

Lord Ordinary, except in so far as it ordained the defender "to deliver up the whole sheets in his possession, or in the possession of any other person for his behoof, whereon any part of the said two works published by the pursuer are printed, in order to be made waste." It occurred, that as the Lord Ordinary had superseded the question as to penalties, his Lordship must have supposed that the delivering up the sheets to be made waste formed no part of the penal provisions in it, but only followed out the declaratory and prohibitory enactments; whereas, the majority of the Court rather inclined to be of the opinion, that this made part of the penal provisions of the statute, as it implied a forfeiture; consequently, that it would be cut off by the limitation introduced as to all action for penalties. A person who had surreptitiously printed any work, where the claim for penalties was cut off, might be prevented from selling the copies during a certain period; after which, however, he might be at liberty to sell them, the right of the author having then ceased.

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The Court therefore remitted to the Lord Ordinary to hear parties further as to delivering up the sheets to be made waste, and adhered to the interlocutor *quoad ultra*.

Lord Ordinary, *Glenlee*.Act. *Reddie*.Agent, *J. Gray*.Alt. *J. Clerk*.Agent, *J. Macfarquhar, W. S.*Clerk, *Gordon*.

F.

*Fac. Coll. No. 151. p. 335.*

1804. June 1. CADELL and DAVIES, and Others, *against* STEWART.

A Book was published at Glasgow by Thomas Stewart, bookseller, entitled, "Letters addressed to Clarinda, by Robert Burns, the Ayrshire Poet." This performance consisted of original correspondence, which had never been published, and contained a variety of letters written by Burns to a lady, who, after the death of the poet, put them into the possession of Stewart, and consented to their publication.

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The person to whom letters are addressed, has no right to publish them without the consent of the writer.

Soon after their appearance, Cadell and Davies, booksellers in London, and William Creech, bookseller in Edinburgh, having acquired right to all the compositions of Burns, presented a bill of suspension and interdict against the publication. An interdict was granted, and the bill was passed. When the cause came to be discussed, appearance was made by the brother of Burns, and by the curator of his children, who concurred in the application. The Lord Ordinary took the cause to report; and the suspenders

Pleaded: Whatever doubts may have arisen with regard to an author's exclusive property at common law, in a work that has been published, his property in manuscript has never been disputed. It arises both from the right which every man has to the offspring of his own labour, and also from the

No. 4. controul over the publication of his works, which is necessary to preserve the literary reputation of an author; 4. Burrow's Reports, p. 2498. Hence, the question in cases of literary property, depends upon two things; 1st, Whether the author has transferred his right to the emoluments of his labour; and, 2dly, Whether he has given his consent to commit his literary character upon the performance.

When an author presents to his friend the manuscript of a work, this circumstance cannot of itself infer a transference of his pecuniary interest, far less bestow a licence to expose his work by publication to the criticism of the world. All that is transferred is the right of using the manuscript as such, and of deriving all the advantage that can be derived from its perusal as a manuscript. Accordingly, in the noted English case of Lord Clarendon's History, it was found, that the person to whom his Lordship had intrusted the manuscript, might make every use of it except the profit of multiplying copies by printing the history; Duke of Queensberry *versus* Shebbeare, July 31, 1758, 4. Burrow, p. 2330.

But the case is infinitely stronger with regard to epistolary composition, than a regular work intended, and in some measure prepared, for the press. It can never be presumed to be the intention of an author, that his confidential correspondence should be published, and that his literary reputation should thus be made to depend upon careless or confidential communications destined for the eye of a friend, but not for the animadversion of the public. There is besides sufficient internal evidence, that the author never intended the letters to Clarinda should be published. Neither can it ever be supposed to have been his object to transfer any pecuniary interest that might be reaped from these letters to the lady to whom they were addressed. If any profit be derived from the publication of his correspondence, it ought certainly to belong to his children, who are entitled to the profits of his literary exertions, and not to the person to whom the letters were addressed, upon whom Burns never intended to bestow any pecuniary emolument.

It is in vain to pretend, that a letter is a gift, and belongs absolutely to the receiver, who may make what use of it he pleases. The manuscript is indeed a gift, and becomes the property of the person to whom it is addressed; but he has no right to alter its nature, and to use it in any other way than as a manuscript; Dodsley against Macfarquhar, 1775, No. 1. *supra*. Accordingly, a letter is considered not as a gift, but as a special property in the receiver, who has at most only a joint interest in it with the writer; Pope *versus* Curl, Aitken's Report, vol. 2. p. 342.

But farther, independent of their pecuniary interest, the children of Burns are materially interested in preventing any injury to their father's literary character, and have in that view a right to hinder such of his works from being published as may tend in any degree to lessen his reputation: But though a selection of these letters, if carefully edited, might possibly have formed a work

not unworthy of the literary character of their author, they are in their present state certainly unfit for the inspection of the public, for which they were never intended.

Answered : The property of these letters has been transferred, by the voluntary consent of the author, to another party, who acquired a right to them without any condition or limitation, and who is therefore entitled to every legal use that may be derived from the property. The suspenders have no stronger right than the author himself would have had; and if Burns had been alive, and Clarinda had chosen to retain them, he could not have claimed the possession of those letters by any of the modes of recovering property recognised in law. He could not have reclaimed them by a *rei vindicatio*, because there is no *corpus* to be the subject of a real action; for it is admitted, that the property of the paper upon which the letters were written was positively transferred, and there is no rational foundation for supposing that the sentiment or intellectual ideas was retained. Neither could these letters have been reclaimed by Burns by a personal action, or *condictio sine causa*, for Clarinda held them without any power of legal, which is a sufficient title to retain possession of a subject.

It is equally certain, that the author, after having absolutely transferred the property of these letters, could not have controlled Clarinda in the use of them by any legal measures. If she had chosen to read these letters to all her acquaintances, or had given copies in manuscript to every one who wished it, he could not in any way have restrained the communication. But if Clarinda had the right of multiplying copies in manuscript, there is no ground for withholding the right of doing the same thing by printing. Again, suppose there had been only one copy of these letters in existence, and Clarinda had chosen to destroy it, no action of damages could have arisen, either at the instance of the author or his representatives.

Thus, it is evident, that no property was retained in these letters, since the author could not have reclaimed them, and since he could have had no action of damages in the event of their being wilfully destroyed. In short the right claimed by the suspenders "falls under none of the ideas, principles, or definitions of property, which are found in the common law of this country."

It is altogether a pretence to say, that the publication of these letters will prove detrimental to the reputation of the author. But, even if it were true, that consideration can have no effect in a question depending upon the right of property in a third party, and resolving itself into a patrimonial interest. If it be held that Burns made a voluntary and unconditional transference to Clarinda, no argument of this sort can have any weight in a court of law, to prevent her from the legal use of her property. The decisions upon this point, referred to by the suspenders, are not reported at sufficient length to justify their being adopted as precedents. \*

\* The case of Dodsley against M'Farquhar, had at this time been only shortly mentioned by Lord Woodhouselee, and on p. 8308. of this Dictionary.

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It is equally incompetent in a court of law, to found an argument upon an alleged breach of confidence in the receiver of these letters, which resolves itself altogether into a question of morality. Whoever intrusts any secret, or makes any communication to another, commits himself in some measure to the discretion of his friend, and he can never hope, by means of a suspension and interdict, to prevent him from telling the secret.

But farther, there is no such thing as literary property at common law; and, as the letters in question are not protected by the act of Queen Anne, the suspenders cannot pretend to any exclusive privilege of publishing the correspondence.

The Lords (May 17, 1804), "having advised the informations for the parties, "continue the interdict, declare the same to be perpetual, and decern." The heirs of Burns were also found entitled to expenses.

And a reclaiming petition against this interlocutor was refused without answers.

There was little difference of opinion upon the Bench. The ground upon which the Court seemed to pronounce the decision was, That the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication.

Lord Ordinary, *Glealee*.

For Suspenders, *Solicitor-General Blair, Bell*.

Agent, *T.*

*Manners, W. S.*

Alt. *Fletcher*.

Agent, *Geo. Tool*.

Clerk, *Menzies*.

*J.*

*Fac. Coll. No. 166. p. 375.*

1804. December 18.

CADELL and DAVIES, and Another, *against* ROBERTSON.

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Entry at Stationers' Hall, in terms of 8th of Queen Anne, cap. 19. is necessary to create a property in literary publications.

IN the year 1793, a new edition of the Poems of Burns was published by Cadell and Davies, booksellers in London, and William Creech, bookseller in Edinburgh; to whom Burns had conveyed the property of that volume of poems which he first published in 1787, with such additions to it as he might afterward make. Upon this occasion, the author furnished twenty additional poems, which were inserted in the new edition. Burns died in 1796;—so that the exclusive privilege of publishing the original poems expired in 1801: but with regard to the additional poems, continued till 1807. These last poems were not entered at Stationers' Hall, in terms of the 8th of Queen Anne; but the original volume of poems was regularly entered.

In 1802, when the exclusive privilege had expired, so far as regarded the original volume, James Robertson, printer in Edinburgh, published a small