dispute that in the least. But that was not what was said in the Sheriff Court. Mr Leslie did not say that he had a right to this subject under certain documents, and that Mrs Sinclair was a sub-lessee. If that had been the case that would have been a matter for inquiry in the Sheriff Court into the right of Mr Leslie and Mrs Sinclair. But that was not the case in the Sheriff Court. The pursuer in that Court produced a document which showed that he had no title at all—at least not the title he founded on in the Sheriff Court—and that was the ground of judgment.

I have only to add that so far as my judgment goes, what we decide ought to have no influence with Lord Fife as to which of the two shall get a title to the subjects. I think the case is quite apart altogether from that question.

The Court adhered, with additional expenses.

Counsel for Complainer (Respondent)—R. Johnstone—M'Lennan. Agent—Robert Stewart, S.S.C.

Counsel for Respondent (Reclaimer)—J. A. Reid—Orr. Agents—Philip, Laing, & Trail, S.S.C.

HOUSE OF LORDS.

Monday, June 13.

(Before Lord Chancellor (Halsbury), and Lords Watson and Fitzgerald.)

CAIRD *v.* SIME.

(*Ante*, vol. xxiii. p. 19; 13 R. 23.)

Literary Property—Professor in a University—Publication.

Held (*rev.* Second Division, *diss.* Lord Fitzgerald) that a professor in a university is entitled to prevent by interdict the publication by any of his students of lectures delivered by him in the ordinary university course.

Per Lord Watson—"Where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture to the extent of taking it down in shorthand for their own information and improvement, but cannot publish it."

Observations upon the construction of the Act 5 and 6 Will. IV. cap. 65, entituled "an Act for preventing the publication of lectures without consent."

Process—Appeal from Sheriff Court—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Findings in Fact.*

In a petition in a Sheriff Court by a professor for interdict to prevent the defender publishing a book alleged to be a reproduction of the pursuer's lectures, the Sheriff-Substitute found, on the evidence, that the book was in substance a reproduction of the lectures, and in law that the defender was not entitled to publish them, and granted interdict. On appeal the case went to the whole Court, with the result that nine judges were of opinion that the book was in substance a reproduction of the lectures, three were of opinion that it was not, whilst the remaining judge reserved his opinion on the point.

On the question whether the pursuer was entitled to interdict, six judges were of opinion that he was, five that he was not, whilst the two remaining judges gave no judgment on the question, holding that the book was not a reproduction of the lectures. The Second Division (*diss.* Lord Rutherfurd Clark) then pronounced judgment, finding that the lectures were delivered by the pursuer as part of his course, and that the book complained of was published by the defender, having been compiled by a student who had attended the lectures and taken notes; they then found "that such publication did not constitute an infringement of any legal right of property belonging to or vested in the pursuer," and refused interdict.

Observed that there was a statutory duty upon the Court under the Judicature Act to insert a finding in fact in the interlocutor expressing the opinion of the majority of the consulted Judges upon the question of infringement.

The appeal was accordingly heard on the merits as if the interlocutor had contained an express finding to the effect that the book complained of was in substance a reproduction of the lectures.

This case is reported *ante*, vol. xxiii. p. 19, and 13 R. 23.

Professor Caird appealed.

At delivering judgment—

Lord Chancellor—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 the 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 Rutherfurd 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

appear 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 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 would be involved in their unauthorised 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 open 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 in 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 a 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 anyone 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 authorised 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 the lecture was intended by those in 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 a majority of the Court? A teacher is in his class-room 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 grammer, 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 reason 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 unauthorised production of his modes 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 prevent such reproduction, and, contrary to his intention, the delivery of his lecture—of his composition—to a limited class of students operated, 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 bargains with its professors which either expressly or impliedly enforces on the professors the making public of their literary compositions, of whatever class those compositions may be, and whether educational and intended for the use of their students or intended for more 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 Lordship's 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 those 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 there was an arrangement between the parties as seems probable, which put an end to the litigation.

With respect to the Act 5 and 6 Will. IV. cap. 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, when 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—My Lords, this appeal is taken in two conjoined processes instituted in the Sheriff Court of Lanarkshire by the appellant, who is Professor of Moral Philosophy in the University of Glasgow, for the purpose of having the respondent, a bookseller in that city, interdicted from publishing or advertising for sale certain books or pamphlets entitled "Aids to the Study of Moral Philosophy," on the ground that these works are mere reproductions of the lectures delivered by the appellant to the students who attend his class in the University. In defence the respondent pleads, in the first place, that the publications sought to be interdicted are not substantially the same as the appellant's lectures but represent the views of the person who compiled them and are the result of independent study and research, and in the second place, that the delivery of the appellant's lectures in the class-room of the University is equivalent to publication, and that he has consequently lost his right to prevent their publication in a printed form. These defences raise two issues, the first being a question of fact, which if the actions had originated in the Court of Session would have been appropriately tried before a jury, the second being a question of law.

Proof was led by both parties, and thereafter on 15th February 1884 the Sheriff-Substitute granted perpetual interdict as craved, and ordained the respondent to deliver up to the appellant all copies of the publications complained of remaining in his hands or within his control. The learned Sheriff-Substitute by his interlocutor of that date found that "the said books or pamphlets are in substance reproductions, more or less correct, of the lectures in use to be delivered by the pursuer to his class of Moral Philosophy in the University of Glasgow," and he further found that "the said lectures are the property of the pursuer and that the defender has not shown that the pursuer has in any way lost his right of property therein, or that he has acquired from the pursuer, or in any other lawful way, a right to publish or reproduce said lectures."

The respondent appealed to the Second Division, who ordered the cause with minutes of debate to be laid before the whole Judges of the Court for their opinion. The result was that of the thirteen consulted Judges a majority of nine were of opinion that the respondent's publications are substantially a reproduction of the appellant's lectures. Six Judges (Lords Shand, Rutherfurd Clark, Adam, Fraser, Kinnear, and Trayner) held that the appellant has a right of property in his delivered lectures; whilst five Judges (the Lord President, the Lord Justice-Clerk, and Lords Mure, Lee, and M'Laren) came to the opposite conclusion. Lord Young, although he did express some views unfavourable to the appellant, distinctly intimated that he did not think it necessary to decide—and did not decide—the question, being of opinion that the appellant's right, assuming it to exist, must be limited to a right to protection "against any publication which may be reasonably held to anticipate or otherwise substantially or prejudicially interfere with a subsequent publication by himself," and that the publications complained of are not of that character. Lord Craighill expressed no opinion whatever upon the matter of right, holding that the view taken by the minority (of which his Lordship was one) upon the question of fact was a sufficient ground of judgment.

The case was advised on the 23d October 1885, when the Second Division pronounced the interlocutor which is now brought under review. It contains the following findings:—"Find that the pursuer is Professor of Moral Philosophy in the University of Glasgow, and that the lectures referred to in this record were delivered by him to his students as part of his ordinary course: Find that the defender, who is a bookseller in Glasgow, published the works now complained of: Find that these works were compiled by a student who had attended the class taught by the pursuer, and also had taken notes in shorthand of the pursuer's lectures." These are in all respects proper findings, although they set forth facts which were not seriously disputed. The important part of the interlocutor follows—"But find, in conformity with the opinions of the majority of the whole Court, that such publication did not constitute an infringement of any legal right of property, or otherwise, belonging to or vested in the pursuer; therefore dismiss the appeal," &c.

The last finding of the interlocutor does not comply with the requirements of 6 Geo. IV. c. 120, sec. 40, and is beset with ambiguity. It suggests either that a majority of the Court held that there was no infringement, or that a majority were of opinion that there was no right capable of being infringed; but in point of fact there was not a majority in favour of either of these propositions. Lord Rutherfurd Clark protested

against the terms of the interlocutor as not being in accordance with the provisions of the Judicature Act of 1825; but he was overruled by the other Judges of the Division, whose reasons for the course they followed I am at a loss to understand. Apparently they meant to find that on some ground or other a majority of the whole Judges were of opinion that interdict should not be granted, such majority being gained by combining two minorities. It may be doubtful whether Lord Craighill's opinion upon the question of fact should have been taken into account in deciding the case, seeing that it had been negatived by a large majority, but in the present state of the case it is unnecessary for your Lordships to consider that matter. Whether judgment was given for or against the appellant, it was the statutory duty of the Court to insert a finding of fact in their interlocutor expressing the opinion of the majority of the consulted Judges upon the question of infringement for the guidance of this House. Your Lordships are by the terms of the statute precluded from reviewing the interlocutor of 23d October 1885 except in so far as it "depends on or is affected by matter of law," and the only question which can be competently raised and decided in this appeal is that which relates to the existence of the appellant's alleged right of property in his lectures. It would have been idle to entertain that question if the Court below had come to the conclusion that, assuming such a right to exist, the respondent's publications did not constitute an invasion of it. Fortunately in the present case the conclusion of the majority of the whole Court upon the question of fact is beyond dispute, and the ministerial duty of the Second Division to give effect to that conclusion by a finding is equally plain. In these circumstances your Lordships did not think it expedient or necessary to subject the parties to the delay and expense which would have been occasioned by remitting the cause in order to have the interlocutor put into proper shape, and permitted them to be heard on the merits of the appeal, as if the interlocutor had contained an express finding to the effect that the publications complained of are in substance a reproduction of the appellant's lectures.

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 House of Lords Cases 815) was decided by this House in the year 1854, it must be taken as settled 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 the 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 House of Lords Cases, 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 fulfilment of the annexed conditions he may proceed to enforce, and for their breach he can 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 *Richardson* v. *Macklin* (Ambler 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 rights, and that he was therefore entitled to restrain its publication from notes taken by a shorthand 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 *munus 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 what had been annually delivered for years before such publication, and have enjoyed without objection or challenge the privilege of copyright. That has been noteably the case with our great academical 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 argu-

ment 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 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 either the governing body of the University or the Professor could derive any benefit 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 neutralises 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 considerations, however important they may be in themselves, are decisive of the present question. As to the position of students attending the appellant's class it is sufficient to say here that they must be members by matriculation of the University, and they must also be enrolled as members of his class for the session upon payment of the prescribed fee. A member of the public, as such, has no right to be present at his lectures, and the public has no right to interfere with or control his teaching. By section 5 of the Universities (Scotland) Act of 1858 the duty of superintending and regulating the teaching and discipline of the University is committed to the Senatus Academicus, which is a body consisting of the Principal and whole professors of the University, subject to the control and review of the University Court. The leading—if not the only—case having a close analogy to the present is *Abernethy* v. *Hutchison* (1 Ha. & Tw. 28, 3 L.J., Chanc. 209), decided by the Lord Chancellor (Lord Eldon) in the year 1825. It is true that in that case there were features that do not occur here. It appeared that upon the affidavits made by Mr Abernethy in support of his application for an injunction against the publication of his lecture at St Bartholomew's Hospital, that it was no part of his duty, as one of the surgeons of the Hospital, to deliver these lectures, which were not in any way open or accessible to the public, and were not attended by any person save by his permission. At the first hearing Lord Eldon entertained some doubt whether there could be satisfactory evidence of the substantial identity of the publication sought to be restrained with the plaintiff's lectures, seeing that these had not been written out at full length, but were delivered orally from notes, and his Lordship also desiderated evidence of the way in which the defendants obtained possession of the matter which they had printed. The motion for an injunction was accordingly delayed, the learned Judge observing—"In the meantime Mr Abernethy may, if he thinks proper, produce his manuscripts; and on the other hand, the defendants will judge for themselves whether they will or not—and I do not require it of them, because I have no right—inform me how they became possessed of the means of publishing this work." Upon the first of these points his Lordship was satisfied by the production of the notes from which the lectures had been delivered, with an explanatory affidavit. The defendants did not respond to the invitation addressed to them, and his Lordship, in the absence of direct evidence, came to the conclusion that they must have obtained the lectures from some person who had attended them, or in some other way of which the Court could not approve; accordingly a perpetual injunction was granted, on the ground that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use.

I may here observe that in the course of the argument for the respondent Mr M'Clymont brought under your Lordships' notice the fact that the record in *Abernethy* v. *Hutchison* shows that the injunction was dissolved by the Lord Chancellor within a few months after its issue upon a motion by the defendants, and without hearing parties. No trace has been found of the affidavit on which the motion was made, so that presumably the recal of the injunction was the result of an arrangement between the parties, and at all events it cannot detract from the weight of Lord Eldon's deliberate judgment *causa cognita*.

In my opinion the reasoning upon which Lord Eldon's judgment is based applies strictly to the case of a professor in a Scotch university. The principle which pervades the whole of that reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture to the extent of taking it down in shorthand for their own information and improvement, but cannot publish it. If that be the real character of the relation between the lecturer and those whom he addresses, it is immaterial whether they are selected by himself or by others so long as it is matter of express stipulation or of reasonable implication that the duty which he undertakes is limited to giving personal instruction to the individuals comprising his audience. Some of the learned Judges in the Court below seem to have been of opinion that the present case cannot be brought within the principle of *Abernethy* v. *Hutchison* because there is nothing in the nature of a contract between the Professor and his students, and therefore there can be no implied contract that they shall not publish. That may be so, but what Lord Eldon held was that the restriction of the hearers' right to use the lectures arose from the relation established by contract between them and Mr Abernethy. In that case the restriction necessarily became an implied term of the contract, but the condition itself is the legal consequence of the relation in

which the parties stand to each other, and must receive effect wherever a similar relation exists, whether it be established by contract or in any other way.

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-certificate of their enrolment 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 *munus 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 fulfil. The nature of the duty incumbent upon a professor in an English university is thus described by Lord Eldon in *Abernethy* v. *Hutchison*—"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 to 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.

That Lord Eldon held the lectures of a university professor to be within the rule laid down and given effect to by him in *Abernethy* v. *Hutchison* is beyond question, because he expressly refers to the case of such a professor as an illustration of the legal principles upon which he gave judgment for Mr Abernethy. None of the learned Judges who are of opinion that the doctrine of *Abernethy* v. *Hutchison* is inapplicable to this case advert to that part of his Lordship's judgment with the single exception of Lord M'Laren, who states, in my opinion correctly, that Lord Eldon "very distinctly and emphatically identifies the case of Mr Abernethy with that of the lectures of Blackstone, originally delivered by that great lawyer in the University of Oxford, in which he held the appointment of Vinerian Professor of Law." Lord M'Laren suggests, however, that there are no means of knowing whether the attention of the Lord Chancellor "had been drawn to the distinction which might be taken between public and private lectures, a distinction in which the main argument of the defender is founded." I cannot for many reasons concur in Lord M'Laren's suggestion. Lord Eldon, in the passage referred to, was distinguishing between lectures public in this sense, that they are communicated *urbi et orbi* by the mere act of delivery, and lectures which are private inasmuch as the author does not by their delivery communicate his ideas and language to the public at large or part with his common law right of property. It was not the habit of Lord Eldon to overlook such obvious differences as did exist between the position of Mr Abernethy and that of William Blackstone; it is manifest that his Lordship was clearly of opinion that these differences could not disturb the application of the same principles of law to both cases alike. In that opinion I entirely concur.

The observations of Lord Eldon assume that Sir William Blackstone would not have had copyright in the text of his Commentaries if the lectures delivered by him as Vinerian Professor were held to have been thereby published. The accuracy of that assumption is controverted by my noble and learned friend Lord Fitzgerald. Never having seen the lectures, I can only say for myself that in the preface to the first edition of the Commentaries, published in 1765, the learned author states that "the following sheets contain the substance of a course of lectures on the Laws of England which were read by the author in the University of Oxford." Lord Eldon heard and took notes of the lectures, and was no doubt familiar with the Commentaries, and was therefore in a position to judge (which I am not), and was perfectly capable of judging, whether the two works were substantially the same. If they were, the statute of Anne could give the author no copyright in the original text, although he might acquire the copyright of new matter to subsequent editions of the Commentaries.

In regard to the Act 5 and 6 Will. IV. cap. 65, I adopt the opinion of the great majority of the learned Judges, which is in accordance with the view taken by Mr Justice Kay in the recent case of *Nicols* v. *Pitman*, 26 Chan. Div. 374. The effect of the statute is to secure their right of property to authors of lectures, and to persons to whom the right has been sold or conveyed, notwithstanding delivery, upon their compliance with certain preliminaries, and their right is protected from invasion by forfeitures and penalties. Its provisions are not confined to cases in which the right would have been protected at common law, but extend to many cases in which, according to that law, delivery would have been equivalent to publication. But by section 5 lectures delivered in a university, or a public school, or on any public foundation, are excepted from the operation of the Act, and it is declared "that the law relating thereto shall remain the same as if this Act had not been passed." I cannot gather from the terms of that exception and declaration any indication of an intention on the part of the Legislature to express their understanding of the existing law with respect to lectures in these institutions. There may be lectures delivered within the walls of such institutions which do by their delivery become public property, just as there may be others which do not. Whether they

belong to one or other of these classes is a question which must be decided irrespective of the provisions of the statute.

I am accordingly of opinion that the appellant is entitled to have the judgment of the Second Division, in so far as adverse to him, reversed, and to have the interlocutor of the Sheriff-Substitute restored.

Lord Fitzgerald—My Lords, the question we have to determine on this appeal seems to me to be one of pure law. I agree with my noble and learned friend (Lord Watson) that we must read the interlocutor of the Second Division as if it contained an express finding that the publications complained of are in substance a reproduction of the appellant's lectures

It was not contested that by the common law of Scotland—as well as by the common law of England—every author has a right of property in his compositions so long as they remain "unpublished," and that a private lecturer may lawfully impose an express condition on persons allowed to hear his lecture that they shall not publish what they hear, and that such a condition may also be lawfully implied from the circumstances. In such cases the common law protects the author's right of property and forbids infringement. On the other hand, a private lecturer may deliver his lecture under such circumstances as indicate his intention to give his words to the public at large. In the latter case, the lecturer has technically published his lecture, and has abandoned the protection which the common law would otherwise afford. We have now, however, to deal with a case very different from that of any private lecturer.

The facts as to which there is no dispute are that the pursuer fills the Chair of Moral Philosophy in the University of Glasgow. It is not necessary to investigate the history of that University, as its status is now in substance similar to that of the other universities of Scotland. They are all ancient public endowed corporations established by public authority for the special purpose of public instruction in theology, law, medicine, and all the arts. In that instruction the public at large has a deep and direct interest. For an outline of the university and the office of its professors, and their functions and duties, I refer to the eloquent judgment of the Lord President. In point of modern regulation and government they all come under the provisions of the Imperial Statute 21 and 22 Vict. cap. 83, which is a statute "for the advancement of religion and learning, to make provision for the better government and discipline of the Universities in Scotland." The University of Glasgow has under that Act a Chancellor, a Senatus Academicus "to superintend and regulate *(inter alia)* the teaching and discipline of the University," a University Court to control the decisions of the Senatus Academicus, and to enforce due attention on the part of the professors to regulations as to the mode of teaching or other duties imposed on them, and to fix and regulate the fees from time to time in the several classes; it has also a University Council, and in order to produce uniformity in the several universities the statute constitutes a general body of Commissioners with legislative powers, for a limited period, to make statutes and ordinances such as in their opinions would be conducive to the wellbeing of the universities, the advancement of learning, the course of study, and the manner of examination, &c. The statute also gives to those Commissioners an important power, namely, to recommend grants of public money for certain purposes, and amongst others, "for increasing the salaries presently attached to existing professorships."

The pursuer was a Professor in the University of Glasgow, nominated to his Chair by the Court of the University, remunerated partly by salary paid out of the University revenues, or out of moneys voted by Parliament, and partly by class-fees which, however, equally formed part of the University revenue though allocated for the time being to him. His obligation and his duty were to teach the nation through its youth according to the regulations laid down by the governing body of the University. It does not appear what those regulations were, nor is it alleged that there were any restrictions or conditions imposed on the students of the class or other auditors by that governing body as to the use to be made of the Professor's lectures when delivered. I assume too, as the contrary does not appear, that the pursuer was left free to teach by lectures if he thought fit. He did teach by the instrumentality of reading lectures. The broad question for our consideration is whether that reading of his lectures to those assembled in the lecture-room is a publication to the nation.

My Lords, after much anxious consideration I have come to the conclusion that the delivery of the lectures was a publication to the public at large, and that being such the pursuer has abandoned to the public the exclusive rights which he otherwise had and the protection which the common law would otherwise have afforded him. I have struggled against this conclusion, as I am conscious how superior my noble and learned friends are to me in knowledge and judgment, but I have been unable to agree with them and am compelled, on the other hand, to accept the broad and vigorous reasoning of the Lord President and Lords Young and M'Laren.

It was urged on your Lordships in argument that a decision in favour of the respondent would operate unjustly on the Professor as depriving him of emoluments which he might otherwise derive from the publication and sale of his lectures by himself or his representatives for all time, but this seems an exaggerated and to some extent an imaginary apprehension. There is no power save that of the University to interfere with the Professor in publishing his lectures for sale, and the public would probably prefer the publication issued with the stamp of his authority, and containing his emendations and additions. This is, however, a consideration which we cannot enter upon. Again, it was urged that the professional practice of repeating the same lecture session after session, in like manner as a minister repeats his sermon, would be interfered with. If this was so, it would seem to be a desirable result.

The Sheriff in his note to the interlocutor of the 23d November 1883 says, *inter alia*, on this point—"The Professor's thoughts as expressed that year must be the same as those to be similarly expressed the next year." This would seem to assimilate the Professor's duty to the cuckoo-cry of repetition. I rather think that this

eminent Professor would repudiate such a suggestion, and tell us that the lecturer should remember that

> "Beneath this starry arch,
> Naught resteth or is still,"

and that his study is to watch over and criticise new modes of thought, new works, the march of intellect, and those discoveries which

> "Make old knowledge pall before the new."

Even in pure mathematics there may be alterations and additions, and ethical science is not free from the inexorable law of mutability.

Lord Young in the reasons for his judgment says—"Now, I have to observe that neither the common law of property nor the statute law of copyright applies to teaching in a public university. It is obviously expedient in the public interest that such teaching should be public, and open to public comment and criticism. This accordingly, I apprehend, is the reason why lectures in public universities are excepted from the provisions of the Act of 1835." My Lords, I concur with the learned Lord (Lord Young) in the opinion that it is essential to the public interest and the public safety that university teaching should be exposed to comment, to searching criticism, and to the full blaze of public opinion. How can this be attained if the contention of the pursuer is well founded. If the lecturer can prevent all other publication of his lectures than that which takes place in his class room, the nation may be left in Cimmerian darkness as to the teachings of its youth in its great universities. Unless there be full and complete publicity, criticism would be impracticable, and a mere empty sound.

Lord Young in the passage just quoted touches on another subject, namely, the Act of 1835, to which perhaps sufficient attention has not been given.

The bill which became the Act of 1835 (5 and 6 William IV. cap. 65) was introduced into this House about ten years after Lord Eldon had given his decision on the injunction motion in *Abernethy* v. *Hutchison*, and it is not improbable that the difficulties supposed to exist in consequence of Lord Eldon's reasons led to the bill. It is a bill entituled "For preventing the publication of lectures without consent." The preamble is obviously taken from the Copyright Act (3 Anne, cap. 19), and the 1st section is large enough to apply to and embrace all lectures wheresoever delivered; section 2 prohibits, under certain penalties, the publication of any lecture in any newspaper without the license of the author; and section 3 provides that no person allowed for fee or reward or otherwise to be present at a lecture delivered in any place shall be deemed to have leave to print a copy or publish such lecture.

The bill as introduced in this House seems to have passed without debate, but in the Commons it met with considerable opposition on the broad ground, that if it was intended to shield public lectures from public inspection, it ought not to receive the sanction of Parliament. In the course of the discussion attention was specially directed to *Abernethy* v. *Hutchison*, which was probably misunderstood. It ended in a compromise, by which words were added at the end of clause 5 providing that the Act should not extend "to any lecture delivered in any university or public school, or college, or on any public foundation, or by any individual, in virtue of or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed."

In *Miller* v. *Taylor* (4 Burrow 2332) it is reported that "Mr Murphy, counsel for the defendant, strongly contended from the amendments made in the Commons, on the Statute 8 Anne, and from the change of title, that Parliament intended to take away or to declare that there was no property at the common law," but to this Mr Justice Willes answered that "The sense and meaning of an Act must be collected from what it says when passed into law, and not from the history of the changes it underwent in the House where it took its rise. The history is not known to the other House, or to the sovereign." The rule so aptly expressed has always been enforced in this House. But strangely enough Mr Justice Willes does shortly afterwards in the same judgment seem to offend against his rule. He uses language which I quote as not inapplicable to the statute before us. His language is this—"The preamble is infinitely stronger in the original bill as it was brought into the House and referred to the Committee. But to go into the history of the changes the bill underwent in the House of Commons, it certainly went to the Committee as a bill to secure the undoubted property of copies for ever. It is plain that objections arose in the Committee to the generality of the proposition which ended in securing the property of copies for a term without prejudice to either side of the question upon the general proposition as to the right."

Now, looking at 5 and 6 Will. IV. cap. 65, we may at least say that objection was taken in the Commons to the generality of the proposed measure, and the proviso was there added at the end of the 5th clause. The statute seems at once in its first clause to recognise the property of the lecturer in his lecture, and to confer on him "the sole right and liberty of printing and publishing such lecture," even though he may have delivered the same under such a state of circumstances as would have otherwise amounted to an abandonment of his words and thoughts to the public. "Leave of the author" and "consent of the author" would probably be interpreted as meaning express leave or consent such as would confer a title on the licensee, and section 4 seems to support that view. There is difficulty of construction in every part of this short statute, but especially in section 5. I am unable to read the concluding proviso of section 5 save as indicating a statutable declaration that lectures delivered in a university, which is necessarily a public institution, become thereby public property for the purposes of publication and public criticism. As to the concluding sentence—"That the law relating thereto shall remain the same as if this Act had not passed"—the words seem to me to have no real force. The reservation is of such common law right, if any, as existed before the Act. The statute does not interfere with or abridge any common law right, but leaves it as it was. In my judgment the only common law right the university lecturer has is a right of property in his lecture when composed, and before its public delivery in the university. There seems to have been no decision whatever on the subject of lectures delivered in a public university

prior to the passing of that Act. I am unable to accept *Abernethy* v. *Hutchison* as final or satisfactory on the propositions, if any, which it is supposed to decide. It arose on a motion only supported by the affidavit of the plaintiff; there never was a plenary hearing of the case at all. Lord Eldon treats as a pure question of law which he would not decide "property in sentiments or language not deposited on paper." He then goes into implied contract or breach of trust, which is wholly inapplicable to the case before us, and it is observable that his strictures are principally, if not wholly, directed against printing for profit. He adopts in substance the proposition of Mr Justice Aston in *Millar* v. *Taylor* that "he has no right to publish for profit the identical work." On the first hearing of the motion Lord Eldon refused the injunction, but gave leave to renew it "on the ground of breach of contract or breach of trust."

The bill having been amended, and the amendment having been supported by affidavit, the motion was renewed on the ground of "contract" only, and Lord Eldon's decision of the motion is expressed in these words—"He was clearly of opinion that whatever else might be done with it the lecture could not be published for profit." That is the whole decision of Lord Eldon. Lord Eldon makes a passing observation (which has been alluded to already by my noble and learned friend Lord Watson), which requires attention. He says—"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 Sir Robert Chambers' lectures, also the students used to take notes, but it was never understood that those lectures could be published."

These observations of Lord Eldon are rather of a negative character, and are somewhat loose, but are undoubtedly valuable as showing that Lord Eldon had in his mind the case of the university professor. But what do they amount to? I am at this moment unaware whether Sir William Blackstone's lectures were ever published as lectures, or that anyone asserted a right to do so. When Lord Eldon speaks of Blackstone's copyright for twenty years he is obviously referring not to his lectures as such, but to Blackstone's Commentaries. The Commentaries which were founded on the lectures revised, corrected, and enlarged with notes were first published in 1765. Nine editions were published in the lifetime of Sir William Blackstone, all revised and added to by the learned author; he prepared also a tenth edition which was not published until after his death in 1780. He had an undoubted copyright in "the Commentaries" under the statute of Anne.

Finding a statement in the debate in the House of Commons on the bill of 1835 that the *Abernethy* suit had been abandoned, your Lordships made some inquiry, with the result of ascertaining that the injunction had been dissolved, but under what circumstances we have been unable to learn. I cannot think that *Abernethy* v. *Hutchison* is entitled to the great weight that has been attributed to it, and it seems to me to state no principle which ought to guide us in the present case. The public lecturer at a university has no authority of his own to impose conditions on his pupils or those entitled to attend his lectures, nor can it be truly said that he could create a trust in his own favour. It is not necessary to consider what the university might do in the exercise of its plenary powers "for the advancement of religion and learning, and improving and regulating the course of study therein."

My Lords, in the legal view which I have adopted it is not necessary for me to consider the weighty authorities to which we have been referred, some of them rather obscured by the extreme length of the judicial reasons. My opinion is that a public lecture delivered publicly at a university by one of its professors in the performance of the public duty he has undertaken, becomes by the act of delivery published to the nation, and may be likened to a gift from the university or the professor to the nation.

In the course which the case is now about to take my opinion becomes worthless; I am bound to assume I am wrong in point of law. Your Lordships' judgment settles the law finally, and in yielding a willing obedience I have at least the palliation for my mistake in law that I have erred in company with the Lord President, the Lord Justice-Clerk, and four other able and eminent Scotch Judges.

I have only to add that on looking at the debate in the House of Commons I find it stated there by a person who had, or at least ought to have had, the most full and accurate knowledge on the subject, namely, the late Mr Wakeley, who was member for Finsbury, and was one of the editors of the *Lancet*, against which paper the *Abernethy* case had been instituted, that that case had been abandoned by the Professor in consequence of its having been found that he held the position of a public Professor.

Interlocutor of the Second Division of the Court of Session appealed from, dated 23d October 1885, reversed, with the exception of the first three findings of fact; and in respect of these findings, and also, in respect that it was admitted by the parties at the bar, and that the cause was heard upon the footing that, according to the opinions of the majority of the consulted Judges, the works complained of are in substance a reproduction of the appellant's lectures, declared that the delivery of the said lectures by the appellant to his students as part of his ordinary course was not equivalent to publication thereof, and that the appellant is entitled, notwithstanding such delivery, to restrain all other persons from publishing the said lectures without his consent; and subject to that declaration, cause remitted to the Second Division of the Court of Session with directions to affirm the interlocutor of the Sheriff-Substitute dated 15th February 1884, and to find the appellant entitled to the expenses of process incurred by him in the Court of Session. The respondent to pay to the appellant his costs of the appeal to this House.

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