

# Playright and the Common Law

**P**LAYRIGHT is a word coined by Mr. Drone for use in his treatise on copyright to express the exclusive right of presenting a dramatic composition. It has been adopted by the Supreme Court of the United States,<sup>1</sup> and is accordingly preferred to "dramatic right" or "stage right" throughout this article on the subject of how far, if at all, playright was recognized and protected at common law.

It is essential to have clearly in mind the distinction between playright, as above defined, and copyright in the strict sense of the right to make copies. The latter was the only right given by the first Copyright Acts.<sup>2</sup> Moreover, it was the right to make copies that was in question in the great controversies following those statutes; had the common law right merged in the statutory right, so that copyright was protected only for the term prescribed by the statute? These controversies were terminated by the decisions in *Donaldson v. Becket*<sup>3</sup> and *Wheaton v. Peters*,<sup>4</sup> and thereafter a claim founded on common law could be made only before the printing and publication of the work.

---

<sup>1</sup> *Ferris v. Frohman* (1911) 223 U. S. 424, 32 Sup. Ct. Rep. 263.

<sup>2</sup> In England, Act 8 Anne, c. 19; in America, Act of May 31, 1790, 1 U. S. Stats. at L. 124. Under these acts, the statutory right attached automatically upon publication.

<sup>3</sup> (1774) 2 Brown Par. Case 129, 1 Eng. Rep. R. 837. The judges being consulted, a bare majority favored the opinion that the statutory right was substituted for the common law right in the case of published works. The small margin, six to five, has often been commented on, but it must be remembered that the judges attended on the appeal to the House of Lords in an advisory capacity only, and that in any case the difference of opinion, manifested by these figures, does not affect the binding character of the precedent established. Lord Mansfield, who in *Millar v. Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. R. 201, had ruled that the common law right was perpetual, and that it had not been destroyed by the statute, delivered no opinion, because a decision of his was drawn into question.

<sup>4</sup> (1834) 33 U. S. (8 Pet.) 590. Appellant (plaintiff in suit) had not complied with the Copyright Act and the majority opinion was against him on two grounds: (1) that copyright apart from statute had not been introduced into Pennsylvania, where the question arose, upon its settlement. "Can it be contended that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history as much distinguished by learning and talents as any other, was brought into the wilds of Pennsylvania by its first adventurers? Was it suited to their condition?" (2) that Congress by the first Copyright Act, instead of sanctioning an existing right, had created a right. "This seems to be the clear import of the law, connected with the circumstances under which it was enacted."

Though the expression, "common law right," as used in the foregoing, means of course "common law right after publication," none the less strict application of the doctrine of *Wheaton v. Peters* would have prevented any protection being accorded to playright until its recognition by statute.

As to playwright, there are three reported cases in England prior to the enactment of the first statute on the subject. The earliest case is *Coleman v. Wather*.<sup>5</sup> This was an action in the King's Bench for the penalty under the statute of 8 Anne, c. 19. The plaintiff had purchased from the author the copyright of an "entertainment" called "The Agreeable Surprise"; and the unauthorized publication with which the defendant was charged was the representation of the piece upon his stage at Richmond. A verdict was taken for the plaintiff with nominal damages in order to raise the question whether this was an infringement of the copyright. Lord Kenyon, C. J., ruled that there was no evidence to support the action. He said that the statute for the protection of a copyright only extended to prohibit the publication of the book itself by any other than the author and his lawful assignees. Buller, J., in concurring said that reporting anything from memory can never be a publication within the statute. He continued: "Some instances of strength of memory are really surprising, but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself." This last sentence means that there must be something more than mere representation on the stage; that the plaintiff must show an actual copying in written characters and publication of the copies. The rule to set aside the verdict was accordingly made absolute.

*Murray v. Elliston*<sup>6</sup> is the last in date of the three cases alluded to. In 1820 Lord Byron wrote "Marino Faliero," a tragedy, and by deed assigned all rights therein to the plaintiff, who printed it and offered it for sale. After it was on sale, defendant advertised his intention to perform the tragedy at Drury Lane Theatre. Plaintiff filed a bill in Chancery for an injunction. As the auxiliary jurisdiction of the court was invoked, the right claimed being a legal and not an equitable one, a case was stated by Lord Eldon for the opinion of the common law judges in accordance with the practice in the Court of Chancery at that time. In the argument before the judges, plaintiff's counsel rested his case, not on the statute, but on the broad ground of an alleged right at common law. The judges ruled

---

<sup>5</sup> (1793) 5 Term Rep. 245, 101 Eng. Rep. R. 137. The doctrine that repeating by an act of memory was not an infringement of a statutorily copyrighted play was extended in this country to the common law playwright protected by the courts here. *Crowe v. Aiken* (1870) 2 Biss. 208, 6 Fed. Cas. No. 3441; *Keene v. Kimball* (1860) 82 Mass. (16 Gray) 545. If playwright is protected by the common law of course there is no reason why it should not be protected from piracy by memorizing as well as in any other way. This was apparently overlooked in the cases cited.

<sup>6</sup> (1822) 5 B. & Ald. 657, 106 Eng. Rep. R. 1331.

against this argument, and they concurred in giving a certificate that, in their opinion, the claim for an injunction could not be supported.<sup>7</sup>

Thus the remedy by statutory penalty and an injunction had both been sought for the breach of the alleged right of sole representation of a drama, and both claims had failed.

Now it happens that in the interval of time between the cases of *Coleman v. Wathen*<sup>8</sup> and *Murray v. Elliston*<sup>9</sup> there is a report of a proceeding before the same Lord Eldon, who referred the facts in *Murray v. Elliston* for the opinion of the common law judges. In *Morris v. Kelly*,<sup>10</sup> the matter referred to, motion was made for an injunction upon affidavit and certificate of bill filed. It does not appear that the defendant had any notice of the proceeding. It is certain that the proceeding was for an injunction *pendente lite*, and that the defendant neither appeared nor was represented by counsel. When plaintiff's counsel moved for the injunction, Lord Eldon asked whether the assignment of the manuscript on which the plaintiff relied was in writing, and not receiving a simple affirmative in answer, he deferred consideration of the motion until the following day. On the continued hearing, he granted an injunction, saying: "I shall assume your title is regular until they show the contrary. Injunction granted." The syllabus of the case shows that it is reported only on the point of the assignment, under which the plaintiff claimed, not being in writing.

The first glance at this reported proceeding<sup>11</sup> would seem to support the notion that a suit to enforce playright was not novel in Lord Eldon's time; that is, before the statute of 3 & 4 William IV, c. 15, which first accorded legal recognition to playright. Further consideration should prevent *Morris v. Kelly* being cited even for that limited purpose. The claim was one in equity against the author of the play who had assigned it to the plaintiff's assignor for valuable consideration. The basis of such a claim is contract, and the defendant's implied undertaking not to represent the play on the stage after receiving the agreed price for the manuscript. It was because

---

<sup>7</sup> No reasons are reported as being given. In *Campbell's Lives of the Chancellors*—"Lord Eldon"—it is said that the judges had discontinued the giving of reasons with such certificates because Lord Eldon was in the habit of gibing at the reasons given.

<sup>8</sup> *Supra*, n. 5.

<sup>9</sup> *Supra*, n. 6.

<sup>10</sup> (1770) 1 Jac. & W. 481, 27 Eng. Rep. R. 451.

<sup>11</sup> It cannot properly be called a "case" in the sense of an issue decided after a contest between the parties.

the proceeding was founded on contract that the question of whether there had been an assignment in writing was raised by the court. *Morris v. Kelly* was not cited in the argument of the later case of *Murray v. Elliston*, and it is submitted that it is erroneous to suppose that there is any conflict between the latter and the former case.

It is a fact of record that the statute of 3 & 4 William IV, c. 15, granting playwright to authors of dramatic compositions,<sup>12</sup> was passed in consequence of the ruling in *Murray v. Elliston*. Is it not clear that in supposing *Morris v. Kelly* to be an authority that playwright was recognized at common law, error is imputed to the British legislature as well as to the judges who decided *Murray v. Elliston*?

Let us now turn to the view that has been taken in this country on the question of whether playwright had any existence at common law. It seems that in all cases in the law reports in America, *Morris v. Kelly*, whenever cited, has been cited as an authority opposed to *Coleman v. Wathen*. At first, the authority of the latter case was preferred. Thus in *Keene v. Kimball*,<sup>13</sup> where the plaintiff, having no right under the Dramatic Copyright Act<sup>14</sup> asserted a right at common law, the Supreme Court of Massachusetts said, ". . . no case has been cited, nor are we aware that any exists, in England or America, in which the representation of a play has been restrained by injunction where no copyright has been acquired, and where the proprietor had permitted its public representation for money, except the case of *Morris v. Kelly*. That case was heard *ex parte* by Lord Eldon and the report does not show the grounds upon which the injunction was asked or granted. Unless it proceeded upon an allegation of the use of a surreptitious copy of the work,<sup>15</sup> it seems to be impossible to reconcile it with the earlier case of *Coleman v. Wathen*, or with the subsequent decision of *Murray v. Elliston*." The court accordingly denied the plaintiff's claim.

The above passage from *Keene v. Kimball* is quoted with approval in *Palmer v. De Witt*,<sup>16</sup> where, moreover, the statement is

---

<sup>12</sup> This statute conferred playwright on the authors of dramatic compositions and their assigns. It did not reserve to authors the sole right of dramatizing their own non-dramatic compositions.

The report of *Morris v. Kelly* was not cited in the argument of *Murray v. Elliston*. It would be difficult to account for this omission if *Morris v. Kelly* had really determined the point that was then being argued.

<sup>13</sup> (1860) 82 Mass. (16 Gray) 545.

<sup>14</sup> Act of Congress of August 18, 1856, c. 169, 11 U. S. Stats. at L. 138.

<sup>15</sup> It is overlooked that the injunction was claimed against the author of the play. Had this been noticed, the true nature of the proceeding would have been apparent.

<sup>16</sup> In *Palmer v. DeWitt* (1872) 47 N. Y. 532, 7 Am. Rep. 480, the decision itself is not an authority on the subject of playwright, because it was an action

made: "Until the passage in England of the statute of 3 & 4 William IV, c. 15, an author could not prevent anyone from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it."

Finally, in the case of *Tompkins v. Halleck*,<sup>17</sup> in which the Supreme Court of Massachusetts refused to follow the earlier case of *Keene v. Kimball*,<sup>18</sup> in the course of the opinion, the court, referring to *Morris v. Kelly*, said: "The report of the case is very brief, and no opinion of the Lord Chancellor is preserved, which is much to be regretted, as his discussion of the question involved would have been of value."<sup>19</sup> The facts found were that persons in the employ of the defendant attended the drama in question while it was being represented at Wallack's Theatre in New York, and after the performance wrote it from memory. Defendant subsequently produced the play from the notes thus made. An injunction was granted restraining him from further production of it.

We now come to the leading case of *Ferris v. Frohman*<sup>20</sup> in which it was held that by the common law the assignee of a foreigner was entitled in perpetuity to playright in this country. The facts were: "The Fatal Card," a drama, was written in London in 1894 by Chambers and Stephenson, British subjects. It was first produced in London on September 6, 1894. On October 31, 1894, and on November 8, 1894, it was registered under the English Copyright Acts. In March, 1895, Frohman acquired all the interest of Stephenson in the production of the play in the United States, and it was subsequently extensively represented here under Frohman's supervision. The play was never printed, either here or in England, and it was not copyrighted here. One McFarlane made an adaptation of the play under the same title, and transferred it to Ferris of Illinois, who copyrighted it in August, 1900, under the laws of the United States. Later, he caused it to be performed in various places in this country. The adapted play differed from the original in minor details, but not in essential features. Frohman having brought

---

to restrain defendant from printing a manuscript drama, of which there was no copyright, and which was unpublished, yet it is valuable because of the dicta contained.

<sup>17</sup> (1882) 133 Mass. 32, 43 Am. Rep. 480.

<sup>18</sup> (1860) 82 Mass. (16 Gray) 545.

<sup>19</sup> It is incomprehensible that the court should have overlooked that *Morris v. Kelly* was merely an *ex parte* proceeding as this is noticed in the opinion in *Keene v. Kimball*.

<sup>20</sup> (1911) 223 U. S. 424, 32 Sup. Ct. Rep. 263.

action in the state court in Illinois to restrain defendant from further representations of the play, the master in chancery, to whom the cause was referred, reported that, in his opinion, Frohman failed to establish an exclusive right to produce the play in the United States. Exceptions were filed to this report and they were allowed. On appeal, the Appellate Court reversed the court below.<sup>21</sup> The Supreme Court of Illinois reversed in turn the ruling of the Appellate Court.<sup>22</sup> Thereupon Ferris sued out a writ of error in the Supreme Court of the United States. A preliminary question of jurisdiction was raised, but the court held that it had jurisdiction on the ground that Ferris raised a claim of right arising from a copyright registered under the Copyright Acts.<sup>23</sup>

On the merits of the litigation, the Supreme Court held that Frohman was entitled to hold his decree. The reasons for the unanimous judgment of the court are given in the opinion of Mr. Justice Hughes.<sup>24</sup> The question of whether playwright was a right known to and protected by the common law is not discussed in the opinion, nor was it raised in argument for the appellant.<sup>25</sup> It is assumed that it was, and it is ruled that the right, so assumed to exist in fact, was not lost by performance of the play. To quote from the opinion: "The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common law right, save by the operation of statute. At common law, the public performance of a play is not an abandonment of it to the public use." (Citing *Macklin v. Richardson*,<sup>26</sup> *Morris v. Kelly*, *Crowe v. Aiken*,<sup>27</sup> *Palmer v. DeWitt*, *Tompkins v. Halleck*.)

Of the cases cited *Macklin v. Richardson* and *Palmer v. DeWitt* support the proposition, but only if it be confined to copyright in the strict sense. The question in each of these two cases was: has copyright in the plaintiff's book been vitiated by prior public representation of the play printed therein? The proper application of *Morris*

<sup>21</sup> (1907) 131 Ill. App. 307.

<sup>22</sup> (1909) 238 Ill. 430, 87 N. E. 327, 128 Am. St. Rep. 135.

<sup>23</sup> (1911) 223 U. S. 424, 430.

<sup>24</sup> (1911) 223 U. S. 424, 429.

<sup>25</sup> It is true that it was argued that playwright had no existence at common law apart from the manuscript of the author, but dates its origin from 3 & 4 Will. IV, c. 15, and in this country from the Act of Congress of August 18, 1856, 11 U. S. Stats. at L. 138. It is conceived that this argument means that playwright was recognized at common law as annexed to the manuscript. An unequivocal denial of playwright apart from statute is made in the following extract from the judgment of a divisional court in England: "Previous to 1833 the liberty of performing dramatic pieces was not the subject of property; but by 3 & 4 Will. IV, c. 15," etc. *Wall v. Taylor* (1882) 9 Q. B. D. 727, 730.

<sup>26</sup> (1770) Amb. 694, 27 Eng. Rep. R. 451.

<sup>27</sup> (1870) 2 Biss. 208, 6 Fed. Cas. No. 3441.

v. Kelly has already been pointed out. *Crowe v. Aiken* and *Tompkins v. Halleck* do in truth support the proposition when applied to playright, but in the former the judge makes it plain that his decision would have been different if the piracy had been effected by an act of the memory alone, and the latter has already been quoted in illustration of how grievously the report of *Morris v. Kelly*, upon which the court relied, has been misunderstood.

The point that Frohman's assignor, being a foreigner living abroad, could have no rights under the common law of the United States, and that Frohman therefore had no derivative right from him, was apparently not made on behalf of Ferris. Though the point has never been expressly decided in England, it has been the subject of emphatic dicta. Thus in *Jefferys v. Boosey*,<sup>28</sup> Baron Parke said: "But whether such an exclusive right of multiplying copies in this kingdom exists or not at common law, in favor of a subject of this country, it is clear that it does not exist in favor of a foreign author living abroad." The judges were unanimous that if the foreign author had no right then his assignee could have no right.

It is an inevitable conclusion from the opinion in *Ferris v. Frohman* that the perpetuity of playright in the United States is not affected by the fact that it has expired in the foreign author's own country, and this was definitely decided in *O'Neill v. General Film Company*.<sup>29</sup> In this case it appeared that Dumas' novel, "Monte Christo," published in France in 1845, was dramatized by one Fechter, and produced in London in October, 1870. Fechter's dramatization was distinguishable from others founded on the same novel in that the character of Noirtier, a minor one in the novel, is made a lead in Fechter's play. He brought it to this country, where it was produced at different times from 1873 to 1879. In October, 1912, defendant began the distribution of a film which was held to be founded on Fechter's play. The English playright had then expired. The Supreme Court of the State of New York held, on the authority of *Ferris v. Frohman*, that the plaintiff, although deriving title from a foreigner, was entitled to restrain the defendant from using the film. The court of course relied, and was entitled to rely, on the ruling in *Ferris v. Frohman* on the point that prior per-

---

<sup>28</sup> (1854) 4 H. L. Cas. 815, 921, 10 Eng. Rep. R. 681. Although Baron Parke was in the minority of the judges who were consulted, it was the opinion of the minority that was adopted by the House of Lords, and became the final ruling of the case.

<sup>29</sup> (1916) 171 App. Div. 834, 157 N. Y. Supp. 1028.

formance in England did not affect playwright here. Moreover, the playwright being perpetual here, according to the doctrine of *Ferris v. Frohman*, so long as the plaintiff did not by his own act throw it into the public domain, the court held that the mere termination of the English playwright made no difference.

Although the final decision of *Ferris v. Frohman* was not made until after the Act of March 4, 1909, came into operation, the opinion in that case does not take any account of the possible effect of that act upon the matter in question, because the facts were complete prior to the passing of the act. The opinion in *O'Neill v. General Film Company* ruled upon facts arising after the Act of March 4, 1909, had come into operation, but the effect, if any, of that act was apparently not raised in argument for the defendant, and the opinion does not touch upon the point. As the effect of the act upon the rule of *Ferris v. Frohman* is therefore probably still open, at all events in jurisdictions other than the State of New York, it is a matter for consideration whether the act has any effect upon the rule laid down.

Before discussing the effect of the Act of March 4, 1909—or rather, as forming part of that question—it is desirable to allude to the doctrine, peculiar at first sight, that performance of a drama is not a publication of it. This doctrine has its root in the English case of *Macklin v. Richardson*, where it was proved that plaintiff was author of a farce, not printed or published, but which had been performed under his license at different theatres. Defendant, who was the proprietor of a magazine, employed a person to go to the theatre and take down the play from the mouths of the actors. He then published the first part of the farce, and advertised that he would publish the second in a later issue of the magazine. Plaintiff filed a bill for an injunction. As the play had not been printed, there was no statutory copyright. Two questions were argued: first, had the plaintiff a copyright at common law; and second, had the plaintiff, by allowing his play to be publicly performed, lost any right at common law? As the case of *Millar v. Taylor*,<sup>30</sup> involving the question of copyright after publication at common law, was then pending in the King's Bench, the case was held over until that cause had been decided. After Lord Mansfield had ruled in the King's Bench that copyright persisted at common law notwithstanding the statute, it became immaterial to decide whether public performance was a publication. Nevertheless, the question was argued and apparently determined by Lord Commissioners Smythe and

<sup>30</sup> (1769) 4 Burr. 2303, 98 Eng. Rep. R. 201.



Bathurst (the Great Seal being then in commission) that public performance was not an abandonment of the copyright of the drama to the public use. Is it a logical application of this decision to treat it as an authority for the proposition that public representation is not a publication, when playwright, and not copyright, is in question?<sup>31</sup> To say that public performance is not *dramatic* publication appears to be almost a contradiction in terms. Now that statutory playwright is obtainable, does it not seem (looking at the matter apart from authority) that public performance without securing the statutory protection would be preeminently a dedication of the dramatic rights in the play to the public? Before statutory playwright was available, the consideration was very weighty, that to treat the public performance as necessarily opening the play to use by anyone, was a deprivation by law of property in an intellectual production. Now that this consideration has ceased to apply, since an author can obtain statutory protection for playwright, it might be thought that the doctrine that public performance was no publication would be reconsidered, but perhaps it has been too firmly established in America to be overturned, even though the reason for adopting it no longer exists.

It might be urged that, since copyright after publication at common law was held to be non-existent after statutory copyright had been provided for, by parity of reasoning to the case of playwright, playwright at common law should be obsolete now that statutory protection may be secured for playwright.<sup>32</sup> Such an argument would, however, ignore the consideration that a play, so long as it remains in manuscript, is treated as being on the same footing as any other literary work before publication, regardless of performances on the stage.<sup>33</sup> Any effect of the Act of March 4, 1909, on the rule of *Ferris v. Frohman* must therefore be sought in the language of the

---

<sup>31</sup> In England, there was no room for judicial determination of the question of whether representation of a drama was a publication of it from the standpoint of playwright, since, almost simultaneously with the statutory creation of a playwright, it was provided by statute that the public performance of a play was to be deemed the equivalent of the publication of a book (5 & 6 Vict. c. 5); the statutory playwright automatically attaching to the play from its first performance. In the analogous case of delivery of a lecture, unprotected by statute the delivery of it to a public audience threw it into the public domain, *Abernethy v. Hutchinson* (1825) 1 Hall & Tw. 28, 47 Eng. Rep. R. 1313.

<sup>32</sup> Mr. Weil inclines to this opinion. Weil, *Law of Copyright*, 153.

<sup>33</sup> In the previous paragraph the effect of public performance of a play was discussed taking only principle and reason as guides. This paragraph takes into account the law about publication as actually decided in *Ferris v. Frohman*.

act itself.<sup>34</sup> It is very doubtful whether the act does have any effect.<sup>35</sup> It is noteworthy that the Constitution of the United States<sup>36</sup> confers on Congress power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. While this does not of course abridge the power of the Supreme Court to declare rights at common law, it is surely a remarkable result that the court has declared to be law what Congress could not enact: that an author of a play may have playwright in perpetuity.

The fact of alienage of the author being no bar to his assignee, who is a citizen of the United States, has already appeared from the recital of the facts in *Ferris v. Frohman* and *O'Neill v. General Film Company*, and it has been said that a foreign author can himself maintain a suit based on common law right in this country. Thus in *Palmer v. DeWitt*<sup>37</sup> the court said: "The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation, or to prevent a violation, of his rights of property in his unpublished works."<sup>38</sup> Though the writer knows of no case in which a foreign author has himself appeared as plaintiff in such a suit, it would appear that the authorities establishing his assignee's right must equally apply to himself suing in person. This aspect of the common law right forms a complete contrast with the statute,<sup>39</sup> which extends statutory copyright to a foreign author only if he is domiciled within the United States at the time of the first publication of his work or is a citizen of a country which has a copyright convention with the United States.

Moreover, the perpetual playwright conferred on foreign authors by the courts of this country, by the decision in *Ferris v. Frohman*, is not reciprocated in other countries. In England, for example, it is well established that prior performance abroad, with the owner's consent, is a bar to playwright in England.<sup>40</sup>

---

<sup>34</sup> Weil, *Law of Copyright*, 141. Mr. Weil thinks that the English Act of 1911 may have affected the rule of *Ferris v. Frohman* because playwright has impressed the fruits of mental labor solely by statute, and the statute defines its territorial limits, once and for all, at birth. But the automatic impress of copyright and playwright was the law of England long prior to the Act of 1911.

<sup>35</sup> Foreign authors may, however, be affected; see post.

<sup>36</sup> U. S. Const., Art. I, § 8.

<sup>37</sup> (1872) 47 N. Y. 532, 540.

<sup>38</sup> It must be remembered that a drama, though publicly performed, is technically not published by the public representation.

<sup>39</sup> Act of March 4, 1909, c. 320, §§. 35 U. S. Stats. at L. 1077. See *Bong v. Campbell Art Co.* (1908) 214 U. S. 236, 29 Sup. Ct. Rep. 628.

<sup>40</sup> *Boucicault v. Delafield* (1863) 1 Hem. & M. 597, 71 Eng. Rep. R. 261; *Boucicault v. Chatterton* (1876) 5 Ch. D. 267. The better opinion appears to

Reverting to the effect of the statute of March 31, 1909, so far as foreign authors are concerned, it is important to note that section 2<sup>41</sup> of that act probably does not operate for the benefit of a foreign author, because, as was said by Lord Cranworth in *Jefferys v. Boosey*,<sup>42</sup> a copyright case in which the benefit of the English Copyright Act was denied to a foreign author, "The general doctrine is that a British senate would legislate for British subjects properly so called, or for such persons who might obtain that character for a time by being resident in this country, and therefore under allegiance to the Crown, and under the protection of the laws of England." It may therefore be that under the present Act of March 31, 1909, foreign authors are deprived of the benefit of the rule of *Ferris v. Frohman*, although that rule still avails domestic authors.

Since playwright at common law is not lost by public representation on the stage, it may well be asked, how then can it be lost? One way in which it can be lost is by publication in book form by the proprietor of the playwright or with his privity. Thus in *Wagner v. Conried*<sup>43</sup> the publishers of a German opera, entitled to the exclusive publication of the book of the opera under a contract reserving the playwright to the composer's heirs, published and offered it for public sale in the United States. It was claimed that they thereby dedicated the opera to the public, depriving them, or the composer's heirs, of the right to restrain stage production of it. This presumption of dedication of the playwright was not defeated by a statement on the title-page of the book: "This copy must not be used for production on the stage."<sup>44</sup> The edition of the book had been published in Germany, and copies were sent by the publishers to their New York agents for sale in this country and several copies actually sold.

The case of *Harper v. Donohue*<sup>45</sup> raises a doubt whether publication in printed form abroad is effective to terminate common law

---

be that these decisions hold good under the present English Copyright Act, so far as the United States, a non-convention country, is concerned.

<sup>41</sup> "That nothing in this act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." 35 U. S. Stats. at L. 1076.

<sup>42</sup> (1854) 4 H. L. Cas. 815, 10 Eng. Rep. R. 681.

<sup>43</sup> (1903) 125 F. 798.

<sup>44</sup> It appears from this case that publication of a book without statutory copyright being secured, raises a conclusive presumption of law that a public dedication was thereby made. It is illogical that this presumption should apply to the playwright, since playwright is separable from the copyright of the book. The difficulties likely to arise from this doctrine, when the ownership of copyright and playwright are vested in different persons, will be apparent.

<sup>45</sup> (1905) 144 F. 491, affirmed (1906) 146 F. 1023.

rights. The question in this case was whether statutory copyright in the United States was defeated by a prior publication in England, or a prior publication in this country, the latter being without the consent of the proprietor of the United States rights. The statutory copyright was sustained. From the language of the opinion, it might be supposed that the prior publication, to be effective to defeat subsequent statutory copyright, had to be made in this country,<sup>46</sup> but that this is the law is in opposition to other authorities.<sup>47</sup> The prior publication in England, however, was subsequent to the sale of American rights, so that the publication was necessarily without the privity of the American assignee.

Another way in which common law playright may be lost is by obtaining statutory playright.

The special statutory right of recovering fixed penalties without proof of damage, and the punishment of willful infringers as misdemeanants, are not available unless playright is secured under the statute, but redress by injunction, by an account of profits, and by damages, are all available to the proprietor of playright at common law.

Reference should perhaps be made to the effect that two bills,<sup>48</sup> to consolidate and amend the law of copyright, introduced into Congress and printed, will have upon the rule of *Ferris v. Frohman*. Both measures provide that there shall be no formalities attaching to the grant of copyright or playright;<sup>49</sup> that the right shall be automatically impressed upon the works when published or produced. Since all playright is made statutory by mere performance in public, it follows that, by the enactment of either bill, the rule of *Ferris v. Frohman* will be superseded by statutory playright.<sup>50</sup>

*Charles B. Collins.*

San Diego, California.

---

<sup>46</sup> This may be contrasted with the rule laid down in *Ferris v. Frohman*, that public performance abroad is not a publication that will throw the drama into the public domain there, even though public performance is a publication according to the law of the country where the public performance takes place.

<sup>47</sup> *Carte v. Duff* (1885) 25 F. 183 and other cases.

<sup>48</sup> H. R. 5841 introduced Dec. 17, 1925, by Hon. Mr. Perkins; and H. R. 10434, introduced March 17, 1926, by Hon. Mr. Vestal.

<sup>49</sup> The word "copyright" is used in these bills to include playright.

<sup>50</sup> It is expressly provided in these bills that the duration of copyright in the United States shall not in the case of any foreign work extend beyond the date at which such work has fallen into the public domain in the country of its origin. This no doubt was suggested by and was intended to be a statutory reversal of the rule in *Ferris v. Frohman* so far as foreign works are concerned. It also applies generally where the term of copyright in the country of origin is shorter than in this country. Such a provision seems reasonable.