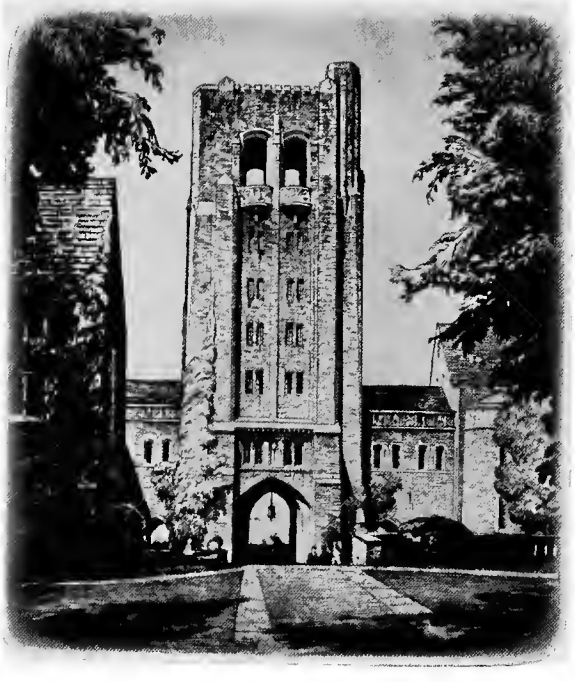

THEATRICAL LAW

THE LEGAL RIGHTS OF MANAGER, ARTIST, AUTHOR, AND PUBLIC

IN

Theaters, Places of Amusement, Plays, Performances, Contracts, and Regulations

By

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OF THE BOSTON BAR

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INTRODUCTION

INTRODUCTION

THE decisions of the courts on matters pertaining to the stage, and all manner of amusements to which the public is admitted, are no distinct phase of the law, merely an application of established principles to those particular subjects. To the lay mind a finding in a particular case on certain facts may sometimes appear opposed to common justice. Such, however, on analysis will prove otherwise, for legal principles do not vary to meet particular cases, and in application must always support those propositions of law which are certain and determined. A rule of justice varied to meet the contingencies of any particular instance would work serious disorder to business and personal dealings. No hardship is done when the individual, understanding the fixed principles of law, accommodates himself and his actions thereto. Everyone is presumed to know the law, and ignorance thereof cannot be pleaded as an excuse. The popular idea of injustice generally arises from a state of facts where ignorance of what the law has determined has been the controlling element. Business would be at a standstill if ignorance and carelessness could override and control contracts and established legal relations. The law attaches to an agreement an integrity of purpose and compels the parties to abide by its terms, and the intent must be construed according to established principles. The careless individual who signs a contract without thought or advice, or assumes relations without knowing his responsibility therein, is most often the one who complains of

lack of justice and unfairness in the courts. His the blame, for the law in its treatment of him as a reasoning, intelligent being presupposes his ability to safeguard his individual rights. No contract is so unimportant as not to merit care and due consideration, no business undertaking so trivial as not to call for an analysis of what it really comprehends. The "common-sense" method of doing business is often a futile attempt to accomplish the legally impossible.

This volume covers in a general, and it is hoped comprehensive, manner, matters which commonly arise in the management of a theater and in the contracts between manager and artist. The rights of the public and the rights of the individual are respectively considered under appropriate heads. Amusements as a generic term covers all kinds of entertainment to which the public is admitted, and the principles stated apply not alone to theaters, but to the race track, the circus, a lecture, an advertising show, or a concert, in fact to any and all kinds of public entertainment.

The author has selected such illustrations and arrangement of these principles as personal experience in actual practice has demonstrated are the general daily questions arising for legal consideration. No attempt has been made to cover the broad subjects of law involved in the specific instances, but rather to classify them with reference to decided cases and general controlling principles. Important statutes are referred to and many common and erroneous ideas of theatrical law explained, with suggestions for their avoidance. It is hoped this volume may prove a helpful guide to the manager, the artist, and the public, and contribute to a better understanding of their respective rights, duties, and liabilities.

The text has been arranged with the thought that it may

interest the general public without detracting from its usefulness as a legal authority for the attorney's use.

The author acknowledges the valuable assistance of John Vandervoort Sloan, Esq., of the Boston Bar, in preparing the index and table of cases.

J. ALBERT BRACKETT.

BARRISTERS' HALL, BOSTON, MASS.
March, 1907.

DEFINITION AND HISTORY OF THE THEATER AND PUBLIC AMUSEMENTS

DEFINITION AND HISTORY

CHAPTER I

§ 1. Theater Defined.

A theater is a "room, hall, or other place, with a platform at one end, and ranks of seats rising step-wise as the tiers recede from the center, or otherwise so arranged that a body of spectators can have an unobstructed view of the platform."

"Century Dict.," Tit. "Theater."

From the Latin *theatrum,* from the Greek *θέατρον*, a place to view shows or plays, from *θεαςθαι* (theasthai), to view, behold from.

§ 2. The Modern Theater.

The modern theater consists, roughly speaking, of two parts, the auditorium and the stage. The first comprises suitable entrances, lobbies, reception-rooms, staircases, and means of approach to the auditorium proper, which is commonly of semicircular or horseshoe form, the floor sloping down to the stage. According to the size of the house, there are from one to four balconies, which follow the curve of the horseshoe. The stage has a floor with an upward incline from the footlights to the rear wall of the theater, and on either side of the stage and at the rear there are spaces for the proper manipulation of the scenery and for dressing-rooms. Above the stage are the flies, where hang the pieces of scenery

to be lowered into place by ropes, and below it corresponding depths into which the scenery may be dropped.

See "The New International Encyp.," Tit. "Theater."

§ 3. Legally, a Theater.

Legally, a theater is a building or any part of a building equipped or adapted and used for the purposes of musical or dramatic entertainments which has a stage, scenery, and like paraphernalia. A hall is not necessarily a theater, though it has a platform or stage. The bare platform is not enough to constitute a theater, but the furnishing of the stage with a curtain, scenery, and other theatrical accessories in the way of footlights and flies would constitute a legal theater as defined by decision and statute.

§ 4. Performance Does Not Determine Theater.

The performance itself, although dramatic in nature, does not establish a place as a theater, and has nothing to do with the characterization of the place or building from a legal standpoint; for a performance given in an ordinary hall without scenery, curtain, or other theatrical accessories, though dramatic, does not constitute the place a theater. All exhibitions, whether dramatic, musical, or negro minstrelsy, are classed as theatrical entertainments, and theatrical equipment in the way of curtains, scenery, and stage properties establishes the room or structure as a theater. A mere temporary occupancy with the removal of all theatrical paraphernalia when not in use does not establish the place as a theater, nor does the payment of an admission fee make it such.

Russell v. Smith, 12 Q. B., 217.

It is not important whether the performances are given by public performers or are in the nature of private theatricals if an admission fee is charged, but depends wholly on the character of the place as determined by its general and permanent equipment.

Private Theatricals, Jour. Jur., 28: 19.

"The use for the time in question and not for a former time, is the essential fact. As a regular theater may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of these purposes would become for the time being a theater."

Russell v. Smith, 12, Q. B., 217.

§ 5. Dramatic Performance Defined.

What constitutes a strictly dramatic performance is not entirely agreed, and such performances have been variously defined in different jurisdictions. Generally, it means any kind of a performance given on a stage, whether comedy, tragedy, opera, or minstrel show, in which people take part or perform either by speech, song, pantomime, or dance.

The license to keep a theater or to give theatrical entertainments would, if strictly construed, bar everything but the pure drama; such is not, however, the intention of the law, for a theatrical establishment in any city that confined itself to the legitimate drama would be badly equipped to meet the popular taste. A more liberal construction is applied as more nearly giving effect to the real intent of the legislature.

"The legislature having determined as to the propriety and policy of requiring a license fee for all theatrical exhibi-

tions, it would be difficult to state any reasonable ground for a distinction between the spoken and the lyrical drama, which would justify the exaction of a license fee from one and the exemption of the other. They are exhibitions of the same general character, and there is no reason why one should bear the public burden more than the other. Both are places of popular amusement and both collect large assemblages of the people and require additional police protection. These considerations are proper in determining the intent of the legislature."

Bell v. Mahn, 121 Pa. St., 225.
Taxing District v. Emerson, 4 Lea. (Tenn.), 312.
Lee v. State, 56 Ga., 477.

§ 6. Theater, History of.

Law is but the necessary regulation of things as they exist; every new subject as it grew and developed into a part of the civic life required laws for its protection, government, and use. The same general laws applied to all things, but they had to be molded by the courts to apply with reason and justice to new conditions. The *rationale* of law depends upon its historical development; its application must ever change to suit the needs of newer and changing conditions. For this reason it is of profit and interest to review in a general way the history of the theater and its performances.

Amusement commenced with life; man early found relaxation and enjoyment in sports, music, and dance. The pastoral and not the dramatic prevailed in the earliest times. It was left to the Greek to establish a *locus* or place for entertainment, which, from the fact of its being a place to "view" or "behold from," was called a theater. This was no more

than the name implies, a mere place or depression with rising ground about it from which spectators could look down into a spot circular in form and called the *orchestra,* from the Greek word meaning "dance." Otherwise a place to view dances, synonymous with amusement. This so-called theater was open to the sky above and in no way protected from the weather. In such an open space, without background or scenery, were performed the earlier plays of Æschylus. The performers dressed in some near-by house, walking to the place of performance through the ranks of spectators. Some years later the ground was so raised at the rear of the orchestra as to allow for an underground passage called "Charon's steps," from which the actors could rise from the ground to the center of the orchestra without mingling in any way with the spectators. Still later a tent was provided for the purposes of a dressing-room, which soon gave way to a permanent structure of wood or stone, in the shape of a temple or palace, from which usually three doors led directly to the orchestra, which was still retained on the same level. Sometimes, to emphasize the meaning of the play, characters representing the gods appeared on the roof of this building, which was called the *skene,* and was frequently covered by a curtain whereon was a painted scene. Hence the derivation of the modern word "scene" and its uses.

§ 7. First Use of Stage.

It is not until the fifth century that we find evidences of the use of a platform or stage. In the early times the profession of acting was not classed as dishonorable; the actors and chorus were free citizens and always men. Women, save as lute girls, had no part in these performances. The plays

generally depicted matters of a serious nature, more or less patriotic or educational in trend, as Grecian life, history, or religion.

At Rome the drama, like the theater, was copied from Athens, but never attained to the dignity of a state performance by citizens. The actors were generally freedmen or slaves, who performed plays adapted from the Greek, both tragedies and comedies. While it is generally supposed admission was at first free, we find in Plato's "Dialogues" ("Apology of Socrates") these words: "And these are the doctrines which the youths are said to learn of Socrates, when there are not infrequently exhibitions of them at the theater, price of admission one drachma at the most."

§ 8. Drama in Early Times.

In the earliest times the drama was a part of the civic life, protected by the state, and of an elevating and inspiring nature. Actors, in Greece, were of an honorable company and a part of the public life and influence. The use of the stage naturally led to supplying needs at first unthought of, and the theater, though still an open, uncovered space, became more permanent and elaborate of construction, as amply evidenced by existing ruins.

The Middle Ages saw no improvement of structural conditions in theaters. The plays given were of a religious or semi-religious character, known as mysteries or miracle plays, and were performed on two- or three-storied scaffolds roughly erected in cathedrals, monasteries, or castle halls, and were sufficient to represent heaven, the earth, and hell. When given out of doors at fairs or public festivals a rough temporary booth was constructed of boards, but no seats were

provided, and the spectators were forced to stand if they desired to witness the play.

These plays all had religious significance, consisting of representations of the popular mysteries and moralities of the day, and were thought proper of performance in sacred places. The players were strollers moving from place to place, having no social recognition, and looked down upon as of no respectable calling, being classed as mountebanks and not afforded the legal protection given the so-considered more respectable artisan or laborer. Their life was one of wandering discomfiture, for they lived and slept as they best could, often in the fields, and were constantly moving from place to place.

§ 9. English Stage in Sixteenth Century.

This was the general condition of the stage and player folk in England until the end of the sixteenth century, when the play sprung into wider prominence as an amusement for all classes and conditions.

§ 10. Revival of the Drama.

With the revival of learning came a like revival of the drama, and this period witnessed the construction of buildings specially designed for dramatic uses. The early Italian theaters always followed on a small scale the model of the ancient theater, but in England, France, and Germany the representations took place in booths and inn yards. The form of our modern theater with its tiers of seats and galleries was doubtless originally copied from the old English inn court or stable yard.

§ 11. In Shakespeare's Time.

The theater of Shakespeare's time was a rudely constructed affair, and is well described by Mr. W. Lloyd in his account of the Globe Theater in Bankside, London, which was built by James Burbage in 1598 and in which Shakespeare's plays were produced. "The internal galleries were protected by a roof of which the eves sloped outward only, while the central pit or yard was open to the sky and the portion of the octagon that was occupied by the stage and tiring-rooms was covered. The foppish custom of privileged spectators sitting on the stage on stools, with pages attendant, was a source of standing annoyance to the general audience. The curtains in front of the stage ran upon a rod and opened in the center, and the stage itself seems to have had an enclosure or arras, answering the purpose of our side scenes; toward the back, where they were called traverses, they could be drawn and undrawn as required. In the center of the stage at the back was a secondary stage, more or less permanent. The break of level was supposed to account for any distance of perspective, and thus a double action might proceed on the stage at once. This secondary stage formed indifferently the ramparts of a castle or the heights of a battlefield, Marc Antony's rostrum, Juliet's balcony, or the stage for Hamlet's prayers. In the way of scenery, the utmost that was attempted seems to have been to put such fixed properties on and about the stage as would suggest the scene required. Tombs, rocks, hell mouths, steeples, beacons, and trees are found in lists of properties. There were devices for counterfeiting thunder and lightning, for exhibiting the sun breaking through a cloud, etc. Graves and trap doors, ascents to and descents from heaven were also provided for.

The stage was strewn with rushes, and on occasion, by excess of refinement, it was matted. The band of eight or ten performers is supposed to have sat in an upper balcony over what is now called the stage box. It remains to be said that changes of scene were generally effected simply by putting up a placard announcing what the stage was supposed to represent; that the dresses were rich and often extravagant; and that until the Restoration female parts were uniformly taken by boys or young men."

§ 12. First Playhouse in London.

This describes the Globe Theater, built by Burbage, although the first permanent playhouse in London was built by him about 1576, and was known as the theater in Shoreditch (1576-1598). Other playhouses rapidly followed and were briefly: The Curtain, also in Shoreditch (1577-1623); The Blackfriars (1576-1647); Paris Garden, Southwark, also used for bear baiting (1544-1647); The Whitefriars (1580-1612), rebuilt as the Salisbury Court Theater (1629), called in 1660 the Dorset Court Theater; The Fortune in Golden Lane, built 1621, rebuilt 1623, pulled down 1621. The Globe (1593-1647, burned 1613), and several others of minor importance. The Drury Lane Theater was first opened in 1663, burned in 1672, rebuilt by Sir Christopher Wren, 1674, again rebuilt in 1794, burned 1809, and rebuilt by Wyatt 1812. The Haymarket Theater was originally built in 1702, rebuilt in 1767, and again rebuilt in 1821. Covent Garden Theater opened in 1732, burned in 1808, again burned in 1856, and was rebuilt by Barry in 1858.

§ 13. First Movable Scenery.

Balthazar Sienna first introduced movable scenery in Italy about 1553, which to some extent was perfected by Bibbiena in 1657. Inigo Jones carried stage mechanism to a degree of perfection for use in the masques which he invented in conjunction with Jonson, Carew, and Davenant, but it was not until after the Restoration that movable scenery, as we know it now, was practically utilized on the stage. In 1700 scenery began to be painted upon flats which were run in grooves on the stage. It was not until 1660 that women appeared upon the English stage to assume the female parts theretofore taken by men and boys. The price for seats or admission to the theater in Shakespeare's time varied from one penny to one shilling.

§ 14. Elizabethan Theaters.

Says Taine in his "History of English Literature" (Vol. 1, p. 264), writing of the period of Elizabeth: "There were already seven theaters in London in Shakespeare's time, so brisk and universal was the taste for dramatic representations. Great and rude contrivances, awkward in their construction, barbarous in their appointments; but a fervid imagination readily supplied all that they lacked, and hardy bodies endured all inconveniences without difficulty. On a dirty site, on the banks of the Thames, rose the principal theater, The Globe, a sort of hexagonal tower, surrounded by a muddy ditch, on which was hoisted a red flag. The common people could enter as well as the rich; there were sixpenny, two-penny, even penny seats; but they could not see it without money. If it rained (and it often rains in Lon-

don), the people in the pit, butchers, mercers, bakers, sailors, apprentices, received the streaming rain upon their heads. I suppose they did not trouble themselves about it; it was not so long since they began to pave the streets of London, and when men like these have had experience of sewers and puddles, they are not afraid of catching cold. While waiting for the piece they amuse themselves after their fashion, drink beer, crack nuts, eat fruit, howl, and now and then resort to their fists; they have been known to fall upon the actors and turn the theater upside down. At other times they were dissatisfied and went to the tavern to give the poet a hiding or toss him in a blanket; they were coarse fellows, and there was no month when the cry of 'Clubs' did not call them out of their shops to exercise their brawny arms. When the beer took effect, there was a great upturned barrel in the pit, a peculiar receptacle for general use. The smell rises, and then comes the cry 'Burn the Juniper!' They burn some in a plate on the stage, and the heavy smoke fills the air. Certainly the folk there assembled could scarcely get disgusted at anything and cannot have had sensitive noses. In the time of Rabelais there was not much cleanliness to speak of. Remember that they were hardly out of the Middle Ages and that in the Middle Ages man lived on a dung hill.

"Above them, on the stage, were the spectators able to pay a shilling, the elegant people, the gentlefolk. These were sheltered from the rain, and if they chose to pay an extra shilling, could have a stool. To this were reduced the prerogatives of rank and the devices of comfort. It often happened there were not stools enough; then they would lie down on the ground; this was not a time to be dainty. They play cards, smoke, insult the pit, who gave it them back without stinting,

and throw apples at them into the bargain. They also gesticulate, swear in Italian, French, English; crack aloud jokes in dainty, composite high-colored words.

"With such spectators illusions could be produced without much trouble; there were no preparations or perspectives; few or no movable scenes; their imaginations took all this upon them. A scroll in big letters announced to the public that they were in London or Constantinople, and that was enough to carry the public to the desired place."

§ 15. The Stage Degenerates after Shakespeare's Time.

A few years saw greater changes for the worse in matters of dramatic representation. Romance had given place to gross sensuality. The public demanded from the stage what it saw and encountered in actual life. The mimic had to be the real—the theater had to produce the street, and that was life in its most sordid and nauseous aspect. The theatergoer no longer was satiated with poetry, comedy must give him the same species of entertainment as real life. "He will wallow equally well there in vulgarity and lewdness, to be present there will demand neither imagination nor wit; eyes and memory are the only requisites. This exact imitation will amuse him and instruct him at the same time. Filthy words will make him laugh through sympathy. Shameless imagery will divert him by appealing to his recollections. The author, too, will take care to arouse him by his plot, which generally has the deceiving of a father or a husband for its subject. The fine gentlemen agree with the author in siding with the gallant; they follow his fortunes with interest and fancy that they themselves have the same success with the fair. Add to this women debauched and willing to be

debauched, and it is manifest how these provocations, these manners of prostitutes, that interchange of exchanges and surprises, that carnival of rendezvous and suppers, the impudence of the scenes only stopping short of physical demonstration, those songs with their double meaning, that coarse slang shouted loudly and replied to amidst the *tableaux vivants,* all that stage imitation of orgie, must have stirred up the innermost feelings of the habitual practicers of intrigue. And, what is more, the theater gave its sanction to their manners. By representing nothing but vice, it authorized their vices. Authors laid it down as a rule, that all women were impudent hussies and that all men were brutes. Debauchery in their hands became a matter of course; nay more, a matter of good taste; they profess it. Rochester and Charles II. could quit the theater highly edified; more convinced than they were before that virtue was only a pretense, the pretense of clever rascals who wanted to sell themselves dear."

"History of English Literature," vol. ii., 154.

§ 16. Public Demands Immoral Plays.

The stage never persists in giving the public what it does not want nor expect, or refuses to patronize. The degradation of the stage at the period of Charles I. was the natural outcome of the demands of a people. who saw no beauty in decency and condemned the works of Shakespeare as too moral for amusement, and too tame to be countenanced.

The taste of such a people fashioned the theater and its offerings; from them it got its inspiration. It was a time of laxity of religion. Morality was scoffed at, and the severe

views of life taken by the Puritans were ridiculed on the stage in the most wanton and lewd manner. The people demanded performances which left nothing to the imagination in the way of words and action, and for sixty years the theater, though it throve, was steadily pushed to the depths of all that was immoral and bad. It was a true reflection of the condition of the times and of a people who were swayed by their desires, and actuated by the baser passions. Catholicism, reduced to external ceremony, had just ended; Protestantism, arrested in its first groping after truth or straying into sects, had not yet gained the mastery, and there was a lack of moral and religious sense.

§ 17. The Puritans.

To such a state had the theater fallen when in the seventeenth century the Puritans crossed the sea to settle a new land. They brought the laws of England with them as a nucleus for their common law, reserving such parts as they deemed fit for their civic guidance in which the puritanical spirit and its narrow ideas held absolute sway. It was a parting of the ways; a literature entirely religious left no place for the condemned wickedness of the play; a theater was considered no better than a bawdy house, and classed as a haunt of sin, having neither part in the needs nor protection under the laws of those stern-minded Puritans

§ 18. Prohibition and Regeneration.

England a few years later was swayed by the puritanical spirit, and Parliament under Cromwell prohibiting the playhouse, it sunk into obscurity and lost all place for several years in the life of the people. During the eight years of

Cromwell's dictation no theatrical performances of any sort were countenanced or allowed. After Cromwell, when the theaters were reopened, public taste had changed; the old comedies, fallen into disuse under the demand for plays less decent, were adapted to suit more puritanical ideas, and in a manner to mar the beauties of their original intendment. Shakespeare's works were considered too immoral for presentation as originally written. The pendulum of public taste had swung far the other way. Plays were transformed, the public had changed, and with it all the stage, too, was changed.

§ 19. Pepys as a Critic.

Pepys records in his diary under date of September 29, 1662: "To the King's Theater, where we saw 'Midsummer Night's Dream,' which I had never seen before, nor shall ever see again, for it is the most insipid, ridiculous play that I ever saw in my life."

Such was the havoc that the pruning knife of public demand had caused with the drama, and managers well realized the necessity of catering to the changed taste of the people, offering only what was expected or would be tolerated, no matter how vapid that same might be.

§ 20. First American Theaters.

Two decades before this was the commencement of the law-forming period of this country, and although the earlier settlers differed on questions of religion and in their definition of liberty of thought, it was not until 1752 that the first American theater was built in Williamsburg, and there in that region of the American cavalier, William Hallam, an English actor, first dared to defy the colonial prejudices

and construct a playhouse. His venture, however, not receiving sufficient patronage, caused him to abandon that place, and a year later he opened the first theater in New York, in Nassau Street, on the site of an old Dutch church; at the end of the same year he moved to Philadelphia and fitted up a building as a playhouse in the vicinity of Pine Street. It was not until 1773 that a theater was built in Boston, which at once became a place of mere toleration and was bitterly opposed by the foremost citizens.

"The Drama," Vol. 19. America.

§ 21. Puritanical Opposition to Stage.

In the few cities now supplied with theaters performances were infrequent and not patronized to any considerable extent, being maintained under the active disfavor of the clergy, who did everything in their power to discourage and prevent such form of amusement. The performers were considered outcasts, and the most rigid and absurd regulations enforced against them and their vocation. These wandering players came from England, and it is not overstrange that the Puritans looked upon them askance, as their knowledge of the theater was traditionary, and conditions which were bad enough at earlier times in the mother country took on no better aspect in their remembrance. It was a new generation who knew only of plays and player folks from the recitals of their fathers, whose knowledge was of the worst period in the history of the stage, and who did not hesitate to condemn such as the product of all that was pernicious, wicked, and immoral.

§ 22. Forbidding Saturday Night Performances.

The law which allowed the opening of the theaters in Boston expressly forbade performances on Saturday night, for nothing so profane could be tolerated at an hour near the holy day, when every thought must be directed toward preparation for the all-important religious duties, and it was not until 1858 that the legislature repealed this statute and allowed the opening of theaters on Saturday night.

The first theatrical performance given on a Saturday night in Boston took place May 1, 1858. The playbills for some time previous contained this announcement:

"SPECIAL NOTICE.

"The Legislature of Massachusetts during the last session, having abrogated an old law, which prevented Dramatic Representation from taking place on Saturday Evenings, and the Board of Aldermen also having granted the petition of Mr. Barrow to open this Theater on Saturday evenings, he proposes testing Public Opinion by giving a Dramatic Performance of a high order on Saturday Evening next."

It is said the public did not respond cordially to the innovation, small attendance being the rule for many Saturday nights.

§ 23. The Common Law.

The common law followed the trend of public opinion, and while it came to sanction prudent theatrical perform-

ances, it still denounces as unlawful and indictable such as are licentious, demoralizing, or obscene, the definition of which varies according to the time and the measurement of such amusements.

Pike v. Commonwealth, 63, Ky., 89.

For an interesting and comprehensive history of the early English laws and statutes pertaining to plays, actors, and theaters, see an article by R. Vashon Rogers, Esq., entitled "Some Things About Theaters," published in *The Green Bag*, Vol. 6, p. 259.

PUBLIC AMUSEMENTS AS DEFINED BY STATUTE
THE LEGISLATIVE POWER TO LICENSE
LICENSES, THEIR SCOPE AND NECESSITY
HOW ISSUED UNDER AUTHORITY
MANDAMUS PROCEEDINGS
THE NECESSITY OF A RIGHT OF APPEAL

CHAPTER II

§ 24. Theatrical and Public Amusements are Proper Subjects for Legislative Control, and the Passage of Laws Regulating the same is a Constitutional Exercise of the Police Power Vested in the Legislature.

In America from the earliest times the theater, public shows, and amusements alike arose in opposition to the wishes of the clergy and came into existence as matters of mere toleration, burdened with oppressive and restrictive regulations. The church did much in molding the early legislation of the older States, and such hostility left no undecided mark on amusement law and furnishes the explanation for many decisions which are harsh and almost absurd in their legal application, when considered from a modern standpoint.

The courts very early recognized the full right of legislative bodies to make laws which should control the theater and all kinds of amusements as a matter directly concerning public morals and behavior, and held such laws were constitutional.

§ 25. The Right of the Legislature to Regulate Amusements.

The legislative power can properly enact regulations governing not only the amusement or exhibition itself, but the *way, manner, and place wherein* the same may be given. This power is derived from the inherent right vested in the legislature to protect the public morals and control anything

which might disturb its peace or security. It can regulate the hours at which public amusements may take place, the manner in which given, and the persons who may take part Minors can be excluded both as performers and spectators.

Stewart v. Thayer, 168 Mass., 519.
People v. Meade, 24 Abb. N. Cas. (N. Y.), 357.
State v. Mackin, 51 Mo. App., 129.

A statute which prohibited the opening of theaters and the use of bowling alleys after six o'clock on Saturday afternoon was held constitutional for the reasons stated, and so of statutes prohibiting Sunday performances.

Commonwealth v. Colton, 8 Gray, 488.
Stewart v. Thayer, 168 Mass., 519.
Quarles v. State, 55 Ark., 10.
State v. Hogreiver, 152 Ind., 652.

§ 26. Legislature May Require the Licensing of Theaters.

It is competent for the legislature to regulate places of amusement and require them to be licensed. It has a right to determine and declare what recreations and amusements are harmless and innocent and therefore lawful. It has the power to define what amusements operate injuriously upon the public or exert a baneful influence upon the community, and thus tend to a breach of the peace or the harm of the morals of the people. Such matters may be lawful or unlawful according to the decision of the legislature, and no public amusement can be given when prohibited or without a license when a license is required.

Wallack v. City of New York, 3 Hun, 84.
Neuendorff v. Duryea, 52 How Pr., 267.
State v. Schonhausen, 37 La. Ann., 42.

§ 27. Courts Will Not Review Discretion Exercised by Legislature.

The courts will not ordinarily, even if they have the power to do so, sit in review of the judgment and discretion exercised by the law-making power, the same being peculiarly within the province of the legislature, and a part of its police authority.

In Boston v. Schaffer, 9 Pickering 415, the question arose as to whether it was competent for the legislature to grant a city the power of exacting payment of money as one of the conditions of granting a license for theatrical exhibitions. In 1828 the defendant applied for a license to give theatrical and equestrian exhibitions in the City Theater, and the right of the city to exact payment of a license fee as authorized by an act of legislature was before the court. Here it was held that "the levying of an excise has been practiced in regard to other occupations, and the constitutionality of it has never been doubted. There can, therefore, be no objection to it in the present case, admitting theatrical entertainments to be as meritorious as other occupations. But it seems to be peculiarly proper in employments of this kind. They require to be watched. Towns are put to expense in preserving order, and it is proper they should be indemnified for inconveniences or injuries occasioned by employments of this nature."

That a license is usual and properly required and that the legislature can regulate places of amusement and require licenses, see

Baker v. Cincinnati, 11 Ohio St., 543.
Commonwealth v. Twitchell, 4 Cush., 74.
Camden v. Camden, 77 Me., 530.

§ 28. The Legislature has the Power to Enact Police Regulations Regulating Places of Public Amusement.

It is clearly within the power of the legislature to make police regulations as to the hours and modes of occupying places of amusement, so as to make their use consistent with the peace of the community. The reasons which may induce a legislature to make it penal to suffer a place of amusement to remain open after certain hours are not open to investigation by the court, the same being within the province of legislative enactment.

Commonwealth v. Colton, 8 Gray, 488.

The legislature may require the obtaining of two licenses, one from the State and another from the city, and still act within its constitutional limits, but a county cannot impose an additional license fee, it having no power to levy taxes.

Orton v. Brown, 35 Miss., 426.
31 Leg. Int. (Penn.), 84.

The legislature or local authority has full power to control the building and maintenance of theaters and structures for public amusements, and may adopt such regulations and conditions as it considers necessary for the protection of the public, even to the requiring that exits and aisles be kept clear and open.

"It is obviously impossible for any man to say how many people would, in a panic, block up a narrow passageway. Certain it is that in a rush some of the weaker will be knocked down and trampled under foot and that their bodies will effectually obstruct the way. It is not a question as to how long it may take to empty a theater where everybody is cool and

moving leisurely, but as to whether it is safe to allow passageways to be blocked when a crowd of panic-stricken people are making a mad rush for the doors.

"The legislature has made its meaning perfectly clear, and has said that no person shall be allowed to stand in the passageways, and it is not for any judge to say that, although the legislature has forbidden it, the manager is at liberty to allow forty or fifty people to occupy the ways of exit. Of course if it should appear that, despite the *bona fide* efforts of the defendant's servants, there was a knot of two or three persons tarrying for a moment or two in a passageway, no sensible justice would hold that the statute was violated."

Fire Department v. Stetson, 14 Daly, N. Y., 125.
Dillon Mun. Corp., par. 357 et seq.

§ 29. The Regulations Must be Reasonable.

The general rule has its reasonable limitations, and it was decided in Waters v. Leech, 3 Ark. 110, that, although a city council has the right to prescribe *reasonable* regulations governing the acts of theatrical managers in the operation of their business, it cannot transcend the rule of reason and demand what is repugnant to common-sense, and that an ordinance requiring owners of theaters to pay the city police two dollars a night for attending public performances therein was unreasonable. On this point, however, it is well to consider the more recent case of Duluth v. Marsh, 71 Minn. 248, wherein the court decided that a license fee for six months, based on the payment of a like amount to an officer, was consistently reasonable.

City of Cincinnati v. Brill, 7 Ohio N. P., 534.
Hodges v. Town, 21 Tenn., 61.
Ex Parte Bell, 32 Tex. Cr. R., 308.

In City of Cincinnati v. Brill it was decided that under the provisions of an ordinance which prohibited the selling of reserved seats for a theatrical performance after the doors of the theater had been opened, a speculator was liable, as having bought theater tickets he became in effect the agent of the theater and liable in the same way as the agent in the box office for a violation of the ordinance, and it was no defense that the speculator purchased the tickets, afterwards wrongly sold by him, from the box office the day before the performance, and that such ordinance was a reasonable and proper regulation.

§ 30. How such Restrictive Statutes are Construed.

Statutes of this restrictive nature are narrowly construed, and the prohibition requiring a license to maintain the sport or amusement *only extends to the class of entertainment specifically mentioned.*

The definition will not be extended to embrace an exhibition which is not clearly prohibited, and a license will not be required except in such instances as are clearly intended by the legislature. Statutes in the different States materially vary in the definition of what may be the subject of license requirement, and should be separately considered. A statute prohibiting *public amusements* without a license does not apply to a school for instruction in dancing, as the whole scope and purpose of the statute would seem to have reference to a different sort of assembly. Such a case is not within the language of the statute nor one of the evils sought to be remedied by it. It is clearly not a place of public show or public amusement or exhibition prohibited by the statute. This view of the statute will not protect a party setting up a place of public amusement to which admission is granted on

payment of money under color or pretense of a school for teaching dancing. A dance hall, to which the public is admitted on the payment of a fee, is a *public amusement* within the prohibition of such statute.

Commonwealth v. Gee, 6 Cush., 174.
Commonwealth v. Quinn, 164 Mass., 11.

§ 31. Various Constructions.

A statute which enumerates specifically the kinds of entertainments requiring a license will not be extended to a *concert* if the same is omitted from the list, not being "specifically enumerated."

State v. Bowers, 14 Ind., 195.

But a statute requiring that a license be obtained for any "interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy or dancing or any other entertainment of the stage" has been construed to apply to orchestral concerts given upon a stage.

New York v. Eden Musée Amusement Co., 102 N. Y. 593.

A statute providing a penalty for "exhibiting or participating in exhibiting in public any musical performance without a license" refers only to the proprietors of the place wherein such performance is given, and not to those who perform therein, the phrase "participating in, exhibiting," etc., having sole reference to a joint owner, manager or controller.

Ex parte Ryan, 7 W. L. B. (Ohio), 50, 299.

"It would be hard to imagine a public amusement offered by the entertainers which would not be included in the words 'public shows and exhibitions of any description' as used in the Revised Laws of Massachusetts."

Commonwealth v. Quinn, 164 Mass., 11.

The word "museum" in a statute providing that any person who shall exhibit for hire any museum, waxworks, etc., shall first obtain a license, includes an exhibition of living animals.

Bostick v. Purdy, 5 Stew. & P., 105.

A license to keep a "theater" will not protect one who by contract with the licensee exhibits therein feats of legerdemain or sleight of hand.

Jacko v. State, 22 Ala., 73.

A horse race is included within a statute prohibiting "similar games of sport and all other exhibitions, performances, and entertainments."

Webber v. City of Chicago, 148 Ill., 313.
Downing v. Blanchard, 12 Wend., 383.

As to a circus, see

Orton v. Brown, 35 Miss., 426.
Harris v. Commonwealth, 81 Va., 240.

Side shows to which no entrance fee is charged, which are maintained to attract patronage for the main performance to

which an entrance fee is charged, are included in the license of the latter.

State v. Lundie, 47 La. Ann., 1596.

Performances given by venders of goods to attract customers are not within the statute.

People v. Royal, 23 N. Y. App. Div., 258.

That a " Flying Jennie " is a public amusement, see

Mosby v. State, 98 Ala., 50.

A merry-go-round was held to be a public amusement requiring a license, and " the virtuous character of those amused by it is not enough to make an exception to the general words of the statute. It is true that the number of persons who could ride the wooden horses at any one time was limited, but that is true of all amusements. The public was invited, and several, if not many, could be accommodated at once. There is nothing to show that the number was so small as to raise the question whether an amusement which could be enjoyed by people only one at a time is public if the public comes to and pays for it in such manner as the nature of the diversion permits."

Commonwealth v. Bow, 177 Mass., 347.

§ 32. The Right of Officials to Grant or Withhold Licenses and to Fix the Price Thereof.

The granting of a license for a public amusement or place for the giving of the same is discretionary and may be granted

or withheld by the licensing power. The courts will not interfere, as it is a matter of pure discretion whether the commission or official delegated by statute issues the license or not, and is therefore no subject for judicial review. The fact that the license is for the place where the enterainment is to be given and not for the entertainment itself makes no difference. Here the applicant must specify the place as well as the purpose, and the inquiry which the licensing official may properly institute is not limited to the applicant's characterization of his intended performance. If the purpose is apparently proper, the official may look beneath the surface and ascertain the real purpose, and if, upon investigation, that purpose, in his judgment, is inimical to good order and public decency, he may properly withhold the license, and even if the official's authority is limited to *the place,* without regard to the purpose, his discretion remains. The locality of playhouses, circus pavilions, concert halls, and the like is clearly a matter of public concern. The question of the neighborhood might be highly important, and that, too, is a question over which the licensing power might exercise his judgment. The discretion is not reviewable and mandamus will not lie, as the court cannot substitute its discretion for that of the officer. To do so would be in effect to usurp the power to grant the license.

People v. Grant, 58 Hun, 455.
People v. Albany, 12 Johns, 414.
Tool's Appeal, 90 Pa. St., 376.
People v. Wurster, 14 N. Y. App. Div., 556.

"A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to

exercise such privilege. The requirement that a person must secure leave from someone to entitle him to exercise a right, carries with it, by natural implication, a discretion on the part of the other to refuse to grant it, if, in his judgment, it is improper or unwise to give the required consent."

People v. Grant, 126 N. Y., 481.
Armstrong v. Murphy, 65 N. Y. App. Div., 123.

The power of granting a license carries with it an implied right to charge therefor, which power may be conferred upon some commission or official, the amount to be determined by the licensing power, from which there is no appeal. As this is an implied right, the court has no power to pass upon the fixing of an amount and can only in clear cases of unreasonableness of charge pass in review on that.

Boston v. Schaffer, 9 Pick., 415.
Duluth v. Marsh, 71 Minn., 248.

§ 33. Necessity of Obtaining License.

Where a statute prohibits the use of a place or the giving of an amusement, except under a license, such cannot be used or given until a license is actually obtained, and courts will not interfere with the power vested in municipal bodies and officers to grant or refuse such licenses.

Congregation, etc., v. Committee, 56 N. J. L., 48.
Bates v. Keith, 66 Vt., 163.
State v. Commissioners, 57 Oh. St., 86.
State v. Smith, 49 Neb., 755.

§ **34. Mandamus.**

Mandamus will not lie to compel a public officer to perform his duties in a particular way. When the granting of a license is discretionary it is immaterial what reasons are assigned for its refusal, how unreasonable they may be or how great a hardship may result.

To obtain relief by mandamus it is necessary that there should be shown an invasion of a clear legal right. In the government of the affairs of a municipality many powers must necessarily be confided to the discretion of its administrative officers, and the exercise of such discretion is respected by the courts.

People v. Grant, 126 N. Y., 481.
Commissioners v. Commissioners, 107 N. C., 335.
Parker v. Portland, 54 Mich., 308.
People v. Grant, 58 Hun, 455.
Ex parte Persons, I Hill (N. Y.), 655.
Armstrong v. Murphy, 65 N. Y. App. Div., 123.

Nor can the mayor of a city grant a license which will legalize or permit the doing of an act prohibited by statute, even though he has the power to license similar acts. His sole power depends upon the language of the statute, which is not to be enlarged by implication or even public necessity.

People v. Grant, 70 Hun (N. Y.), 233.

Where the terms of a statute are not imperative, yet while an official or licensing board may be permitted to exercise his judgment, his discretion may not be wholly unqualified, and where a discretion is abused and made to work an injustice, there may be such an abuse as can be controlled by

mandamus. This would seem to be limited to instances of a review of his judgment as to the actual extent of his rights of judgment under the law.

People v. Wurster, 14 N. Y. App. Div., 556.
People v. Grant, 126 N. Y., 473.
State v. Hastings, 10 Wis., 518.

§ 35. Statute Deemed Discretionary and Not Mandatory.

When a statute relates *exclusively* to the public welfare or is created for the protection of the public interests, the statutory provisions conferring the power will be deemed mandatory; but such is not true of a statute providing for the licensing of a theatrical or other amusement, for such is clearly and in intent discretionary, and not an invasion of a clear legal right, and hence not controlled by mandamus.

People v. Grant, 70 Hun (N. Y.), 233.
People v. Wurster, 14 N. Y. App. Div., 556.
Armstrong v. Murphy, 65 N. Y. App. Div., 123.
Armstrong v. Grant, 126 N. Y., 482.

"Mandamus will not lie in any matter requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by the law, either to control the exercise of that discretion or to determine the decisions which shall be finally given, but only to set him in motion and compel him to exercise his function according to some discretion when he has refused or neglected to act at all."

§ 1433. Spelling's Injunctions and other extraordinary remedies. Citing among many cases:
United States v. Seaman, 17 How., 225.
People v. Fairchild, 67 N. Y., 334.
Freeman v. Selectmen, 34 Conn., 406.

The kind of license under discussion is one which is properly governed by matters of local consideration involving the well-being and peace of a community. No rule of law could be framed governing definitely the granting thereof, so of necessity the power must be vested in someone who can grant or withhold according to his discretion. The case differs from that of filling an office where the appointing power refuses to act; in such instance the statute is mandatory; in the case of an amusement license it is merely discretionary.

§ 36. Officials Cannot Impose Tax.

Where it is left to the discretion of an official to grant a license and fix its terms, the power must not be abused to the extent of charging a fee which is tantamount to imposing a tax or compelling the doing of anything prohibited by law. A reasonable exercise of discretion is not the proper subject for judicial review, but an abuse of such power is.

In Duluth v. Marsh, 71 Minn. 248, the question arose whether a license fee of $125, for six months, imposed by the Common Council of the City of Duluth for theatrical performances was so excessive that the court would be justified in holding it was unreasonable and in excess of the police power conferred on the Common Council. "What is a reasonable license fee, under all the circumstances of the case, must be left largely to the sound discretion of the municipal authorities; and unless the amount is so manifestly unreasonable, in view of its purpose as a police regulation, that it is apparent that the police power has been abused and made a pretext for doing what is forbidden, as, for example, imposing a tax, the courts ought not to and will not interfere with the municipal discretion.

"In respect to theatrical exhibitions and amusements of

similar character, a larger discretion on the part of municipalities is recognized than in the case of ordinary trades and occupations, both because they are liable to degenerate into nuisances and also because they require more police surveillance and police service.

" Theatrical and other similar performances are of this character, both because of the large number in attendance, and also of the crowds (frequently in part of disorderly persons) which are liable to congregate in the vicinity of the entrance. Such performances in a city of any size usually require the attendance of at least one policeman to preserve order. The wages of one policeman every time there is a performance at a theater, which may be daily, would in six months amount to more than the fee required by this ordinance."

§ 37. Abuse of Power.

The courts will not interfere in the granting of discretionary licenses, save in a clear case of abuse of that power, either resulting from an error on the part of the official as to what he can legally exercise his discretion over or where the discretion is abused in such a way as to work an injustice.

See Spelling's Injunctions, etc., § 1433 and § 1384 and cases cited.

People v. Wurster, 14 N. Y. App. Div., 556.
People v. Grant, 126 N. Y., 473.

Where there is a clear case of an abuse of discretion which works an injustice it may be controlled by mandamus; as to just how far discretion may go before it will be arrested by mandamus is not clear, and the rule is stated with some doubt. The right is, however, recognized in People v. Grant, 58 Hun, 460, where it is said, by way of *dicta,* that " there

are cases where an abuse of discretion may be controlled by mandamus."

Village of Glencoe v. People, 78 Ill., 382.
Topping on Mandamus (Am. Ed.), 66.
Spelling's Injunctions, etc. (2d Ed.), § 1433.
Commonwealth v. Stokely, 12 Phila. (Pa.), 316.

Where in terms the statute is not imperative the official has discretionary power. "While the mayor may be permitted to exercise his judgment, his discretion is not unqualified. A denial of an application for a license may be such as to constitute an abuse of power and be subject to review and correction by mandamus."

People v. Wurster, 14 N. Y. App. Div., 556.

"In performing their duties, the board is exercising a *quasi* judicial function, and, so long as it does not art arbitrarily and illegally, its determination cannot be coerced through the courts through writs of mandamus, so far as they involve the exercise of their discretion."

Williams v. Dental Examiners, 93 Tenn., 628, citing numerous authorities.

Courts dislike to interfere in matters of discretion and refuse most generally to do so, leaving it to the designated authorities to act or not as their discretion dictates, only interfering where there is a clear and well-established instance of abuse.

Williams v. Dental Examiners, 93 Tenn., 619.
State v. Gregory, 83 Mo., 123.
People v. The Examiners, 110 Ill., 180.
People v. Scully, 53 N. Y. Sup., 125.
Miles v. State, 53 Neb., 305.
Spelling's Injunctions, etc., § 1476.

The distinction is very clearly drawn between powers purely discretionary, which are not open to mandamus proceedings, and instances of duty to grant a license for a specific thing set forth by law, where the abuse of the power is in the failure to act. In the former instance the courts will generally not interfere, in the latter they will in a clear case of abuse.

§ 38. Refusal to Grant a License.

The refusal to grant a license is not changed in legal contemplation because the licensing board stated it would make no objection to the use of the premises for the purpose requiring a license. The fact of making no objection to an unlicensed use of the premises does not import a license, the giving of which is a formal and official act, and cannot be implied.

Simpson v. Wood, 105 Mass., 263.

The license need not be in writing or in formal form; a vote of a city renewing a theater license is sufficient, and if the proprietors conformed to the conditions of the vote and proceeded thereunder, no question as to the validity of the license can be considered.

Boston v. Schaffer, 9 Pick., 418.

§ 39. License Determining Right to Use Building for Specific Purpose.

The vesting of the sole power to license a theater or place of amusement in one official or board is customary and of reason, but when the license determines the *right to use the*

building for amusement purposes on the grounds of public safety rather than on grounds of morality, serious hardships may result in such sole and arbitrary power. Recent fatalities have led to the passing of rigid laws concerning fire protection which have to do with structural conditions as well as equipment, and a license to use the building for a theater or place of amusement can only be obtained when a certain official or board is satisfied that the requirements of the building laws have been met, or the building is safe for the intended use. These laws necessarily apply to all structures, some of which are old and of varying architecture and condition, both in construction and location. No definite standard or line of requirements can be universally applied, and some discretion must be allowed or else no old building could be made to conform in all respects to such hard and fast rules. While one method of protection may be safe, others suitable to particular buildings can be devised which are equally so, yet no general law could be framed containing enough specific provisions to cover the needs of every structure. The important question is one of safeguarding the public, protecting it in a sound building, with suitable means of egress and reasonable methods of fire protection properly installed.

No matter what or where the structure, if this is accomplished the intendment of all protective building laws is satisfied. The application of the law should be within reason, and with proper regard to its real intendment. To enforce protective legislation to the letter would result in serious injury and often deprive the owners of all right to use buildings constructed and only fit for a definite purpose. Even here the exercise in good faith of discretion in issuing licenses can work a serious hardship, through ignorance or misapplied zeal.

§ 40. Appeal Should be Provided For.

Statutes or ordinances are unfair unless providing some direct method of appeal to the courts when an official withholds a license and thereby deprives the owner of the right to use his property.

Here is an instance of virtually condemning real estate without any provision for damages or relief. Such may not have been the intendment of the law-making body; the result is, however, clear. It goes beyond the mere question of refusing a license for some special entertainment, for others can be substituted; it is, in effect, a power to close a place of amusement to its intended uses, for a cause which may only exist as a theoretical possibility of constructural danger; whether mandamus would lie under such circumstances, without showing actual bad faith, is open to question. In such an instance of serious hardship the court might well see fit to grant the remedy as against an unreasonable exercise of discretion within the limitation of the rules heretofore stated. The decisions, however, show a marked disinclination on the part of the courts to interfere in matters where the legislature has made the matter of licensing clearly discretionary, and will generally only review the question of whether the official or board has acted under a wrong construction of the power conferred, and not as to whether the exercise of the discretionary power has been wise or just.

The application of the rule to a case which in effect is really the condemning of property as such, is debatable matter and not at all clear in the decisions.

§ 41. Terms of License Must be Strictly Complied With.

The terms of the license when issued must be strictly complied with, and the lessee of a theater does not escape liability

under statutes which require of him the enforcement of prescribed regulations by allowing another to sublease the theater and give performances therein, unless the original lessee has *absolutely no control or authority* over the property and the persons employed therein.

Allowing another to use the place, with the employees under the original lessee's control, although subject to another's orders, is no bar to liability imposed on the manager by statute. He has it in his power to see that the requirements of the law are obeyed, and so long as he has that legal right he must exercise it in obeying the terms of the statute. The responsibility attaches to the one *actually* though not *actively* in control.

As illustrative of this principle, in an action for a penalty for violation of a statute prohibiting the crowding of passageways, it was shown that the defendant was the lessee of the theater and had sublet to another the right of giving performances therein. The defendant furnished the ticket sellers, ushers, and other *attachés,* and paid the same, although they were subject to the orders of the one giving the performances, and it was by the latter that the persons who crowded the passageways at the time complained of were admitted. It appeared that a few days previous the officers had called the defendant's attention to a similar violation of the statute, and he was cautioned not to allow its occurrence again, and promised he would obey the law, and that he was subsequently about the theater when the overcrowding continued. Held, that these facts were sufficient to warrant a finding that the defendant was liable under the statute for obstructing the passageways, as being actually the one in control.

Fire Dept. v. Hill, 14 N. Y. Supp., 158.
Fire Dept. v. Stetson, ubi supra.

§ 42. Effect of Unlicensed Entertainments on Contracts.

Matters prohibited unless licensed are in violation of the criminal law and subject to such punishment as may be prescribed in the statute, and such prohibited matters cannot be the subject of a legal contract, when the disability is known to the parties concerned. Knowledge of the illegality is, however, essential, where the matter would be legal if licensed.

In Roys v. Johnson, 7 Gray 162, the defendants without first obtaining a license set up theatrical exhibitions in which they employed the plaintiff as an actor, and thereby violated the law and subjected themselves to punishment. The court there says: "But it does not appear that the plaintiff knew that they had no license. Unless he knew the fact, he is in no legal fault; and where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong, to defeat the rights of a plaintiff who is innocent. It is the ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license and were doing unlawful acts." Penal statutes of this character are not to affect innocent parties who are not participators in the acts made punishable by statute.

Cranson v. Goss, 107 Mass., 442.
Frye v. Bennett, 28 N. Y., 324.
Emery v. Kempton, 2 Gray, 257.
See post, Illegal Contracts.

There must, however, have been authority in some person or board to license, otherwise there can be no recovery for services.

Stewart v. Thayer, 168 Mass., 519.

An actor can recover for services rendered in an immoral performance, if the giving of the same is permitted by law, and is to that extent protected by the license given the manager by whom he is employed.

Baumeister v. Markham, 101 Ky., 122.
Shelby v. Emerson, 4 Lea. (Tenn.), 312.
Reg. v. Strugnell, L. R., 1 Q. B., 93.

Statutes compelling the necessity of procuring a license are construed to give the licensing board or official discretionary power when the phrase "may license" occurs. The power imposed becomes mandatory, however, when the words "shall grant" are employed.

Commonwealth v. Stokely, 12 Phila. (Pa.) 316.

DEFINITION OF DRAMATIC PERFORMANCE

DRAMATIC PORTRAYAL

NECESSITY OF DRAMATIC ELEMENT

IMPORTANCE OF ORIGINALITY

MECHANICAL AND SCENIC CONTRIVANCES

COMMON-LAW OWNERSHIP IN TITLE

METHODS OF PROTECTION OF TITLE

CHAPTER III

§ 43. Definition of a Dramatic Performance.

The definition of a dramatic performance is broad and comprehensive, covering any representation in which a story is told, a motive conveyed or the passions portrayed, whether by words and actions combined or by mere actions alone. While generally orally spoken, it may be pantomime without uttered words, or an opera where music takes the place of ordinary speech, all such, however, being adapted to the stage with appropriate scenery and properties for its representation.

"A drama is a story represented by action. The representation is as if the real persons were introduced and employed in the action itself. It is ordinarily designed to be spoken, but it may be represented in pantomime, where the actors use gesticulation, sometimes in the form of the ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary speech and the dramatic treatment is essentially different from either. An opera is defined to be 'a musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations and representing some passionate action.'—*Webster.* The spoken drama, therefore, and the opera agree in the method or manner which is essential to the dramatic art, viz., imitation in the way of action. In the former, it is true, the actor observes the rules of rhetoric and of oratory and follows the special laws of dramatic delivery, while in the latter, he employs the power of music, both vocal and instrumental,

as a medium of artistic and passionate expression; music, however, which is not arranged with reference mainly to its melodic interest, but in such form as to express, not only the words, but the thought, emotions and passions of the mind, such as joy, grief, hope, despair, etc., which the idea or conception of the play may involve. The word-setting, the orchestration, the musical intervals and the composition generally, are all arranged to serve the exigency of the passing sentiment and to turn the subject of the story into the action of the play; in short, the opera is composed with special reference to the declamatory power of music.

"The opera is essentially and in every point of view a dramatic composition and its representation a dramatic exhibition. The opera house and the theater alike comprehend the stage, proscenium, boxes, orchestra, pit or parquet, and the galleries; the scenic representation is of the same general character, and the stage machinery and decorations of the same order. The ordinary theater is adapted to the performance of the opera, and it is well known that this form of exhibition, especially of the light opera and opera comique, rendered 'partly in song and partly in dialogue,' forms in these days a permanent feature of theater work.

"Therefore, there is no ground of legal distinction between the spoken and the lyrical drama which would justify the exaction of a legal license fee from one and the exemption of the other."

Bell v. Mahan, 121 Pa. St., 225.

§ 44. Dramatic Portrayal Must Embody the Element of Human Life.

The question of the dramatic portrayal which is the basis

of a dramatic performance depends entirely on the personal theme or element as therein represented, which theme must be carried out by action portraying or representing some phase of human life. This does not depend on spoken words, for it may be uttered and portrayed by pantomime or even by marionettes if accompanied by dialogue, carried on by unseen but living persons.

Lee v. Simpson, 3 C. B., 871.
Daly v. Palmer, 6 Blatchf., 256.
Day v. Simpson, 18 C. B. (N. S.), 680.

Lacking the phase of representing some element of human life, there is no dramatic composition; for this reason a tumbling or fencing exhibition, a circus, a skating exhibition, costume dance, or feats of legerdemain, although full of action, does not constitute a dramatic performance.

Rex v. Handy, 6 T. R., 286.
Harris v. Commonwealth, 81 Va., 240.

§ 45. Theater and Circus Contrasted.

"Although the term 'theater' has an extended signification and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partakes more or less of the character of the *drama.* The term drama, as defined by Mr. Webster, means *a poem or composition representing a picture of human life and accommodated to action.* It may be conceded that its signification is broad enough to cover any representation in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone; yet it would by no means follow that the terms 'theater' and 'cir-

cus' were synonymous or convertible terms. The dramatic performances which are recognized as belonging to a theater are those adapted to the stage, with the appropriate scenery for their representation. The stage, with its machinery and appurtenances, forms an essential element in the definition of the term 'theater.' A circus, on the other hand, has no stage, but a ring, and the performances are of a character and can take place in the circle, in the absence of the stage and its appurtenances. They may both be arranged under the general term 'amusements,' but differ from each other as one species differs from another under the same genus. It may often be difficult to trace the dividing line between the terms theater and circus from the character of their exhibitions, but there can be none whatever in distinguishing the difference between the usual performances of a theater and an exhibition of feats of sleight of hand or legerdemain. The latter cannot be said to be a dramatic performance in any legitimate sense of that term."

Jacko v. State, 22 Ala., 73.

§ 46. Dramatic Composition Defined.

The words *dramatic composition* have received liberal construction, both in settling rights of ownership thereto at common law or establishing what is embraced within their meaning for the purposes of copyright. The definition of what may properly be classed as dramatic composition is of material aid in determining what a dramatic performance is, the latter depending on the former, as there can be no performance of a dramatic nature unless it consists of the portrayal of a dramatic composition.

We have already considered the extreme limit of the appli-

cation of this definition, and while a pantomime in which the meaning is made plain by appropriate gestures is adjudged dramatic because it would produce the emotions which are the purpose of the regular drama, yet a dance full of vigorous action, with attractive costumes, lights and shadows, illustrating the poetry of motion by a series of steps, poses and movements, is not dramatic, as it tells no story, portrays no character and depicts no real emotion.

Fuller v. Bemis, 50 Fed., 926.
Carte v. Duff, 23 Blatchf., 347.

§ 47. Application of the Definition.

The mechanical arrangement on a stage of water flowing into a tank, wherein the villain fell from a bridge, is not a dramatic composition, being more mechanical than human in its elements.

Serrana v. Jefferson, 33 Fed. R., 347.

See, however, Daly v. Palmer, 6 Blatchf., 256, wherein a railroad scene involving the use of a track and engine in conjunction with human action was held to be sufficiently dramatic in matter of composition. See, also, Daly v. Webster, 56 Fed. Rep., 483, which had to do with the play "Under the Gaslight." In confirming the decision in Daly v. Palmer, the court says: "In plays of this class the series of events are the only composition of any importance. The dialogue is unimportant and as a work of art, trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented and so worked out by the display of feeling or earnestness on the part of the actors

as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative. The mere exhibition of mechanical appliances to represent incidents is not to be included within this classification. There must be a series of events, dramatically represented in a certain sequence or order. In other words, there must be a composition, *i. e.,* a work invented and set in order, a work of various parts and characters, which, when put upon the stage, is developed by a series of circumstances."

§ 48. A Stage Dance Not a Dramatic Composition.

In Fuller v. Bemis, 50 Fed. Rep. 926, Loie Fuller attempted to protect a stage dance as a *dramatic composition* under the copyright laws, depending upon a copyrighted composition describing "The Serpentine Dance by Marie Louise Fuller." The composition was explicit and described every movement and step of said dance, the arrangement of lights, the music, etc., etc. In determining that such dance was not a dramatic composition and not subject to copyright protection the court said: "It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction, but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary, and when it does it is the ideas thus expressed which become subject of copyright. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely

these described and practiced here convey and were devised to convey to the spectator no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic."

The court also comments on the case of Daly v. Palmer, which is sometimes cited as upholding a different rule.

§ 49. The Necessity of Dramatic Element.

While the courts have construed the copyright statutes liberally, in this respect, it still is necessary that the composition have the dramatic element present in a suitable form for representation, and capable of producing those emotions of human life which are the attributes of the drama, and within the meaning of its definition. Such emotions may be sad or gay, tragic or commonplace, for all these in their varying degrees are a reflection of some phase of life either unusual or general.

Russell v. Smith, 12 Q. B., 217.
Daly v. Webster, 56 Fed., 483.
Daly v. Palmer, 6 Blatchf., 256.

In Russell v. Smith the court construed the "dramatic pieces" as enacted in the statutes of 5 and 6 Victoria Chap. 42, section 2. That case concerned a song called "The Ship on Fire," which related the burning of a ship at sea and gave a vivid description of the sufferings of those who escaped; this was sung by one person who played his own accompaniment on a piano. No costume or scenic setting was employed. This was found to be matter sufficiently dramatic to bring it within the meaning of a statute which comprehended "any

piece which could be called dramatic." Though in Barnes v. Miner, 22 Fed. 480, it was held that the singing of well-known songs by an artist, with a kinetoscope which was displayed during the interval of her change of costume, was not such a dramatic composition as to be subject for copyright.

§ 50. Scenery Not a Dramatic Composition.

Divested of the person or the human dialogue the scenery and properties alone do not constitute a dramatic composition, no matter how elaborate, novel or unique they are. These make but a picture which, though moving and beautiful, attractive to the eye and satisfying to the senses, are, like a dance, merely spectacular, and devoid of that which is defined as dramatic, or of human interest. It lacks the human element which gives it dramatic life.

Lee v. Simpson, 3 C. B., 871.
Martinetti v. Maguire, Deady, 218.
See post, § 97, et seq.

This element of human interest, which to a greater or less extent must enter into all dramatic compositions, depends entirely on some physical personal connection with the piece enacted, which shows some mentally evidenced thought appealing directly to the heart or intellectuality of the spectator. The person who speaks or controls need not be visible, as in the performance of marionettes, nor need he utter words when in view, as a clown in a pantomime, for the voice explaining the action and gestures of the marionette and the mind working through the pantomime art of the clown, both illustrate some feature of life with its story of human interest. Such is not true of a dance or a superb picture produced by scenic art; both may be satisfyingly beautiful, but neither is dramatic. "To act in the sense of the statute, is to represent as real, by countenance, voice or gesture, that which is not

real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas."

Daly v. Palmer, 6 Blatchf., 264.

§ 51. What May be the Subject of Copyright as a Dramatic Composition.

As we have seen, only such matters as include a performer or human dialogue and portray emotion can be classed as dramatic performances; a more liberal rule has been laid down as to what may be protected as a dramatic composition under the copyright law. Hence the necessity of considering them separately.

In 1897 Congress enacted that an unlawful presentation of a play or musical composition should be punished by a certain money penalty, and if the performance was willful and for profit it should be a misdemeanor punishable by imprisonment not exceeding one year. Further, the property in uncopyrighted dramatic and musical compositions, for a long time recognized at common law, has in several States been protected by statute.

See *post*, § 80, *et seq.*

U. S. Rev. Statutes, § 4967.
Goldmark v. Kreling, 25 Fed. Rep., 349.

§ 52. Importance of Originality.

Originality is the keynote of copyright, for it only protects such matter as has been created by the author; it must not be imitated or copied from another's work, nor be immoral in its nature.

The originality of the idea, work, composition or arrangement is what copyright was created to protect and is the test of all decisions thereunder, without which no protective action can be successfully maintained at law or in equity.

Bartlett v. Crittenden, 5 McLean, 32.
Reed v. Carusi, Taney, 72.
Jollie v. Jacques, 1 Blatchf., 618.
Emerson v. Davies, 3 Story, 768.
Egbert v. Greenberg, 100 Fed., 447.
Broder v. Zeno Mauvais Music Co., 88 Fed., 74.
Brady v. Daly, 83 Fed., 1007.

§ 53. Originality May Consist of Arrangement.

"Copyright may justly be claimed by an author who has taken existing materials from sources common to all writers, and arranged and combined them in a new form and given them application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement and combination; and, having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement as provided in the copyright act."

Lawrence v. Dana, 4 Clifford, 75.
Gray v. Russell, 1 Story, 11.
Lewis v. Fullarton, 2 Beav., 6.

A rearrangement of old matter, new words to an old air,

or a new air to old words are matters which may be copyrighted as sufficiently original.

Leader v. Purday, 7 C. B., 4.
Reed v. Carusi, Taney, 72.
Aronson v. Fleckenstein, 28 Fed. Rep., 75.
Atwill v. Ferret, 2 Baltchf., 39.

"Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author as well as the thought of others; and would not have found existence in the form presented but for the distinctive individuality of mind from which it sprang."

National Tel., etc., Co. v. Western, etc., Co., 119 Fed., 294.

§ 54. Scenic Effects Constituting Links in a Chain of Incident Speech and Action as the Subject of Copyright.

A scene, portraying some particular idea in conjunction with a play, a written synopsis of directions conveying the author's ideas by means of characters representing the energetic wholly by action, the arrangement of new words to an old tune or a new score to an already written opera, an original scene, or some innovation of a mechanical nature clearly associated with the production, are all matters properly protected by copyright as dramatic or musical compositions.

Daly v. Webster, 56 Fed., 483.
Daly v. Palmer, 6 Blatchf., 256.
Atwill v. Ferrett, 2 Blatchf., 39.
Jollie v. Jacques, 1 Blatchf., 216.

§ 55. The Doctrine of Daly v. Palmer.

In Daly v. Palmer, 6 Blatch. 256, concerning Daly's play "After Dark," Blatchford, J., delivering the opinion, said: "Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and in doing so has evinced skill and art; but the same use is made in both plays of the same series of events, to excite by representation the same emotions in the same sequence. There is no new use, in the sense of the law, in B's play of what is found in the plaintiff's 'railroad scene.' The 'railroad scene' in B's play contains everything which makes the 'railroad scene' in the plaintiff's play attractive as a representation on the stage. As in the case of a musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars; so in the case of a dramatic composition designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that, in which the whole merit of the scene consists, is incorporated in another work without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and from the language of the first play is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy

if the appropriated series of events when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impression to and exciting the same emotion in the mind in the same sequence or order. Tested by these principles, the 'railroad scene' in B's play is undoubtedly, when acted, performed, or represented on a stage or in public place, an invasion or infringement of the copyright of the plaintiff in the 'railroad scene' in his play. The substantial identity between the two scenes would naturally lead to the conclusion that the later one had been adapted from the earlier one."

§ 56. Adaptation is Subject of Ownership.

An adaptation of a published play, a foreign drama or an opera will be protected because of new and original results which the adapter has obtained by his own work.

Aronson v. Fleckenstein, 28 Fed., 75.
French v. Maguire, 55 How. Pr., 471.

§ 57. Mechanical Contrivances as Part of a Dramatic Composition.

An isolated scene or picture, a mechanical contrivance merely incident to a play, or a novel treatment of certain stage properties is not the subject of copyright as a "dramatic composition" unless it can be fairly considered as some necessary or vital part of that which, coupled with the words and action of the performance, goes to make up the play or drama in its entirety. It must be an integral part or reasonable incident of the composition to be considered dramatic in nature

and a part of the drama itself. The element of fitness must be found, otherwise it is merely incident to and not a part of the dramatic composition.

In Serrana v. Jefferson, 33 Fed. 347, the plaintiffs used in the play "Donna Bianca, or Brought to Light," a real tank three feet square and seven feet deep filled with natural water, which was made to represent a river, and the plaintiffs sought to protect the same under the copyright act as an original composition. The court said: "There is nothing original in the incident thus represented on the stage. Heroes and heroines, as well as villains of both sexes, have for a time whereof the memory of the theatergoer runneth not to the contrary, been precipitated into conventional ponds, lakes, rivers, and seas. So frequent a catastrophe may fairly be regarded as the common property of all playwrights."

§ 58. Common-Law Ownership in Compositions.

The common law recognizes a right of ownership in composition and ideas. The same property or title which is protected in a tangible thing is in the same degree protected in a dramatic or musical production, a song, a verse, a mechanical or original scene, a method or contrivance of stage craft, and so long as its originator or owner keeps it to himself and does not dedicate it to the public he can protect its use perpetually at the common law. There must, however, be originality in the thing *in toto* or at least in some important part. It is the personal idea which is alone recognized as the subject of individual ownership. This is his to do with as he pleases; in it he has absolute title, and his right therein is fully protected.

That the artisan has a right to the thing he builds or molds

with his hands is apparent, and the attempt to take it from him is readily recognized as wrong, both in the civil and criminal law. His work has created a thing which has shape and substance. To the same extent must be recognized a protection for the work evolved from the brain of man in the form of a literary production, a play, an opera, a song, or a stage or scene contrivance. A thing copyrighted has protection, but it is also dedicated to certain uses of the public, and although still the property of its creator, can be used by the public in ways depriving the author of his proper recompense.

The author of a book or poem copyrights and publishes his work; he is protected to the extent of deriving the proceeds of its sale, but the work cannot be copied or sold save by those having his authority. The nature of such work is only profitable when published and offered to the public. This, however, is no protection to the playwright or composer. His profit is derived from a production by those who will give him a price or royalty for its use. Its general sale and publication as a copyrighted play or composition would at once defeat his principal source of income and make his work valueless. In such cases the exclusive use constitutes its sole value. The original song, sketch, or joke of a performer, the mechanical device and treatment of some scene or situation originated by a producer, would at once lose all value if after a public use it could be copied in whole or in part by anyone else.

The provision of the copyright law as to plays and musical compositions is generally the same as provided for books. To obtain the copyright of a play it must be printed and copies deposited in Washington. As a result plays are not copyrighted, for the printing would make them public property, and their value, apart from the purely literary aspect, would be

nothing. As a matter of practice and protection they remain in manuscript, each part with the connecting cues being distributed among the players who are to perform therein.

See "Law for Playwrights," 8 So. L. Rev., N. S., 13.

§ 59. Title, How Protected.

The title to a play is a proper subject of copyright and will be protected, although the full text of the play itself is not printed nor copies deposited in Washington. See *post,* § 105. But there should be no variance between the title as deposited and as finally used. Mr. Daly, years ago, filed and secured a copyright to the title of a play called "Under the Gas Light, a Romantic Panorama of the Streets and Homes of New York." He produced it as "Under the Gas Light, a Drama of Life and Love in these Times." Twice this was the subject of contention before the courts, and both times it was held that the variance was fatal. Later, however, the court reversed these former decisions and, rejecting the descriptive words, held that the title was merely the words "Under the Gas Light," and upheld the copyright.

Daly v. Brady, 39 Fed. Rep., 265.
Daly v. Webster, 47 Fed. Rep., 903.
Daly v. Webster, 56 Fed. Rep., 483.

In another case the question arose as to whether the title "Pianoforte arrangement of the Comic Opera The Mikado or the Town of Titipu, by W. S. Gilbert and Sir Arthur Sullivan" was a variance from the title "Vocal Score of the Mikado or the Town of Titipu." See *post,* § 104.

Carte v. Evans, 27 Fed. Rep., 861.

§ 60. Method of Protecting Title.

The protection of a title is accomplished by depositing a printed copy of the title page of the play, though the play itself is never published, and the two copies required by law never deposited. See *post*, § 104.

"The letter of the law does not require the book to be filed to confer a copyright, and it seem to be assumed throughout all of the statutes that a copy of the book will, and must, within a short time after filing the title page, be filed with the Librarian of Congress."

Boucicault v. Hart, 13 Blatchf., 47.
Revised Statutes, United States, § 4956.

"The rights of a complainant to a copyright, if any he has, are conferred by the Constitution and the statutes of the United States. It is there we must look for them, and unless there found, they do not exist. If conditions are imposed by statute, as preliminary to the existence of such rights, their performance must be shown. All the conditions clearly imposed by Congress are important, and their performance is essential to a perfect title."

Boucicault v. Hart, 13 Blatchf., 47.
Wheaton v. Peters, 8 Peters, 657.

OWNERSHIP IN PLAY OR MUSICAL PUBLICATION

HOW PROTECTED CIVILLY AND CRIMINALLY

PUBLICATION DEFINED

PERFORMANCE OF PLAY DOES NOT CONSTITUTE PUBLICATION

ABANDONMENT

RIGHT TO REPEAT OR RECITE FROM PLAY

PLAY MUST BE MORAL AND NOT LIBELOUS

LIABILITY FOR WRONGFUL USE OF UNPUBLISHED COMPOSITIONS

CHAPTER IV

§ 61. Ownership in Play or Musical Composition.

The common law has long recognized title or ownership in a dramatic or musical composition, and authors are protected in the exclusive right of their literary, musical, or intellectual productions, with the enjoyment of the pecuniary benefits derived therefrom. This is a well-settled proposition and applies to all plays or other compositions which have not been dedicated to the public either by publication or abandonment; the author has a right of property or title in his original manuscript and its contents of words, ideas, sentiments, characters, arrangements, combinations, description, dialogue, and their connection one with another. Just as the author has a right of ownership in his play, the composer in his opera, so has a dancing instructor ownership in an arrangement of steps, positions, and figures, the producer of plays to his scenes, situations, and mechanical devices, the vaudeville artist to his original matter and specialty act, and the pantomimist to his scheme of silent story as worked out by action and gesture. The originality of the thing, though intangible, is an incorporeal matter capable of ownership and given full protection at the common law. This right exists independent of statutes concerning copyright, and should be considered independently.

Boucicault v. Hart, 13 Blatchf., 47.
Boucicault v. Fox, 5 Blatchf., 87.
Crowe v. Aiken, 2 Biss., 208.
Palmer v. DeWitt, 47 N. Y., 532.

"This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession and is protected by the same process and has the benefit of all the remedies accorded to other property as far as applicable. It is personal, as other movable property, personal in legal contemplation, following the person of the owner, and is governed by the law of his domicile."

Palmer v. DeWitt, 47 N. Y., 532.

§ 62. Protection at Common Law and Under Copyright.

The common law provides protection which cannot be obtained under our copyright law. Many things in the way of original ideas, devices, and systems are not subject to copyright registration and protection under the copyright law and its construction by the courts. Advertisements, advertising devices and novelties, contracts, cuts for advertisements, dances, form of words, ideas, mechanical devices, names of companies, stage names, professional names, stage scenery, specialty acts, stage business, stage scenes, systems, and tickets, though capable of ownership and having a title which the common law protects, are not subject to copyright registration and protection.

Ideas, methods, schemes, and systems, as such, are not subject to registration for copyright protection, and yet these very matters are the underlying basis of much which is valuable and profitable in stage business, and when original are capable of ownership, but though protected at common law, have no standing in the sense of a copyrightable thing.

A man's sole ownership in any original and unpublished manuscript of a play or musical composition, and his sole property in the use of that manuscript, whether to play, read,

or sing it himself or to have it played, read, or sung by other people in a theater or elsewhere, is fundamental law.

This was the law of England until 1845, when its copyright act destroyed such form of property. In the United States the common law still prevails and recognizes this kind of property, which is not affected by the copyright law.

§ 63. A Presentation on the Stage is Not a Publication.

The very important question as to ownership and title to a play which had been publicly performed arose in the early case of Keene v. Kimball, 16 Gray (Mass.), 545, which involved the rights to Tom Taylor's play of "Our American Cousin." Taylor gave to Laura Keene, the lessee and manager of Laura Keene's Theater, an absolute bill of sale and assignment of the comedy and delivered thereunder the manuscript. Laura Keene presented this comedy at her theater continuously for five months, when the proprietor of the Boston Museum attempted a production of the same play without any right to do so from either Taylor or Keene. And although the doctrine established in this case was subsequently reversed in Tompkins v. Halleck, 133 Mass. 32, it is interesting to note what the court said in respect of ownership in dramatic compositions. "We can entertain no doubt that a dramatic composition is equally under the protection of law with any other literary work. Courts will not interfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production; but the particular application once made of this rule of the common law, in conformity with the peculiar opinions, sentiments, or prejudices of one generation of men, will not control its application in a state of society where different views prevail. If

our ancestors prohibited all scenic exhibitions it was because they regarded them as immoral and pernicious. If we do not so regard them, the reason ceasing, the rule ceases with it.

"An author has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which equity will protect his assignee as well as himself. This property continues until, by publication, a right to its use has been conferred upon or dedicated to the public.

"The representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignee of this right of property."

The court, however, went too far in this case; for after stating the doctrine which still prevails as to ownership, it attempted to establish a right in anyone to reproduce the same, provided he solely depended on his memory for so doing, and quite erroneously decided that Laura Keene's production could be copied by Kimball as a matter of right, as there was no property in gestures, tones, or scenery which would forbid such production if produced from memory solely.

The illogical element of this decision is apparent, as it really destroyed the ownership which it recognized as a matter of common law right. For if anyone by aid of memory could reproduce and use whatever he saw, no ownership would be of any possible value. Such, however, remained the law in Massachusetts and elsewhere until the question again arose in Tompkins v. Halleck, 133 Mass. 32

Here was involved the right to a drama called "The World." It appeared in evidence that this play was originally written in England, where, after presentation, it was sold to one Colville in New York, who caused it to be altered in some particulars by one Stevenson. It was successfully represented in New York and then sold to the plaintiffs with the exclu-

sive right to present the same in the New England States. The drama had never been copyrighted or printed.

While represented at Wallack's Theater in New York one Byron and one Mora attended the performance on several occasions with the intent of copying and reproducing the drama. Byron committed as much of the play as he could to memory and after each performance dictated to Mora until the copy was completed. Byron subsequently made an arrangement with the defendant to produce the same and as produced it was called "The World," and was found to be in all substantial particulars identical with the plaintiff's drama of the same name. This was directly following the decision in Keene v. Kimball, and in the line of its suggestions.

In overruling the doctrine established in Keene v. Kimball and stating the law as it now stands, the court says: "That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public, has never been disputed. If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public. If of a work of which a copyright has been obtained, it is so dedicated, subject to the protection afforded by the laws of copyright, the author accepting the statutory rights thereby given in place of his common-law rights. But the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein. It will not interfere with his claim to obtain a copyright therefor. Nor will it deprive him of his power to prevent a publication in print thereof by another. Nor can we perceive why it should deprive him of his right to restrain the public representation thereof by another.

"A theory that the lawful right to represent a play may be acquired by the exercise of the memory, but not through the use of stenography, writing, or notes, is entirely unsatisfactory. It is not easy to understand why the author by admitting the public to the performance of his manuscript play any more concedes to them the right to exercise their memory in getting possession of his play for the purpose of subsequent representation than he does the privilege of using writing or stenography for that purpose. The spectator of a play is entitled to all the enjoyment he can derive from its exhibition. He may make it afterward the subject of conversation, of agreeable recollection, or of just criticism, but we cannot perceive that in paying for his ticket of admission he has paid for any right to reproduce it. The mode in which the literary property of another is taken possession of cannot be important. The rights of the author cannot be made to depend merely on his capacity to enforce them, or those of the spectator on his ability to assert them. One may abandon his property, or may dedicate it to the use of the public; but while it remains his, the fact that another is able to get possession of it in no way affects his rights.

"The special use of his play made by the author, for his own advantage, by a representation thereof for money, is not an abandonment of his property nor a complete dedication of it to the public, but is entirely consistent with an exclusive right to control such representation. If the spectator desires, there is no reason why he should not be permitted to take notes for any fair purpose; as, if he is a dramatic critic, for fair comment on the production, which is offered to the favorable consideration of the public; or, if a student of dramatic literature, for comparison with other works of this class. The taking of notes in order to obtain a copy for

representation is a different matter; it is the use intended to be made that renders it proper to restrain such an act. The ticket of admission is a license to witness the play, but it cannot be treated as a license to the spectator to represent the drama if he can by memory recollect it, while it is not a license so to do if the copy is obtained by notes of stenography. In whatever mode the copy is obtained, it is the use of it for representation which operates to deprive the author of his rights."

§ 64. Value of Play to Author Not Limited to One Performance.

The same doctrine prevailed in Palmer v. DeWitt, 47 N. Y. 532. "The value to the author of a play or of a lecture, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first, so that it may be fairly assumed that it is not intended, in any case, to surrender property in a literary composition so long as the author of it retains it in manuscript and uses it before the public for his private pecuniary benefit."

"It seems to me that any surreptitious procuring of the literary property of another, no matter how obtained, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury."

"The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterward as the means of depriving the owner of his property. Such use, it seems to me, is as much an

infringement of the author's common-law right of property as if his manuscript had been feloniously taken from his possession."

That a representation of a play or opera is not a publication, and that the common-law ownership continues, see

Boucicault v. Hart, 13 Blatchf. (U. S.), 47.
Roberts v. Myers, 23 Monthly Law Rep., 396.
Palmer v. DeWitt, 47 N. Y., 532.
Crowe v. Aiken, 2 Biss., 208.
Boucicault v. Fox, 5 Blatchf., 87.
Shook v. Rankin, 6 Biss., 477.
Tompkins v. Halleck, 133 Mass., 32.
Gilbert v. Bacher, 9 W. N. C. (Pa.), 14.

§ 65. Violation of Common-Law Rights.

The publication or representation of a play acquired without the author's consent by means of phonographic reports, theft, or other surreptitious means is such a violation of the common-law rights of ownership as will entitle the owner to an injunction restraining such improper use.

Macklin v. Richardson, Ambl., 694.
Crowe v. Aiken, 2 Biss., 208.
Tompkins v. Halleck, 133 Mass., 32.
French v. Maguire, 55 How Pr., 471.
Keene v. Wheatley, 4 Phila. (Pa.), 157.
Shook v. Daly, 49 How Pr., 366.
Post, Chapter 24, Injunctions.
Ante, § 63.
Thomas v. Lennon, 14 Fed. Rep., 849.

§ 66. Presentation of Play Not Legal Publication.

The presentation of a play or other matter capable of ownership is not a publication, and therefore no dedication to

the public. The author has a right to use his creation for profit, and so long as it is confined to manuscript form or oral direction or instruction his rights continue. He cannot, however, publish his play or music and stipulate its private and not public uses. There can be no partial dedication. He may lease his rights and allow productions in many places, without destroying his ownership. Once placed on actual sale, though but one copy is sold, his rights cease and no further protection is afforded by the common law.

French v. Kreling, 63 Fed. Rep., 621.
Shook v. Rankin, 3 Cent. Law J., 210.

§ 67. Notice Not Necessary.

As a mere representation by the author or his assignee is no dedication thereof, no restrictive notice is necessary to spectators to protect the author's rights, which are fixed and determined.

Crowe v. Aiken, 2 Biss., 208.
French v. Kreling, 63 Fed. Rep., 621.

It is unnecessary to state on the programme an announcement that the play is not published by the performance given or to caution and warn the public against the use of the same. The protection attaching to ownership exists independently of notice, and so long as there has been no publication by printing or dedication it will continue.

The Iolanthe Case, 15 Fed. Rep., 439.

§ 68. Publication, What Constitutes.

The work, if not printed, abandoned, or dedicated to the public, has not been legally published. The fact that the

author has permitted and procured its representation for his own benefit and through his selected channels does not amount to a publication within the statute or a dedication to the use of the public. The representation of a play on a stage is not such a publication or dedication to the public as authorizes others to print and publish it without the author's permission. The manuscript and the author's right are still within the protection of the law. The author has the exclusive right to the first publication of his work, but no exclusive right to multiply copies or control the subsequent issues, save under copyright protection.

Boucicault v. Hart, 13 Blatch,, 47.

"And there is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives, or to such persons as he shall transfer them. But the author who publishes his work dedicates it to the public. He voluntarily incurs all the responsibility of a publisher. His object is to instruct or amuse mankind, and the more his work is circulated, the greater is the compliment to his ability as a writer. There is no reason then against a republication of the work by anyone, except that it may reduce the profits of the author. And on this ground he cannot complain, as he has failed to secure the right under the statute."

Bartlett v. Crittenden, 5 McLean, 32.

§ 69. Abandonment Defined.

"Any clear, unequivocal and decisive act of the proprietor of a copyright showing an intention not to maintain and exercise his right will constitute an abandonment and warrant any person in the free and unrestricted use of the work."

9 Cyc., 927, Title "Copyright," citing:
Wall v. Gordon, 12 Abb. Pr. N. S., 349.
Mifflin v. Dutton, 112 Fed., 1004.
Boucicault v. Wood, 2 Biss., 34.
Shook v. Rankin, 21 Fed. Cas., 12,805.

§ 70. The Right of Ownership Extends to Assignees and Licensees.

The author of any literary or dramatic work is the sole owner of the manuscript and its contents and of copies of the same, independent of legislation, and such ownership continues so long as he does not publish it or part with his title. This is a common-law right and exists irrespective of copyright statutes. This right of property, though intangible, he can convey and transfer, and a court of equity will protect him or his assignee just as it will the owner of any other kind of property. The giving of a copy or of several copies of the manuscript will not necessarily be a publication, nor is a public performance such.

§ 71. Title, and Assignees Thereof.

"Until published the work is the private property of the author, wherever the common-law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to such rights as the author may have received under copyright laws,

and they can have no force or give any rights beyond the territorial limits of the government by which they are enacted.

"The rights of assignees domiciled there, or alien authors resident abroad, have been sustained by the courts of this country, and no distinction has been made between transfers of literary property and property of any other description. The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation of his rights of property in his unpublished works."

Palmer v. DeWitt, 47 N. Y., 532.
Macklin v. Richardson, Ambler, 694.

The assignee has a right to assign, and his assignee in turn can invoke protection for an invasion of the author's rights as assigned to him through another.

Crowe v. Aiken, 2 Biss. (U. S.), 203.

A mere licensee or a part owner can maintain a suit for the protection of his common-law rights of ownership as fully and effectually as the original owner.

Aronson v. Fleckenstein, 28 Fed. Rep., 75.

§ 72. Good Faith of Wrongful User No Excuse.

It is no defense to an action brought for the protection of the owner, assignee, part owner, or licensee of a play that the wrongful use was by one acting in good faith and belief that he, himself, was actually the owner of the manuscript.

Shook v. Daly, 49 How Pr., 366.

§ 73. Ownership in Alterations and Changes.

Alterations and changes which an author may from time to time make in his manuscript belong to him and are his property to the same extent and to all the purposes of the original; if these changes are unwritten and have been made by verbal suggestion, their use by another is improper, and it has been held that a proprietor of a theater to whom such changes were communicated by an actor could be enjoined from using them.

Keene v. Wheatley, 4 Phila. (Pa.), 157.

The written additions to the manuscript are not independent literary productions, but *accessions* whose proprietorship is incidental to that of the principal composition. Unwritten additions are not capable of being the subjects of literary ownership in anybody. But independent of any question of proprietary right, if one profits by these suggestions, while in the employ of the author or his assignee, he cannot use them in another and rival position. Such is a breach of confidence from which a court of equity will not permit him to derive an advantage to the true owners' prejudice or to retain an advantage thus derived.

Keene v. Wheatley, 4 Phila. (Pa.), 157.

§ 74. Right to Repeat or Recite from Play.

Anyone has a right to orally repeat a book or play which has been published by its author, or any part thereof, but he cannot reproduce and republish it, or a substantial part of it, in writing or in print.

An actor can be enjoined from using his remembrance of

a part in an unpublished play, in another and unauthorized production. Where the plaintiff translated a novel and subsequently dramatized it and the defendant, an actor, memorized the part of one of the characters while in the plaintiff's employ, it was held that he was properly enjoined from speaking the part and using the business original to the plaintiff's dramatization in a rival theater where another dramatization of the same novel was being performed.

Keene v. Wheatley, 4 Phila. (Pa.), 157.
Fleron v. Lackaye, § 95, post.

The same doctrine was recognized in Shook v. Rankin, reported in 3 Cent. L. J. 210, where the court prohibited a use of the play "The Two Orphans." There the defendant, McKee Rankin, familiarized himself with the play when represented, he being a leading actor in the cast, and thus it was memorized, and subsequently used by him in another's theater.

§ 75. Play Must be Moral and Not Libelous.

If a play or other literary production is irreligious, libelous, obscene, or immoral, it is no part of the office of the court to protect it by injunction or otherwise. The rights of the author in this respect are secondary to the rights of the public to be protected from what is subversive of good morals, and this applies equally at common law, equity, or under the copyright act.

Shook v. Daly, 49 How Pr. R. (N. Y.), 366.
Story's Eq. Juris., § 936 (12th Ed.).

In Martinetti v. Maguire, 1 Deady (U. S.), 216, the court refused to enjoin a production of a play called "The Black

Crook" on the ground that the law would not interfere to prevent the giving of an indecent performance, although it was an infringement. "'The Black Crook' is a mere spectacle: in the language of the craft, a spectacular piece. The dialogue is very scant and meaningless and appears to be a mere accessory to the action of the piece; a sort of verbal machinery tacked on to a succession of ballets and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called 'Paradise,' and, as Witness Hamilton expresses it, consists mainly 'of women lying around loose'; a sort of Mohammedan paradise, I suppose, with imitation grottoes and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts or an exhibition of model artists might as justly be called a dramatic composition."

§ 76. Publication Must be Intentional.

From the law as already stated it will be remembered that the ownership or title to a play, composition, opera, and the like depends upon its originality and the fact of its never having been published and thus dedicated to public uses. This deprives the owner of his peculiar and intangible rights therein, for if his work is printed and sold, he can no longer expect to retain his rights therein at common law. The personal element which has been protected is thus destroyed, and what was private becomes by the author's own act public property, or he may by his acts deprive himself of this right by an abandonment. This dedication or publication or aban-

donment must be intentional, and is not accomplished by an unlawful or surreptitious obtaining of the manuscript or by an unauthorized or felonious retention thereof. Such wrong will be prevented by injunction.

Story's Eq. Jur., § 943, (12th Ed.).
Keene v. Wheatley, 4 Phila. (Pa.), 157.
Aronson v. Fleckenstein, 28 Fed., 75
Keene v. Kimball, 16 Gray, 545.
Tompkins v. Halleck, 133 Mass., 32.
Boucicault v. Hart, 13 Blatchf., 47.
Palmer v. DeWitt, 47 N. Y., 552.

Where the authors of the opera "Iolanthe" allowed the publication of the libretto and vocal score with piano accompaniment and kept the orchestration in manuscript, they were denied relief against a person who independently arranged a new orchestration, using for that purpose only the published vocal and piano scores. Here had been a publication, and as the scores had been dedicated to the public they could be used for any purpose, and it was no invasion of the author's rights after such publication to arrange an orchestral score from the book and piano scores as published.

Carte v. Ford, 15 Fed., 439.

§ 77. Publication Terminates Right of Exclusive Use.

When the composer of any work, literary, musical or dramatic, has authorized its publication in print, his control over so much as he has published, and of the use which others make of it, is at an end.

Wheaton v. Peters, 8 Pet., 591.
Mark Twain Case, 14 Fed. Rep., 728.
Iolanthe Case, 15 Fed. Rep., 439.

§ 78. Remedies for Wrongful Invasion of Ownership.

As ownership is recognized at common law, an invasion of that right affords grounds for an action for damages in which will be awarded compensation for such injuries as can be legally proved. This form of action and what damages are provable is discussed in Chapter 22, *post*. As an action at law is generally inadequate in these matters, relief is more generally obtained by equitable proceedings. See Chapter 24, *post*.

§ 79. Criminal Liability for Wrongful Use of an Unpublished or Undedicated Play or Dramatic Composition.

While the common law recognizes ownership in dramatic and musical compositions, and equity grants an injunction against a wrongful use thereof, such protection is often found inadequate and too slow to be of any beneficial use. The harm by piracy is often done and the transgressor beyond the jurisdiction of the court before the author learns of the violation of his rights.

This wrongful use of another's ideas is unfortunately common and by those who are financially unable to respond in damages or beyond immediate reach of a writ of injunction. To remedy this evil has been the earnest effort of the American Dramatists Club, of which Bronson Howard, Esq., the eminent playwright, is president. Mr. Howard, in conjunction with Harry P. Mawson, Esq., the club's aggressive chairman of committee on legislation, and the coöperation of the club's members, has been instrumental in securing statutory protection against the wrongful use of unpublished plays and operas in many of our States.

This is an important and valuable effort, and the reasons

and intendment of these statutes are set forth by Mr. Howard in his published address on this subject, from which we quote:

"These laws have no relation, in any sense or any way, to the copyright laws of the United States, or to the principle of copyright. They protect a form of property which was recognized long before copyright was established by statute in any country. The United States statutes provide a penalty of one year imprisonment for infringement of copyright, but Congress has no power, under the Constitution, to deal with this form of uncopyrighted property. Only the State legislatures can do so.

"These laws do not, in any sense whatever, create a new form of property; nor give any special right of property to anyone; nor extend protection to any property not previously recognized by State courts as properly subject to the protection of the law. They simply provide for the more efficient enforcement of the authority of the State courts in dealing with what has been recognized as property, so long as English and American law has taken cognizance of literature in any form."

§ 80. These Laws Do Not Create a New Offense.

"These laws do not, in any sense, create a new offense, nor establish a penalty for a new offense; they merely make an old offense punishable by criminal as well as civil penalty. They establish a penalty, heretofore lacking in the State laws, for what is already necessarily and logically a criminal offense; because the State courts have always recognized the fact that the manuscript of a play or musical composition, and its use, is a man's personal property under the common law; and this property has always been protected by damages

or injunction; under these laws a criminal penalty, as well, may follow misappropriation, as in the case of all other forms of property. The necessity for this additional penalty lies in the fact that nearly all the offenders of this kind, with whom the courts deal, in States where such laws do not yet exist, can now defy their authority; being irresponsible wanderers from place to place, without financial resources or fixed residences; tramps, who merely laugh at money damages and injunctions, and despise the law."

As a direct and valuable result of the work of this organization, statutes have been passed in some of the States (and should be in all) making a misdemeanor of the wrongful invasion of this well-recognized property right.

To steal a man's coat is a crime which was punishable in earlier times by death and now by imprisonment, yet only recently, and in a few States at that, has it been made a punishable offense to steal the product of a man's brains and intellect, though it represent the labor of many years of effort, experience and study. Why not protect that which is of infinitely more value to the individual by the same degree of law which protects his coat?

The plea of the Dramatists Club is fair and the reasons undebatable; the protection sought is just and needed, and should be enacted in every State.

The statutes on this subject are important, and, being of recent date and not of ready and general access, are here stated in full.

§ 81. New York.

Section 1. The penal code of the State of New York is hereby amended by adding thereto a new section to be known as section seven hundred and twenty-nine, and to read as follows:

Section 729. Any person who causes to be publicly performed or represented for profit any unpublished, undedicated or copyrighted dramatic composition, or musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished, undedicated or copyrighted, and without the consent of its owner or proprietor permits, aids or takes part in such a performance or representation shall be guilty of a misdemeanor.

Section 2. This act shall take effect September first, eighteen hundred and ninety-nine.

§ 82. Louisiana (1900).

Be it enacted by the General Assembly of the State of Louisiana, that any person or company who takes part in or causes to be publicly performed or represented for profit any unpublished or undedicated dramatic or musical composition known as an opera without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished or undedicated, and, without the consent of the owner or proprietor, permits, aids, or takes part in such a performance or representation, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars for every such performance, or imprisonment for not less than thirty days.

§ 83. New Hampshire.

The present law of New Hampshire, protecting labels, trade-marks, special advertisements, establishing brands, etc., was passed in 1895. Its protection extends over "any liter-

ary, dramatic, or musical composition" not copyrighted or published. Included, also, under its sheltering wing are maps, charts, engravings, cuts, prints, photographs and negatives, statues, statuary, and models or designs. The punishment for violation of this law is as follows: Imprisonment for not less than three months nor more than one year, or a fine of not less than one hundred nor more than two hundred dollars, or both.

§ 84. Oregon (Feb. 27, 1901).

Any person who knowingly causes to be publicly performed or represented for profit any unpublished or undedicated dramatic composition, or musical composition, known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished or undedicated, and without the consent of its owner or proprietor, permits, aids, or takes part in such a performance or representation, shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred (100) dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment. Each performance or representation so given shall be deemed a substantive offense.

§ 85. Pennsylvania (May 29, 1901).

Section 1. Be it enacted, etc., that no unpublished dramatic play and no unpublished musical composition shall be publicly presented for profit without consent of the author or authors thereof.

Section 2. Any and all persons, firms and corporations violating the provisions of section one of this act shall be guilty of a misdemeanor, and on conviction thereof shall for

each offense be sentenced to pay a fine of not less than ten dollars and not more than five hundred dollars, or to be imprisoned not exceeding three months, or either or both, at the discretion of the court of quarter sessions.

§ 86. Ohio (March 25, 1902).

Section 1. That any person who causes to be publicly performed or represented for profit any unpublished or undedicated dramatic composition or musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished or undedicated, and, without the consent of its owner or proprietor, permits, aids or takes part in such a performance or representation, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars and not more than three hundred dollars, or be imprisoned not less than thirty days or more than three months, or both.

Section 2. This act shall take effect and be in force from and after its passage.

§ 87. New Jersey (April 10, 1902).

1. Any person who causes to be publicly performed or represented for profit any unpublished, undedicated or copyrighted dramatic composition, or musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished, undedicated or copyrighted, and without the consent of its owner or proprietor permits, aids or takes part in such a performance or representation, shall be guilty of a misdemeanor.

2. This act shall take effect immediately.

§ 88. Massachusetts (March 29, 1904).

Whoever causes to be publicly performed or represented an unpublished and undedicated dramatic or musical composition without the consent of the proprietor thereof, and with knowledge or notice that such dramatic or musical composition is unpublished and undedicated, or whoever, being in control of a theater or other public place of amusement, licensed or unlicensed, without such consent and with such knowledge or notice, permits a public performance or representation of such dramatic or musical composition in such theater or place of amusement, or whoever without such consent and with such knowledge or notice takes part in a public performance or representation of such dramatic or musical composition, shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment.

§ 89. California (March 18, 1905).

Section 1. There is hereby added to the Penal Code a new section to be numbered 367a, to read as follows:

367a. Any person who causes to be publicly performed or represented for profit any unpublished or undedicated dramatic composition or dramatic musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished or undedicated and without the consent of its owner or proprietor, permits, aids, or takes part in such a performance or representation, or who sells a copy or a substantial copy of any unpublished, undedicated or copyrighted dramatic composition or musical or dramatic musical composition, known as an opera, without the consent of the

author or proprietor of such dramatical or dramatic musical composition, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty (50) dollars and not more than three hundred (300) dollars, or be imprisoned for not less than thirty (30) days or more than three (3) months or both such fine and imprisonment.

§ 90. Minnesota (March 15, 1905).

Section 1. Any person, company or corporation who knowingly causes to be publicly performed or represented for profit, any unpublished or undedicated dramatic composition or musical composition, known as an opera, without the consent of its owner or proprietor, who knowing that such dramatic or musical composition is unpublished, or undedicated and without the consent of its owner or proprietor, permits, aids or takes part in such a performance or representation, or any person, company or corporation who sells a copy or a substantial copy, or any unpublished, undedicated or copyrighted dramatic composition or musical composition, known as an opera without the written consent of the author or proprietor of such dramatic or musical composition, shall be guilty of a disdemeanor.

Section 2. This act shall take effect and be in force from and after its passage.

§ 91. Wisconsin (June 1, 1905).

Section 1. Any person who sells a copy or a substantial copy, or who causes to be publicly performed or represented for profit any unpublished or undedicated dramatic play or musical composition, known as an opera, without the written consent of its owner or proprietor, or who, knowing that such

dramatic play or musical composition is unpublished or undedicated, and without the written consent of its owner or proprietor, permits, aids, or takes part in such a performance or representation, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than one hundred dollars, or by imprisonment not exceeding sixty days.

Section 2. This act shall take effect and be in force from and after its passage and publication.

§ 92. Michigan (June 16, 1905).

Section 1. No unpublished, uncopyrighted or undedicated dramatic play, and no unpublished or undedicated musical composition shall be publicly performed or represented for profit without consent of the owner or proprietor thereof.

Section 2. Any and all persons, firms and corporations that shall cause to be publicly performed or represented for profit any unpublished, uncopyrighted or undedicated dramatic composition, or unpublished or undedicated musical composition without the consent of the owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished or undedicated, and without the consent of its owner or proprietor, permits, aids or takes part in such a performance or representation, shall be guilty of a misdemeanor and on conviction thereof, shall for each offense be sentenced to pay a fine of not less than ten dollars, and not more than five hundred dollars or be imprisoned not exceeding three months, or either, or both, at the discretion of the court.

§ 93. Connecticut (June 7, 1905).

Section 1. Any person who causes to be publicly performed or represented for profit any unpublished, undedicated or copyrighted dramatic composition or any musical composition, known as opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished, undedicated or copyrighted, and without the consent of its owner or proprietor, permits, aids, or takes part in such performance or representation shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.

Section 2. Nothing in this act shall affect amateur performances or representations given for purely charitable purposes.

DRAMATIC AND MUSICAL COMPOSITIONS UNDER COPYRIGHT LAWS

RIGHTS IN TRANSLATION AND DRAMATIZATION

RIGHT OF AUTHOR TO SELL HIS WORK

WHAT MAY BE PROTECTED BY COPYRIGHT

RIGHTS OF EMPLOYER TO WORKS OF EMPLOYEE

TITLE OR NAME OF PLAY

CHAPTER V

§ 94. Dramatic and Musical Compositions Under the United States Coypright Law.

Under the copyright law a *dramatic composition* covers a tragedy, comedy, farce, drama, play or any similar differentiating term.

A musical composition includes both words and music, or music alone. If it is desired to copyright the words only of a song or opera, application should be made for a "book." These distinctions are statutory, and hence arbitrary.

The statute affords no protection for stage business, specialty acts, stage scenes, curtains, ideas, dances and kindred matters. See § 62, *ante*.

The author, or his assignee, of any literary, musical, dramatic or artistic work, which is recognized by the statute, may obtain a copyright, provided it is original matter, on application and payment of the required fee, and to complete or hold this copyright, is further required before the publication or distribution of any copies thereof to deposit two copies with the Librarian of Congress, which must be complete and of the best edition. The copyright for dramatic or musical composition titles should be applied for upon printed or typewritten forms, setting forth the title. This being filed, the title is protected. As the time of publication of any work of which the title has been recorded is not

limited by the statute, which makes no provision for any *interim* period, the right to the title continues to exist *although no publication has been made,* as there is no violation of the law until publication and a neglect to file the required copies. While it is true the courts have intimated that the publication should take place within a "reasonable time," that period has not been definitely defined, nor passed upon.

While the title to a dramatic composition is generally copyrighted, very few are completed as required by the copyright act by the subsequent printing and deposit of copies.

The title to the play or musical composition is nevertheless protected by copyright and no one else can adopt or use it. A valuable play is never printed; it remains in manuscript form, each part, with the connecting cues, being distributed to the members of the company selected to play it.

If the play is published, the rights of copyright cease, unless copies of the play are sent to the Librarian of Congress as required.

As a public performance under our law is no publication of a dramatic or musical composition, it naturally follows that the name or title thereto is protected by copyright and the provisions thereof sufficiently complied with, as no copies have to be filed at Washington until there has been an actual publication, the time of which is not specified. See *post,* § 104.

For detailed information as to registration see "Directions for the Registration of Copyrights" prepared by Thorvald Solberg, Reg. of Copyrights. Copyright Office Bulletin No. 2.

The act of March 3, 1891, U. S. Statutes at Large, Vol. 26, p. 1107, provides that "Authors or their assigns shall have *exclusive* right to dramatize and translate any of their

works for which copyright shall have been obtained under the laws of the United States."

As to musical compositions, see:
U. S. Rev. Sts. (1878), § 4965, as amended.
29 U. S. Stat. at L., 481. [U. S. Comp. Stat. (1901) p. 3415.]

Translations authorized by the authors or owners of copyrighted works and translations of non-copyrighted books are subject to registration in the copyright office as original productions, and application for copyright registration should be made as for an original work.

§ 95. Translation and Dramatization.

Translation and dramatization can, like any other literary production, evidence originality, and are therefore entitled to protection in the same degree as any other original matter. The dramatization of a novel, story or plot requires peculiar and original ability, and although a play may evolve the same story and introduce familiar characters, yet as a dramatization it can be sufficiently original to merit protection.

The play itself under such circumstances is valuable property, which the author has devoted much time and skill in evolving and for which the manager may have paid a large price. It is not so much the novelty or originality of the matter used as the novelty and originality of treatment. The plot of the "Count of Monte Cristo" is familiar, old and usual, yet a new play can be evolved from the story so original as to warrant protection as a proper copyrightable matter, or to establish therein a title at common law which equity will protect. "He who honestly translates or dramatizes, produces a work in a new and useful form, and is entitled

to the same protection extended to original compositions. The value of a translation depends upon the learning and ability of the person who does the work and upon his adaptability to the particular task undertaken. It requires versatile talent of a high order to do it well. Dramatization requires the skill and experience of a playwright, and the success of the work depends upon his dramatic knowledge or genius. Dion Boucicault received $30,000 for dramatizing 'Led Astray,' and other playwrights have received sums almost as large for similar work. It follows that such productions are valuable property that require and must receive protection. Anyone may dramatize a novel, and the dramatization becomes his property (Daly v. Byrne, 43 N. Y. Superior Court 261; aff'd 77 N. Y. 182), and the author or his assignee, whether a citizen or an alien, is entitled to protection (Shook v. Daly, 49 How. Pr., 366; Widmer v. Greene, 56 *id.* 91), and it matters not whether it be the exclusive work of one or of several acting in coöperation. (French v. Maguire, 55 How. Pr. 471.) The plaintiff does not dispute the right of anyone to translate Dumas' novel or to dramatize or represent it on the stage, nor does he contest the right of the defendant to take part in such performance and speak the lines of such translation and dramatization. He insists, however, and with right, that the defendant, while performing under such other dramatization shall not speak the lines nor do the stage business peculiar to the plaintiff's dramatization."

Fleron v. Lackaye, 5 N. Y. Law Jour., 21—April 28, 1891.

§ 96. Right of Author to Sell.

The author of a novel having full ownership therein may

give to another the exclusive right of dramatization, and the assignee will be protected therein.

House v. Clemens, 9 N. Y. Supp., 484, see ante, § 71.

§ 97. What May be Protected by Copyright.

Although for the reasons heretofore stated a dramatic composition is kept in manuscript form and not published, it is nevertheless a copyrightable matter, both here and in England, if the author so elects.

U. S. Rev. Stat. (1878), § 4952.
As amended 26 U. S. Stat. at L., 1106. [U. S. Comp. Stat. (1901), p. 3406.]
Directions for the Registration of copyrights. Bulletin No. 2. Copyright office, Washington.

It naturally follows if an original work, story or novel is properly copyrighted the author may protect an adaptation or dramatization thereof. He is entitled to the full benefit of his original creation, and it does not cease with his rights to its entirety, but extends to every original part, plot or situation, and no one has the right to use, adapt or dramatize any portion or part. Apart from statute, such use is the invasion of a well-recognized right at common law, as already explained.

Boucicault v. Fox, 5 Blatchf., 87.
Shook v. Rankin, 6 Biss., 477.

The statute gives to authors or their assigns full and exclusive rights of dramatization of their literary compositions.

U. S. Statutes at Large, Vol. 26, p. 1107.

§ 98. Copyright Protection.

The copyright laws do not protect as a dramatic composition or under any other head that which is merely a picture, motion, scene or spectacle, for such are not dramatic compositions within the statutory intendment.

Daly v. Webster, 56 Fed., 483.
Martinetti v. Maguire, Deady, 216.
Daly v. Palmer, 6 Blatchf., 256.
For other cases and illustrations, see ante, § 46.

The courts have gone far in finding elements of what is termed dramatic in compositions, and while such can readily be traced in a pantomime, as described in Lee v. Simpson, 3 C. B. 871, or in a book of stage directions concerning the putting on of a drama as explained by Mr. Justice Blatchford in Daly v. Palmer, yet a topical song, though held dramatic in the legal sense, as in Henderson v. Tompkins, 60 Fed. 758, would seem to be the extreme limit of application. In this case the song was held to be a proper subject for copyright, being of value as a connecting link in the general scheme of explanation which surrounded the piece as produced. In such cases the author in protecting his idea only copyrights the theme or skeleton of the song, reserving the words, which remain unpublished in the copyright sense.

The general application of the rule to particular instances of what is dramatic in composition under the statutes, is interesting and sometimes confusing, a sharp contrast being found in the cases of Daly v. Webster, 56 Fed. 483, and Serrana v. Jefferson, 33 Fed. 347. In the Daly case the central feature of the drama was the use of a railroad track and train, the hero being fastened to the track in such a way that the momentarily expected train would run over and kill

him; his rescue at the critical moment forming the chief incident of the act. This was held dramatic and properly a subject for copyright protection, for although chiefly a matter of vision and mechanical device, it was still such an arrangement or scheme of dramatic events as to entitle it to the statutory protection. In Serrana v. Jefferson a tank of real water formed a like central episode, the villain of the piece falling therein at a critical moment from a bridge above the water. This, however, though quite as realistic as the railroad scene in the Daly case, and forming the central and exciting motive of the play, was repudiated as not being a link in the chain of action sufficiently dramatic and original to come within the intendment of the statute.

§ 99. Necessity of Human Interest and Portrayal of Emotions.

Whatever the case, the facts must show such a chain or combination of dramatic events as are capable of producing the emotions of human feeling attributed to the purpose of the legally defined drama. Since, as we have seen, a dance, though beautiful and attractive, fails as such a composition because of the lack of story and emotion depicted, and a song of descriptive nature rendered by one person who mimics the characters in the supposed story, as he accompanies himself on the piano, is sufficiently dramatic, we do not see why a song rendered in costume by a woman who portrays the characters she describes in her song, is not logically of the same general worth as a dramatic composition. Such is not so, however, under an application of the general principle in another case.

Fuller v. Bemis, 50 Fed., 926.
Russell v. Smith, 12 Q. B., 217.
Barnes v. Miner, 122 Fed., 480.
See ante, § 49.

§ 100. Originality an Important Element.

The novelty or originality of the subject is the test which must be satisfied to obtain a copyright, for the statute has in view only the promotion of that which is the work of the individual effort and its protection to the author or his assignee. To allow one who has not created the composition, or acquired it by assignment from its creator, would be to legalize theft and give a wrongdoer a superior title to the real owner.

Only through originality can protection be claimed, which must be that of conception, and not a copy, imitation or evasion of another's work. Old materials can be arranged in new form and an old theme rehabilitated with new scenes and dialogue so long as that which is new is original.

Emerson v. Davies, 3 Story, 768.
Martinetti v. Maguire, Deady, 216.
Reed v. Carusi, Taney, 72.

This principle applies equally to musical as well as dramatic compositions, the strict rule of originality being the test of copyrightable matter.

The courts have not found the same difficulty in determining what was a musical composition as they have in cases of dramatic composition. Here the only question involved is that of originality, which requires no additional discussion.

§ 101. Rights of Employer to Works of Employee.

The fruits of a servant's labor belong to his master, and the literary or musical work of a salaried employee, created in the course of his employment, is the property of his employer, who may copyright the same. This is not true,

however, if by contract or implication it can be shown that the ownership in the composition is to remain in the employee. To establish such a case calls for definite and unmistakable evidence, as generally the employee has no such right and the work, though his own original creation, belongs to his employer.

Lawrence v. Dana, 4 Cliff. (U. S.), 65.
Colliery Engineer Co. v. United, etc., Co., 94 Fed., 152.
Boucicault v. Fox, 5 Blatchf., 87.
Callagan v. Myers, 128 U. S., 617.

§ 102. Title Must Also be Original.

While one who deposits in the copyright office the title of a drama thereby obtains protection, it must be proved to be orginal, and he cannot retain this protection to the exclusion of others who have already used the title to a play adapted from the same story, before the filing.

Benn. v. Leclercq, 3 Fed. Cas., 1308.
Isaacs v. Daly, 39 N. Y. Super. Ct., 511.
Brightley v. Littleton, 37 Fed. Rep., 103.

§ 103. Statutory Requirements.

The requirements of the statute as to the time of filing, the manner of application and method required, must be carefully complied with. The law only confers the privilege of this protection after the doing of certain clearly defined things, and a neglect in any detail bars the right sought.

Explicit directions as to the method of obtaining a copyright have been compiled by the government officials, and should be followed, as originality in this respect is quite sure to be fatal in securing the desired protection. The courts

have construed the copyright statutes narrowly, and applicants have been held to the letter of the law.

If the words only of a song are to be protected, the application should be for a *book;* if both words and music are sought to be protected, then application should be for a *musical composition.*

Comedy, drama and farce are under the statutory designation of *dramatic composition,* and application should be made under such term.

The copyright law has but three heads covering all such matters: (1) book, (2) musical composition, and (3) dramatic composition.

Book covers poems, stories, novels, histories, and songs without music.

Musical composition covers a song (both words and music), an opera, or any musical piece of an instrumental nature.

Dramatic composition covers a play, farce, drama, tragedy and comedy or any other composition of a kindred nature.

In securing protection for dramatic compositions under the copyright law application should be made upon printed or typewritten titles, as in the case of other literary compositions. It is not sufficient that the title is written. It has been the practice of the copyright office to receive at the claimant's sole responsibility two typewritten copies of a drama for the copies required under the statute to perfect the copyright, but the only safe method is to file copies which are printed in the common acceptance of the term. As has been stated, it is usual to file the printed title to a dramatic work, which secures the protection thereof without publication.

§ 104. Title or Name of Book, Play, or Musical Composition.

By the terms of the copyright statute the protection centers on the copyright of "the book," the word book being used to describe any literary production and not extending to the mere title or name thereof. Although by the terms of the statute a printed copy of the title of such book must, before publication, be sent to the Librarian of Congress, "yet this is only as a designation of the book to be copyrighted; and the right is not protected under the statute until the required copies of such copyrighted books are, after publication, also sent. It is only as a part of the book and as a title to that particular literary composition that the title is embraced within the provision of the act."

Osgood v. Allen, 1 Holmes, 185.
Jollie v. Jacques, 1 Blatchf., 618.

"The title does not necessarily involve any literary composition; it may not be and certainly the statute does not require it should be the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies and frequently does not in any way describe the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title is original, and the product of the author's own mind, and it is appropriated by the infringement, as well as the whole or a part of the material com-

position itself, in protecting the other portions of the literary composition courts would probably also protect the title."

Osgood v. Allen, 1 Holmes, 192.
Corbett v. Purdy, 80 Fed. Rep., 901.

The same rule would apply to the title or name of a dramatic or musical composition, and the protection would result only in accordance with the principles stated in Osgood v. Allen.

The title to a dramatic composition is protected under the copyright law, although the body of the play is different from the one originally intended or written. The title attaches to the composition finally filed, and is in such manner protected.

Shook v. Wood, 32 Legal Intel. (Pa.), 264.

§ 105. Further Consideration of Name of Play.

When a title or name is novel and original and the title forms a part of the literary production, it then becomes necessary, in order to protect the copyrighted literary composition, for courts to secure the title from piracy as well as the other productions of mind of the author in the book, and under such circumstances another person will be enjoined from such wrongful invasion and prevented from using the same title.

Osgood v. Allen, 1 Holmes, 185.
Jollie v. Jacques, 1 Blatchf., 618.
Bradbury v. Beeton, 39 L. J. Ch. (N. S.), 57.
Bradbury v. Dickens, 27 Beav., 53.
Isaacs v. Daly, 39 N. Y. Super. Ct., 511.

§ 106. How Legally Protected When an Evasion of the Copyright Statute.

The application of this principle is very limited and only extends to a clear case of originality, and then rather by the application of the doctrine of protection in equity against the wrongful invasion of another's rights than a clear case of wrongful interference with a copyrighted thing, for *titles as such* are clearly not copyrightable matters, and their status as a matter of equitable protection can only be determined in reference to the printed copies of the work which are supposed to follow and be finally filed as a physical fact. For this reason the proper filing of the *title* to a play protects it, although the play itself is never printed and copies never sent to the Librarian of Congress. The statute is silent as to any requirement of furnishing copies within any period of time after the filing of the title. Hence it cannot be determined until the copies appear whether such is a case where it is necessary to protect the title as a part of the literary composition or not. Pending this final test the title stands as filed under the protection of the copyright act and as a preceding part of a book or play, pending the sending of printed copies, is protected, although it may never be intended by the author to have the book or play printed. So by a species of bad faith is accomplished the very protection of a title under the copyright law which the act itself denies.

Bartlett v. Crittenden, 5 McLean, 37.

§ 107. No Right to General Words or Terms.

The law gives no one an exclusive right to the use of a title which consists of a word or words of general signifi-

cation, even though such be actually copyrighted and used as the name of a play or opera. The owner thereof cannot object to the use of such title or name when bestowed upon another play entirely dissimilar in nature provided there is an absence of bad faith. If bad faith exists, another rule prevails, for if one adopts a title which has been copyrighted, though the same is of general signification, and uses it to profit by another's work or to injure another's play or business, such wrongful use will be considered as an invasion and enjoined in equity.

Isaacs v. Daly, 39 N. Y. Super. Ct., 511.
Benn v. Leclercq, 3 Fed. Cas. No. 1308.

MANAGERS' DUTY TO PROTECT PATRON FROM INJURY

CHAPTER VI

§ 108. Manager's Duty to Protect Patron from Injury.

Although the theater patron is merely a licensee whose right to remain on the premises may at any moment be revoked by the proprietor (see *post,* § 140), yet as such licensee he is to be protected from harm while in the enjoyment of this license.

The burden rests on the manager to see that his building and grounds are safe, and that no lack of due care on his part has placed a chance of injury in the way of those who patronize his performance. The rule of care required is one of reason, which demands that the manager shall have knowledge as to the structural safety and condition of his building or place of amusement and the appliances therein.

The licensee has a right without personal investigation to suppose the place safe, and that nothing will occur to injure him while on the premises or in the lobbies and entrances leading thereto. The place set apart and given over to amusement purposes and its approaches must be safe, and the manager must exercise ordinary care and diligence to protect the patron from injury while entering, leaving or on the premises. To allow open a trap door without guards to protect the opening, to provide a seat which is insecure and falls apart, to allow depressions in the floor which are liable to be fallen over, to leave unlocked a door leading to an unguarded platform, or to tolerate any condition of affairs which would reasonably lead to an accident and which ordinary human pru-

dence, foresight and sagacity can prevent, is such a lack of ordinary care and diligence as to cause liability.

Camp v. Wood, 76 N. Y., 92.
Phillips v. Wisconsin State Agri. Soc., 60 Wis., 401.
Currier v. Boston Music Hall, 135 Mass., 414.
Hart v. Washington Park Club, 157 Ill., 9.
Selinas v. Vermont State Agri. Soc., 60 Vt., 249.

In Higgins v. Franklin County Agricultural Soc. 100 Me. 565, it was held that a fair association which maintained on its grounds a track for horse racing was bound to use reasonable care to keep the track free from danger to patrons at times when they were invited or permitted to cross and while they were thus crossing.

The court there said: "The plaintiff might have avoided the collision had he been on the constant watch for approaching horses from the time he entered upon the track, which, however, he was not. The defendant insists that, hence the plaintiff did not exercise due watchfulness and that his negligence in that respect was a contributing cause of the collision. The only question of law arising under this contention is whether the plaintiff was negligent, as matter of law, under the circumstances, in not being constantly on the watch for horses and vehicles rapidly passing along the track he was crossing. We think he was not." "If the owner or occupier of land directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition."

Thornton v. Maine State Agri. Soc., 97 Me., 113.
Davis v. Central Cong. Soc., 129 Mass., 367.
Hart v. Washington Park Club, 157 Ill., 9.
Lane v. Minnesota State Agr. Soc., 62 Minn., 175.
Conradt v. Clauve, 93 Ind., 476.

§ 109. Liability of Manager for Negligence of Occupier of Leased Space.

Where a State fair association gives the exclusive use of a portion of its ground to an exhibitor and advertises such exhibit as one of the attractions of the fair, it is liable to a spectator for any injury which is caused by the negligence of the exhibitor.

And where the injury was occasioned by the negligent construction of seats it was held that no matter by whom the seats were erected it was the duty of the association to see that the same were in reasonably safe condition before inviting the public to occupy them. Whether invited upon the premises by contract of service, or by the calls of business, or by direct request is immaterial. The party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence are exercised to protect him against dangers not within his knowledge and not open to observation.

Texas State Fair v. Brittain, 118 Fed., 713.
Sebeck v. Plattdeusche, etc., Verein, 64 N. J. L., 624.
Conradt v. Clauve, 93 Ind., 476.

§ 110. Rule as to Independent Contractor of Exhibition.

The fact that the side show, exhibit, balloon ascension or whatever else is included in the general scheme of entertainment, is given by an independent contractor does not relieve the general management of the amusement enterprise, of which the side show, etc., is a part, from its duty of using due care to protect its patrons from injury.

Despite its contract with another for an exhibition, space

or whatever else, the management is legally in control of the whole and must see that patrons suffer no injury from negligence and lack of ordinary care from any source of provided entertainment.

Richmond & M. R. Co. v. Moore, 94 Va., 493.
Texas State Fair v. Brittain, 118 Fed., 713.
Thompson v. Lowell, etc., St. R. Co., 170 Mass., 577.
Sebeck v. Plattdeusche, etc., Verein, 64 N. J. L., 624.
See post, § 121.

§ 111. The Duty of Protecting the Patron is One of Reasonable Care.

A spectator at a theater, fair or other public amusement, on becoming a patron by invitation of the management, has a right to expect protection from injury from such exhibits and performances as take place therein. He must not be injured by the falling of a floor, building, stand or seat negligently constructed, by fireworks, the careless handling of weapons in a shooting gallery, the falling or dragging of guy ropes from a balloon or by any act which the management with reasonable care might have prevented.

Texas State Fair v. Marti, 69 S. W. R., 432.
Texas State Fair v. Brittain, 118 Fed., 713.
Thornton v. Maine State Agri. Soc., 97 Me., 108.
Peckett v. Bergen Beach Co., 44 App. Div. (N. Y.), 559.
Richmond & M. R. Co. v. Moore, 94 Va., 493.
Brown v. South Kennebec Agr. Soc., 47 Me., 275.
Dunn v. Brown County Agri. Soc., 46 Oh. St., 93.
Latham v. Roach, 72 Ill., 179.

The rule is not to be confused with the case of the owner of premises who gives a bare license or permission to another

to enter, for there such licensee takes the risk of the ordinary dangers resulting from the faulty construction or arrangement of the premises. But to open a hall or place for public purposes, the same is thereby held out to the public as safe to frequent, and the owner or manager is bound to exercise care to provide safe arrangements for the entrance, remaining and departure of people who go there upon his invitation.

Camp v. Wood, 76 N. Y., 92.

"Managers of theaters and others who invite the public to become their patrons and guests, and thus submit personal comfort and safety to their keeping, owe a special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."

Dickson v. Waldron, 135 Ind., 520.
Oakland City Agri. Co. v. Bingham, 4 Ind. App., 545.
Oakland City Agri. Co. v. Bingham, 4 Ind. App., 545.

The proprietor of a theater, hall or grounds must exercise ordinary care and diligence to put and keep his place of amusement in a reasonably safe condition for persons coming there under the circumstances for which it is open. The proprietor's knowledge of the defect is immaterial and does not alter his liability; it is a matter he is legally presumed to know independent of the real fact.

His knowledge of the defect is not material in establishing the liability. The question is whether with the exercise of ordinary and reasonable care he could have known of the

defect and thereby prevented the injury, and not whether he actually knew it.

Oxford v. Leathe, 165 Mass., 254.
Schofield v. Wood, 170 Mass., 415.
Jennings v. Tompkins, 180 Mass., 302.
Currier v. Boston Music Hall, 135 Mass., 414.

As to the rule when injury grows out of the permanent structural conditions as a slope of balcony and arrangement of seats, see

Dunning v. Jacobs, 36 N. Y. Sup., 453.

If a manager by mere chance has actual knowledge of a defect which by reasonable and ordinary care he could not have discovered, then the actual knowledge fastens the liability upon him, as he is bound to remedy what he knows about, no matter how the knowledge was obtained.

§ 112. Ordinary Care Varies in Every Case.

There can be no exact direction by which the general rule can be applied to determine what is ordinary care, as it necessarily varies in each particular case. The defendant must exercise ordinary care and diligence in the maintenance of his property, but cannot be compelled to go beyond such requirements.

In Jennings v. Tompkins, 180 Mass. 302, the plaintiff had purchased a seat in the fourth row of the gallery of the defendant's theater, and while walking down the wooden steps of the aisle to go out, he fell and seriously injured his knee. He testified that he felt the stair give slightly; that his heel

caught and that he fell face downwards. The plaintiff also introduced evidence that the tread of the stair in question was made of a seven-eighth inch board; that it did not project beyond the riser on which it rested; that it was worn thin by use and that there was a nail protruding about one-sixteenth of an inch; that the board gave a little when stepped on, and that when a person stepped on the tread the nail stuck up about three-sixteenths of an inch.

"We think that a jury would be authorized in finding that the plaintiff's heel caught on this nail. This case, therefore, presents the general question how far a board can be allowed to be worn down by use without its being a defect as against persons who have a right to use it. The line must be drawn somewhere, and it is necessarily to some extent an arbitrary matter where it is to be drawn. We are of opinion that if the board is worn so that a nail projects three-sixteenths of an inch there is not a defect."

§ 113. Care Extends to Construction, Maintenance, and Management.

A person erecting and maintaining a structure or place for public exhibitions must use reasonable care in the construction, maintenance and management of it, having regard to the character of the exhibitions given and the customary conduct of spectators who witness them, and the act of a spectator, who is injured by the falling of the guard rail upon which he was leaning in front of the gallery, must be judged according to the conduct which ordinarily prudent people show under like circumstances. In this case it was shown that others leaned on the same guard and thereby contributed to the accident. It was, however, held that the defendant

could not escape liability if he was negligent in the manner in which the guard rail was constructed and maintained, if the plaintiff was in the exercise of due care, although other persons may have contributed to the injury. The manager does not avoid liability for negligent construction even though he has employed a competent person to do the work, and has no supervision over the same.

Fox v. Buffalo Park, 21 N. Y. App. Div., 321; 163 N. Y., 559.
Francis v. Cockrell, L. R. 5 Q. B., 501; 23 L. I., 466.

A person erecting and using a hall for amusement purposes, a fair ground or recreation park must use reasonable care in the construction, maintenance and management of it, having regard to the character of the exhibitions given and the customary conduct of spectators who witness them, and the acts of the spectator must be judged according to conduct which ordinarily prudent people show under like circumstances.

Schofield v. Wood, 170 Mass., 415.
Hart v. Washington Park Club, 157 Ill., 9.

While in ordinary cases in the leasing of buildings there is no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are leased, the rule is different when applied to buildings and structures in which public exhibitions and entertainments are designed to be given and for admissions to which the lessors directly or indirectly receive compensation. In such cases the lessors or owners of the buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used and impliedly under-

take that due care has been exercised in the erection of the buildings. This is true of a tent or temporary booth.

Fox v. Buffalo Park, 21 App. Div. (N. Y.), 321.
Francis v. Cockrell, L. R., 5 Q. B., 501.
Wendell v. Baxter, 12 Gray, 494.
Campbell v. Portland Sugar Co., 62 Me., 552.

§ 114. The General Rule Governing Manager and Patron.

The reason of the rule is apparent: the place of entertainment is public, a place where people consort in numbers and wherein they are controlled and located as the management directs. There is no reason to suppose that the individual who attends will, before entering, inquire as to the condition of the building, as to whether the floor is secure, the seats safe, or the chandelier strongly in place. His care ends in this respect by behaving in an orderly, careful and reasonably observant manner and remaining in the portion of the building or grounds dedicated to his use. He must not become a trespasser by invading a part of the premises where he knows he has no right to go, for then he ceases to be a patron and becomes a trespasser and acting at his own peril. But while within his rights he can properly be considered in the exercise of due care, and is to be protected from the negligence of the manager or of his servants or agents, in all the particulars enumerated.

This authority to enter upon the premises of another to do a particular act or series of acts, although given by a ticket or other written evidence, is merely a license and subject to all the conditions and limitations thereof.

Cook v. Stearns, 11 Mass., 533.
Oxford v. Leathe, 165 Mass., 254.
Post, § 139.

The manager is in quite the same position as a shopkeeper who invites the public to his shop to inspect and purchase the articles he has on exhibition, being bound to keep his premises in a reasonably safe condition for the purposes for which they are used. If they are not in proper condition and a person is injured while in the exercise of due care and not transcending the license given him, the proprietor becomes liable for the injury.

Gilbert v. Nagle, 118 Mass., 278.
Conradt v. Clauve, 93 Ind., 476.

§ 115. Patron Must Not Misbehave or Violate the Conditions of His Admission.

While this invitation or right of admission is a license, yet it does not justify any misbehavior on the part of the licensee, and if he transcends his license, then he becomes a trespasser *ab initio* and has only the rights of a trespasser.

Sterling v. Warden, 51 N. H., 217.

This right of admission, though affording protection, is limited in its duration by any express provisions of the contract.

Mason v. Holt, 1 Allen, 45.

The manager is not liable as an insurer of the safety of his patrons; he is only bound to exercise reasonable care for their safety.

Dunning v. Jacobs, 15 Misc. (N. Y.), 85.

§ 116. Duty as to Outside of Building.

The owner of a building, under his control and in his occupancy, is bound as between himself and the public to keep it in such proper and safe condition that travelers on the highway shall not suffer injury.

Gray v. Boston Gas Light Co., 114 Mass., 149.

§ 117. The Extent to which the Rule Applies.

The lobbies, entrance vestibules, retiring-rooms and all the approaches to and parts of the theater or premises under the control of the management alike come within the principle stated. That the place is constantly frequented by large numbers of people is an added burden to the manager's exercise of reasonable vigilance in seeing that his premises are safe and that no displacements of the structural conditions or fixtures are allowed to remain in dangerous or defective condition. This rule really demands a constant and rigid inspection of the condition of the property, for in no other way can the manager be in the exercise of reasonable care. A seat may become broken during a performance, but, at the time, do no injury, yet if not repaired may cause damage to the person or clothing of the next occupant. While this could not be discovered and remedied on the instant or during that one performance, yet with reasonable inspection it could be discovered before the theater was next opened to the public, and if not, the manager would still be responsible for any injury sustained, as it is a matter he should ascertain.

§ 118. The Origin of the Defect Immaterial.

The way or manner in which a defect arises does not alter the rule of liability. A trespasser may wrongfully and even

maliciously cause a defect by breaking a seat, loosening a hand rail or placing some substance or matter where it will be likely to cause injury. Here the defect starts as an act of a wrong-doer, and it is apparent that the management cannot be held responsible because this is done, yet if allowed to continue after a reasonable period in which the manager might inspect and discover the defect so caused, even though he has no real knowledge of the same, he becomes liable therefor to the same extent and purpose as if he himself had caused it. The protection of the public demands a rule of such strictness, for otherwise there would be no limitation as to when defects should be remedied and patrons safeguarded.

To leave banana skins on the floor or stairs, to allow nails to protrude from a seat, or to tolerate anything which could reasonably lead to injury is not due care. All such requirements are well within the rule that the manager must keep his premises in a reasonably safe condition at all times.

Currier v. Boston Music Hall, 135 Mass., 414.
Bard v. N. Y., etc., R. Co., 10 Daly, 520.

§ 119. Time Sufficient to Establish Liability.

Twenty-four hours has been held a sufficient time to charge the owner with notice of a defect in the stairs of his place of amusement.

Butcher v. Hyde, 10 Misc. (N. Y.), 275.

A shorter period would doubtless suffice in other instances, which must be governed by the circumstances surrounding a particular case.

A manager has been held responsible for injury caused

by a drunken man to a spectator when he had sold him the liquor on the premises and with knowledge of his quarrelsome disposition.

Mastad v. Swedish Brethren, 83 Minn., 40.

While the rule is broad it does not mean that the proprietor must avoid or insure against all conditions which could result in injury; he may regard many things as possible of happening for which he will not have to answer, but if the jury finds that the use made of the premises was something which he was bound to have contemplated, he is liable for any neglect of proper precautions to make it safe.

Edwards v. New York & Harlem Railroad, 98 N. Y., 245.
Joyce v. Martin, 15 R. I., 558.
Oxford v. Leathe, 165 Mass., 254.
Higgins v. Franklin County Agri. Soc., 100 Me., 565.

§ 120. Where Patron May Go or Sit.

A patron may occupy any place or seat which is provided, and does not assume any risk by so doing, as he has a right to suppose his safety is under the care of the management, and that the place designated for his use and comfort can be occupied in security.

For this reason he can occupy a front seat in a theater and not be negligent in so doing, and can recover damages for an injury sustained by the falling of a performer from a trapeze upon him, while occupying such place.

Fox v. Dougherty, 2 W. N. C., 417.

§ 121. Injury Caused by Performer.

In Thompson v. Lowell, etc., Ry. Co., 170 Mass. 577, the defendant under authority of a statute maintained and carried on a recreation park which contained a large platform or stage for exhibitions. The defendant entered into a written contract with a manager, under which the latter furnished and managed various entertainments there, and among them an exhibition of marksmanship by a man born without hands. The defendant paid for advertising the exhibitions and carried posters on its cars. The plaintiff, having seen an advertisement, was a spectator at the exhibition of marksmanship, having come on one of the defendant's cars. A butt was provided to receive the bullets. All the appliances were furnished by the manager or the performer and nobody in the defendant's employment exercised any supervision or control over the performance. Immediately after a shot had been fired, something struck the plaintiff in the eye. It was not made plain just how the accident occurred, but on the evidence the jury might have found that the plaintiff was struck in the eye by a small fragment of a bullet, or other metallic substance, which flew from the impact when the bullet hit the butt. There was no suggestion that he was not himself in the exercise of due care, or that he was not in a place provided for spectators. The defendant asked for an instruction to the jury that it "was not responsible, unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The judge instead instructed the jury that "the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present

under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm."

The court held that the fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator unless due precautions were taken to guard against harm. The instruction as given was right.

Curtis v. Kiley, 153 Mass., 123.
Richmond & Manchester v. Moore, 94 Va., 493.
Hawver v. Whalen, 49 Ohio St., 69.
See ante, § 108.

In Herrick v. Wixom, 121 Mich. 384, plaintiff was injured by the explosion of a giant firecracker thrown by one of the clowns in a circus. The defendant was held liable, and the fact that the plaintiff forced his way into the show tent, where he was injured, did not preclude a recovery, since the duty of reasonable care is owed even to trespassers when their presence is known.

In Kendall v. City of Boston, 118 Mass. 234, a city for the purpose of a concert hired a public hall and employed a person to decorate it. Among the decorations was a bust placed on the outside of a balcony. Plaintiff sat in a seat on the floor of the hall immediately under the bust. The audience were requested by the programme to rise at a certain part of the concert, and when they did so, the bust fell from its place and injured the plaintiff. No evidence was offered as to the manner in which the bust had been attached to or placed upon the balcony, or as to whether it had been properly secured, and the plaintiff relied simply upon the fact that it fell, as evidence of negligence on the part of those whom she claimed

to be responsible for the decoration of the hall. The court held that it was not sufficient for the plaintiff to show that the injury might have been occasioned by the negligence of him she sought to charge with it; that if there were other causes which also might have produced it she was in some way to show that these did not operate; that without some evidence as to the manner in which the bust was attached or secured its fall alone did not furnish sufficient evidence of negligence. This position is not inconsistent with the general rule except that it goes to the full extent of the requirement of showing that the defendant was negligent.

§ 122. The Spectator Must Not be Negligent.

The patron must exercise due care, otherwise he will be guilty of contributory negligence and cannot recover for injury sustained.

Where the entrance to a place of amusement is by a lighted hall and stairway, both familiar to the plaintiff, he is guilty of contributory negligence in leaving such way and stepping outside the building in the dark upon a platform from which he falls because it is unprotected by a railing.

Johnson v. Wilcox, 135 Pa., 217.

In an action for injuries sustained by plaintiff in falling from the gallery of the defendant's theater, it appeared that he was walking back of the second row of seats when he slipped or stumbled and fell over those in front and over the parapet, which with the guard rail was over three feet high, that the floor had a slope of 55 degrees, and the plaintiff had been in the gallery before, and that the theater had been in use many years and no such accident had ever occurred before.

It was held that these facts did not show negligence in the construction of the building.

Dunning v. Jacobs, 15 Misc. (N. Y.), 85.

While the spectator is entitled to protection and to have his safety guarded with care, he must not go where he has no right to, and if he does, he must be taken to have assumed the risk.

Johnson v. Wilcox, 135 Pa. St., 217.

If the manager of a public amusement enterprise does all he can within reason to prevent injury by erecting suitable barriers, railings and the like, he cannot be held responsible for the injuries occasioned by a runaway horse on a race track or for injury to a spectator caused by the bolting of a horse from the race course. The test in such cases is whether the grand stand, seats, rails and barriers were suitable and properly erected with a view to protection in case of the happening of what might reasonably be expected in the conduct of such an entertainment.

Hallyburton v. Burke County Fair Assoc., 119 N. C., 526.
Hart v. Washington Park Club, 157 Ill., 9.
Barton v. Pepin County Agri. Soc., 83 Wisc., 19.
Selinas v. Vermont State Agri. Soc., 60 Vt., 249.

§ 123. Protection from Fire and Other Causes.

The same principle of law requires that the manager make reasonable provision to protect his patrons from injury by fire, and he must exercise the same care over his stage appliances and combustible matter used in productions as he does

in respect to seats, entrances and other portions of his theater. He must reasonably guard against the possibilty of fire from all sources which are or should be within his knowledge. He is required to strictly conform to laws made in respect thereof, as his failure to obey is a matter of wrong the result of which he is answerable for. He must adopt such reasonable devices for fire protection as are commonly and generally used, and these must be maintained in proper working order, but he cannot be expected to go beyond what is reasonable in this respect. It is a question of reasonable diligence in all matters, and he is not accountable save for such causes as are legally within his control and subject to his care. While he is responsible for a fire caused by explosives or inflammable matter used in the performance or for not preventing gas lights from igniting scenery, he is not accountable for a fire caused by the careless dropping of a match by a patron; for in the first two instances only, the cause is under his supervision and control and within the range of his protective ability.

The test is whether the origin of the trouble was a matter which he was bound to guard against or prevent, or, if occurring from any cause, he has at hand such proper means as the law can require to control it. If he has used reasonable prudence and care and done all that any reasonable man could have done in the way of vigilance and providing methods of protection, the requirements of the rule are satisfied. He is not an insurer of the lives and safety of his patrons and not bound to protect them at all hazards. When he has done what reasonable care can demand he can be expected to do no more.

The rule requires constant vigilance. The lives of a great many people are under his protection and the responsibility is grave. The greater the risk correspondingly greater must be the care, and no element of negligence should creep in. To

merely install a system of protection against fire is not enough; it should be reasonable and carefully tested so as to insure its working at the needed time. The installation of the newest device is no protection against liability if it fails to work through lack of care of the management. The requirements of the rule apply as strictly in such cases as elsewhere. For the same reason a patron must be protected from appliances or properties used on the stage which might fall or break and cause injury, as, for instance, the breaking away of a trapeze or wire rope which goes over the auditorium, the escape of steam or flame used in a scene, the breaking of glass or negligent use of stage properties.

See ante, § 108.

These are matters which must be safeguarded against and for which the management is strictly accountable; they are elements of danger, which he employs at his peril and from which his audience has the right of protection. No reasonable man would frequent a place of amusement if he expected to be injured while there, nor could any rule founded on reason require him to be on the watch to avoid harm from the properties and implements used in the entertainment furnished for his amusement.

The general rule has no application where a person is not induced or invited to enter upon the premises and does not go there on any matter of business or mutual benefit, but solely for his own amusement. In such a case the owner or proprietor owes him no duty except to abstain from injuring him by active misconduct on his part.

Shea v. Gurney, 163 Mass., 184.
Herrick v. Wixom, 121 Mich., 384.

§ 124. Free Shows or Public Exhibitions, the Rule of Care Required.

We have been discussing the class of cases which presupposes a paid admission fee, but a different doctrine has been enunciated as applying to free or public shows, or a free exhibition in a public place, street or square.

In Scanlon v. Wedger, 156 Mass. 462, the plaintiff was injured by the explosion of a mortar used in a display of fireworks in a square which was a public highway in the City of Chelsea. The display was made by the defendant, who acted under a license from the mayor and aldermen for a display of fireworks in said square. The defendant used reasonable care and the plaintiff was a voluntary spectator. It was contended that the mayor and aldermen had no authority to issue a license under the statute. The court held that, "Under this state of things it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable.

Vosburgh v. Moak, 1 Cush., 453.
Jenne v. Sutton, 14 Vroom, 257.
Conradt v. Clauve, 93 Ind., 476.

"But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of anyone, although the show was unauthorized. He takes the risk. See Pollock on Torts, 138-144."

The court, however, was not unanimous in this decision,

and a dissenting opinion was rendered in which it was said: "There is nothing to show that they (the spectators) had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption.

"The most that can be said of them is that they knew all the facts material to the risk, and appreciated and understood it. It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one, who, being lawfully on the highway and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk of injury from it. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb.

"It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful and unjustifiable business, that he used due care in it. Due care is predicated of something which by his negligent manner of doing it may become injurious to others; not of something which he has no right whatever to do."

§ 125. The Care of Bill Boards.

In the line of a manager's duties comes the burden of looking after bill boards for advertising purposes which are maintained by him. If one gets out of repair, blows down, or through any neglect causes damage, he is liable, and if the same is on a public way and blows down, the city or town becomes liable, too. Although in the latter instance a munici-

pality is primarily liable, the manager would have to reimburse the city for whatever damage it had to pay on account thereof.

Lanagan v. Atchinson, 35 Kan., 318.

§ 126. Rule of Liability when Relation of Contractor and Contractee Exists.

The general rule is that he who does the injury must respond The well-known exception is that the employer shall be responsible for the doings of the employee, whom he selects, and through whom, in legal contemplation, he acts; but when the person employed is in the exercise of a distinct and independent employment and not under the immediate supervision and control of the employer, the relation of master and servant does not attach. The distinction upon which the cases turn is whether the relation of master and servant exists or that of contractor and contractee. In the case of a wrongful act done by another, it is not the manager himself who caused the injury. It must be done by one acting by his command or request and by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct and whose negligence he might restrain. This establishes the relation of master and servant. Where, however, there is a contract of employment and one has entered into a contract to do certain things for a stipulated sum, there is established the relation of contractor and contractee, as here the person employed is in the exercise of a distinct and independent employment, and while the one for whom he is performing the service may suggest the way and manner in which it may be done, such suggestions can be repudiated, as the real *status* of the purpose is defined by the contract, and by law there is no power or right to command or direct the conduct of one performing the service under a contract.

If the relation of contractor and contractee actually exists, then the contractor must respond for whatever injury he occasions, and there is no liability on the part of the one from whom he has the contract. This rule is well established, and it would seem advisable in such matters of outside work as bill posting and distributing, where the manager is unable to direct and pass upon the various acts which may be done and which often become trespasses, to have such service rendered under a specific contract of such a nature as to exclude any possibility of the legal establishment of the relation of master and servant, for "when * * * * the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the direction or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be done. The question in these cases, whether the relation be that of master and servant or not, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor." To secure this protection the contract should be clear and explicit and in no uncertain terms.

See post, § 184.
Forsyth v. Hooper, 11 Allen, 419.
Hilliard v. Richardson, 3 Gray, 349.
Linton v. Smith, 8 Gray, 147.
Brackett v. Lubke, 4 Allen, 138.

The manager assumes the duty of protecting his patrons from the negligence and assault of his employes. See *post*, § § 176, 182.

THE DUTY OF THE MANAGER TO PROTECT HIS PATRONS FROM FIRE AND PANIC.

CHAPTER VII

§ 127. Manager Must Regard Patrons' Safety.

As already stated, the manager is bound to use all reasonable care to make his theater or place of amusement safe for his patrons. This rule cannot be fixed by any definite measurement, and is solely determined on the facts which surround the particular place and occasion, with due regard to the nature of the entertainment given.

A production using firearms, lights, mechanical contrivances producing flame, materials of inflammable nature, such as fireworks or like substances, should be guarded with great care; their dangerous nature is known, and the manager must use every precaution to avert fire. He legally assumes the risk of using such dangerous substances. The more dangerous the material employed just so much more care is exacted to conform to the rule of reasonable effort to prevent injury.

The origin of most theater fires has been on the stage and occasioned by decorations catching fire from some carelessly guarded source, the accumulation of rubbish and waste, or the careless use of inflammable substances. The nature of the materials used, and in fact the stage itself, lends many possibilities of fire, which can be restricted, but probably never entirely overcome.

Even in the most modern theater a portion of the stage must be of wood; the scenery, though fireproofed, at best an expensive and useless process, remains inflammable under cer-

tain conditions; the furniture, draperies and rugs used are commonever be wholly fireproof. Much can be done to lessen the bustible; in short, a stage equipped for theatrical uses can amount of inflammable material used, but to obtain the effects and realism required by the public, real materials must be used, and so long as they are composed of substances which will burn, just so long is a fire possible, and a matter to be guarded against in every reasonable and intelligent way. There is no rule of law which condemns an old theater or treats it in any manner as beyond the rule of reasonable care. While modern construction is an improvement in many ways over the old, it cannot be fairly said that a new theater is less liable to fire than an old, or any safer from disaster.

The starting of a fire has generally nothing whatever to do with the building itself, and as it commonly originates in oversight, accident or negligence, it is as likely to occur in one place as another. Accumulations of dirt and rubbish in out of the way places under and about the stage are dangerous as starting places for fire and should be eliminated.

§ 128. Prevention and Control of Fire.

The question is simply one of prevention and control. Prevention is the personal element of careful supervision adopting such methods to existing circumstances as will minimize all chances of fire, and control, the plain duty of providing all reasonable methods of putting out or holding in check a fire which has started. Legally no more can be required, and while in an old theater there is the duty of discarding obsolete methods of protection for new ones, when this is done the manager is quite as well within the rule of reasonable effort as the owner of an entirely modern house. Legislatures and

city governments in passing laws for fire protection applicable to theaters seem in many instances to lose sight of the important fact that structural conditions are of slight importance as compared to the methods and appliances which can be installed for the purpose of checking and stopping a fire. And all these are of no protection whatever, unless in working condition, with those in charge who know how to direct their operation. The matter for consideration is not whether the building is fireproof (and we doubt if there are any absolutely such), new, old, of wood, of iron, of stone, but simply is it equipped with such appliances as will hold the fire in check and keep the carbonic-oxide, hot air and smoke away from the auditorium for a time sufficient to allow the escape of the spectators? This requires a small interval of time, for a theater empties very rapidly; yet, on the other hand, five minutes may become fatal to life from the generation of gases and accumulation of smoke. It is safe to state that the audience is never in danger of actual burning by contact with flame from any fire which originates on the stage, for in no theater, whether of old or new construction, could the flames spread faster than the people can vacate. As to the control of carbonic-oxide and hot air, that can be accomplished as well in an old structure as a new. The age of the building does not interfere with the installation of modern appliances which prevent or control fire and the adoption of rules and regulations tending to check carelessness of actors and stage hands. It is in such matters of precaution, rather than in structural condition, wherein safety lies, and to which attention should be given. The most disastrous catastrophe of recent date occurred in a new theater, which combined elegance with all that was new in the way of construction and was provided with every known appliance for fire protection. There, how-

ever, modern construction with liberal exits, aisle space and fireproof materials availed nothing, because the appliances for checking the flames and carrying away the hot air and gases were defective or inoperative, and although equipped with fire curtain, ventilators, and a solid wall between auditorium and stage, the curtain was only part way lowered and the ventilators were covered and could not be opened; all of which resulted in a great and unnecessary loss of life.

From this and other instances it is fairly demonstrated that a theater depends, not on its construction, but on its appliances for protection. Every theater or hall as it differs in form and location must also differ in the methods for safety which it adopts. No one rule or method can be of universal application, except in certain general details.

§ 129. Unwise Legislation.

No specific law can be enacted which can reasonably or safely apply in the same way to all places; this would not be reasonable or just. A method might be suitable in one place and entirely useless in another. So of all protective requirements, each place must be made safe according to its own needs.

Legislative action adopting an inflexible rule with no opportunity of substituton or discretion in the enforcing officer, not only works a hardship on owner and manager, but opens the way to disaster and loss of life, for many laws have been proposed, if not enacted, which are absurd and distinctly dangerous. While old buildings may be more difficult to adapt for protective appliances than modern ones, it is merely a matter of additional trouble or cost, and when thoroughly equipped both are equally safe, for the well-recognized protec-

tive measures are matters of appliance and addition and not structural in nature.

The question under discussion is not how to save the building and conserve the property, but solely how to check the fire and its attendant evils until an audience has had time to escape. The loss of the property does not concern the public; its interest is to know that provisions are ample and sure to guarantee the escape of the spectators.

In small towns the theater is destitute of much in the line of protective nature, owing to inadequate water supply, cheap construction and the use of buildings for theater purposes never designed for such, depending on oil or gas for light and having many other features which are not commendable. The liability of the manager here is correspondingly great, and he should be very alert and watchful in preventing injury to his patrons, and should install whatever he can of a protective nature. The use of an improper and badly equipped building for theater purposes is clear negligence, and the manager in such instance is virtually an insurer of his patrons' safety, and bound at all hazards to provide for it.

Fire protection demands in all theaters and halls used as such:

1. A dividing wall between stage and auditorium.
2. A fire-resisting curtain.
3. Ventilation over the stage.
4. Water curtains and sprinklers.
5. Trained stage hands.
6. Inspection.

§ 130. Dividing Wall Between Stage and Auditorium.

Every stage should be separated from the auditorium by a fire-resisting wall of suitable thickness, having not more

than two (better one) openings communicating with the stage which should at all times be closed with fire-resisting, self-closing doors, covered with metal and of sufficient weight and thickness to prevent the escape of flame and gas. These doors should at all times be kept tightly closed. No ventilating apparatus of any kind should connect from the stage to the auditorium through this wall. It is imperatively necessary that such wall, when the curtain is down, provide an absolute barrier between stage and auditorium sufficient to prevent the escape of flame, smoke and gas.

§ 131. A Fire-Resisting Curtain.

The fire wall referred to affords no protection unless the stage opening can be closed in by a fire-resisting curtain, which should be adjusted to admit of a sure and quick lowering and so arranged at its sides as to overlap or enter into the proscenium arch sufficiently to prevent the escape of flame or gas at its sides. A groove is sometimes used, but is open to objection as retarding or blocking the curtain in its fall. The curtain should be of fire-resisting material; combined experience indorses as the most practical one of thick and firmly woven asbestos cloth. Such are exclusively used in the modern theater, and while in no sense of the word fireproof, are nevertheless sufficiently fire-resisting and thick to keep the flames and gases in check until the audience has escaped.

An asbestos curtain is not fireproof; asbestos cannot be woven alone, and necessarily has to be adulterated with cotton. Its chief virtue lies in its non-inflammability and the fact that it does not burn. Although it will go to pieces under continued and intense heat, before doing so it must have been subjected to continued and actual contact with the flames.

While in place it proves a complete barrier for smoke and flame and hides from the audience the sight of fire, which, when unscreened, adds materially to the fright and confusion.

Of metal curtains nothing can be stated in their favor; the best are of corrugated iron or steel, which, though strong and fire-resisting, are heavy to handle and very liable to get stuck in the grooves in which they must slide. They are often out of order and of uncertain dependence, and have been the cause of several catastrophes abroad by failing to lower properly when required, or when in place likely to be bent by heat, thereby opening another avenue of danger.

Reasonable care demands that the manager see that the mechanism for the raising and lowering of a suitable curtain is perfect from a mechanical point of view and in operating order at every moment when the theater is in use. This curtain should be managed from the stage level and from some other advantageous place. Its operation should be understood by more than one of the stage employees to insure its use at a time of emergency. For no matter how good the curtain, it is of no use unless it can be instantly and properly lowered into place. Its immediate availability is the chief advantage.

§ 132. Ventilation Over Stage.

The actual contact with flames is of small moment as compared to the danger arising from carbonic-oxide gases and hot air, causing suffocation, and the inrush of smoke through the proscenium arch into the top of the auditorium.

To keep these gases and smoke away from the audience is of paramount importance. To accomplish this an area of ventilating space directly over the stage should be provided.

This is generally in the form of skylights or flues which open automatically or by means of ropes which can be released or cut. The ropes are made of inflammable material which will burn when touched by flame. To depend entirely upon these ropes to release the ventilators is of doubtful value, and fusible links should be employed for opening all smoke vents. This matter will be referred to farther on. These ventilators afford a simple and wholly effective method of carrying away gases and smoke from a fire, and will undoubtedly accomplish more for the safety of the public than all the other provisions of the most elaborate building law. The principle is that of the old-fashioned fireplace: the air in the auditorium escaping upwards creates a draft which carries away the smoke and gases from the burning matter. The value of this method should not be offset by too many exits in the rear of the stage or of the auditorium. For the ventilating spaces over the stage are deprived of their usefulness if the open spaces out from the rear of the auditorium or stage are of greater combined area and create a counter draft. Such would tend to draw the gases and smoke to the audience and not away from it, causing the very harm it is vitally necessary to avoid. The ventilators should be sufficient to carry away and control the smoke and gases. Many cities require the area of ventilating space to be at least one-tenth of the open area of the stage; which can never be too great and will not cause a down draft, as has sometimes been suggested. The gases and smoke drawn to the audience are quickly fatal, and the demand that many wide exits from auditorium and stage, although liable to make a counter draft, are necessary, as allowing an ideal method of escape, is erroneous. Gas and smoke can travel faster than man, and as he must traverse the auditorium to an exit and must be delayed in so doing, a few seconds can prove

fatal. While the idea of a ventilating space over the stage is excellent and imperative, the ventilator or flue which provides it must be so constructed as to allow of an immediate opening. Such ventilator or damper should be so perfectly constructed and equipped as to work promptly and accurately in a moment of need, and should at all times be kept free from every kind of obstruction and under no circumstances covered with anything, no matter how flimsy or trivial the material used may be. An awning over a skylight will prevent the advantage provided by the open area.

In the Austrian experiments which occurred at Vienna November 22, 1905, tests made by burning old scenery and sheets of paper representing proportionately the amount of combustible matter which might generally be used in two stage performances, demonstrated that with smoke vents of a total area of eleven per cent. of the stage area open, the smoke ascended through these vents over the stage with no suggestion of danger to the persons in the auditorium, except that near the proscenium opening the heat was somewhat severe. In tests with the stage vents closed and curtain down it bulged out toward the audience and lifted from the floor at the bottom and the auditorium was soon filled with smoke. In a later experiment with sprinklers spraying the fire, on opening a door or ventilator in the auditorium gallery some steam and hot gases were drawn into the auditorium, although the stage smoke vents were open. This latter experiment clearly demonstrated the danger of too much direct ventilation in the auditorium proper and the danger of wide exit spaces in the upper portions of the building, which provided a counter draft.

These valuable tests were made at the expense of the Austrian Government on recommendation of the Austrian

Engineers and Architects' Association, and took place in a specially constructed model theater of about one-third the linear dimensions of the ordinary theater, with about one-twenty-seventh of its cubic capacity. This structure was of reinforced concrete with the usual stage, proscenium opening and auditorium. The tests further demonstrated that a steel proscenium curtain was no safeguard for the protection of the audience, as the air pressure due to expansion prevented it from lowering promptly, and even when in place the gas and smoke were forced past its loosely fitting edges into the auditorium. Throughout all of the tests it was amply demonstrated that with the smoke vents open, the ventilator in the auditorium closed and the exit from the gallery closed, that a proscenium curtain was hardly necessary.

From these practical tests it can be seen that the ventilating space over the stage is of the first and greatest importance. Safety, however, depends upon the ventilators being immediately opened, and for this purpose fusible links can better be relied upon than a cord of combustible material. Such links melt open at about 162 degrees Fahrenheit, long before the flame reaches them, while a cord of combustible material, unless cut, only severs on actual contact with the fire, which may not reach it for many minutes and after fatality from escaping smoke and gas has occurred. While cords of combustible material may be employed and are of immediate value when loosed by cutting, the ventilators independent thereof should be equipped with fusible links. These are reliable, practicable, of trifling cost, and are commonly used on automatic fire shutters and fire doors in factories, where during the past twenty years it has been demonstrated that they have worked successfully and well.

It is not the purpose of this work to enter into a description

of the mechanical means by which the opening of the ventilators can be accomplished. It is enough to state that a prompt use of a sufficient ventilating space over the stage will undoubtedly afford a sure means of protection.

The cry for more and larger exits at first consideration appeals as a sure method of safety, but such is not the case, and while there should be a reasonable number conveniently disposed, too many, especially from the galleries, are far more dangerous than few, as creating a draft from the stage, with resulting disaster.

Ventilators in the ceilings of the auditorium should be capable of immediate closing, for these, like open exits, create a counter draft which is distinctly dangerous.

While modern hygienics demand good ventilation in public places, all devices and systems should be constructed with the all-important purpose of keeping out any possible draft from stage to audience at time of fire. All draft should be from the stage up to its roof, which, being higher than the auditorium, draws the air away from the auditorium, thereby protecting the audience. Anything which tends to change the direction of the current of air from stage to audience is the most culpable negligence and fatal in its consequences. The opening of exits from the stage to the street is distinctly dangerous as creating a draft from the stage to the gallery and balconies, unless the ventilators are open over the stage.

§ 133. Water Curtains and Sprinklers.

Water curtains and automatic sprinklers are so generally in use and so well understood that no space is necessary to show that such equipment is clearly within what can be reasonably expected from the manager in this respect. These

appliances are like all else, of value only if they work, and the greatest care should be used to ascertain if the main water supply is in readiness for immediate use, if the pipe connections are free and in working order, and that no rust has accumulated in valves and joints; for it is no justification to merely install what is efficient: the actual operation of the plant is the all-essential need.

The value of these appliances is in their immediate availability to extinguish or at least control the fire long enough to make certain the emptying of the theater; beyond that, in his relation to the public, the manager need have no concern.

The water supply should always be under the control and subject to the frequent tests of the manager, who has a right to know if he can depend upon the supply and its ordinary pressure.

In some cities the main supply or turn-on is under the control of the water or fire department, and must not be touched or used by the manager, save in case of emergency. This is a regulation as absurd as it is dangerous; for what dependence can be placed on that which is of principal importance in checking a fire, unless it is frequently and systematically tested. This is another of the ridiculous methods of public supervision of fire protection, adding an element of uncertainty to the working of an almost infallible system, for a plentiful and continuous supply of water, literally drenching the stage, if operated quicky, would be the prompt undoing of any ordinary blaze and avoid all evil consequences of smoke and gas.

§ 134. Trained Stage Hands.

The fire curtain, ventilators and sprinklers are of no avail unless promptly put to use. The fatality from gas and smoke

is quick, and no instant should be lost in lowering the curtain, opening the ventilators, and operating the sprinklers. This can never be accomplished by the haphazard efforts of employees; they should be carefully and frequently drilled in the practical work of exactly what to do in case of fire; every man should have some one duty assigned him which he can instantly perform in time of need, when every second counts, and there should be no confusion or delay in operating the safety appliances. This drill is necessarily simple, the mere doing of certain well-understood things immediately with a knowledge of just how to do them.

The prompt use of the means of fire protection suggested insures the safety of an audience for the time necessary to allow its escape. A theater can be emptied quickly, but a few minutes is required under crowded conditions in the largest houses, and it is only to hold a fire in check for such time that is important.

It is believed that loss of life will be impossible from flame or vapor if these suggested methods are immediately carried into effect; they would so far retard the fire as to allow ample time for an audience to make its way out in safety, and prevent the accumulation of smoke and gas in the auditorium.

§ 135. Inspection.

A rigid inspection at regular periods by qualified experts acting for the city or town is advantageous, and the manager should properly inspect his premises during a performance. Inspection is excellent in that it reduces the possible chances of carelessness and tends to efficiency and perfection. It gives the public faith in the safety of the theater and helps to avert panic, and is a material aid to the manager in assisting him to

a knowledge of what defects exist and how to remedy them. This inspection should not only be of the stage, but over and under it.

Rigid inspection is probably the best and most comprehensive fire preventive, reducing the possibility of a fire to a minimum, for where it exists those things which lead to a cause for trouble are corrected and abolished. Laxity is a breeder of danger, and fire calamities are only to be averted by constant care and vigilance. While most fires start on the stage, it is well to remember the possibility of a fire beginning in the front of the theater. This might be occasioned by defective heating apparatus, a crossed electric wire or careless disposal of a match or lighted cigar or cigarette. The same consideration of how to get the audience away in safety would arise, but the progress of a fire here would be much slower and more easily controlled, as the flames would have little of a combustible or inflammable nature to feed on. It is nevertheless a subject for attention and should not be lost sight of in protective measures.

For an interesting and instructive treatment of theater protection from fire and panic, see "Theater Fires and Panics" (1896) and "Theaters: Their Safety from Fire and Panic" (1900) by William Paul Gerhard, C. E.

In the Foreword to the printed address of John R. Freeman, Esq., president of the American Society of Mechanical Engineers, on the "Safeguarding of Life in Theaters," delivered at the opening of the annual meeting of the society in New York City, December 14, 1905, the matter of fire protection is most clearly and wisely summed up as follows:

1. It is not a difficult or an expensive matter to provide safeguards such that a theater or other hall of public assembly may be made reasonably safe.

2. In the great theater fires of history the loss of life has commonly resulted from the rapid spread of flame on a stage covered with scenery, followed within two or three minutes by an outpouring of suffocating smoke through the proscenium arch into the top of the auditorium, before those in the galleries could escape. Death has come chiefly to those in the balconies, and often within less than five minutes of the first flame.

The three great safeguards are found to be:

1. The providing of ample, automatic, quick-opening smoke vents over the stage.

2. The thorough equipment of the stage with automatic sprinklers by means of which the action of the heat will promptly release, over the burning scenery, a rainfall tenfold heavier than the heaviest thunder-shower, drenching the scenery and extinguishing the flames.

3. The providing of especially ample exits and stairways from the gallery.

4. The foregoing transcend all other requirements.

The fire proofing or flame proofing of scenery is found to be of doubtful value under practical conditions of use.

The so-called fireproof paints are of very small fire-retarding value.

The asbestos curtain is found to possess much less endurance against heat and flame than had been supposed.

The steel curtain covered with non-conductor on the stage side is far better than the asbestos curtain, but may give trouble in lowering or may permit large quantities of suffocating gas to be forced into the auditorium around its edges.

5. Dry-powder fire-extinguishers and hand grenades are likely to prove worse than useless, by promoting waste of valuable time.

The explanation given as to the cause of the Iroquois Theater disaster by Mr. Freeman, in his address referred to, is as follows:

On a Wednesday matinée the theater was crowded largely with women and children; a spectacular play was being given and the amount of scenery used therein was unusually large. "The fire was caused by a spark from a portable electric arc light known as 'spot light,' used to throw a strong light on a special group, which set fire to one of the draperies. The fire spread in the hanging sheets of scenery with great rapidity, and it is probable that in from one to two minutes the great mass of scenery on the stage was in flames; meanwhile an unsuccessful attempt was made to lower the asbestos curtain. The leading comedian came forward and urged the audience to keep their seats. A door, opened by the escaping actors, let a great rush of air inward, and this, together with the expansion of the air in the top of the stage space by the heat, drove the flames out under the proscenium arch into the upper part of the auditorium."

Mr. Freeman further states that on instant discovery of the fire there was cool and prompt action by the theater's staff, and that the fire department was on the ground within little more than five minutes from the first alarm; that the scene of this disaster was the newest of Chicago's theaters, a building of fireproof construction that justified the name, so far as the building itself was concerned, and one that structurally had no superior in this country or in the world. Little except scenery, decorations and upholstery was damaged by the fire; that there had been shameful neglect in important

details of fitting up; that fire hose on the stage had been delayed; that fire pails and soda water fire extinguishers were absent; that the ventilating sky-lights over the stage were blocked so they could not slide over, and that the exits were poorly marked.

Out of an audience of about 1830 persons, 581 were killed and some 250 more injured. Of these about 400 occupied the gallery and about 125 the balcony. Of those who occupied the floor not more than seven were killed, and most of these deaths were caused by persons jumping from the gallery. Suffocation was the main cause of death, and most of the deaths occurred within five minutes of the first flame.

The great lesson of the Iroquois centers around the sudden outbreak, the rapid progress of the fire over the stage and the fact that most of the deaths occurred within five minutes of the first flame, that death came to nearly all of those who had seats in the gallery, while nearly all of those on the floor escaped. The great lesson of the Iroquois fire was only a repetition of a lesson that has been given several times before and each time forgotten. The recurring formula is:

1. A stage crowded with scenery.
2. The sudden spread of the flames over this scenery.
3. The opening of a door in the rear of the stage, an inrush of air.
4. Scant smoke vents over the stage, an outburst of smoke under the proscenium arch.
5. Death to those in the galleries.

Mr. Freeman's published address contains much valuable matter of a practical nature and can be read with profit by all those who manage or undertake to regulate places of amusement.

§ 136. Panic.

Panic is a matter beyond human control. It occurs without reason and with disastrous results. It may arise in the most modern and safe theater, in an open park or in a circus tent. It may start where no danger exists and where no harm could come. It may arise from the appearance of something unexpected, from a sudden extinguishing of lights, a cry, a flash of flame, the smell of smoke, or the crash of some falling body. The most insignificant of things may be its cause. At such a crisis all human probabilities are overthrown; people act without reason in a mad hysteria of terror. The principal effort is to escape, which must be accomplished no matter how, but at once and quickly. With many exits, all fight to go through one. Reason is suspended in the mad instinct to escape at any cost. Physical force is dominant; the strong trample the weak in the fierce rush for self-preservation.

Exits, aisles, fire-escapes, are alike disregarded, and provided means, ample and sure for escape, are unnoticed and unused. When it is remembered that one of the most disastrous panics of modern times occurred in an open park provided with numerous exits, because all tried to leave by one, it is hopeless to suggest any remedy to stay the frenzy and control of an alarmed audience.

The only safety is prevention of fright, and while panic may not be controlled, much can be done to avert its rising.

It is advisable to have an audience realize it is in a theater which has adopted all reasonable means to control a fire, and that the employees are drilled as to what to do at such a time. Let the audience know it is safe, no matter what may occur. Confidence is the greatest preventive of panic. An audience which believes in its own safety will not be alarmed unnecessarily. The manager does well to familiarize his patrons with

the number and location of exits which should be plainly designated and always open for use, and if the house is dark and any disquieting noise or smell arise it should immediately be made light. The knowledge of a fire curtain which is raised and lowered during every performance, the use of all exits and knowledge of convenient fire-escapes, establish confidence and act as a powerful opposition to unreasoning fear. A safe, and known to be safe, theater is an excellent advertisement for the manager, and he can well afford to spare no pains in bringing the facts of safety before the public. Unused exits, which patrons never see and know nothing about, are of little practical help in time of emergency. Instinct rather than reason sways in time of peril, and it is more natural to seek the exits one has used and is familiar with than to search for others which are untried, or only opened in emergency.

The frantic crowding to escape is the danger to be most dreaded. For this reason it is doubtful if too wide aisles and too wide space between the rows of seats is a wise method of construction. The crowd is safer when reasonably retarded. If large numbers can at the same time arrive at one point there occurs a fatal crush which it is impossible to avert.

§ 137. Benefit of Narrow Aisles.

Reasonably narrow aisles help to retard and hold people in check for a short interval of time, thereby giving more opportunity for those nearest the doors to get out of the way; this is equally true of the seat spaces leading into the aisles. Congestion at any one place is fatal, and is much more to be feared than the fire. Too broad aisles are directly responsible for disaster, offering too quick an approach to the exits

and providing space in which people can be pushed down and trampled upon. Too much room leading to or about an exit is far more likely to result in injury than in too little. That such is true is the opinion of practical theater men who have witnessed panics, and their opinion is more to be relied on than the professional theory of how a theater should be constructed or how an audience would act, by those without practical experience. Too much has been written and suggested of the theoretical in modern theater construction without heed to those things which at such a time are sure to arise and must be met. Theory never controlled a panic or averted a disaster.

Man at such times asserts his savage nature and conforms not at all to the acts of self-reliance and chivalry which theory plans for him. This subject is one for practical treatment and not of experimental belief. Too much of the absurd has already crept into the legislation of some States on this subject, which so far divides the responsibility of fire protection as to make no one accountable, and provides methods and demands changes which supply danger and not safety to the public. It is a matter for practical attention depending on many elements which only a thorough knowledge of a theater and its practical workings can supply. The adoption of any law to protect a place of amusement in case of fire can only be of use when plain, founded on practical reason and capable of quick and efficient application; all else is futile. There should be no divided responsibility; the city which separates the duty of inspection and regulation among many departments, with no official in full and absolute control, acts unwisely and accomplishes no beneficial results.

MANAGER'S RIGHT TO FIX PRICE OF ADMISSION
TICKET OF ADMISSION A REVOCABLE LICENSE
RIGHTS OF REVOCATION, HOW EXERCISED
TICKETS, RESERVED SEATS, RETURN CHECKS
DISCRIMINATION, WHEN PROHIBITED BY STATUTE

CHAPTER VIII

§ 138. Right of Manager to Fix Price of Admission. Tickets and Rights of Ticket-Holders.

According to legal classification, amusements and theatrical entertainments are luxuries, not necessities, and therefore managers are free to regulate the price of admission to their own liking, and the public has no lawful right to complain of what it may consider an unfair or even extortionate charge, for such is not a subject for regulation by law.

"Theaters are not absolute necessaries of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable the evil will cure itself. People will not go, and the proprietors will be ruined unless they lower their admissions, but the proprietors of a theater have a right to manage their property in their own way and to fix what prices of admission they think most for their advantage."

Lord Mansfield in Clifford v. Brandon, 2 Camp., 358.

§ 139. The Theater is Private Property.

While a theater caters to the public and from it gets its financial support and is subject to legislative control and police regulation, yet it is a private business and not a public institution.

The theater itself is private property, and although fre-

quented by the public and legislated over and policed for the protection of the public, it still remains a private business enterprise established in some individual's theater, over which he has absolute control; he can open or close it as he sees fit, can admit certain of the public and not others, can charge a reasonable rate of admission or an extravagant one; in short, do any act consistent with ownership provided he obeys the laws regulating its uses in the sense of protection and good morals.

§ 140. A Ticket is a Revocable License.

The early cases held that the purchase of a ticket to a theater or place of amusement gave an irrevocable right to enter and remain during the performance, and that its holder's rights could not be revoked.

Tayler v. Waters, 7 Taunt., 374.

These decisions were finally overruled in the now leading case of Wood v. Leadbitter, 13 M. & W. 838. There the owner of the land on which was erected a stand for the accommodation of spectators at a horse race sold a ticket to the plaintiff to enter the same and view the races. Before the races were over, without any misbehavior on plaintiff's part and without tendering him back the amount paid for admission, the owner ordered him to leave the premises, and on his refusal so to do removed him. It was held that his ticket was a mere license and was revocable. The only cause of his removal was that on being seen by the Earl of Elgintown, the steward, he ordered Leadbitter to ask Wood to leave on account of some alleged shady transaction. The court was of opinion that such right of license was vir-

tually an easement which could not be granted without a deed, and the license not being sustained by an interest in the land could consequently be revoked at any time. Hence a theater is classed as real estate, and the right to enter whether by ticket or otherwise is a license, and as any other license, to do an act or series of acts on the land of another, is revocable at the pleasure of the one in control of the property.

This is an inherent right of land ownership and controls all questions of admission, tickets and cancellation or revocation of the granted right of entry.

§ 141. The Right of the Manager to Revoke Admission.

As a theater is a private estate, the owner is under no burden of explaining or justifying his acts in the management of his business; he can admit, exclude or expel in the same degree that a householder may. This right determines the status of a ticket and its holder. One who purchases a ticket at the box office of a theater merely acquires a license to attend a specified performance. He enters into contract with the management for this license, and the ticket he accepts is evidence of the contract, but not the contract itself. It usually contains some of the terms of the agreement, such as the date and hour when the license is to be exercised, the price, the place in the theater to be occupied, and can properly set forth any conditions as to performance, cost or transfer of ticket. The holding of the ticket does not in any way affect the fundamental right of the management to revoke the license at any time, for it is revocable even if the person granting it has expressly contracted not to revoke, and the holder on revocation can be ejected. If the licensor does revoke, an action at law will lie for breach of contract, and damages may be recov-

ered for the loss sustained, but no action in tort will lie for the revocation, as to exercise such revocation is merely a legal right properly availed of.

§ 142. Definition of Ticket.

A ticket has been defined as a " formal document valid and interpretable by some well-known business custom requiring the party issuing it to do something or to give something not money to the bearer at or within a certain time. It secures a future right to the bearer; thus differing from a receipt or voucher which merely proves a right already secured."

1 Harvard Law Rev., 17.
Pingrey's Extraordinary Contracts, § 502.

" The contract is implied from the circumstances and is an agreement on the part of the proprietor for the consideration mentioned to admit the holder of the ticket, upon presentation thereof, to his theater at the date named, with the right to occupy the seat specified and there to witness the performance. A theater ticket is a license, issued by the proprietor pursuant to the contract, as convenient evidence of the right of the holder to admission to the theater at the date named with the privilege specified, subject, however, to his observance of any reasonable condition appearing upon the face thereof. The license, though granted for a consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein."

Collister v. Hayman, 183 N. Y., 253.
Pingrey's Extraordinary Contracts, § 509.

§ 143. What the Ticket Contract Calls For.

As a ticket to a place of amusement is a contract, it entitles the holder to see or hear the play, person or thing the ticket was purchased for. For which reason it becomes material to determine what was really the subject matter of the contract. This is not confusing when a star of recognized magnitude is ill or fails to appear or an advertised play or opera is not given and another substituted. But where a cast, as in opera, is made up of several stars and one fails to appear, or in a play some one actor is dropped from the performance, then the question becomes more involved. As the sale of a ticket is a contract which entitles the holder to enjoy some specified thing, it necessarily follows that any change of an advertised play or opera to another is a violation of the contract, and the same is true when the star and not the play, opera or performance is the feature; in such cases if the advertised play or opera is not given or the performer does not appear, the contract is rescinded and the ticket-holder can recover back his money paid and such additional expense as he may have gone to in fulfilling his part of the contract; but such damage, apart from the price paid for the ticket, must be directly connected with or flow from the breach of the contract, the rule of damages as hereinafter explained being narrowly limited and the subject of strict proof. The patron must, however, withdraw and demand back his money on ascertaining the change in the subject matter of the contract. To stay on and witness the substituted matter bars all right of subsequently demanding back the whole or any part of the original price of admission. By remaining, the ticket-holder voluntarily elects to accept the substituted matter for what was originally contracted for, and it is presumed he gets a fair return for the consideration paid.

His act estops him from any subsequent complaint on account of the change, as his presence countenances the substitution. The management should so publicly announce the necessitated change as to allow the ticket-holders to know of it before entering the theater or at least before the performance commences. This will allow the patrons their choice of staying or at once leaving; if they decide to leave, their tickets should be redeemed for the amount paid. The question governing the ticket-holder's rights is merely whether or not the offered attraction reasonably provides that which can be fairly considered the actual and real subject matter of the contract. If it does, although it may vary in certain particulars and lack some unimportant elements as originally advertised, the contract is substantially performed, and the ticket-holder cannot complain that the return for his money is inadequate.

§ 144. Rights of Revocation.

The sale of a ticket to a theater or other place of amusement is a license to the purchaser to enter and remain during the performance. As a theater is a private business enterprise, this license may be revoked by the one who sold it at any time, even before the object and purpose for which it was granted have been availed of or wholly accomplished. Nor does it make any difference as to this right of revocation that the contract under which the license was derived was either wholly or in part executed and that the licensee was in the actual enjoyment of the privilege given him when his licensor revoked it. The fact that admission is allowed, and that the spectator is in the enjoyment of the play or concert does not in any way interfere with the manager's right of

revocation, which is legally justified because the proprietor has the power at any time to revoke the license, which is not in its nature irrevocable in any sense. The licensee has no alternative save to submit, no matter how unjust or unreasonable the revocation is. If the ticket-holder is refused admission to or requested to leave the premises, he must do so, and the manager is not obliged to explain or furnish any reason for his action; he is well within his legal rights when he refuses or revokes the admission. Of this he is sole judge. If the licensee remains after notice to leave, he becomes a trespasser and can be ejected by the use of as much force as may be reasonably necessary to accomplish the purpose.

The admission at best is a mere naked license, revocable at all times, and when actually revoked, if the licensee does not immediately depart upon request to do so, he can be forcibly ejected. For such removal no action of trespass will lie, it being legally justified.

Burton v. Scherpf, 1 Allen, 133.
Giles v. Simonds, 15 Gray, 441.
McCrea v. Marsh, 12 Gray, 211.
Wood v. Leadbitter, 13 M. & W., 838.
Pearce v. Spalding, 12 Mo. App., 141.
Johnson v. Wilkinson, 139 Mass., 3.
Greenberg v. Western Turf Assoc., 140 Cal., 357.

After several conflicting decisions on this question the doctrine was finally laid down in Wood v. Leadbitter, 13 M. & W. 838, which establishes the rule as now followed in the United States.

For a review of the cases and comment on Drew v. Peer, 93 Pa. St. 234, see an article on the "Law of the Theater," 12 Central Law Journal, 390.

§ 145. Ticket-Holder Becomes Trespasser on Refusal to Leave.

"The sale of the ticket to the plaintiff was a license to him to enter the hall of the building in possession of the defendant as its temporary lessee, and to remain in it during the concert to be given there. But the license was revoked immediately upon the entrance of the plaintiff into the hall before he had taken his seat. By remaining there afterwards and refusing to depart upon request, he became a trespasser; and the defendant had a right to remove him by the use of such degree of force as his resistance should render necessary for that purpose."

Burton v. Scherpf, 1 Allen, 133.
Johnson v. Wilkinson, 139 Mass., 3.

The rule is the same if the ticket-holder has entered the theater and is actually in the enjoyment of the license: the proprietor has the right to order him to leave at any time during the performance, and upon his refusal may do so, using no unnecessary force.

Wood v. Leadbitter, 13 M. & W., 838.
Pearce v. Spalding, 12 Mo. App., 141.
McCrea v. Marsh, 12 Gray, 211.

§ 146. No Action in Trespass Maintainable.

If the manager prevents the holder of a ticket from entering, no action of tort can be maintained for the exclusion.

McCrea v. Marsh, 12 Gray, 211.

In Horney v. Nixon, 213 Pa. St. 20, the plaintiff brought trespass for the price of certain theater tickets and for the

inconvenience and mortification suffered by reason of his exclusion from the seats called for thereby. He had purchased eight seats at the defendant's theater, but before the performance the city authorities ordered certain end seats removed, and in the confusion resulting from such removal the plaintiff's seats were resold to other persons. On his arrival at the theater with his party he was told that the seats were occupied. The management offered him other seats, which he refused to accept, and on his becoming so noisy as to disturb the audience he was invited to go into the corridor, where the money paid for the tickets was tendered to him, but he refused to accept it. The court, citing Vol. 21 Encyc. of Pl. & Pr. 647, said, "A theater ticket being a mere license to the purchaser which may be revoked at the pleasure of the theatrical manager, upon such revocation, if the person attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser and may be prevented from entering or may be removed by force, and can maintain no action of tort therefor. His only remedy is by an action on the contract to recover the money paid for the ticket and damages sustained by the breach of the contract implied by the sale and delivery of such ticket."

§ 147. When Action of Contract Can be Maintained.

While the right of revocation exists and for an ejectment no action of trespass in tort will lie, yet the ticket-holder has a right of action which, while not interfering with the manager's right to revoke, grows out of the invasion of his contractual rights, which are evidenced by the ticket. Having made a contract for an agreed price to enjoy a certain thing,

he cannot be deprived thereof without having a right to recover back in an action of contract what he paid for his ticket and such other damage as is directly occasioned or consequential from the invasion of the agreement.

In Drew v. Peer, 93 Penn. St. 234, the facts showed that the plaintiff and his wife purchased two reserved seat tickets of admission to the defendant's theater, and on entering the lobby were refused further admission, and finally were forcibly ejected. The court held that an action in the form of trespass on the case would lie and the plaintiff could recover as damages not only the price of the tickets, but the loss occasioned him by his wife's illness, which was attributable to the effect of the ejection; and in the case of Smith v. Leo, 92 Hun 242, the rule of damages was extended to such injuries to the good name, fame and credit of the plaintiff as were occasioned by the expulsion.

Here we have the peculiar doctrine of a license which can be legally revoked, and when revoked no action will lie in tort for the expulsion of the ticket-holder, after notice to leave, the same being justifiable; yet an action lies for the breach of contract involved in the same act, and damages can be recovered for the price of the ticket and such other computable injury as is the direct or consequential outcome of the revocation.

The application of this rule led to some confusion in the earlier cases, but the principle seems now to be firmly established as stated, and although the court said in Drew v. Peer, 93 Pa. St. 234, "that as purchasers and holders of tickets for particular seats, they had more than a mere license," yet the later decision in Horney v. Nixon (see *ante*), by the same court, is in line with the general and now undoubted doctrine that a ticket is a mere license and

nothing more, with full rights of revocation. And in the latter case the court, contrasting it with Drew v. Peer, says: "There is no analogy between the two cases."

Jamieson v. Milleman, 3 Duer, 255.
Prince v. Case, 10 Conn., 375.
Jackson v. Babcock, 4 Johns, 418.
McCrea v. Marsh, 12 Gray, 211.

§ 148. Damages Recoverable for Revocation.

In case of the revocation of the license conferred by a ticket of admission to a place of amusement, whether such revocation was before or after the holder has entered, the remedy is an action of contract and not tort.

The plaintiff is entitled to recover in an action of contract the money he paid for the ticket and all legal damages which he sustained by breach of the contract implied by the sale and delivery of the ticket.

McCrea v. Marsh, 12 Gray, 211.
Horney v. Nixon, 213 Pa. St., 20.

The question of damages, whenever the same have been allowed in an action of tort for trespass, seems to depend upon the manner in which the right of ejection is exercised, for conceding the right of revocation, it cannot be exercised and the ticket-holder ejected in such a way as to injure him bodily or hurt his good name, fame and credit, causing scandal and disgrace. Only such force as is absolutely necessary may be employed, and the manner of the act must be seemly or else the manager transcends his rights and becomes a trespasser himself, and liable for such wrongful act. Nor can the

manager in exercising his right of ejectment cause a breach of the peace without being guilty of a criminal misdemeanor.

Drew v. Peer, 93 Pa. St., 234.
Smith v. Leo, 92 Hun, 242.

In case of the revocation of a license to enter a place of amusement, if the same is unwarranted or a case of illegal discrimination, the jury can only award compensatory damages, the plaintiff being limited in his recovery to the damages actually sustained by him.

Smith v. Leo, 92 Hun, 242.

§ 149. Mistake in Sale of Ticket.

In a case where tickets were sold by mistake and as a result a patron was obliged to vacate his seat and leave the theater, the court held, although the mistake was attributable to the management, it was only slight negligence and it would be unjust to punish by vindictive damages.

MacGowan v. Duff, 14 Daly, 315.

§ 150. Right of Ejectment Discussed.

The right of ejectment, unless preceded by some disorderly or indecent conduct, is at best a narrow and perilous privilege when undertaken merely as a right and without clear and justifiable circumstances, tending as it does to the use of too much force on the one hand and the likelihood of a breach of the peace on the other.

The right to remove a drunken, disorderly or indecent per-

son is more clear of application and not fraught with the same difficulties. The common good and comfort of patrons demands the latter, while only the whim or fancy of the management may control in the former instance. The right to eject continues, but its enforcement leads to practical difficulties, which should be well considered in any instance.

When a manager revokes the rights conferred by a ticket and no undue force in ejecting is employed, the only remedy for such act is an action for the price of the ticket and for such actual legal damages as may have been sustained as a direct result of the revocation.

Wood v. Leadbitter, 13 M. & W., 838 (which overrules the earlier decision in Tayler v. Walters, 7 Taunt, 374.)
Burton v. Scherpf, 1 Allen (Mass.), 133.
McCrea v. Marsh, 12 Gray, 211.

§ 151. The Rule of Purcell v. Daly.

The reason and right of this rule is stated in the decision of the court in Purcell v. Daly, 19 Abb. N. Cas. (N. Y.) 301. "The theater is owned by the defendant, is private property, and is governed so far as the public is concerned by such rules and regulations as the defendant may see fit to make. It is in no sense a public enterprise, and is consequently not governed by the same rules which relate to common carriers or other public institutions of a like character.

"The proprietor of a theater is under no obligation to the public to give any performance therein. He has no duties to perform with which the public are in any legal sense concerned, or with which the public have any right to interfere.

It is true that he pays a license for the privilege of giving theatrical exhibitions, but this in no way changes the character of the institution from a private to a public one. He may shut up his theater, or he may use the theater property for other purposes than theatrical entertainments, in which case he is under no obligation to pay a license. It is only when he uses his property for that purpose that a license fee is exacted. If the proprietor of a theater sees fit to discontinue performances, the public cannot complain. This being so, the proprietor of a theater has a perfect right to say who he will or will not admit to his theater, and should anyone apply at the box office of a theater and desire to purchase tickets of admission, and be refused, there can be no question that he would have no cause of action against the proprietor of the theater for such refusal. And in the same way, if tickets are sold to a person, the proprietor may still refuse admission, in which case the proprietor would be compelled to refund only the price paid for the tickets of admission, together with such other expense as the party might have been put to, but which expense must be directly connected with the issuing of the ticket of admission. For he could not accept money for the right of admission to his theater, and then upon refusing that admission seek to retain possession of the price paid for the privilege. A theater ticket is simply a license to the party presenting the same to witness a performance to be given at a certain time, and being a license personal in its character, can be revoked."

Mendenhall v. Klinck, 51 N. Y., 246.
Wood v. Leadbitter, 13 M. & W., 838.
Rex v. Jones, 1 Leach C. C., 204.

§ 152. Conditions on Ticket.

The manager has the right to issue his tickets with conditions printed thereon. If a ticket states it will be worthless "*if transferred*" or will not be received as good for admission "*if sold or purchased on the sidewalk,*" such is legal, for a license is personal and not transferable, and can properly be limited to its original purchaser.

The contract limits the right of admission to the actual purchaser, which is the gist of the conditional contract made between the parties. There is certainly no agreement on the part of the manager to refund the money in case the ticket so issued is not used, and hence under any aspect of the case the only liability on the part of the defendant would result from his refusing admission to the theater to the person to whom the ticket is issued.

Purcell v. Daly, 19 Abb. N. Cas. (N. Y.), 301.
Mendenhall v. Klinck, 51 N. Y., 246.
Collister v. Hayman, 183 N. Y., 253.

§ 153. Return Checks.

A return check, being merely an evidence or voucher of the original contract, cannot be transferred if the original ticket of admission is not transferable. The return check establishes no new contract or relation between the parties. How far this rule would apply, where the original ticket is transferable, is open to some question.

The matter has been discussed in an article on "The Law of the Theater" in 12 Cent. Law J. 390, in which it is said: "We should think that the purchaser of a reserved seat at a theater, who sells his pass on leaving the house, together with the ticket for his seat, could confer no right to the second pur-

chaser which would entitle him to admission; it being one of the characteristics of a license that it is limited to the person to whom it was originally given, and cannot be susceptible of transfer and alienation. Licenses are confined to the original parties and can neither operate for nor against third parties."

This rule necessarily depends on what a return check really is: should it be considered as a part of the original contract or a mere identification of the rights of the one to whom it is given to reënter; is it personal in nature, showing that the original holder is a licensee satisfactory to the management and may return, or is it simply a ticket of admission entitling anyone having the same to enter? We believe it is restrictive and should be limited to the uses of its original holder, for it cannot be construed as evidence of a new contract which allows the original license to transfer his rights of reëntrance to anyone he chooses to select; rather it is merely an additional privilege given him of leaving and returning, which the terms of his contract do not embody and which he cannot as a matter of right insist on or claim. For a ticket-holder who has once surrendered his ticket and entered has no right to leave and insist on a right to reënter. If allowed to do so, it is by way of courtesy and not of legal right, and one to whom he gives it cannot complain because he is refused admission thereon.

Another doctrine has been stated thus: "A purchases a ticket entitling him to a reserved seat at a theatrical performance. He enters a theater, and, at the conclusion of the first act, leaves the house, and not being disposed to return, sells the check or pass received from the doorkeeper on leaving, together with the ticket for his seat, to B. Is B entitled to admission upon the pass? Answer: The contract between

the manager of the theater and the ticket-holder is a contract for the use of a certain seat by some person, *i. e.,* the holder of the ticket. It is not a contract that a certain seat shall be occupied by a certain person. It is a contract for so much space, which the ticket-holder may occupy by himself or by his friend, or which he may leave unoccupied. The right to use or occupy that seat or that space is, for the time being, his property; he has bought it, and he may either exercise that right himself or he may sell or assign it to another, provided there are no personal objections to that other. If B is a person to whom there would have been no objections had he been the original holder of the ticket, he is entitled to admission upon the pass."

12 Cent. Law Journal, 390.

This doctrine seems to be founded on the erroneous assumption that a theater ticket contract is a lease, and the reasoning cannot apply if it is considered as a license. A license is a personal right and not transferable. The holder of the return check could not transfer it if the original ticket of admission was non-transferable, as it surely cannot have superior rights to the ticket itself.

The first stated rule would seem to be in accord with the decisions. The mentioned but doubted doctrine is based on the assumption that the ticket contract between the holder and the management is an agreement for the use of a designated seat or place by any person who happens at the time being to be the holder thereof, and is not dependent upon any question of who originally purchased the ticket and thereby became a party to the contract. If such proposition is true and there is no individuality to the contract and the ticket

passing from hand to hand creates new and successive parties to the agreement, then undoubtedly whoever holds the ticket has the right to occupy such seat or space in the theater as designated under his contract with the manager, and the return check being a species of voucher for the surrendered ticket, the original holder's rights may be assigned to any person to whom he gives the return check. It would seem, however, that such a rule is repugnant to the entire doctrine governing such tickets, for the holder of the ticket if admitted to the theater has so far entered upon the enjoyment of his contract that he may not during the performance make a legal assignment of a part of the enjoyment thereof; and if he leaves at the end of the first or other act and is given a return check, which at best is merely a courtesy on the part of the management, and delivers the return check to another, the management should have every right to refuse the holder admission thereon if on no other ground than the transfer of a personal license.

The ticket confers merely a license and establishes no definite and absolute right to any particular seat or place for any specified time. It is a privilege, personal in nature, which the management can revoke at its discretion, and as such license is revocable there is no reason for giving a return check a greater degree of importance than the original ticket. It would seem entirely consistent with the general rule to refuse admission on a return check which has been transferred to another, on the ground that the same being a mere personal license, it cannot be legally assigned, and its new holder has no rights thereunder.

Jackson v. Babcock, 4 Johns, 418.

§ 154. Reserved Seats.

If the manager advertises the sale of reserved seats at a stated price for specified performances and refuses to sell certain seats as demanded, he is not liable, for he can sell a seat or not as he pleases.

In Pearce v. Spalding, 12 Mo. App. 141, the proprietor of the Olympic Theater caused an advertisement to be published in the St. Louis newspapers as follows: "Olympic Theater—Opera—Special Notice—The Season Sale of Seats for Her Majesty's Opera will open at the box office of the theater on Monday morning, February 7th, at nine o'clock and continue February 8th.

"Repertoire, Monday, February 14th. 'La Somnambula,' etc. Prices, Parquette and dress circle, $3," etc.

The plaintiff presented himself and was first at the box office, at the advertised time, demanded certain seats and was refused the same. The seats were in defendants' possession and were subsequently sold to other persons. The plaintiff brought an action for breach of contract. The court in its decision said: "Defendants advertised to sell reserved seats; but they did not advertise that the first applicant should have his choice of any seats in the parquette at $3 for each entertainment, nor that he should have numbers 675, 677, 679 and 681; nor that he should have a license to use any seat during the performance for seven consecutive entertainments. By no fair construction can any such meaning be got out of the language of the advertisements. Suppose a man, wishing to ruin the house, or to forestall the entertainment or from any motive, good or bad, had tendered the boxkeeper the price of every seat in the parquette, for every entertainment, must he have accepted it? Why so? Theaters are not necessities of life, and the proprietors of them may manage their business

in their own way. If that way is unfair or unpopular, they will suffer in diminished receipts. Clifford v. Brandon, 2 Camp. 358-368. But suppose that defendants had offered to plaintiff, in express terms, his choice of seats, provided he were first at the box office at nine o'clock on February 7th, and by extraordinary efforts he had got there at that hour, and the defendants out of mere caprice had determined to close the house, or to throw it open to the public, or to hold a prayer meeting in it during the week advertised for the opera, to what damages would plaintiff have been entitled to for the false representation? Clearly he would have been entitled to no damages, except for some loss that could be estimated by a money standard. He might recover perhaps for loss of time and for car hire. He could recover nothing, we think, for the mental anguish occasioned by not hearing 'Fra Diavolo' or 'Lucia di Lammermoor' any more than he could have recovered for any agonies that he might possibly have endured had he been present at the opera and had the music been so excruciatingly bad that any intervals of silence would have come like so many poultices 'to heal the wounds of sound.'

"It has been held, indeed, that where one who has actually purchased his ticket to the theater, no matter what his musical tastes may be, or what delight he may anticipate, is prevented from entering by the management, with no rudeness or unnecessary force, he cannot maintain an action of tort for the exclusion; and that his recovery must be upon the contract; and the measure of damages is the money paid for the ticket and all actual legal damages sustained by the breach of the contract."

This rule is capable of many applications, and in a case where plaintiff purchased seats for a specified time for a per-

formance at defendant's theater, but was forced to surrender them to the usher, as the ticket agent had by mistake sold him tickets for a performance of an earlier date, and it appeared that no force or violence was used by the usher and the plaintiff did not claim he had been insulted, it was held that the plaintiff had no claim for exemplary damages, as the manager acted wholly within his rights.

MacGowan v. Duff, 14 Daly, 315.

§ 155. Right to Refuse Sale of Ticket.

Having the right to revoke necessarily determines the privilege of selling or refusing to sell. The manager is under no legal obligation to give or sell the license of admission to anyone, or if sold to continue it in force; until he does sell the ticket no contractual relation is established; hence a refusal to sell can give no basis for any action.

§ 156. Sale of Reserved Seats a Constitutional Right.

A manager may sell tickets entitling the holder to a reserved seat, and an act of the legislature prohibiting such sale is incompetent as being a vexatious and unlawful interference with the rights of private property.

District of Columbia v. Saville, 1 McArthur, 581.

But an ordinance providing that it shall be unlawful for any person to sell reserved seats to a theatrical or other performance after the doors of the theater have been opened, is not invalid as being unreasonable.

City of Cincinnati v. Brill, 7 Ohio N. P., 534.
Same, 5 Ohio S. & C. P. Dec., 566.

The management of a theater may grant tickets of free admission at its discretion, but this practice, if carried so far as to become an injury to the stockholders or other interested parties, may be restrained by injunction.

Baker's Appeal, 108 Pa. St., 510.

§ 157. Where all Seats are Sold Purchaser can Demand Back Admission Fee.

The manager has no right to sell admission to his theater if all the seats are occupied, without explaining to the purchaser such fact. The purchaser is justified in the belief that his ticket entitles him to a seat and must be informed that it does not; otherwise he is entitled to a return of his money. He must, however, leave the theater immediately on ascertaining such fact and has no right to occupy a higher-priced seat than his ticket calls for, because there is no room elsewhere. If he persists in such a course, he may be removed. He has a right, seemingly, to occupy such higher-priced seat until asked to vacate and commits no wrong until given notice.

Lewis v. Arnold, 4 C. & P., 354.
Dauney v. Chatterton, 45 L. J. C. P. Div., 293.
McGoverney v. Staples, 7 Alb. L. J., 219.
Comm. v. Powell, 10 Phila. (Pa.), 180.
Fire Department v. Stetson, 14 Daly, (N. Y.), 125.

If a person is told on entering a theater that there is room, when in fact there is not, his proper course is to leave the theater and demand the return of his money; and such person is not justified in getting into a private box in the theater, and if he does, the proprietor may remove him, using no more force than is necessary.

Lewis v. Arnold, 4 C. & P., 353.

§ 158. Discrimination.

The manager has the power of assigning seats in his theater as he sees fit, and can designate certain thereof for the use of colored persons without violating the fourteenth section of the Constitution of the United States.

Civil Rights Cases, 109 U. S., 3.

Unless a State has enacted a law undertaking to say how theaters and places of amusement shall be managed in this respect, the manager has full right to assign to any certain class a specified place or seat, excluding such from other portions of the auditorium.

In Younger v. Judah, 111 Mo. 303, where no State law had been enacted, it was held that where the proprietor did not exclude a colored person, but compelled him to take seats in the balcony, such was a reasonable regulation which could be enforced.

Bowlin v. Lyon, 67 Iowa, 536.
Burton v. Scherpf, 1 Allen, 133.

§ 159. Discrimination, when Prohibited by Statute.

But where a State has enacted laws known as civil rights statutes, under them it has been held that the proprietor of a theater will be liable in damages for a refusal to admit a colored person, and for a refusal to admit a colored person to the several circles or grades of seats in a theater, for refusing a colored person admission to a skating rink, and for drawing any line of distinction between a white and a black man in a restaurant.

Joseph v. Bidwell, 28 La. Ann., 382.
Donnell v. State, 48 Miss., 661.
Baylies v. Curry, 128 Ill., 287.
People v. King, 110 N. Y., 418.
Ferguson v. Gies, 82 Mich., 358.

In Greenberg v. Western Turf. Assoc., 140 Cal. 357, the Supreme Court of California held that a statute making it unlawful to refuse admission to any opera house, theater, race course, or other place of public amusement to any person over twenty-one years of age who presents a ticket of admission and providing a penalty therefor was a valid exercise of the State's police power, and was not unconstitutional as a deprivation of civil rights conferred by the Fourteenth Amendment. "It is uniformly held that the State has the power to speak in regulating such places of amusement, and that when it does so speak, it is with absolute authority, and its express law supersedes the mere whim or pleasure of the proprietor so that he may no longer exercise his right to revoke this personal license." Citing among other cases:

People v. King, 110 N. Y., 418.
Messenger v. State, 25 Neb., 674.
Munn v. Illinois, 94 U. S., 113.

§ 160. Discrimination Against Race or Color.

In certain jurisdictions theaters are so far considered as enterprises of a public character as to come within the limits of State laws prohibiting the discrimination against persons because of race or color, which has led to considerable apparent confusion in the decisions. The general rule, however, has undergone no change, but its enforcement in such prohibited cases gives a ground for criminal complaint. While at

common law the right of cancellation of admission is recognized independent of any specified reason for so doing, yet this rule must be carefully applied when a statute against discrimination exists. Some States have adopted laws making it unlawful to discriminate against colored people or any person over twenty-one years of age. In such instances the manager must be careful in exercising his common-law right of revocation, provided any remains to him under the statute, for unless some apparent reason in justification is shown, a jury would be apt to attribute his act to the discrimination prohibited. That no discrimination be made on account of race or color cannot be extended, for even under such statute a person could not insist on a right to enter if in an unfit condition or be exempt from the manager's right to eject if his conduct was improper.

§ 161. The Right of Revocation Not Abridged.

These statutes in no wise change the common-law rule which is still applicable, and a manager has the full and complete right of revocation; but if it is found that he exercised this right solely on account of a discrimination against race or color, he would be liable therefor, as provided by the statute. This statutory rule against discrimination may apply not only to admission, but to the choice of seats, and allows a right of selection of place which must be respected as fully as though there was no question of color. The statutes of the different States vary in extent and should be consulted as to how far the general rule of discrimination has been abrogated. With this exception, if such it can be called, the manager has full control over the persons who may be admitted to his theater, and even here he still has the right to refuse

admission, although for so doing he may be held under the statute either criminally or for a stipulated sum in a civil action.

Statutes prohibiting the exclusion of colored persons from places of public amusement have been held constitutional and within the rule of allowable legislation.

People v. King, 110 N. Y., 418.
Baylies v. Curry, 128 Ill., 287.
Drew v. Peer, 93 Pa. St., 234.

§ 162. Statutes Against Discrimination and the Common Law.

This doctrine seems to be established in direct opposition to the theory on which the right or license of admission to a theater rests, for if a license is legally revocable and the manager has full and unrestricted powers to admit or refuse admission to his place of entertainment, which is his private property in the same degree as a man's dwelling house, then such statutes are in abrogation of private property rights and not within the powers of police control over public business, or matters which are recognized as proper for restrictive legislation under the Constitution. If one, for no reason, can legally exclude a person from his premises because of his inherent right so to do, or, having granted a license to enter, can immediately or subsequently revoke the same, such rights must be absolute and unconditional, as they proceed on the same theory that recognizes every man's house as his castle and inviolate from those not invited to enter.

When the legislature insists that a certain class of condition or color shall not be excluded from the place of amusement it must do so on the ground that the place is public and therefore subject to legislative control, which is certainly not

the case. It is quite certain, even under the cited decisions, that the manager's right of exclusion is not taken away, and he may continue to exercise the same, although incurring some prescribed liability under the statute for exercising a function which is clearly of a private and personal nature. He can consistently exercise his full powers of revocation, for in that respect there is no question of the abrogation of his right.

§ 163. Exclusion of Notorious Characters.

A person of notoriously bad character can properly be excluded from a theater as affecting patronage and tending to annoy the patrons, and such would be equally true of an intoxicated, insane or otherwise objectionable person. This is apparent and justifies the act of exclusion or ejection.

The theatrical business is of such a semi-public nature, depending on general patronage, that the manager is forced to protect his patrons and their feelings; otherwise they will refuse to attend his place of business. Their sensibilities must not be outraged by objectionable people who are obnoxious either in morals, appearance, conduct or personal condition. The rule is of easy application and is properly enforced in the interest of the comfort of the audience and the business of the manager.

The right of the management to refuse admission to an insane person or a person afflicted with a contagious or infectious disease does not need judicial sanction, so clear is the wisdom of such exclusion. An analogous case is found in the law as applied to a sleeping car company.

In Pullman Co. v. Krauss, 40 So. Rep. 398, the Alabama Supreme Court held that the right of a person to a berth or passage on a sleeping car is not unlimited, but is subject to

such reasonable regulations as the sleeping car company may prescribe, and that a rule excluding insane persons and persons afflicted with contagious or infectious diseases is reasonable. The plaintiff in this case had purchased a sleeping car ticket, but on its being discovered that he had a contagious disease, the conductor refused to let him ride on the car. The court held that the company was within its rights in refusing him passage, though it was bound to offer to return the purchase price of the ticket.

For the same general reasons the manager should refuse to admit anyone in a filthy condition of dress or so attired as to cause discomfiture to others. He can go to any unreasonable extreme in this direction and refuse to admit soldiers in uniform, people in outing dress or those not wearing regulation evening clothes. The motives of the manager's refusal to admit are immaterial, and he is not under legal obligation, because a license has been granted him, to admit any person whom he chooses to exclude. To refuse admission to one in dirty condition of dress or coatless may seem more logical than to exclude a sailor because of his uniform or a man not in evening garb. The principle does not depend, however, on such reasoning, but solely on the inherent right of the manager to admit to his place of amusement only such persons as he wishes, and those who do not satisfy his ideas of fitness in the matter of dress he can exclude.

If the person who is refused admission has acquired a ticket, he has an action of contract (not of tort) against the manager and can recover the price paid for the ticket and any actual expenses incurred in attempting to obtain admission to the place.

See ante, § 146.

This question was recently passed upon (April, 1907) by the Rhode Island Superior Court in the case of Buenzie v. Newport Amusement Association.

There a chief yeoman of the United States navy was refused admission to a pavilion because he was wearing a naval uniform, and the Court held that because the plaintiff was in the garb of the United States navy, he was in no different legal position from one who is excluded because he is not in evening dress or for any other reason, though it may have been but the whim of the defendants.

TICKET SPECULATORS

RIGHTS OF MANAGER AND PUBLIC IN RESPECT OF SAME

FORGERY OF TICKET

CHAPTER IX

§ 164. Ticket Speculators and Their Standing.

The peculiar rights of a manager in respect of control over admission to his place of amusement necessarily determine the ability of ticket speculators to do business. The manager can properly refuse admission on tickets purchased from a speculator, but should display notices to that effect at the ticket office of the theater, or have such condition printed on the tickets themselves in order to avoid any possible question as to damages on refusal to admit. The person purchases his ticket subject to the actual conditions and may not complain, although he has acquired the ticket in ignorance of the real facts. Under such circumstances the manager is warranted in refusing to honor tickets purchased from speculators.

§ 165. The Doctrine of Purcell v. Daly.

This principle was most carefully discussed and enunciated in the leading case of Purcell v. Daly, 19 Abb. N. Cas. (N. Y.) 301, where the following facts appeared:

Action was brought by Purcell to recover from Augustin Daly the sum of three dollars, the price paid by one Stedeker for two reserved seats at Daly's Theater for the performance of March 23, 1885. The ticket of admission was sold to one Aaron, who purchased the same at the request and for the benefit of Stedeker. This ticket was subsequently sold by Stedeker to one McNeany at an advanced price, but when

presented at the entrance to the theater it was not honored and admission was refused. McNeany then presented this ticket at the box office of the theater, and demanded the return of the price paid for it, namely, three dollars, which was refused. Stedeker then repaid to McNeany the money paid to him, and in person, presented the ticket at the box office and demanded the return of the amount paid for it. This second demand was also refused. Stedeker then assigned his claim to recover back the price of the tickets, to the plaintiff.

Daly was the proprietor of Daly's Theater and Stedeker a speculator in theater tickets duly licensed by the proper authorities. The defendant for some time had endeavored to stop speculation in tickets of admission to his theater, and to that end issued a peculiar form of ticket to persons applying for admission and caused a notice to be conspicuously displayed in the vestibule of his theater informing all persons that tickets purchased or sold on the sidewalk were worthless, and that they would not be received at the door of the theater, and requesting all parties to read the notification on each slip. This notification printed on each ticket or slip was to the effect that a ticket so issued was a simple license and issued to the party applying for the same by name and was not transferable and would be refused at the door if purchased or sold on the sidewalk.

The court on these facts found that the plaintiff could not recover, on the ground that the theater was private property, and governed so far as the public was concerned by such rules and regulations as the defendant saw fit to make. The same being in no sense a public enterprise and not governed by such rules as apply to public institutions.

"The license of a 'ticket speculator,' so far as it has any validity, simply authorizes him to conduct his business on

the sidewalk, within the limits prescribed. Neither the license to the owner of the theater nor the license to the ticket speculator adds to or takes from the rights of the parties to the contract made when the proprietor sells a ticket. The rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made. The privilege accorded by the city authorities cannot change the inherent nature of a theater ticket."

§ 166. That Ticket Speculator is Duly Licensed Makes No Difference in the Application of Rule.

That a ticket speculator is licensed by the local authorities to deal in theater tickets and is engaged in a lawful business does not alter the right of a manager to refuse admission on a ticket sold by him, as the privilege accorded by the city authorities cannot change the inherent nature of a theater ticket. If that ticket could be bought and sold by anyone, as are railroad tickets, the rule would be different; but as a theater ticket is merely a revocable license, the manager has a right to refuse admission thereon, and it is competent for him to refuse to recognize tickets purchased by a speculator and resold to another, and he may warn persons intending to so purchase tickets that the same will not be accepted notwithstanding a city ordinance has given power to the authorities to license a ticket speculator and thereby give him authority to carry on that business. There can be no question of discrimination involved in such a case.

Collister v. Hayman, 71 N. Y. App. Div., 316.

§ 167. The "Metcalf Case," People v. Flynn.

The same principle has recently arisen in another form in the so-called "Metcalf Case," which is reported in People v. Flynn, Supreme Court, N. Y. App. Div., July 12, 1906, N. Y. Supplement, vol. 100, page 31.

The defendant was the manager of a theater and a member of the Theater Managers' Association of New York. The complainant, James S. Metcalf, a dramatic critic and writer, charged Flynn and other theater managers with entering into a criminal conspiracy to prevent him from exercising his lawful calling of critic by making an agreement to exclude him from the theaters managed by them, and by carrying out such agreement and forcibly preventing him from entering after he had purchased a ticket of admission.

At a meeting of the Theater Managers' Association of New York, held in January, 1906, a resolution was adopted not to admit Metcalf to the theaters under the management of a large number of the members, and this because the association felt that Metcalf had persistently attacked their personal integrity and had made unjustifiable attacks upon the religious faith of certain members.

Flynn was a party to the original agreement, and it was claimed he was guilty of a criminal conspiracy therefor.

The court, however, held that there was no such legal conspiracy. "If the various theater managers had the right to refuse admission to the complainant to their theaters, an agreement to do so and the subsequent preventing of him from entering them was not unlawful unless such agreement was entered into, not to protect their own interests or to please their own fancies, but for the sole purpose of injuring the business and calling of the complainant.

"The rights of theater managers and theatergoers have been recently considered by the Court of Appeals in Collister v. Hayman, 183, N. Y. 250, and it was there decided that the conducting of a theater is a private business, which the proprietor can open or close at will, admitting as many as he sees fit, and charging what he may choose as a rate of admission.

"The particular matter under consideration in that case was the right of one who purchased from a speculator a limited ticket, and in upholding the manager's right to limit a ticket, the court held that 'they (theater managers) can make it a part of the contract and a condition of admission, by giving due notice and printing the condition on the ticket, that no one shall be admitted under twenty-one years of age or that men only or women only shall be admitted or that a woman cannot enter unless she is accompanied by a male escort and the like.' Taking the holding of the court of last resort, therefore, in its broad sense, the manager and proprietor of a theater has the right to say who shall enter his place of entertainment and who shall not or what class of people shall be entitled to do so and what class shall not. This necessarily from the fact that his enterprise is a private one and not public and because, while he may entertain the public at large if he sees fit, he is under no obligation to do so. His rights and duties are not like those of carriers of passengers, for example, who have public franchises and are under obligations to give public service.

"The relator and his associates did not, therefore, enter into an unlawful agreement when they agreed among themselves that the complainant should not be admitted to the various theaters managed by them. If they disliked his presence or thought his attendance was injurious to their

business, they could agree that he should not be permitted to attend. If he attempted to do so, their place of amusement, being their own and being a private place so far as any individual or the public was concerned, they had a right by such reasonable force as was necessary, to prevent him from entering. Their acts, therefore, in so preventing him were not unlawful acts."

§ 168. The Manager May Refuse to Admit on Ticket Purchased of a Speculator.

This attitude is entirely optional with the management and is a necessary result of the general right to refuse anyone admission, and therefore it can apply the rule to certain tickets and not to others.

This, while in effect discrimination and inconsistent with the general idea of fairness, is merely an application of the well-settled principle of the implied right of revocation for any reason or no reason at all. The public sees but little difference between a ticket purchased from a sidewalk speculator, which the management refuses to honor, and a ticket purchased from an established general ticket agency supplied with tickets by arrangement with the theater, that the management honors. The fact remains, however, that a ticket is but a personal license with power of revocation and not a note or bill equally good as it passes from hand to hand. It is subject to the will of the manager, who has the legal power to insist that it shall not be resold under certain conditions. He can arbitrarily do quite as he pleases. The box office of a theater differs from a shop in that in the latter whatever is for sale can be required as a matter of right by anyone who selects the article and proffers the price before

it is withdrawn from sale. In the case of a box office no such rule obtains, and the public must remain content with what is offered and cannot demand as of right what may be unsold or reserved for others. The rule of first come first served, while more fair, has no legal application, and though it would doubtless tend to a better and more loyal patronage, is not compulsory, nor can it legally be made so without overturning the established doctrine of ticket law. The manager can dispose of his tickets as he pleases, can give them to speculators for sale at advanced prices and be pecuniarily interested therein; or hold certain seats in reserve for regular patrons or for selected persons, since the whole matter is entirely within his control. How many tickets, or when or where or to whom the same shall be sold is not subject to legal supervision in any respect, save as to sales beyond seating capacity or against the provisions of some building or fire ordinance. Statute may attempt to regulate this matter, but it is doubtful if any law could be framed which could accomplish any real or practical change in the present method of control, without being unconstitutional. Laws have been quite generally passed prohibiting sales of tickets by speculators on the sidewalks and streets of cities, which are just, as protecting the public from what is defined as a nuisance, as these sellers often misstate as to location of the seat offered, sell forged or invalid tickets to unsuspecting persons or obstruct travel on the sidewalks.

The purchaser has no practical redress, as the speculator has disappeared by the time the deceit has been discovered. This is a matter properly within the police power of the legislature, which can and should pass laws protecting the public in such respect.

While catering to public patronage a theatrical busi-

ness still remains a private enterprise, and its opening or closing is a matter of the personal desire of the manager, who is best able to determine how his business shall be conducted, These statements of law will serve to reconcile and answer many questions which are at times annoying and perplexing and not generally understood. The theater, it must be borne in mind, is not a public institution, and while regulated, licensed and controlled by statute and ordinance, it remains a private enterprise, depending on the public for support, yet with free powers of self-management and the right of arbitrarily determining those who shall have admission within its portals. While just criticism can be made of the manner in which certain managers treat the general public in some respects, such are matters incapable of legal control or adjustment, for in the words of Lord Mansfield, "the proprietors of a theater have the right to manage their property in their own way."

A theater is a private estate, and the manager has as full control over it as the householder over his home. On no other principle could the theater owner compel the public to respect his private rights, which are personal despite the public nature of the business he carries on. His catering to the public does not destroy the privacy of the place and business he conducts.

§ 169. Forgery of Ticket.

A false ticket wholly printed and in no part written is nevertheless a forgery, and although it does not state any terms of the contract in detail, but only abbreviations and words from which a contract may be properly inferred and be legally stated, it is still evidence, showing a valuable legal

interest which arises from the possession and ownership of the instrument. Although it is wanting in details of language fully stating the nature and extent of the contract, it is sufficiently indicative of a promise or obligation to render it an instrument of value, a forgery of which would clearly prejudice legal rights. Such false instrument would, if genuine, create a liability on the part of the manager to allow the holder thereof to enter his place of amusement, and would, therefore, be a contract of value in the hands of a third person, and although revocable, the sum paid therefor can, in case of revocation, be recovered back in an action of contract. Thus would occur a sufficient and improper invasion of legal rights.

Commonwealth v. Ray, 3 Gray, 441.
Benson v. McMahon, 127 U. S., 457.

EJECTION, HOW ACCOMPLISHED

INJURY OCCASIONED BY REMOVAL OF DISORDERLY PERSONS

MANAGER'S RESPONSIBILITY FOR THE WRONGFUL ACTS OF HIS EMPLOYEES

THE ESTABLISHMENT OF A CONTRACTUAL RELATION

LIABILITY FOR LOSS OF PATRON'S PROPERTY

CHAPTER X

§ 170. How Ejection Must be Accomplished.

Having determined the manager's right to eject in any particular case, it is important to consider the way and manner in which the ejectment should be performed to avoid civil liability for assault. This can be accomplished by the act of the manager or anyone under his direction or in his employ. There is no necessity for police interference, for a constable or police officer attending or employed in a place of public amusement has no greater or increased power than he would have in any other place, and is bound to discharge his duties in the same way and manner, with the same regard to the rights of the person whom he may seek to eject or arrest. If he is employed by the management to maintain order, while acting in the discharge of his duties, he has no other or greater rights than a private individual who might be employed in the same capacity to enforce the rules and regulations provided for the conduct of the audience.

State v. Walker, 1 Ohio Dec. (Reprint), 353.

§ 171. Not a Trespasser Until After Notice to Leave.

"Nor is it lawful for the owner of property in defense of his possession to make an attack upon the trespasser without first calling upon him to desist from his unlawful purpose, unless the trespasser is at the time exercising violence."

Bigelow on Torts, section 384, and cases cited.

One who has been permitted to enter is in no sense a trespasser until notified that his right to remain is revoked, and then, after he has had an opportunity to depart and does not, he becomes a trespasser, and can be ejected by the use of so much force as is necessary for its accomplishment.

The revocation of the right to remain need not be explained; the request to leave is ample notice of the withdrawal of the license. The removal, where the entrance was rightful, must not only be prefaced by a request to leave, but followed by an allowance of a reasonable interval of time for compliance with the demand. If the person refuses to leave, after a lapse of such reasonable interval, he can be forcibly ejected, but not before, without civil liability on the part of the management for the act.

Commonwealth v. Power, 7 Met. (Mass.), 596.
Gyre v. Culver, 47 Barb., 592.
Woodman v. Howell, 45 Ill., 367.

§ 172. Improper Conduct Constitutes Trespass.

Anyone who rightfully enters but afterwards becomes disorderly or misbehaves or conducts himself in an improper manner, or refuses to abide by the rules and regulations provided by the management, thereupon becomes a trespasser, and after notice to leave can be forcibly ejected, his wrongful acts having forfeited any right he may have had to remain.

Markham v. Brown, 8 N. H., 523.
Wall v. Lee, 34 N. Y., 141.
Abt v. Burgheim, 80 Ill., 92.
Reid v. Inglis, 12 U. C. C. P., 191.
Webster v. Watts, 11 Q. B., 311.

§ 173. Force Allowable to Accomplish Removal.

"It is well settled that a person may, after requesting another to remove from his premises, and his refusal to do so, use force for the purpose of removing him. As the kind and degree of force proper to remove a trespasser must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case is a question of fact to be left to the jury."

Commonwealth v. Clark, 2 Met. (Mass.), 23.

The force used, to be justifiable, must be reasonable and not disproportionate to the requirements of the particular instance.

Commonwealth v. Mann, 116 Mass., 58.
Abt v. Burgheim, 80 Ill., 92.
Commonwealth v. Bush, 112 Mass., 280.

§ 174. The Exercise of the Right Must be Reasonable.

This rule should be strictly adhered to, and while the motive for the expulsion is immaterial, yet the exercise of the right must be in reason. No more force than is absolutely necessary will be tolerated, nor can any uncalled for indignity be perpetrated. The removal once accomplished, it is assault and battery to follow the evicted person up and strike him, and to do so affords reason for additional damages. If the manager uses more force than is necessary to compel the wrongdoer to leave, he becomes a trespasser *ab initio*.

Jones v. Jones, 71 Ill., 562.
Brebach v. Johnson, 62 Ill. App., 131.
Sargent v. Carnes, 84 Tex., 156.

If the act of expulsion is performed with wanton cruelty, exemplary or punitive damages will always be given to the wronged party.

Kimball v. Holmes, 60 N. H., 163.
Jones v. Jones, 71 Ill., 562.

§ 175. Injury Occasioned to Patron by Removal of Disorderly Person.

If there is a rule of the management that an usher or other employee shall remove from the theater any person who by reason of misbehavior or of intoxication makes himself obnoxious to other patrons, it is the duty of the employee to remove such person at once, and if in so doing another patron is injured by the resistance of the wrongdoer, the management is not liable for such injuries, as the employee was acting rightly in ejecting the person, and as against the patron who receives an injury he was doing one of the things which had to be contemplated as the necessary consequence of a lawful and reasonable act.

In the enforcement of rules and regulations which are made for the comfort and protection of others against disorderly or drunken persons, a patron may not complain of an injury he sustains occasioned by the ejectment and because of his nearness or proximity to the trouble. The enforcement of this rule is a necessary and lawful act, which, neglected, would make the management responsible for resultant injuries, and if someone is injured during such ejection, it must be taken as one of the risks which anyone assumes in entering a public and crowded place. It would, of course, be impossible to clear the theater of its audience before ejecting a disorderly person; his going should be immediate, and in removing him the man-

agement cannot be made responsible for what he does to others in resisting the ejectment. One attending a crowded place resorted to by the general public assumes certain risks which the law considers are the logical outgrowth of the situation, and if the injury received was the necessary consequence of a reasonable act, it relieves the manager from the liability.

Cobb v. Boston Elevated Ry., 179 Mass., 212.
Spade v. Lynn & Boston Railroad, 172 Mass., 488.

The same rule applies here as in the case of a common carrier who is bound to eject from his conveyance drunken or disorderly persons who annoy or molest other passengers. The usher or other *attaché* of the place of amusement acts rightly in ejecting a person who is intoxicated or disturbs others in the audience. As against a person injured because of such ejection the usher does one of the things which the patron had to contemplate as liable to happen when he entered the place. If people are seated in close proximity to a disorderly person, he cannot be removed without more or less contact, and if he pushes or falls upon and hurts a patron and such is the necessary consequence of a lawful and reasonable act, then it was one of the risks which the patron assumed when he entered.

Cobb v. Boston Elevated Ry., 179 Mass., 212.

§ 176. The Manager's Responsibility for the Wrongful Acts of His Employees.

Under the established principles of agency a manager is liable for the wrongful acts of his agents or employees if done within the scope of their employment.

The manager of a place of amusement is responsible for an assault upon a patron committed by a special police officer, who was appointed by the police commissioners for the theater at the special request of the manager, and who was employed and paid solely by the manager, and also for an assault committed by a gatekeeper at a park.

Dickson v. Waldron, 135 Ind., 507.
Oakland City, etc., Co. v. Bingham, 4 Ind. App., 545.

The test as laid down by Cooley is "not the motive of the servant, but whether that which he did was something which his employer contemplated, and something which, if he should do it lawfully, he might do in the employer's name."

Cooley on Torts, 536.

The difficulty in applying this principle lies in defining what acts properly fall within the scope of that service. An employer, however, is not responsible for the wrongful act of his employee unless that act be done in the execution of the special authority given by his employer. Beyond the scope of his employment he is as much a stranger to his employer as any third person, and therefore his act cannot be regarded as the act of his employer.

An employer is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment. The master, however, is not liable for a wrongful, willful and unlawful act of his employee toward a third person, although the employee professes to be acting in the manager's employment, if the act is

entirely independent and outside of and having no proper connection with the employment.

Browne Domestic Relations, 138.
Dickson v. Waldron, 135 Ind., 507.
Article on Master's Liability for Assault by Servant, 33 Am. Law Reg. (N. S.), 448.

§ 177. Duty of Management as to Patron.

"Managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal comfort and safety to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."

Dickson v. Waldron, 135 Ind., 507, citing :
Chicago, etc., R. R. Co. v. Flexman, 103 Ill., 546.
Craker v. Chicago, etc., R. W. Co., 36 Wis., 657.

§ 178. Liability of Manager for Acts of Regular Police Officer Called in to Enforce Regulations.

"It is said Kiley was a policeman, and therefore appellants are not responsible for his attack upon appellee. Whether, at the time of the injuries complained of, Kiley was acting as a policeman or as agent of the appellants must depend upon the acts done by him. Because he was a police officer, it does not follow that all his acts were those of a policeman; and because he was an agent of appellants, it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their

agents to aid in enforcing the regulations of the theater, he would for such purpose be only an agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater he should discover appellee in the act of violating a criminal law of the State or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion without direction, express or implied, on the part of appellants, then appellants would not be responsible."

Dickson v. Waldron, 135 Ind., 507.
Jardine v. Cornell, 50 N. J. L., 485.

§ 179. Presumption as to Official Character of Policeman's Acts.

"Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his official character, unless such presumption is repugnant to some rule of law or is rebutted by the facts of the case."

Jardine v. Cornell, 50 N. J. L., 485.

§ 180. Acts of Employees Must be Within Scope of Authority.

The manager is responsible for the wrongful acts of his employees if performed within the scope of their authority, and this is so although the employee is reckless, lacks judgment or yields to passion causing an unjustifiable injury, or acts wantonly or even willfully.

Cohen v. Dry Dock, etc., R. Co., 69 N. Y., 170.
Mott v. Consumers Ice Co., 73 N. Y., 543.

If any injury is caused by the negligence of an agent or employee, in the performance of the business committed to his charge, the master is liable, although the act was contrary to his orders, and an assault or other willful trespass committed by the servant in the course of doing his master's work and for the purpose of accomplishing it, is the act of the master, and the latter is responsible. While "a servant may do great damage to another person in the negligent and careless performance of his master's service, though against the master's will and contrary to his orders, yet this is a ground of action against the master."

Southwick v. Estes, 7 Cush., 385.
Philadelphia, etc., Ry. Co. v. Derby, 14 How., 468.

A master is responsible for a wrongful act done by his servant in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the mere negligence of the servant or by wanton and reckless purpose to accomplish the master's business in an unlawful manner.

Howe v. Newmarch, 12 Allen, 49.
Ramsden v. B. & A. R. Co., 104 Mass., 117.

"In an action of tort for a willful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for when the merely physical injury is the same, it may be more aggravated in its effect upon the mind, if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness."

Hawes v. Knowles, 114 Mass., 518.

§ 181. Test is Manager's Control of Employee.

"The responsibility of the manager grows out of and is measured by and begins and ends with his control of his employee. On this ground rests the distinction now well established between the negligence of the servant and his willful and malicious trespass; the act in either case being done in the course of his employment.

"For the former the master must answer; for the latter he is held not liable unless the trespass is proved to have been authorized or ratified by him."

Parsons on Contracts, p. 114, 7th Ed. and note.
McManus v. Crickett, 1 East, 106.
Corbin v. American Mills, 27 Conn., 274.

"The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master gives an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the author-

ity given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence or by wanton or reckless purpose to accomplish the master's business in an unlawful manner."

Howe v. Newmarch, 12 Allen, 49.

§ 182. Liability of Employer for Assault Committed by Employee.

For illustration, the manager would be responsible if an usher committed an assault upon a patron while ejecting him, although the force was unjustifiable, and a wanton disregard of his instructions, because it was an act within the scope of his authority, even though an accomplishment of the manager's business in an unlawful manner. On the other hand, the manager would not be responsible for an assault committed on a patron by a member of the orchestra or by a stage hand, for here is something done without authority and in no sense within the scope of such employee's duty, whose line of employment cannot embrace and does not contemplate such an act; the employee acts independently and on his own responsibility, for which the manager is not liable.

Oakland City Agri. etc., Co. v. Bingham, 4 Ind. App., 543: 31 N. E., 383.

§ 183. Application of the Rule.

The manager cannot be supposed to issue orders and control the acts of his employees beyond the line of their regular and well-established duties.

The ticket-seller binds his manager for all acts consistent with his box-office duties; there his authority ends, and if he

transcends it by ejecting people from the theater, interfering with the power of the stage manager or assuming to control the orchestra leader, the manager cannot be made liable, any more than if the stage manager wrongfully assumed the duties of the treasurer or a scrub man that of a special police officer, or a bill poster that of an usher. Each employee has certain defined duties and binds his employer only when he acts within their province. True, he may disregard orders as to method of accomplishment, be negligent and even malicious in carrying them out, and thus establish his employer's liability; but outside of the scope of these powers, he creates a liability solely for his own answering, and in no way binds another for such wrong. The rule, broad and far-reaching within the confines of the scope and duty of employment, fails at once when the employee ceases to be under it. In some cases the line may be vague and doubtful, particularly when an employee has broad and general powers, or has several distinct duties to perform; it will be much less confusing, however, if the wrongful act is carefully measured according to the exact extent of the actual duties. This is the sole and determining factor.

§ 184. Contractual Relation Avoids Liability.

The manager is liable only for the wrongful acts of his employees within the limits of the stated rule. This liability extends to all employees and their wrongful acts in the line of their employment, unless it can be shown they acted as independent contractors and not as servants. If the manager has his bill posting done under a contract for a specific sum or rate, and has no control over the contractor in the sense of direction, as in the case of an employee, then the principles

applying to independent contractors govern and the manager is not responsible. Here there is no relation of master and servant, and the relation being contractual, the contractor must bear the burden of his wrongful acts, which, although done for the manager, do not make him responsible for the way and manner of their accomplishment.

See *ante*, § 126.

§ 185. Liability for Loss of or Injury to the Property of Persons Attending Places of Amusement.

The obligation imposed upon the manager is that of exercising reasonable care, and he is only liable when a loss of property, over which the law determines he has control, is due to the negligence or misconduct of himself, his employees or agents.

It is no part of reasonable care or its requirements that the management provide an employee to look after the property of patrons in such places as they may see fit to place it, suitable for their own convenience. This was decided in the case of Patterson v. Hammerstein, 17 Misc. N. Y. 375; 39 N. Y. Supp. 1039. There the plaintiff purchased tickets and with a party of friends occupied one of a row of boxes in the second tier to witness the play in the defendant's theater. Ingress and egress from the box was through an opening into a passageway in the rear of the row of boxes, and the interior of the plaintiff's box was screened by a curtain which was hung in the opening. The box was furnished with hooks, which were fastened to the side of the box near the opening and intended for use in the case of such apparel as the patrons of a theater are wont to lay aside while attending a performance.

When the plaintiff first entered the box two overcoats, sub-

sequently ascertained to have been the property of defendant's ushers, were suspended from the hooks. There was no protest against the presence of these articles, and the plaintiff suspended his overcoat beside the others. During the play the plaintiff visited other parts of the theater, two or more members of his party always remaining in the box. While the plaintiff was absent a stranger entered the box, tarried for a short time without objection or complaint and departed. When the play was concluded it was ascertained that the plaintiff's overcoat had been taken.

"The hooks provided were a means of enabling the occupants of the box to care for their apparel with more care and comfort to themselves, but an effort to imply from the mere presence of such hooks an assumption by the defendant of the custody of whatever the occupants might place thereon tortures reason."

The test is whether the manager by his agents or employees assumed any control over or custody of the property lost or damaged. It is not enough that hooks are furnished on which the patron may, at his convenience, hang his hat or coat, or a place provided under the seat for stowing his property; he places his property there at his own risk, and no relation of bailor and bailee is etablished. The reverse is true when the management assumes control of the property even without extra charge, as where a coat or parcel-room is provided for patrons wherein property is checked and cared for. Here the manager has established the relation of bailor and bailee and becomes responsible as a bailee.

In such instance the manager has voluntarily taken another's property into his possession, proffering to care for the same. The responsibility of its care is solely his, and the owner is not required nor expected to have further concern

in reference to it; no longer is it in any sense in his custody and control, but in the hands of the management as bailee. The principles of law which govern these cases are well settled. The proprietor owes to a patron no duty of protecting or caring for such property as he keeps in his own custody and control.

§ 186. Relation of Bailment Must be Established.

To constitute a liability on the part of the management for the care of the personal property of a patron there must be established by some act of custody the relation of a bailment. A bailment implies the delivery of a chattel, and to subject the manager to liability, as such, it is a necessary constituent that he voluntarily assumed or retained the custody of the chattel alleged to have been bailed. He must actually or impliedly agree and physically assume the temporary custody of the chattel. Until such a condition is shown to exist there is no bailment and until such is established the patron assumes all risk of the care of his property. The management cannot be said to either expressly or impliedly establish such relation by merely providing convenient hooks or places to accommodate the chattels of a patron; the duty of caring for the same continues to be the patron's, which is not changed until the manager takes them into his care, and thereby establishes himself as bailee, after which he is liable for the safe keeping of the property entrusted to him.

And when such bailment relation is established, the manager

Claflin v. Meyer, 75 N. Y., 260.
Schouler Bailments, § 23.
Bunnell v. Stern, 122 N. Y., 539.
Patterson v. Hammerstein, 17 Misc. N. Y., 375.

in the absence of bad faith is only liable for negligence and not for a loss occasioned by the unforeseen or legally unavoidable.

Claflin v. Meyer, 75 N. Y., 260.

The same rule applies as to railroad companies, steamboat and sleeping car companies, in regard to articles which the patron prefers for his own use or convenience to keep with him.

Wicher v. Boston & Albany R. R., 176 Mass., 275.
Tower v. Utica, etc., R. R., 7 Hill, 47.
Henderson v. Louisville & Nashville R. R., 123 U. S., 61.

§ 187. Burden of Proof.

The burden of proof here, as in every case, rests upon the party asserting the negligence of the other, and until the fact of negligence is apparent from some act of commission or of omission, the presumption that the duty to observe due care was performed, must prevail. The mere loss of an article by a patron is not evidence of negligence on the part of the manager, the burden of proof being on the patron to show such negligence as establishes the manager's liability.

Cosulich v. Standard Oil Co., 122 N. Y., 118.
Wicher v. Boston & Albany R. R., 176 Mass., 278.

§ 188. Where Article is Entrusted to Care of Management.

Here the bailment is for mutual benefit, and the manager is bound to exercise ordinary care in relation to the article entrusted to his care, which care must be graduated according to the value of the property and the temptation it may offer as the subject of theft. Such care being given, the mana-

ger's liability ends; he is not an insurer of the property entrusted to his care, nor responsible for it beyond the ordinary, reasonable care. If the property is stolen he is not liable therefor unless the loss is the result of negligence on his part, and the criminal conduct of a servant or employee is not imputable to him if he has used reasonable care in his selection of the same for employment.

Smith v. Westfield, etc., Bank, 99 Mass., 605.
Whitney v. Lee, 8 Met., 91.
Harter v. Blanchard, 64 Barb., 617.

§ 189. Check and Coat Rooms.

The manager in establishing a check or coat room is bound to have a competent person in charge, who must use ordinary care in checking and caring for the property entrusted to his care; this room should be reasonably secure from invasion by thieves and protected either by constant attendance or suitable fastenings. The degree of care increases according to the location, place and patrons, and it is a question of what is reasonable according to the particular place and time. It it not reasonable care for an attendant to confuse his checks and deliver the checked article to a person not its owner, but if the check has been stolen from its rightful holder and presented, the employee cannot be presumed to know and remember its rightful holder and is justified in delivering the article to the one presenting the proper check. Here the holder of the check is negligent in allowing it to be stolen, for as it represents his property he should not lose his voucher and cannot hold another responsible for what he has by his own lack of care brought upon himself; the same is true if he loses or misplaces his check.

The manager, however, is responsible if the article is not produced on presentation of the check by its proper holder unless he can show that it has been taken in some manner which ordinary business care, applicable to such instances, could not prevent.

The modern application of this rule is far reaching, and the ordinary care required is exacting, owing to the nature of the business and the character of people likely to be about and ready to take advantage of any lack of proper custody.

The knowledge of the elements concerned in a business of so public a nature adds an additional degree to the requirements of the due and reasonable care exacted of the management. Of property entrusted to its care, with modern facilities preventing any reasonable chance of loss, it is almost an insurer as against theft or careless delivery to the wrong person occasioned by negligent use of a checking system. If the property is confused in checking and thereby delivered to the wrong person, the manager is clearly responsible for its loss to the rightful owner.

§ 190. Loss of Article by Theft from Manager.

In Taylor v. Downey (Mich.) 29, L. R. A. 92 (and note) it was held that a hotel keeper was not liable for the theft of the valuables of a guest from the hotel safe by a night clerk. It appeared that the clerk had been hired after a reasonable investigation into his character and was employed some months prior to the theft. The same rule would apply to the theft of articles by the custodian in a theater; the rule is one of bailment, and only due care can be required. The manager is not an insurer, but is bound to use reasonable care in the selection of his employees.

While answerable for the negligence of the employee in charge of the property left for safekeeping, he would not be liable for the theft of property by such employee unless it could be shown he was negligent in his act of taking the person into his service.

The manager performs his duty by using reasonable care in the selection of his employees; he is not required to watch their every act, and is only responsible for their wrongs when committed within the scope of their authority: theft is no part of an employee's duty, and hence outside the line of his employment.

In such instances the only question of due care involved is the way and manner in which the manager satisfied himself as to the employee's character as to honesty when he employed him.

See *ante,* § 188.

CONDUCT OF AUDIENCE
RIGHTS OF CRITICISM
DISTURBANCE OF PUBLIC PERFORMANCE

CHAPTER XI

§ 191. Conduct of Audience, Right to Applaud and Hiss.

The patrons of a theater have a right to express by applause or cries of disapproval their opinion of a play; it is lawful for them to give audible and free opinions of the merits of the performers or the performance. So as it is right to express appreciation by applause, it is right to hiss and thereby show disapprobation. It is no riot or disturbance of the spectators to express their feelings spontaneously by applauding or hissing the piece or the actors.

Clifford v. Brandon, 2 Camp., 358.
Gregory v. Brunswick, 1 C. & K., 24.
Rev v. Leigh, 1 C. & K., 29.

§ 192. This Right Confined to Unbiased Opinion.

The public who attend the theater have a right to express their free and unbiased opinions of the merits of the performers who appear on the stage; but people have no right to go to the theater by a preconcerted plan to make such a noise that an actor, without any judgment being formed of his performance, shall be driven from the stage; and if two persons are shown to have laid a plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable for a conspiracy.

Gregory v. Brunswick, 1 C. & K., 24.

§ 193. Must Make No Breach of the Peace.

In 2 Bishop's Criminal Law, § 308, the language of Bushe, Chief Justice, in Rex v. Forbes, 1 Craw. & D. 157, is quoted with approbation: "They (the audience) may cry down a play or other performance which they dislike, or they may hiss or hoot the actors who depend upon the approbation of caprice. Even that privilege, however, is confined within its limits. They must not break the peace or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment, for if it be premeditated by a number of persons who conferred beforehand to cry down the performance of an actor, it becomes criminal. Such are the limits and privileges of an audience even as to actors and authors."

The manager may adopt rules and regulations for the conduct of his patrons, reasonable and proper for the comfort and safety of the audience, and has a right, to such extent at least, of regulating their conduct and behavior. Any patron who violates a rule so provided or is guilty of any disturbance or disorder, though the same does not constitute a breach of the peace, may be expelled, but the manager or those in his employ before using any force on the body of such person must first request him to leave, and if he refuses, then and then only can such force as may be necessary to accomplish his removal be used.

State v. Walker, 1 Ohio Dec. (Reprint), 353.

The manager has full right to insist that his patrons behave in an orderly manner and not in such a way as to

interfere with the comfort and enjoyment of others. This rule requires propriety of deportment and silence when the play is in progress, as no one may so conduct himself as to deprive others of the full pleasure of what they have paid to see and hear. The rule is one of reason and fairness and applied wholly within such limits.

§ 194. Criticism.

The editor of a newspaper has the right, if not the duty, of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made a subject of public exhibition, whether it be a theater, a dramatic performance, a production, a play, actors or their acting, artists or other performers, and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice. Whatever may be offered as a public show or spectacle, with all that goes to make it, is subject to the opinion and criticism of the press. Opinions vary, individuals have different conceptions of what should be done or provided, and the editor of a public journal has every right to publish his opinions in reference thereto. This criticism may ridicule or censure the play or artist in severe terms, yet if it is in the spirit of candid criticism, not intended to injure, it is not libelous. The words may be harsh and of condemnation, yet if made without an intent to injure the manager or performer in the opinion of the public, although they really do, such words are privileged and allowable. The condemnation of books, paintings and other works of art, music, plays, architecture, and generally of the product of one's labor, skill or genius may be unsparing, but it is not actionable without

the averment and proof of actual malice. In order to constitute such malice it is not necessary that there should be direct proof of an intention to injure. Such an intention may be inferred from false statements, exceeding the limits of fair and reasonable criticism and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another or in a reckless disregard of his rights and the consequences that may result to him. Anyone offering his creation, abilities, work or production, his music, acting or skill, exposes himself to observations and criticisms which may be harsh, scathing and merciless. While to the author his work may appear perfect and the manager may have felt justified in giving the public what he has offered, yet the individual feelings are not reckoned in the adjustment of the right of criticism. The critic is supposed to rate another's works or efforts fairly and with due and proper regard to the truth, and he acts within the confines of his right until such time as his criticism is made with an intent to injure; this constitutes legal malice. The rule is definite and exact and affords no protection beyond this point. Unless the element of malice is shown there can be no action for libel, despite the suffering and damage which may have arisen from the harsh and even unjust criticism. The question of criticism and what it should be, outside the bounds of malice, is impossible of exact legal definition. So long as the element of malice is lacking the courts will not determine the matter written as libel, for the question of the harshness, severity, or even unkindness of the criticism has absolutely nothing to

do with its determination. The element of malice must appear before any compensation in damages can be awarded.

Didbin v. Swan, 1 Esp., 28.
Gott v. Pulsifer, 122 Mass., 235.
Dooling v. Budget Pub. Co., 144 Mass., 258.
Fry v. Bennett, 28 N. Y., 324.
13 Cyc., 331.
Fay v. Harrington, 176 Mass., 270.

The proprietor of a theater cannot maintain an action for a libel on one of his performers, although by reason thereof she was deterred from appearing on the stage and to the injury of the proprietor. The action is always personal.

Ashley v. Harrison, Peake, 256

§ 195. Disturbance of Public Performance.

Statutes enacted to prevent disturbance of public meetings apply to amusements, although not expressly mentioned. What constitutes an interruption and disturbance cannot easily be brought within a definition applicable to all cases; it must depend somewhat on the nature, usage and character of each particular kind of amusement and the purposes for which it is held, and must be decided as a question of fact in each particular case. Although a disturbance may not be easy to define beforehand, there is commonly no great difficulty in ascertaining what is a willful disturbance in a given case. It must be shown to be willful and designed, an act not done through accident or mistake.

Proprietors and all others persons interested either as audience, performers or employees are protected in their rights

against willful disturbance so that the performance and everything involved therein may be witnessed, heard and enjoyed.

Commonwealth v. Porter, 1 Gray, 476.

A meeting is disturbed when it is agitated, molested, interrupted, hindered, perplexed, disquieted or diverted from the object of the assembly, and this may consist in either language, conduct or behavior: either by speech, noise or act.

See 14 Cyc. 542 Tit. "Disturbance," and cases cited.

THEATRICAL CONTRACTS, THEIR SCOPE AND NATURE

MUST BE LEGAL AND MORAL, AND NOT VAGUE OR UNCERTAIN

PERSON *NON COMPOS MENTIS*

MARRIED WOMEN

MINORS

CORPORATIONS

CHAPTER XII

§ 196. A Theatrical Contract Explained.

A theatrical contract does not differ in essential details from any legal agreement, except when usage has established certain rules of construction regulating its performance. Where there is a well-established usage pertaining to a theatrical matter of which the parties had knowledge at the time of making their contract, such is binding.

McCaull v. Braham, 16 Fed., 37.
Am. Academy of Music v. Birt, 26 W. N. C. (Pa.), 351.
Duff v. Russel, 60 N. Y. Supr., 80.
Watson v. Russell, 149 N. Y., 388.

In no respect can a contract be more unfortunate than to leave open any question as to what is really intended; on this point there must be an actual and intelligent meeting of the minds. It is not the policy of the law to hold parties to an agreement not understood or contemplated, and where one party intends one thing and the other another, while all the other essentials of the contract exist, it lacks an agreement and must fail as a legal contract, no matter how formally it has been entered into, or with what care it has been drawn up and executed.

§ 197. The Intent of the Parties.

To avoid complications every effort should be made to plainly state the actual intent of the parties, leaving no point of essential detail uncovered. Only in this way can the con-

tract be assuredly legal and binding. The subject matter is the important reason for any contract, and the agreement should explain with clear and sufficient detail all that the parties desire embraced within its terms. The agreement must not be vague, indefinite or uncertain; the purposes of the parties should appear with distinctness and in sufficient detail; otherwise there is no meeting of minds and no contract.

A written agreement is not elastic and will not include matters which may have been discussed, but have not been made a part of the writing.

§ 198. Oral Testimony Not Admitted to Show Forgotten Terms. Mistake when Corrected in Equity.

The oral agreement once reduced to writing in an attempt to reflect the intent of the parties, is fixed, and no forgotten matter or detail can be added. The rule is well settled which decides that the terms of a written contract, not presenting a case of latent ambiguity, are not to be varied by extrinsic and parol evidence.

Black v. Batchelder, 120 Mass., 171.

Oral testimony cannot be admitted in a court of law to show a mistake in a written instrument, and if such mistake actually exists, it must be corrected by proceedings in equity where the court is not limited to affording relief only in mistake of fact, and a mistake in the legal effect of a description or in the use of technical language may be relieved against on proper proof.

Canedy v. Marcy, 13 Gray, 373.
McGuinness v. Shannon, 154 Mass., 86.

§ 199. The Agreement Must be Legal and Moral.

The subject matter of a contract must not only be definite, certain, and entirely stated, but must be legal, moral, and in accord with the rules of public policy. Unless the requirements of this rule are satisfied the agreement, although formally made, is not binding on the parties thereto, as covering matter which the law does not recognize or tolerate. See *post*, § 223.

§ 200. The Agreement Must Not be Vague.

The contract must be clear and positive in its terms and not vague, uncertain or ambiguous. Therefore a contract, whereby the manager is to pay a stated sum a week for a season which is to "commence some time in the month of September and shall continue as long as the same may be mutually agreed upon" is not enforceable, for "where the parties contemplate by their own actions in a formal agreement to make that certain which is uncertain in an informal agreement, which is not intended to be the final agreement, there is nothing which the court has any jurisdiction to enforce. Under these circumstances the paper is to be treated as nothing but a step in a negotiation looking to a final settlement." Such contract is necessarily void from its uncertainty; it establishes no basis upon which damages could be ascertained in case of a breach.

McIntosh v. Miner, 37 N. Y. App. Div., 483.

Where a printed clause in a contract, if not absurd, is at least ambiguous, parol evidence is admissible to show a usage which would tend to explain.

Baron v. Placide, 7 La. Ann., 229.

And while a contract will not fail for uncertainty if from it the court can ascertain the real intendment of the parties thereto, it is well to avoid, if possible, all chances of doubtful construction.

Raymond v. Rhodes, 135 Mass., 337.
Grier v. Puterbaugh, 108 Ill., 602.

§ 201. Parties to the Contract.

No agreement can be made without parties, and they must be legally competent to enter into a contractual relation. Certain classes of individuals are denied this privilege by the law and have no power to obligate themselves, no matter how formal the language or how great the good faith of their intentions. These persons are divided into classes which we consider separately.

§ 202. Persons Non Compos Mentis.

The parties to a contract must be legally competent to enter into an agreement. As an agreement is dependent upon the mental ability and power of the parties to understand, it is clear that an idiot or insane person cannot be bound by what, in another's case, would be a legal undertaking. Such persons must act through a legally constituted guardian, and if the services of one *non compos mentis* are desired, such can only be contracted for through the channel of guardianship. Often persons of meager mental ability are employed to be exhibited in public amusements, such as museums, circuses and side shows, and if contracted with personally, such agreement has no binding force or power and can be repudiated by the maker or his legal representative. Such persons should be under a guardian, and the latter can properly represent the

interests of his ward in such agreements as it may be necessary and proper to make.

The test of mental capacity is one of fact, and the question involved is whether the person has sufficient mental ability to understand and realize the import of the contract he may have undertaken. The mentality need not be extraordinary, for many below the normal degree of mental alertness may have sufficient mind to enter into and understand the particular agreement attempted. This is all the law requires, for anyone who understands can assent and become bound; one who does not understand cannot possibly assent in the legal sense, is not bound by his words or acts, and has full power to repudiate any contract he has undertaken. This principle is too well established to need the citation of authorities.

§ 203. Married Women.

At common law a married women has no ability to make contracts, and such as are attempted are void and as though never made; her capacity to contract has been extended by statute in various ways in the different States. She is now quite generally allowed to carry on business and can do so as a *femme sole* by conforming to certain statutory requirements; these, of course, must be strictly complied with and differ in the several States. As the power to contract is all essential in any agreement, it is well to consider in each individual instance the matter of qualification as provided by statute. This subject is too extended for discussion here, and reference is made to works treating on the status of married women at common law and under statutes.

At common law a contract made by an actress who is a married woman is not binding upon her.

Burton v. Marshall, 4 Gill (Md.), 487.

§ 204. Minors.

All persons under the age of twenty-one are minors or infants at common law, and their contracts are voidable at their option before or after they have attained their majority. A minor becomes of age the day preceding his twenty-first birthday.

While an infant may avoid his contract at pleasure, the adult with whom he has made the agreement is bound thereto and must fulfill the same strictly, unless the infant on his own responsibility sees fit to make the avoidance. The theory is based on the reasoning that an infant is of tender years and does not possess business judgment, and, therefore, if bound to his contracts, wrong may result. Hence the right of avoidance. As the adult is of years of discretion he is held by the contract and must chance the probability of the minor's refusal to abide thereby. There is no certainty in contracting with a minor, for although on avoidance he is obliged to return the consideration paid him, nevertheless if he has lost, consumed or sold it during minority, he can avoid his obligation and not be compelled to repay. For instance, if a minor is paid a definite sum to perform some service, and decides not to render it, he should return the amount received; yet if he has spent it and can make no restitution, he is still legally justified in canceling his agreement. This rule, though harsh, is settled, and in contracts for personal services it is at least safe to insist on performance before payment. It is well in this connection to remember that under most circumstances the supporting parent is entitled to collect and hold the minor's earnings, and in such instances a payment to the infant is no payment at all and may again be collected by the parent, unless he authorizes or sanctions the payment to the child as his agent.

These instances are referred to as important to consider in dealing with minors whose services are made the subject of contracts, for many hardships have resulted from ignorance or carlessness in respect thereto.

The actual age of a person legally settles the question of minority, and although the infant misstates his age, either honestly or with intent to deceive, and has every appearance of being older than he really is, he is nevertheless an infant and is not bound by his contracts. Then, too, if he performs his contract, he is not bound by the stated compensation, and can sue and recover whatever his services are reasonably worth. There is a mistaken impression that a man is of age at twenty-one and a woman at eighteen. Both man and woman arrive at legal majority at twenty-one, or, more strictly, on the day preceding the twenty-first birthday.

In statutes which prohibit the employment of children under a certain age in public exhibitions or their admission to places of amusement, the vital question is as to the actual and true age, and not as to whether the minor's appearance as a performer or his admission as a spectator to the place of amusement endangers his morals or health. The employment or admission under the stipulated age is the unlawful act, which vitiates contracts in respect thereto and constitutes a misdemeanor.

Birkett v. Chatterton, 13 R. I., 299.
Re Stevens, 70 Hun, 245.
State v. Mackin, 51 Mo. App., 129.

No other question is at issue, and unless the necessary quantum of age exists, all other conditions are unavailing as defense or excuse. The law presumes a minor to be of tender years and absolutely in need of protection, which rule

is universal and is not to be controlled by the facts of any particular case, or to be changed in instances of great hardship.

The only protection possible is to ascertain the actual age of the person employed where statutes prohibit performances of minors or their admission to amusements under a certain age. It is no excuse for a violation of such a statute that the minor willfully and intentionally misrepresented as to his actual age, or looked older than he really was.

Re Stevens, 70 Hun (N. Y.), 245.
Birkett v. Chatterton, 13 R. I., 299.
People v. Meade, 24 Abb. N. Cas. (N. Y.), 357.

The legislature has power to enact laws which prohibit the employment of children of immature years in theatrical or amusement exhibitions, and the mayor of a city cannot by his consent legalize or allow a participation in such by children under the prescribed age. The prohibition is absolute and once created cannot be waived.

People v. Ewer, 141 N. Y., 129.
People v. Grant, 70 Hun, 233.
State v. Macken, 51 Mo. App., 129.

§ 205. Corporations Organized for the Carrying on of Amusement Enterprises.

The fact that an amusement enterprise is incorporated does not alter its liability in respect of contracts and duties toward those who patronize it. So long as the persons conducting the business act within the powers and limitations of a corporation the liability is against the company, and processes and suits are limited thereto.

A corporation cannot exceed the powers given it by statute or perform any acts which are not legally sanctioned; to do otherwise creates a personal liability on the part of the officers, and not infrequently involves the directors and stockholders. The corporation must act through and by powers delegated to its officers as matter of record, the effect of which is always open to judicial review. A corporation created and domiciled in one State can properly do business in another, provided it has qualified by filing such papers and making such returns as may be required of foreign corporations. Many States have stringent laws in this respect, a violation of which is attended by heavy fine and an invalidation of all acts attempted by the company.

The necessity of this compliance with the laws of States in which a corporation does business is often overlooked and frequently causes serious and unexpected consequences. Incorporation sought to limit or avoid personal liability is excellent as a preliminary step, but avails little unless the business is subsequently operated strictly and fairly under the limitations applicable to a corporate body. Many managers obtain a charter, advertise as a legally organized company, and then proceed to do business in the way of a firm or individual, creating the very kind of liability sought to be avoided. A corporation first and always must adhere to the fixed rules by which a corporation can do business. The involved and important law of corporations is a subject which must be treated by itself; it has a multiplicity of exact requirements and compels a strict compliance with governing statutes. The individual who thinks a charter a shield of protection, too often finds it a legal pitfall. The incorporated company does well to see that it is legally chartered and continually within the limits of its determined powers; the individual who deals

with it can do so in safety only when he has ascertained the legality of its acts and determined whether it can do what it attempts or proffers. See *post* § 231.

In many States a foreign corporation (*i. e.*, one incorporated by the laws of another State or country) is expressly prohibited, by a severe penalty, from doing any business within their limits until after the corporation has filed certain papers and appointed an agent resident within the State in which business is sought to be done, on whom legal papers can be served. Here is a matter of important consideration to an amusement company which does business in many States, by sending to them its attractions, without first complying with the laws pertaining to foreign corporations. Such neglect may entail great loss and other serious consequences.

The law is exact in its requirements as to stock, records, state returns and the way and manner in which the business is contracted. All the power to perform its functions is in the corporation until it delegates certain phases of it to its officials. This is accomplished by vote, primarily of the stockholders, who may empower the directors or officers to act for them. Herein may fail all the machinery which is intended to do away with troublesome individual liability. From personal experience it seems quite safe to say that a very large percentage of so-called close business corporations, legally incorporated and properly started, through ignorance of how to conduct the business in accord with legal requirements are converted into partnerships with the liability which attaches to the individual members thereof. Generally this fact is discovered too late for correction or avoidance of pecuniary loss and sometimes criminal punishment. No branch of the law is so generally availed of and so generally misunderstood, with serious resulting trouble. This volume

would be far from complete did it not caution and advise against a careless administration of corporation affairs.

The courts do not presume, in the absence of evidence, that an agent or representative has any power to act for and bind his company. The facts must appear from which the legal status will be determined. The advertisements, statements, letterheads or contracts even of a corporation or its officials do not finally establish the legal liability. That must be determined from the actual powers and votes of the company, for, unlike an individual, a corporation cannot be presumed or committed to the doing of anything not provided for in its powers or by the proper vote of its legally constituted officers.

Vogel v. St. Louis Museum, etc., 8 Mo. App., 587.
Ashuelot Manuf. Co. v. Marsh, 1 Cush., 507.

The basis of liability, the validity of contracts and accountability for other acts depend in every instance on the power to do the particular thing as vested in the corporation and whether the doing of the same has been properly delegated to an official or agent.

See Tucker's Manual of Business Corporations (2d ed.), 14, 148, 155, 227, 231, to which profitable reference can be made in respect of corporation matters in general.

THE CONSIDERATION OF A CONTRACT
IMPOSSIBLE AND ILLEGAL AGREEMENTS
ACT OF GOD AS EXCUSE FOR PERFORMANCE

CHAPTER XIII

§ 206. The Consideration of a Contract.

The *consideration* of an agreement is another important element, and must not violate certain well-defined rules of contract law, which require it to be ascertainable, a matter of value, and legal in the accepted sense of the word.

Harriman on Contracts (2d Ed.), § 85 et seq.

§ 207. Impossible Contracts.

A contract founded upon an impossible consideration, and necessarily valueless one, is void, and stands as though never made, for the law will not compel a man to do that which is not within the limits of human capacity or reason; but this rule is not to be extended and must not be confused with matters of mere hardship or considerations possible though difficult or burdensome of performance.

Story on Contracts, § 586.

To excuse a performance on this ground the rule requires that the act which is to be done must be *absolutely impossible in the nature of things.* The law takes no notice of an agreement which in its very nature is at all times impossible of performance. Such a contract is a nullity, and in the eyes of the law is as though never made.

§ 208. Impossibility when No Legal Excuse.

A positive unconditional contract to do something which is possible in the nature of things, and not contrary to law, and only impossible by some peculiar circumstance of that particular case, is binding, although the impossibility was not known when the contract was entered into and is of such a nature that a present compliance therewith is actually impossible. Here the party by his own contract creates a burden upon himself and must make it good, though inevitable necessity prevents, because he might have provided against such contingency. Hence a contract to perform at a certain place on a certain date is binding, although at the time there was no possible way of getting to the place because of flood or other unsurmountable condition of travel or conveyance. For the same reason a contract between A and B that C will sing or act on certain dates is binding, although C refuses to do so and there is no possible way for A to compel him.

Mounsey v. Drake, 10 Johns, 27.
School Dist. No. 1 v. Dauchy, 25 Conn., 530.

A man may by apt words bind himself that it shall rain to-morrow or that he will pay damages; he may agree to do anything which is in the nature of things possible, and will be bound if they fail to happen. The law does not protect one against his own lack of sense or judgment. He who contracts to deliver to another a certain thing on a certain day must do so; it is no excuse that a flood intervenes, that the transportation company fails to operate its conveyances, the plant burns down where the thing is being made, or someone steals it before the promisor has a chance to get it into his possession. True, the performance now becomes impos-

sible, so far as the present is concerned, but it was not an impossibility in the nature of things when undertaken, and the contract stands in binding force. The party who is to receive the benefit must not do anything himself to make performance impossible, for then he could not complain of his own wrong.

Story on Contracts, § 588.

§ 209. Impossibility when No Excuse.

The mere fact that the performance of a contract has been rendered more burdensome than originally contemplated, is more expensive or even a severe hardship, does not constitute an impossibilily and affords no legal excuse for non-performance. For under a positive contract to do a thing not in itself unlawful, the contractor must carry out its terms or pay damages for not doing so, although in consequence of unforeseen accident the performance has become unexpectedly burdensome, dangerous or even impossible. This rule is only applicable when the contract is positive and absolute and not subject to any condition either express or implied.

Tobias v. Lissberger, 105 N. Y., 404.
Baker v. Johnson, 42 N. Y., 126.
Walker v. Tucker, 70 Ill., 527.
St. Joseph County v. South Bend, etc., R. Co., 118 Ind., 68.

The law never requires impossibilities, but when parties choose to make contracts which become subsequently impossible though possible at the time made in the nature of things, the law will force them to keep to such contract or answer in damages for its breach. The law does not and cannot pro-

vide against a man's recklessness or foolishness when he is legally able to contract and safeguard his own interests.

Hare on Contracts, 656.
Harriman on Contracts, § 264 et seq.

Where A entered into an agreement to furnish horses to the United States Government, and before the time of delivery the bureau of cavalry made new rules as to the inspection and acceptance of horses, and A, claiming that the new rules made it impossible for him to secure horses up to the requirement of the new rules, abandoned his contract, making no effort to fulfill it, but brought an action against the United States for the profits he might have made, it was held he could not recover, as the impossibility of performance was a mere inconvenience, not such as to excuse his fulfilling his contract, or to allow him to sue for profits he might have made.

Smoot's case, 15 Wall, 36.

§ 210. Implied Conditions. Performance Made Impossible by Law.

A condition is implied in every contract that if a change in the law or some action by or under the authority of the government subsequently renders the performance of the contract according to its terms unlawful or impossible, the promisor shall be discharged from his obligation. The act of law discharging the contract may be legislative, executive or judicial.

Harriman on Contracts (2d Ed.), § 266.

It would be manifestly unfair to hold one to the terms of a contract the performance of which is subsequently made impossible by a legislative act. Property condemned for use as a theater or hall would release a lessee who hired it for such distinct and stated purpose. A manager would be released from his contract to give a play or exhibition if the law prohibited the giving of such entertainment. What is legally made impossible of performance cannot be compelled, as to insist thereon would be the authorization of an illegal act.

Cordes v. Miller, 39 Mich., 581.
Hughes v. Wamsutta Mills, 11 Allen, 201.
People v. Globe, etc., Co., 91 N. Y., 174.

When a contract is terminated by the act of the law, the party is entitled to be paid for his services or outlay to that date only, and has no claim for damages against the person employing him beyond that time.

Pollard v. Schaffer, 1 Dallas, 210.
Ball v. Liney, 44 Barb., 505.
People v. Globe Mut. Life Ins. Co., 91 N. Y., 174.

§ 211. Application of the Rule.

The application of this species of implied condition, as affecting the existing contract between the parties, depends entirely on the construction of the particular contract. In Hughes v. Wamsutta Mills, 11 Allen 201, the defendants admitted that work was done by the plaintiff for them to the amount alleged, but proved that he was to give two weeks' notice before leaving, or not claim any wages due; that he gave no notice at all before leaving, but was arrested, tried and convicted, and was in jail under sentence; and that the

injury to the defendants from the want of notice was more than the amount claimed for his work. "The interpretation which he (the defendant's counsel) seeks to put on the stipulation that the plaintiff was to receive no wages if he left the defendant's service without giving two weeks' previous notice of his intention so to do, is inconsistent with the terms of the stipulation and too narrow to be a fair or reasonable exposition of the intention of the parties. The stipulation clearly had reference only to a voluntary abandonment of the defendant's employment, and not one caused *vi majore,* whether by the visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it; he could give notice only of such departure as he could anticipate, and the stipulation that he was to have the privilege of leaving after giving two weeks' notice without forfeiting his wages, implied that the forfeiture was to take place only when it could be within his power to give the requisite notice. It certainly cannot be contended that the stipulation was absolute; that he was to receive no wages in case of leaving without notice, whatever may have been the cause of his abandonment of the service. It is settled that absence from sickness or other visitation of God would not work a forfeiture of wages under such a contract. *Pari ratione,* any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages. It may be said that in the case at bar the commission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences that followed after it and led to his compulsory departure from the defendant's service are,

therefore, to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule to be applied to such contracts is this: To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor. It results from these views that the plaintiff has not forfeited his wages by any breach of his contract, and that he is entitled to recover the full amount due to him for services, without any deduction for damages alleged to have been suffered by the defendants in consequence of his sudden departure from their employment."

§ 212. Change of Law Subsequent to Making of Contract.

While the general rule is certain, its application is narrow and only within the strict confines of its intendment.

A change of requirements in the building laws of a State may make it impossible for a building to be continued in its use as a theater, the same being structurally incapable of required changes. Here, in respect of the lessee and his covenant to pay rent, arises the question of what he can demand under the lease: Do the terms of this agreement clearly bring him within the rule affording relief because performance is made impossible by the change in law, or merely deprive him of a desired use of the premises? It becomes important to ascertain whether performance of the contract is not legally possible or merely less advantageously so to him. The lessening of a benefit, so long as performance is not prevented by the law, does not make the contract legally impossible. The act of law must make an entire performance impossible.

§ 213. Change of Law as Affecting a Lease.

Under a lease of real estate used by the lessee as a theater, it was held no defense to the covenant to pay rent; that after the lessee entered into occupancy of the premises described in the lease a change of statute law in respect of fire protection prevented the occupancy of the premises for such purpose either entirely or until certain changes in the structural condition of the building were made, and the lessor, who has not covenanted so to do, does not commit any breach of the covenant of quiet enjoyment by failing to furnish additional means of egress or other structural changes as required by a public official acting under the provisions of the new law. The lessor, to be required to make such changes or abate the rental, must have covenanted that the building be fitted and continued in a suitable condition for use as a

theater, and to constitute a "constructive eviction which while it continues suspends the payment of rent, it must affirmatively appear that by his intentional and wrongful act the landlord has deprived the tenant of the beneficial use and enjoyment of the whole or a part of the leasehold."

In a lease which does not contain a covenant that it shall be fitted and continued as a theater by the landlord, there is no implied warranty that the building leased was fitted for occupation as a theater or for any particular use, and the lessee is at liberty to occupy the estate for the pursuit of any lawful business. When no covenant appears in the lease requiring the landlord to provide the facilities of entrance or exit required by law or to make such structural changes as may be required by laws enacted after the giving of a lease, he is under no obligation to make such alterations as may be required to make the building safe for the uses of those attending theatrical performances therein.

Taylor v. Finnigan, 189 Mass., 568.

§ 214. Sole Power in Official to Determine Fitness: Necessity of Appeal from Official's Decision.

Where sole power vests in one official or department to determine as to the structural fitness of a building and its appliances for use as a theater or place of amusement as a condition precedent to the granting a license for the same, the license cannot be demanded or compelled until such officer or department has favorably passed thereon.

See ante, § 39, Licenses.

Legislation of this sort is both unwise and unfair and

should provide for an appeal on such matters to the courts, for here is involved a question of greater importance than mere structural and building requirements, for the judgment or lack thereof of one man can deprive the owner of his right to occupy his property for its intended uses. It is really in effect the right to condemn property without providing for either trial or damages. The granting of a license to give theatrical entertainments, which is a matter of discretion, can more properly be left to the final determination of one official, but even here a grave wrong can be done where no appeal is allowed. To combine the power of granting both licenses in one official, offers every opportunity of an exercise of poor judgment or bad faith with no remedy whatever for the owner or manager.

See ante, § 32, Licenses.

§ 215. Act of God as an Excuse of Performance.

This doctrine is well defined in the case of School District No. 1 v. Dauchy, 25 Conn., 530. In that case the court said: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of that character) will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather

than from a denial of the principle itself. Such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive, or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies, in which case the parties are held to have contracted in view of that contingency. In these and like cases the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract. These and a few other exceptions of a similar character are to be found in the books, but they are not so much exceptions after all as cases presumed or inferred, though not expressed, from their peculiar situation or from the subject matter itself. It is said, however, that there is one real exception to the rule, viz., where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case which we will mention. The act of God will excuse the not doing of a thing where the law has created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon anyone a duty to perform what God forbids, or what He renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law. It is further said that the books declare that where the condition of a bond becomes impossible by the act of

God, or is prohibited by the law, the condition becomes void, and the bond is absolute; or if it be a subsequent condition for the divesting of title, that the condition becomes void, and the title remains good. Whether even this is true, without some qualification, we are not quite confident, nor will we stop to consider; but if so, still, the doctrine of that class of cases does not reach the present one, as the same books abundantly declare. In Platt on Covenants, p. 582, it is said that the rule laid down in Paradine v. Jayne, Alleyn, 27, has often been recognized in courts as a sound one, viz., where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenants to repair, the circumstance of the premises being consumed by lightning, or thrown down by an inevitable flood of water, or an irresistible tornado, will not effect his discharge. But where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, as in the case of waste where the house is destroyed by a tempest. In some cases where the act of God renders performance absolutely impossible, the covenants shall be discharged *quia impotentia excusat legem;* as if a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterward the trees are blown down by tempest, or if one covenants to serve another for seven years, and he dies before the expiration of the seven years, the covenant is discharged because the act of God defeats the possibility of performance. I should rather say, because it is implied that the thing shall exist or life be prolonged, or else the contract of course cannot be broken. . . . The

court must fully recognize the rule that the act of God will not operate to discharge a promise which is absolute and unqualified in its terms, though the contingency is beyond the power of the contractor."

Unavoidable casualty is limited to damage or destruction arising from supervening and uncontrollable force or accident. Events or accidents which human prudence, foresight and sagacity cannot prevent are unavoidable casualties.

Welles v. Castles, 3 Gray, 323.

DEATH OR DISABILITY AS EXCUSE FOR NON-PERFORMANCE

CHAPTER XIV

§ 216. Death or Disability as Affecting an Agreement.

Contracts for personal services are subject to the implied condition that the person shall be able at the time appointed to perform them, and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This principle applies to all contracts which though in terms are unqualified and absolute, where from the nature and wording of the contract it cannot be carried into effect if some specific thing or person ceases to exist or is disabled by disease or sickness, the parties will be presumed to contemplate the possibility of such an event and to have intended that if the contingency occurred the obligation should be dissolved. Whether the impossibility arises from the death or illness of the person by whom the agreement is to be performed or the destruction of the place where or means through which it can be fulfilled, there is equally a breach of an implied condition and the contract cannot be enforced.

Robinson v. Davison, L. R. 6 Exchange, 269.
Thomas v. Knowles, 128 Mass., 22.
Field v. Brackett, 56 Maine, 121.
Dexter v. Norton, 47 N. Y., 62.
Hare on Contracts, § 647.
Poussard v. Spiers, 1 L. R. Q. B. Div., 410.
Harrison v. Conlan, 10 Allen, 85.
Spalding v. Rosa, 71 N. Y., 40.
Gould v. Murch, 70 Maine, 288.
Walker v. Tucker, 70 Ill., 527.

The Tornado, 108 U. S., 342.
Lord v. Wheeler, 1 Gray, 282.
Nicol v. Fitch, 115 Mich., 15.
Harrington v. Fall River, etc., Co., 119 Mass., 82.

§ 217. Illness as a Termination of Contract.

Absence from business on account of illness affords legal grounds under some circumstances for discharge, and where an actor absents himself from rehearsals because of sickness it is sufficient ground to allow the manager to terminate the contract, and the actor cannot recover for salary accruing after the dismissal. If at the time the services of the artist are required he is in such a state of physical disability as to render his attendance impossible, and on recovery he at once seeks his employer and offers to continue his service for the remainder of the term of the employment, his employer would not be obligated to accept such offer if his services were so essential and material to the success of his business as to make an interference therewith when he was absent, but otherwise when the disability is of short duration and the services not absolutely essential.

So where an actor is unable to attend rehearsals, it is sufficient ground, if such absence interferes with the manager's business, for a termination of a contract for such service. To hold otherwise and to regard the employer as under a continued obligation to perform his part, and to receive the services of the employee, when the latter has recovered from his sickness or disability, would thrust into every contract of employment requiring the personal services of skilled artists, artisans and mechanics in the varied enterprises and occupations of mankind an element of uncertainty which would lead to serious confusion and to uncertainty of duration. If, under such circumstances, the employer is compelled to specu-

late upon the chances of the early recovery of the employee, it can be readily seen that, if the enterprise is to be continued, he can only contract for like services at the peril of being required to pay both the former employee and those whose services have become necessary, because of the inability of the former employee to continue. To hold that by the sickness of the employee, both contracting parties are discharged from further performance of the contract of employment, imposes no greater hardship upon such employee than is suffered by any person who is prevented from continuing his earnings by means of the employment of his services, since he is not required to forfeit any compensation for the services actually performed.

Prior v. Flagler, 13 Misc. (N. Y.), 115.

§ 218. Permanent and Temporary Sickness Contrasted.

A distinction should, however, be made between permanent and temporary disability arising from causes beyond the control of the employee. In the case of a mere temporary disability, the effect thereof would not in every case be to work a dissolution of the contract of employment.

Fisher v. Monroe, 16 Daly (N. Y.), 461.
Wharton on Contracts, § 332.
Hubbard v. Belden, 27 Vt., 645.

In such cases, if the temporary disability does not in any substantial manner prevent performance on the part of the employee the employment must be regarded as continuing.

It is a question in each particular case as to whether or not the presence of the employee in the employer's service during the continuance of the disability was material and essential to the prosperity of the enterprise in which the serv-

ices were required, and if such presence was not so material and essential the employer is not relieved from his obligation to accept the services of the employee when the latter, on his recovery, offers to continue.

Fisher v. Monroe, 16 Daly, 461.
Ryan v. Dayton, 25 Conn., 191.

§ 219. Implied Condition of Capability.

Under the general rule an artist, who agrees to perform on a day certain, but is sick and unable to perform, although his contract is explicit and has no conditions, is excused from performance because an agreement to perform a personal act is considered as made with an implied condition that the party shall be alive or capable of performing the contract.

Robinson v. Davison, L. R. 6 Exch., 269.
Stewart v. Loring, 5 Allen, 306.
Spalding v. Rosa, 71 N. Y., 40.

In Spalding v. Rosa, 71 N. Y. 40, defendants contracted with plaintiff, proprietor of a theater, to furnish the Wachtel Opera Troupe to give a number of performances in their theater. Wachtel, after whom the troupe was named, was the director of the company and its star attraction. Wachtel was taken sick and became unable to sing, and as a result the defendants did not furnish the attraction. In an action for a breach of this contract it was held that Wachtel's appearance was the essence or an important element in the agreement; that plaintiff would not have been obliged to accept the company without him and that his inability to sing constituted a legal excuse for the non-performance of the contract.

§ 220. Services Must Be Personal in Nature.

The rule, however, only applies where the services are so personal and of such a character that no one else can perform them. The *personality* of the party is the determining factor, for if another can be substituted and fulfill the contract just as well, then death or sickness affords no excuse. The principle is that where a contract creates between the parties strictly a personal relation the death of either party dissolves that relation.

Howe Sewing Machine Co. v. Rosensteel, 24 Fed., 583.

§ 221. Necessity of Notice.

The artist is bound to give notice of his illness to the manager, which must be reasonable in accordance with the nature of the services required under the contract or the particular circumstances of the individual case, and must continue absent only so long as the disability lasts.

Corsi v. Maretzek, 4 E. D. Smith (N. Y.), 1.
Harrington v. Fall River, etc., Co., 119 Mass., 82.
Naylor v. Fall River, etc., Co., 118 Mass., 317.

§ 222. Continued Absence When No Excuse.

If one leaves his work willingly, without sufficient cause to justify or excuse his conduct, under such circumstances and in such manner that his employer, considering the nature of the work and its relation to the other operations of the employer's business might fairly and reasonably regard his leaving and continued absence as an abandonment of his work, rendering it necessary to procure another person to supply

the place, it is a breach of the agreement and a forfeiture according to its implied terms, although there may have been an intention on the part of the employee to be absent only temporarily and to return to his work at his own convenience.

Naylor v. Fall River, etc., Co., 118 Mass., 317.
Partington v. Wamsutta Mills, 110 Mass., 467.

"But if the employee is kept from his work by sickness and gave reasonable notice thereof to the employer, and was absent only so long as he was so disabled, his absence was not willful or intentional, and did not forfeit his right to his wages, either under the contract of the parties or by the general rules of law."

Harrington v. Fall River, etc., Co., 119 Mass., 82.

ILLEGAL AND IMPOSSIBLE CONTRACTS

CHAPTER XV

§ 223. Illegal Contracts, Their Nature and Effect.

The law will not tolerate an agreement which is in its nature illegal or immoral. Such contracts are void as against the rules of public policy. The law refuses relief to either party to such an agreement and leaves them where it finds them, neither lending its aid to an enforcement of rights thereunder nor affording any protection on account of money paid or property transferred in part performance thereof. This rule is certain and far reaching, affording no relief whatever. *Ex dolo malo non oritur actio.* Any agreement referring to matter illegal at common law or by statute is not binding. Public policy does not tolerate a contract the subject matter whereof is prohibited by law. In the leading case of Holman v. Johnson, 1 Cowp. 341, Lord Mansfield gives the reason for this universally accepted rule, thus: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the

transgression of a positive law of this country there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for when both are equally in fault, *potior est conditio defendantis.*"

"It is upon this principle, that a bond, note or other executory contract, made and delivered upon the Lord's day, is incapable of being enforced, or, as is sometimes said, absolutely void, as between the parties."

Towle v. Larrabee, 26 Maine, 464.
Pope v. Linn, 50 Maine, 83.
Allen v. Deming, 14 N. H., 133.

§ 224. Illegal Contracts Cannot Be Ratified.

"And it follows that as between them it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff in proving his case to show his own illegal act in making the contract at first.

"Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the effect of his own unlawful act. Thus if the amount of a preëxisting debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again."

Cranson v. Goss, 107 Mass., 439.
See post, § 229.

§ 225. Immoral Performances.

Hence any contract concerning the giving or taking part in any play of an immoral nature, the showing or advancement of any immoral thing, the rendering of services for matters prohibited on the Lord's day, as they are not proper subjects for legal contract, can neither be enforced nor any protection given to anyone thereunder. A payment of money on Sunday being illegal, such can be again demanded, as though no payment had been made. For a like reason compensation for services performed on Sunday cannot be the subject of court proceedings. While such a rule apparently offers chances for dishonorable dealing, yet its reason is founded in the abhorrence law has for any transaction bearing the taint of illegality.

Stewart v. Thayer, 168 Mass., 519.
Jameson v. Carpenter, 68 N. H., 62.
Cohn v. Heimbauch, 86 Wis., 176.
Wheeler v. Russell, 17 Mass., 258.
Atwood v. Fisk, 101 Mass., 363.
Duval v. Wellman, 124 N. Y., 156.
Irvin v. Irvin, 169 Pa. St., 529.
Hope v. Linden Park, etc., Assoc., 58, N. J. L., 627.

A lease of a hall for a lecture which was to attack Christianity was held void, as the subject matter was illegal as contravening the laws of public policy.

Pringle v. Napenee, 43 U. C. Q. B., 285.

§ 226. Sunday Contracts.

In Stewart v. Thayer (168 Mass. 519) the plaintiff sought to recover for a balance due him in pursuance of a contract

made with the defendant, by the terms of which the plaintiff was to receive for the services of himself and band during certain months, $24.00 for a week of seven days for each man, for the leader double pay, and for the soloist, when there was one, $10.00. The plaintiff performed his part of the contract, playing with the band at a seaside resort of which the defendant was the proprietor. On Sundays the afternoon concerts began from half-past two to half-past three, and there were also concerts in the evening. The defense was that, as some of the work and labor contracted for was to be done on the Lord's day it was forbidden by the statute which prohibited any game, sport, play or public diversion, except concerts of sacred music upon the Lord's day.

The court said: "We have no doubt that the contract was an entire one. If a person makes a contract in violation of the statutes for the observance of the Lord's day, he cannot maintain an action thereon. Hazard v. Day, 14 Allen, 487, and Myers v. Meinrath, 101 Mass. 366. Such a contract is absolutely void and cannot be ratified. Day v. McAllister, 15 Gray 433, Stevens v. Wood, 127 Mass. 123. The principal ground on which the plaintiff contends that he is entitled to recover is that the concert might have been licensed, and that, as the plaintiff was ignorant that the defendant had not procured a license, he is entitled to recover under the principle laid down in Emery v. Kemptin, 2 Gray 257, and Roys v. Johnson, 7 Gray 162. We are of opinion, however, that under the Pub. Statutes c 98 § § 1, 2, there was no authority in any person or board to license a concert on the Lord's day, except a concert of sacred music on the evening of that day; and that as the plaintiff agreed to give concerts on that day, and not merely on the evening thereof, and actually did give them, he is precluded from recovery."

§ 227. What Constitutes Illegality.

The contract may be illegal because it contravenes the principles of the common law or the special requisites of a statute. The former illegality exists whenever the consideration is founded upon a transaction which violates public policy or morality; the illegality created by statute exists when the act is either expressly prohibited or when prohibition is implied from the nature and objects of the statute.

Story on Contracts, § 582.

§ 228. Subject Matter of Contract Governs Application of Rule.

That the agreement is in legal form and shows no element of illegality on its face makes no difference, for the substance, not the form, is considered, and oral evidence is admissible to show an illegal purpose. The intent to do a wrongful thing, the agreement to accomplish an immoral purpose, is none the less the actual subject matter of the agreement though carefully concealed in a written contract apparently proper. The real intent of the parties governs, and the rules of evidence give every right to establish it. A contract made on Sunday, even if otherwise dated, is against the law of public policy and is void although for a moral purpose. Here nothing in the contract itself shows an illegality, yet the fact of its being made on Sunday can be established, and the contract is left where the court finds it.

Day v. McAllister, 15 Gray, 433.
Cranson v. Goss, 107 Mass., 439.

Therefore a contract must be free from any suspicion of illegality, for if made in opposition to the law or for a con-

sideration prohibited or to do or perform some immoral or improper thing, it is against public policy and void. The most important consideration under this head in respect of theatrical agreements is on account of contracts either made or performed on Sunday in States where all business matters are illegal if transacted on the Lord's day. A contract being illegal will not support an action. It has no legal force or obligation. No repudiation by a formal act is necessary to render it inoperative. Such contract is incapable of ratification. A party to such contract cannot ratify it; the validity of the subject matter does not depend in any degree upon the maker's choice.

Day v. McAllister, 15 Gray, 433.
Stebbins v. Peck, 8 Gray, 553.

§ 229. Sunday and Other Illegal Contracts.

While some States now tolerate the doing of certain things on Sunday, by far the greater number are most strict in this respect and allow but small latitude for Sunday transactions.

Where the Lord's day rule prevails any contract made on Sunday is void. So also is a payment of an entirely proper obligation considered as no satisfaction at all if made on this day, and work and services rendered cannot be collected for. This rule, though harsh in its application, is well settled. To the same degree the principle applies to all contracts concerning the employment of minors under an age prohibited by statute, the traffic in or use of prohibited articles, the giving of immoral plays or display of obscene pictures, awarding prizes in the nature of a lottery, and all dealing in such matters

as public policy or statute have decided violate what has been determined as legal. The rule keeps pace with the things prohibited by statutory enactment.

Texas, etc., Ry. Co. v. Putnam, 63 S. W., 910.
Birkett v. Chatterton, 13 R. I., 299.
Cranson v. Goss, 107 Mass., 439.

Under a statute which prohibits the giving of amusements on Sunday or prevents labor on that day, all contracts concerning the same are illegal and void. This applies to agreements with actors for dramatic or prohibited services on Sunday. Statutes prohibiting Sunday performances are constitutional, as the legislature is the sole and final judge of what is to be prohibited with a view to maintaining the public good and preventing the obstruction of religious worship and the bringing of the religious institutions of the people into contempt, and it is equally against the law under such statutes if a compulsory admission is charged to a camp meeting on Sunday.

Quarles v. State, 55 Ark., 10.
Birkett v. Chatterton, 13 R. I., 299.
Lindenmuller v. People, 21 How. Pr. (N. Y.), 156.
Lindenmuller v. People, 33 Barb., 548.
Commonwealth v. Weidner (Pa. Com. Pleas), 37 Alb., L. J., 148.

§ 230. Failure to Procure License.

If statute requires that a license must be obtained for the giving of a theatrical performance or entertainment an agreement concerning such, where no license has been obtained, is necessarily illegal and void. Here the license is required;

without it the doing of the act requiring such permission is prohibited and illegal.

Harding v. Hagar, 60 Me., 340.
Spurgeon v. McElwain, 6 Ohio, 442.
Stewartson v. Lothrop, 12 Gray, 52.
See ante, Licenses.

§ 231. Extent of Application of Rule.

The application of this principle of law is far reaching and covers all matters connected with the illegal consideration. The unlicensed matter being an illegal transaction, it naturally follows that the use of a building in which to give it and the contracts made for the employment of people to take part therein are within the prohibition. This can be followed to even greater extent, for if the subject matter is clearly against public policy or immoral, every contract or transaction into which it enters is likewise void. The hardship of this rule is apparent, as it leaves an evildoer often in a position to profit by his own wrong. He may have received the benefits and can now avoid all responsibility of payment therefor, because the law gives no redress against him. Otherwise the court would be obliged to adjudicate and recognize a wrong to arrive at popular justice. This illegality may arise because some special statute is violated or its conditions not strictly adhered to. Often it requires careful consideration and investigation to avoid such technical violation, but so far reaching is this rule of illegality and so strict of application, that no pains should be spared to ascertain the requirements of the particular jurisdiction as to the amusement enterprise to be undertaken. The Sunday laws, employment of minors and licenses in general are local regulations, varying to a great

degree in the different States and should be carefully considered in each instance. To violate their intendment makes all transactions which are performed thereunder illegal, with sometimes far-reaching and serious consequences, and ignorance of the law affords no excuse. Statutes relating to Sunday observance are generally held to be remedial and therefore to be construed liberally.

Lindenmuller v. People, 33 Barb., 548.

According to the doctrine of Roys v. Johnson, 7 Gray, 162, where the defendants without a license set up theatrical exhibitions in which plaintiff was employed as an actor, it was held that unless the plaintiff knew they had no license he was in no legal fault and could recover for his services as " where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong to defeat the rights of a plaintiff who is innocent."

The doctrine of this case demands careful consideration as providing a remedy where the artist is ignorant of the lack of an enabling license in the management by whom he is employed. The case has been followed and approved in many Massachusetts decisions.

Stewart v. Thayer, 168 Mass., 519, ante, § 226.

In line of the foregoing principles and decisions can be considered the contracts and business transacted by a corporation in a State other than the one in which it is organized, where it has failed to perform the duties demanded of foreign corporations as a condition precedent to the carrying on of its business. Such failure, in many States, debars the corporation from any standing and makes its acts void or illegal, to the same intent and purpose as though its transactions were

in their nature immoral or against public policy. A State may deny the right to foreign corporations to do business within its limits, or may allow them to upon certain restricted terms.

In this matter the State is the sole judge, for a foreign corporation is not a citizen entitled to all privileges and immunities of citizens in the several States under Art. IV. § 2, of the Constitution of the United States.

See ante, § 205.
Liverpool Ins. Co. v. Mass., 10 Wall, 566.
Attorney General v. Bay State Co., 99 Mass., 148.
Reyer v. Odd Fellows' Assoc., 157 Mass., 367.
Tucker's Manual of Business Corporations (2d Ed.), 1-8.

THE CONTRACT BETWEEN MANAGER AND ARTIST

1. PARTIES AND DATE
2. SALARY
3. RESTRICTIONS AS TO PLAYING ELSEWHERE
4. PERFORMANCES
5. CLOSE OF SEASON
6. PERFORMER'S DUTIES—INCOMPETENCY
7. COSTUMES
8. RULES AS TO TRANSPORTATION

CHAPTER XVI

§ 232. Contracts Between Manager and Artist.

Printed forms of "house" and "engagement" contracts are quite generally used, and as many questions of construction continually arise thereunder, an explanation is given of certain clauses with suggestions as to their use which can be profitably followed. The courts, where vague and uncertain language occurs in a contract, are often compelled to find an interpretation not intended by the parties; hence it is important to remember the significance of certain phrases and expressions as legally determined. A contract when reduced to writing precludes any reference to prior and unmentioned terms, and will be interpreted as written without verbal qualification or addition, for which reason it is necessary that the writing be complete and reflect the actual agreement of the parties in unmistakable and precise language. Herein lies the danger of using a printed form of contract, which, always general in nature, is often employed to cover a specific and actually different intention. To correct this apparent defect the printed form is altered in an abortive attempt to make it correspond to what the parties want, and the result is generally disastrous. The new matter inserted for the purpose of bettering the contract actually contradicts or is controlled by the other printed clauses, regardless of the actual intent of the parties, and they are bound to a performance of the agreement as it stands and cannot show another or qualifying

condition of things. It is, therefore, imperative to consider the details and provisions of the agreement from all points, for while it may appear just and consistent at the time of signing, after a breach or failure to perform it assumes proportions unconsidered at an earlier period. Thoughtlessness in this respect generally causes serious and unavoidable consequences, resulting in disappointment or serious financial loss and injury.

It is advisable to reduce the terms of the agreement to writing independent of prepared forms, only adopting such clauses and covenants as are clear and understandable in their application to the contemplated contract.

Certain of the important and necessary features employed in contracts are herein set forth with an explanation of their meaning as judicially determined. The manager or artist in signing a contract does so voluntarily and cannot be excused from the operation of its terms because of a failure to read or understand them.

The law seeks to discover the intent of the parties from the instrument, and takes every part thereof into consideration, never asking the parties what they intended; the agreement must determine that. The very importance of a contract demands attention and care in its making, and when unadvisedly entered into leads to consequences which, with thought and care, could be avoided.

The clauses now referred to are independent of one another and not as a whole intended to make one contract in entirety. Their use and combination must be determined by a specific and definite need duly considered.

§ 233. The Contract Between Manager and Artist in Detail.

1. *This agreement made and entered into the first day of January, 1907, by and between A. B., party of the first part, and C. D., party of the second part.*

The engaging party should be designated by his proper and legal name, followed by any business or stage name which he may have adopted; if a co-partnership, the individual names of the members of the firm should appear, followed by the partnership name. For example: "A. B., an individual doing business as 'The American Theater Company,'" or "A. B. and X. Y., co-partners, doing business under the firm name and style of 'The American Theater Company'"; or if the business is carried on by a corporation it should read "The American Theater Company, a corporation duly organized under the laws of the State of New York." The real name of the party should appear and if commonly known by a stage name such should be referred to, as "C. D., commonly known as Armand Duval." The date in this clause should be the actual date of the signing of the agreement and not the date when the services are to commence. It often transpires that the date of the signing becomes material, and if the date used is not the true date, evidence can be offered to show the actual date of the agreement. Nothing can be gained by making the date other than it is, for if an issue arises in which it is necessary to prove *when* the contract was signed, the writing does not absolutely govern and can be explained to the extent indicated. It merely stands as *prima facie* evidence of the time when the signatures were affixed.

"So insignificant is the mere date of a deed that the delivery may be averred and proved to be either before or after the date; and if an absurd or impossible date, or no date at all,

be found, the grantee may prove the time of execution, if important to be proved, by witnesses."

Parker, C. J., in Harrison v. Trustees of Phillips Academy, 12 Mass., 463.
Jacobs v. Denison, 141 Mass., 117.
Turner v. Butler, 126 Mo., 131.

If one makes a contract under an assumed name he may nevertheless sue in his right name. Such signature does not invalidate the contract.

Hathaway v. Sabin, 61 Vt., 608.

§ 234. The Contract Between Manager and Artist in Detail.

2. *The party of the first part hereby engages the exclusive services of the party of the second part as an actor (performer or musician, as the case may be) at a weekly salary of* $100 *for the theatrical season of the play of "Life," which season is to commence at the option of the party of the first part on or about the first day of September,* 1907, *said engagement being subject to the two weeks' notice of cancellation hereinafter mentioned.*

Here the salary, the name of the company, and the date of the commencement of the contemplated season should be distinctly stated. The salary, if payable by the week or by the single performance, should be distinctly explained, that no question can arise thereon, as many performers are paid for certain performances only, or by a percentage based upon the gross or net earnings; such arrangements cannot be too specifically stated to insure the protection an agreement should provide. As every agreement varies in this particular, no set form is suggested; the terms, reasonably and intelligently stated, will control. The parties are free to make any terms they desire, which if explicitly set forth will be enforced by the court. The length of a theatrical season under this clause is determined by the manager, who has full rights in this respect. See *post,* § 255. While this form is in common use it is not sufficient to compel an enforcement of its terms by preventing the artist from performing elsewhere. A negative clause not to perform or render services elsewhere must be inserted, as explained in the following paragraph.

§ 235. The Contract Between Manager and Artist in Detail.

3. Restrictive covenant suggested in note to McCaull v. Braham, 16 Fed. 37, to prevent rendering services elsewhere.

"And it is further agreed, in consideration of the premises, that the party of the second part (the actor, artist or other employee) will not, during the term of this agreement, exercise his professional skill and talents as an actor (or artist, etc.) in public within the City of New York (or otherwise state the limit to which restriction is intended to be confined; and the courts are more willing to enforce these restrictions when the locality is limited) either for compensation or gratuitously, and either upon his own account or for another employer or establishment, without the consent in writing of the party of the first part first obtained, under pain of injunction, action for damages or any other available, judicial remedy: provided, however, that the party of the second part may, at any time and as often as he thinks fit, perform gratuitously at any entertainment charitably given for the burial expenses and relief of the family of a deceased actor (or otherwise state explicitly any right which the actor desires to reserve)."

This clause insures the protection of the manager against a violation of the contract and is not opposed to the rule against public policy which prohibits contracts in restraint of trade. Here is only a reasonable or limited restraint for a definite time capable of enforcement. The clause can be the basis of proceedings in equity or its breach made the ground for an action at law for damages. Such negative stipulation is vitally important if the manager desires to avail himself of equitable process to prevent the artist from appearing else-

where, which remedy in America will be denied in the absence of the foregoing or a similar negative covenant.

McCaull v. Braham, 16 Fed., 37, and note.
Consumers' Oil Co. v. Nunnemaker, 142 Ind., 560.
Anchor Electric Co. v. Hawkes, 171 Mass., 101.
Swanson v. Kirby, 98 Ga., 586.

"Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, that the artists will not perform elsewhere, and the damages in case of violation are incapable of definite measurement, they are such as ought to be observed in good faith and specificially enforced in equity."

That violation of such covenants will be restrained by injunction, see

McCaull v. Braham, 16 Fed., 37, post, § 354.

In the United States a contract to serve another without the negative clause or restrictive covenant leaves the employee quite at liberty to take other service.

Burton v. Marshall, 4 Gill, 487.
Butler v. Galletti, 21 How. Pr., 465.
Wallace v. DeYoung, 98 Ill., 638.
See post, Chapter 24, Injunctions, § 354.

§ 236. The Contract Between Manager and Artist in Detail.

4. *The number of performances to be given each week shall be according to the custom of the places of amusement in cities and towns in which the party of the second part may be required to appear, also on holidays, and should the management be unable to give a performance or performances through accident, sickness, delay occasioned by reason of common carrier by rail or water, riot, fire, public calamity or other unforeseen cause, not attributable to the party of the first part, and time of performance is lost, then the party of the second part shall not receive any salary for said time in which performances are not given.*

The management reserves the right to temporarily close the season the week preceding Christmas, and also Holy Week, for which time no salary will be paid. Should the party of the first part play the week before Christmas or Holy Week, then the party of the second part agrees to accept half salary for such time played.

These clauses may be changed to suit any special occasion in the minds of the contracting parties, but should distinctly state the amount, if any, of salary to be paid pending certain conditions of lay off, and the conditions controlling the same.

If the question of custom here arises, evidence can be adduced to show the particular custom which obtains in the designated place. This, not for the purpose of altering or changing the terms of the contract, but to explain its intended meaning and purpose, and to show what the custom of the place is.

Eaton v. Smith, 20 Pick., 150.

"Usage cannot be incorporated into a contract which is

inconsistent with the terms of the contract; or, in other words, where the terms of a contract are plain, usage cannot be permitted to affect materially the construction to be placed upon it, but when the terms are ambiguous, usage may influence the judgment of the court in ascertaining what the parties meant when they employed those terms."

Moran v. Prather, 23 Wall, 503.
Montague v. Flockton, L. R. 16 Eq., 189.

§ 237. Duties of Artsist. Details of Performance.

5. *The party of the second part agrees to render his services as required at such theaters, opera houses, places of amusement, and halls as may be selected by the party of the first part, playing the part (or doubles or part of understudy) for which he may be cast, in a correct and painstaking manner, which at all times must be satisfactory to the party of the first part or his representative, paying strict attention to "make-up" and the proper dressing and costuming of the character or part assigned, shall furnish costumes for the same and conform to and abide by all rules and regulations adopted by the party of the first part in respect of such matters.*

The defining of what the artist is to do should be explicit and cover in detail every contingency which may arise as to the degree and kind of services required. No part of the contract is more important; here questions arise as to the particular grade and line of parts within which the artist contracts to play. An actor engaged for leading parts cannot be required to appear in secondary or subordinate parts. The decision of what is a leading part can be left by the contract to the party of the first part, otherwise it becomes a matter for judicial determination. On this point perplexing questions may arise if distinct language is not used covering the various contingencies. While the law implies that the performer shall do what is assigned him to the best of his ability, yet it is advisable to have an exact definition of the requirements. This species of contract is of a personal nature and impliedly requires the best ability, attention and skill of the actor, who is never justified in slighting, slurring or guying his part and must at all times give a performance which is painstaking,

consistent and artistic. The manager or his representative is properly the judge of the quality of such efforts and is under no obligation to retain the services of a performer who mars his performance by bad work. Protection against such an unwarranted act is implied by law, whether the contract explicitly states it or not, for otherwise, if such conduct had to be tolerated, business would suffer and a loss of patronage and financial support result to the management. The conduct required of an actor, although not explicitly outlined, is nevertheless impliedly a portion of the written contract, and an important part thereof. While the manager has a right to the best efforts and skill of the actor, he, in turn, must respect the latter's standing and ability, and cannot require of the actor those things which are not fairly in the line of the part for which he is engaged.

§ 238. Standard of Part as Provided For in the Contract.

If by skill, endeavor and ability the actor has established a reputation and acquired a professional standing, such must be respected. If employed to play a certain line or grade of parts he cannot be expected to take a lower grade than the standard set in his contract, except by a distinct and actual waiver of his rights.

The manager, if he keeps within this rule, may use his judgment as to the assignment of parts and the casting of a play, and the actor has no legal ground of complaint because he does not like the part assigned to him or feels that it is not within the line of his ability. Here the sole question which can arise is one of *degree,* whether the part assigned is within the class of parts for which the actor is engaged; if so, his

liking or taste for the part is of no consequence. What he would like and his personal choice of play or part is not for his determination unless specifically provided for in the contract.

Baron v. Placide, 7 La. Ann., 229.

Where under the contract a performer can be required to substitute for parts other than the one engaged for, he is entitled to a reasonable time in which to prepare, for otherwise a bad performance might result to the injury of his professional reputation, which is always a matter of important consideration.

Graddon v. Price, 2 C. & P., 610.

§ 239. Construction of Theatrical Terms.

The custom and definitions of the stage will govern judicial decision here as in other respects, and when the meaning of any particular word or clause is not apparent oral evidence is admissible to show the recognized meaning of theatrical terms such as "star," "leading part," "comedy part," "juvenile," etc., etc. If the language used is applicable and has a distinct meaning in the particular profession to which it applies, it can always be explained to show the real intent of the contract.

This rule is narrow and can only be invoked when certain words need explanation to arrive at their sense in the particular way employed, and is not allowed when it is sought to establish another or different intent. As illustrative of this: in a contract between author and manager which provides that when the play is produced the *names of the various artists to be engaged shall be submitted to the author,* such clause

cannot be altered or controlled by oral evidence tending to show that in the theatrical profession the reservation of the right to approve the cast is merely to prevent the employment of incompetent people, and that such objections are never made until *after* the play has been produced and there has been an actual showing of incompetence on the part of one or more actors.

Lowenfield v. Curtis, 72 Fed., 105.
Kelly v. Caldwell, 4 La., 38.
Baron v. Placide, 7 La. Ann., 229.

The scope of the place of performance can be properly enlarged to suit the terms of the agreement as follows: "*The party of the first part hereby engages the party of the second part to render services at such Theaters, Opera Houses, Halls, Parks, Expositions, Fairs, or other places of Entertainment, as required.*" It is well to have this clause sufficiently broad to cover any contingency of place, for an artist engaged to play in a theater might properly object to performing at a fair or in a park. An explicit statement cannot be enlarged or varied to cover other places which are not enumerated or mentioned.

The time when the contract for services begins, unless definitely stated, is a question of fact.

Leavitt v. Kennicott, 157 Ill., 235.

§ 240. Incompetency.

6. *The party of the first part may cancel this agreement at any time before the opening of the engagement if he shall be dissatisfied with the party of the second part at rehearsals and need assign no reason therefor. No compensation is to be paid said party of the second part for rehearsals whether the same are before the opening of the season or during the season, the management reserving the right to call a rehearsal at any time. The party of the first part to have the right to dismiss the party of the second part without notice if at any time he neglects his part or plays the same in an unsuitable manner.*

The actor's engagement presupposes his competency, which should distinctly appear after a fair trial at rehearsals. The manager must be impartial and honest in his judgment and cannot use incompetency as a reason without just cause, or a mere pretext for discharge. If the actor shows his incompetency at rehearsal he may be discharged, and cannot insist on a right to appear as a final test at the first public performance. The management is not compelled to run any such risk and, incompetency or inattention existing, can at once protect his production by a discharge of the actor.

Grinnell v. Kiralfy, 55 Hun, 422.

In all contracts for personal service there is an implied condition of competency, and if such is lacking and the employee cannot suitably perform the service he has undertaken, it affords legal grounds for discharge, although he is employed for a definite period. It matters not whether he represented any degree of ability. The law requires that the person employed shall have sufficient ability to reasonably fill the posi-

tion. Otherwise the services do not satisfy the intendment of the contract, and the incompetency affords proper grounds for immediate discharge.

Newman v. Reagan, 63 Ga., 755.
Mexican Soap Co. v. Clarke, 72 Ill. App., 655.
Lyon v. Pollard, 20 Wall, 403.

In such case the contract can be terminated at once, for the employment demanding certain and explicit duties, such must be rendered to satisfy it, and the right of discharge exists without reference to any termination by notice, for under such circumstances no notice is required even though the contract is made with a clause providing for a termination in a stipulated manner. The construction of the contract shows that no notice could be consistently demanded under such conditions.

Lyon v. Pollard, 20 Wall, 403.

§ **241. Costumes.**

7. Party of the second part to furnish at his own expense, according to the directions and to the satisfaction of the party of the first part, all costumes which may be required in the part or parts assigned, and agrees to loan to the party of the first part such costumes or any portion thereof for the use of such substitute as the party of the first part may select to play said part or parts, at any time during the continuance of this agreement, when for any reason the party of the second part does not play or perform.

The actor who engages to play a part must dress it properly. The part determines the costume, and although no express words are used as to what shall be worn, the manager can insist on that which is correct and suitable. The actor who agrees to appear in tights cannot refuse to do so because of cold weather; the woman who agrees to assume a male part cannot object to donning a man's costumes, nor can a woman engaged to assume a distinct part insist on dressing it unappropriately. In all such respects the manager has every right to dictate, even though the contract does not expressly so state; this is a matter of business detail and its right of requirement is implied.

Duff v. Russell, 60 N. Y. Supr., 80.

§ 242. Transportation.

8. *The party of the second part agrees to obey the rules, orders and directions of the manager and his representative, to be promptly on hand at all rehearsals, to be at such railroad or steamboat stations on the departure of the company as shall be designated, and to travel with the company by such routes and conveyances and at such times as the party of the first part may direct, and the party of the first part is not to be liable for the loss, damage or miscarriage of any baggage belonging to the party of the second part, although he assumes control over the same for the purposes of transportation.*

This is a simple and comprehensive statement of what can properly be required by the manager of anyone in his employ. The nature of the business itself implies the necessity of attention to and obedience of these requirements without any special mention, and such clause will be strictly construed by the court. The actor must adapt himself to the business elements concerned in his engagement and has no right to interpose individual objections to the time and methods of his transportation, and must be ready to rehearse and travel at the designated time with the other members of his company. Otherwise would result confusion and unnecessary expense.

This rule is an enunciation not only of law but business sense, without which no company could be successfully managed, controlled and transported. The rules and directions must, however, at all times be reasonable and fair.

See *post*, § 246.

THE CONTRACT BETWEEN MANAGER AND ARTIST (*Continued*)

9. RULES GOVERNING PERFORMER
10. REHEARSALS, UNSATISFACTORY PERFORMANCE AS GROUND FOR DISCHARGE

    CLAUSE AS TO INCOMPETENCY CONSTRUED

    "SATISFACTORY" DEFINED
11. TRANSPORTATION
12. NOTICES AND PHOTOGRAPHS
13. AS TO TERMINATION, TWO WEEKS' CLAUSE
14. THEATRICAL "SEASON" DEFINED
15. FINAL CLAUSES, SIGNATURE AND SIGNING

CHAPTER XVII

§ 243. Rules Governing Performer.

9. *The party of the first part may make such rules and regulations as are necessary for the conduct and management of the party of the second part, and if such are violated or if the party of the second part fails to obey the party of the first part or his representative, or if by speech, act or conduct does that which does or tends to injure the manager, his business or company on or off the stage, the party of the first part shall have immediate right to discharge the party of the second part without notice, in which event the salary shall be paid only pro rata according to the performances played, up to the time of the discharge.*

Discipline is an essential element in the success of any theatrical business; the manager has the right for his own protection to exact from his people their best abilities and conduct. An engagement embodies the need of the best ability freely contributed to the business in hand. Rehearsals are essential for the success of any play or production, the number, length and hours of which are properly determined by the management. As a performance depends upon the *ensemble* work of the cast, every member of the company must attend rehearsals when required, even though individually an artist is satisfactory in or knows his part and may have no personal need of further rehearsal. That, however, does not determine the rights of the manager, for rehearsals

must continue until the performance reaches his ideal; he is the sole judge, and may require rehearsals to that end.

An employer may not, without cause, discharge an employee who is under contract to serve for a definite period, but *faithful service* is a condition precedent to the right of wages, and where there is any conduct inconsistent with the relation of manager and artist, the former has an undoubted right, at any time, to put an end to the contract. A failure to obey reasonable rules is legal disobedience and a reason justifying an immediate discharge. While a trifling matter might not justify a dismissal, yet even slight transgressions, if interfering with discipline, afford proper grounds. The employee, no matter what his grade of service, is required to be respectful and obedient. He cannot be insolent and must obey all reasonable commands of his employer, and those having control of the business in which he is employed. He must be respectful and must abstain from all vulgarity and obscenity of language and conduct.

The actor may recover his salary up to the date of dismissal, unless the manager can show some actual loss resulting to him therefrom; if he can, the damages so suffered may be deducted from the amount due under the contract.

Matthews v. Park, 146 Pa. St., 384.
Hamlin v. Race, 78 Ill., 422.
Leatherberry v. Odell, 7 Fed., 642.

See *post,* Damages.

§ 244. Intoxication.

For the same reasons intoxication, when of such a nature as to interfere with the employee's ability to serve his employer well and faithfully, affords proper justification for a discharge.

Gonsolis v. Gearhart, 31 Mo., 585.
Bass Furnace Co. v. Glasscock, 82 Ala., 454.

§ 245. Character, Conduct, and Morals.

While as a general rule of contract law, in an agreement for personal services, the question of the character or morals of the contracting parties does not enter, yet where the agreement is personal in nature, there is an implied condition of decency of deportment and reputation which must be sustained.

An artist is a public character; his position compels a certain degree of publicity whether he desires it or not. For this reason it is not enough that he is competent, skilled and painstaking, fulfilling his contract within all its expressed requirements; he must further refrain from such indecent or immoral conduct as would become a matter of public scandal. Such conduct immediately depreciates his value to his manager, tending to keep the public from the performances in which he appears. He is engaged for the express purpose of appearances before a public which pays to see him or the production in which he takes part. The profit to his manager comes solely from public patronage, and he necessarily has the right to cancel the actor's engagement if a state of immoral conduct exists, though he performs in an artistic manner all his professional duties.

This conduct to warrant discharge must be generally known and a matter of common knowledge with the public. If merely known to the manager, it is not sufficient ground for a legal discharge; the injury from such conduct comes with publicity, leading to diminished drawing powers and resultant damage.

In the management of a public amusement there must be some government, and where the performers "all mix together in the intercourse incident to their calling there must be the restraint at least which common decency imposes; where one

acts under no such restraint it would be intolerable if the management was required to keep such a person in his troupe in consequence of his contract. If, by the contract the performer expressly engaged 'to conform to the rules and regulations of the company,' it was a reasonable regulation to require that she would be orderly and decent while mingling professionally with the members of the troupe."

Drayton v. Reid, 5 Daly, 442.

§ 246. Manager's Right to Make Rules.

The manager has the right to make reasonable rules for the conduct of his employees, not only in the playhouse, but in public places; he can insist on decency of conduct and associations. The company, and the way its individual members impress the community, is an essential element in the success of his business. The public must not be outraged or shocked by the conduct of his people when off the stage, for if this was tolerated the value of their services as professionals would be seriously impaired. The manager may pass upon these matters, and has the right to protect himself by discharging the offending member.

Hamlin v. Race, 78 Ill., 422.

It is advisable to have the rules and regulations determined and made a part of the contract to which reference can be had, thereby avoiding confusion and argument as to what may or may not be required. Oral directions are too often misunderstood or their precise import forgotten to be of any real and lasting value.

§ 247. Fines.

Rules and regulations, if made a part of the contract, can cover all matters of the artist's performance, deportment, and habits. They may provide against intoxication, the introduction of profane language or improper jest, the way of attending to the duties assigned, and cover all matters which are important in the proper conduct and control of the company. Such rules as follow are examples of what is reasonable and necessary.

No person permitted on any account to address the audience without the consent of the manager. Any violation of this rule will subject the party to immediate discharge.

Any person in this company who shall perform or tender services in any other theater or any concert or public exhibition, without the consent of the management, will be subject to an immediate discharge.

The manager can distinctly reserve to himself the right to discharge from the company all members who shall be guilty of conduct unbecoming ladies and gentlemen and calculated to bring disrepute on his organization; also, any who shall conspire against the interests of the manager, defame the members of the company, make public the private affairs of the concern, or by other conduct manifest a disposition to interfere with the business of the organization.

In some companies a violation of the rules and regulations in minor matters are adjusted by an agreed fine, which is imposed by the manager and deducted from the salary of the performer. The question of fine is to be treated in the same spirit as a clause providing for liquidated damages, and must be a reasonable and just amount and not in the nature of the enforcement of an inequitable penalty.

A contract cannot provide anything in the nature of a

punishment, and while the actor may agree that in certain instances of disregard of rules there may be deducted from his salary a specified amount, this is only binding to the extent of a reasonable compensation to the manager in liquidating the damage that results from the forbidden act.

In matters where the damage resulting from the doing of a wrongful act is incapable of precise estimation some latitude will be allowed by the courts in placing the amount of the fine by the management. In any event, it must be fair and not oppressive and in the nature of compensation for an injury rather than a punishment. The law will not allow or tolerate matters of punishment in the guise of a contract. The parties may adjust prospective injuries by agreeing upon an amount which is fair and reasonable as a species of liquidation and for the purpose of avoiding subsequent litigation. The provisions are recognized as just and legal when dealing with a matter where the determination of damages which might result therefrom is vague. Here the parties place a value upon a prospective wrong, and if the amount is reasonable and really in the nature of a liquidation, the court will not interfere. If, however, there is no element of liquidation and the matter is merely in the nature of a fine, punishment or penalty, such provisions will be disregarded and the court will not allow the enforcement thereof as against the artist. From this it can be seen that a reasonable fine imposed for being late at rehearsal or performance, for carelessness in dress, deportment and acting, would be maintained by the court as a proper adjustment of a definite damage resulting to the manager. All such matters tend to lessen the value of a company's work and to interfere with the profits derived from a good performance.

To exactly estimate the actual damage occasioned to the manager in money because an actor is late or an actress is careless in her performance or untidy in her dress, is an impossibility, for which reason a fine or deduction for such act in an agreed amount will be upheld and enforced by the court, provided it does not transcend the rules of reason and common justice, and is in the nature of liquidated damages. No fine can be imposed or deduction made from salary unless the same is the subject of an exact amount and provided for in the contract. The law never allows the parties to adjust matters according to their own ideas in the way of arriving at damages, unless the same is the subject of mutual agreement, and while the actor by his absence, negligence, or behavior may have damaged the performance, his manager cannot deduct from his salary such sum as he thinks right, unless the contract explicitly provides for such contingency and states the sum. The damage, although capable of proof, can only be adjusted by agreement or proceedings in a court of law, but when established as a determined sum in the way of liquidated damages can be deducted from the amount due under the contract.

Matthews v. Park, 146 Pa. St., 384.
Hamlin v Race, 78 Ill., 422.
Leatherberry v. Odell, 7 Fed., 642.

"A penalty," says Lord Loughborough, in Hardy v. Martin, 1 Cox Ch. 26, "is never considered in this court as the price of doing a thing which a man has expressly agreed not to do; but if the real meaning and intent of the contract is that a man should have the power, if he chooses, to do a particular act upon the payment of a certain specified sum,

the power to do the act upon the payment of the sum agreed on is part of the express contract between the parties."

Vincent v. King, 13 How. Pr., 234.

"As under our law the fine (when of an undue amount) must be considered as in the nature of a penalty, it cannot be recovered, and the plaintiff is entitled to recover only the amount of the damages which have been caused by the breach of the contract."

"The amount of the fine is plainly intended as a penalty to be paid in addition to the amount of any actual damages suffered."

Meyer v. Estes, 164 Mass., 466.
Higginson v. Weld, 14 Gray, 165.

"As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject matter of the agreement. The contract is to govern; and the true question is, what was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence if the intention is clear. If there be no fraud, circumvention, or illegality in the case the court is bound to enforce the agreement. In order to determine whether the sum named in a contract as a forfeiture for non-compliance is intended as a penalty or as liquidated damages, it is necessary to look at the whole contract, its subject matter,

the ease or difficulty in measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequence of the breach."

13 Cyc., 90, and cases cited.

Where a contract provides for a fine or forfeiture in a sum so inadequate as to make it apparent it was inserted *in terrorem* it will be treated as a penalty and not enforced.

Bradstreet v. Baker, 14 R. I., 546.
See post, § 338.

§ 248. Services to be Satisfactory.

10. *"The said party of the second part further agrees that if said party of the first part shall feel satisfied that the said party of the second part is incompetent to perform the duties for which said party of the first part has contracted in good faith, or is inattentive to business, careless in rendering of characters, or guilty of any violation of the rules, then the said party of the first part may annul this contract by giving one week's notice to said party of the second part to that effect, and said party of the second part shall have no further claim upon said party of the first part."*

This clause was construed to the effect that the words, *in good faith,* referred to the previous expression, *shall feel satisfied,* and the party employed was thereby protected from a capricious or arbitrary discharge from the employment. The employer having contracted affirmatively for his own good faith must be held to his bargain. "If a discharge at will had been intended, it would have been easy to say so in a few words. It contemplated the steady employment, for a full season, of a person of recognized qualifications, but with a reasonable check upon inattention or carelessness."

Grinnell v. Kiralfy, 55 Hun, 422.

This provision is strengthened in the interests of the manager by the words *"or if not satisfactory to the party of the first part, he may,"* etc., leaving out any reference to *"good faith."*

Here the services can be submitted to one measurement only, and that is the satisfaction of the employer, and a different rule than that stated in Grinnell v. Kiralfy applies. It now becomes no longer a matter of good faith, simply one

of satisfaction, for where the contract stipulates that the services are to be "satisfactory" to the employer, he is the sole judge, and the question of the reasonableness of his judgment is not one for the court to pass upon. For were not this so and he was obliged to show circumstances in justification of the discharge, it would annul the clear intendment of the parties, as without the clause he has the implied right to discharge the employee for not properly performing his services.

This rule, not only applies to services which are to be satisfactory, but to any matter where the subject is one wherein can figure the personal elements of fancy, taste, or judgment; as the acceptance of a picture, a costume, a bust, a play, a lithograph, the painting of a scene, literary and press work, for in all such cases if the contract so provides, the party may accept or not, as he is satisfied and is the sole judge of his own mind. It is not a question of whether he ought to be satisfied, but solely one as to whether he is. The state of mind herein defined is purely personal, and though he act from caprice, whim, fancy, or in a manner to others unreasonable, yet if not *satisfied* the contract is not performed. The rule is well settled and universally recognized.

The person who stipulates to render his services or make or do something to the satisfaction of another cannot complain at what may appear as an unreasonable outcome of his contract; the clause is binding and affords no protection against an unreasonable decision of the determining party. It is a case where the law will not undertake to say for the party that he must be satisfied; it leaves the decision solely to him with no limitations.

Gwynne v. Hitchner, 66 N. J. L., 97.
Crawford v. Mail Pub. Co., 163 N. Y., 404.

The determination of the question whether the services of the employee under a contract are satisfactory belongs entirely to the employer and is subject to no control of the courts. The employer's will is the only tribunal to which the question can be referred. Where the personal taste of the employer is concerned the contract will be construed literally.

Spring v. Ansonia Clock Co., 24 Hun, 175.
Wood Co. v. Smith, 50 Mich., 565.
Tyler v. Ames, 6 Lans., 280.
Brown v. Foster, 113 Mass., 136.

§ 249. Application of the Rule.

In Kendall v. West, 196 Ill. 221, West employed one Ezra Kendall, a specialist in monologue, to perform at such places and theaters in the United States and Canada as West might require, and Kendall agreed to "render satisfactory services" at a stated sum per week. Kendall was discharged as rendering unsatisfactory services. The company managed by West was a minstrel company. Kendall was requested by West a number of times to shorten the time of his performance and to try his part in black face, with both of which requests he positively declined to comply. The court held that West was justified in discharging Kendall.

"The appellee (West) was the proprietor of the company and had the right to direct its management, and if Kendall refused to comply with his reasonable request, West had the right to discharge him. The contract for employment provided that Kendall should render *satisfactory services*. Kendall did not undertake to render services which would satisfy a court or jury, but undertook to satisfy the taste, fancy, interest and judgment of West. It was West who was to be

satisfied, and if dissatisfied, he had the right to discharge Kendall at any time for any reason, of which he was the sole judge."

If the general fitness of the performer is to be the determining element, the word *satisfactory* must be eliminated from the contract, for with such qualification there is no element which can be considered, and any qualifying description is surplusage. If the matter in question does not involve the personal equation of the promissor, the tendency of the courts is to construe the contract as meaning that the determining party shall act reasonably.

Harriman on Contracts, § 283.

Citing:

Hawkins v. Graham, 149 Mass., 284.

Duplex Safety Boiler Co. v. Garden, 101 N. Y., 387.

§ 250. Transportation.

11. *The party of the first part to pay the second party's transportation while the company is* en route *and to carry his baggage up to two hundred pounds weight. Transportation as herein specified does not include fare to the place of opening performances, fare after the final performance under the contract, sleeping or parlor car fare, nor expense of carriage hire to and from hotel, station or theater.*

This clause states the manager's agreement in respect of matters of transportation. Further concessions are often made and should distinctly appear. The manager can agree to pay any additional charges over the salary, but is not obligated to, save by explicit agreement; here custom cannot be cited to vary the express terms of the agreement, nor to add other conditions to it.

The mere contract for personal service does not carry with it the duty of paying transportation, which although generally assumed by the manager, is not an implied part of the agreement for service and cannot be compelled. All such matters must be the subject of express and definite agreement.

As to Baggage, see *post*, § 289.

§ 251. General Provisions.

12. *Any original matter in the way of lines, lights, scenes, music or business which may be introduced in the performance by the party of the second part, shall on the election of the party of the first part become a part of the performance thereafter, for which no compensation shall be paid, and which may be used by anyone succeeding to the part. And the party of the second part shall furnish to the party of the first part such photographs as he may require, the same to be used in any way for the purpose of advertising the party of the second part and the attraction in which he appears. If for any reason the party of the first part shall be unable to give a performance, or if the party of the second part shall be unable to appear on account of sickness, or if the company shall be laid off and not play, then there shall be deducted from his salary such a proportionate part thereof for the day or days so lost as is pro rata according to the salary for the week. The party of the first part reserves the right to lay off the company at such times as may seem advisable to him and for which period or periods no salary is to be paid to the party of the second part.*

The rights to publish the photograph or picture of the party of the second part, the excuse of sickness and other matters provided for in this clause are elsewhere considered under their appropriate headings.

§ 252. Notice of Termination of Contract.

13. *This contract may be terminated at any time by either party's giving to the other two weeks' notice in writing of the intention so to do, without assigning any reason or cause therefor.*

In case of notice to the party of the first part it shall be in writing and delivered to him or his representative in hand, but in the absence of both from the company for a period of over two days, then notice may be mailed properly addressed to the principal office of the party of the first part. In case of notice to the party of the second part, it shall be in writing and delivered in hand to the party notified, or left in the place in the theater where the party is playing, provided for the deposit of letters addressed to members of the company, or upon the call-board of said theater, or by mail to the theater where the company is playing, properly addressed to the party of the second part. The commencement of the two weeks shall be from the time the notice is actually received by either party hereto.

A clause of the same general effect was upheld in Watson v. Russell, 149 N. Y. 388: "It is further agreed that the said Russell may cancel this contract at any time on giving the party of the second part one week's notice, and paying one week's additional salary, and in consideration of such additional week's salary the party of the second part agrees to accept one week's notice of cancellation at any time."

Fisher v. Monroe, 2 Misc. R. (N. Y.), 326.
Peverly v. Poole, 19 Abb., N. C., 271.
Derry v. Board of Education, 102 Mich., 631.

A theatrical custom to discharge an actor on two weeks' notice cannot prevail over an express contract, wherein the agreement is for a specified time, if no provision allowing a two weeks' notice appears therein. Custom cannot vary the specific terms of an agreement, and when the contract is for a specified or definite time it can only be terminated in the way and manner the contract provides, and if silent in respect of a two weeks' notice none will be implied or grafted on to the real agreement, because of some usage or custom which may prevail in the profession. Most theatrical contracts contain this clause, which is well recognized and understood, but unless actually written in and made a part of the contract it does not apply. When this notice is provided for, the actor is entitled thereto, and if discharged without it may recover as damages the amount of his salary for the two weeks which he would have earned had notice been given him as provided.

Hall v. Aronson, 4 N. Y. Law J., 1499.
Peverly v. Poole, 19 Abb. N. Cas., 271.

§ 253. Notice Must Be Actually Given.

This notice must be actually given and in such a way as to insure the fact thereof being known to the actor. It is not enough, unless the fact becomes actually known, to post a discharge under a two weeks' notice clause on the door of the green room. On this point the court said in DeGellert v. Poole, 2 N. Y. Supp. 651, that: "Notifying a lady of confessed talent that she is discharged, by posting the fact in the green room, would hardly be an agreeable form of notification to an artist of ordinary feelings, nor do we believe that the plaintiff ever

contemplated that such a form of notice should be given to her under the contract. It would be unreasonable to expect every chorister or member of the ballet to be daily scanning the walls of the green room for notices of their discharge, when the more agreeable and easy method of personal communication was at all times present. The plaintiff was a member of the defendants' company, under their constant command and direction, and personal notice was so easy of communication that we are satisfied that both parties contemplated it. Under our construction of the contract, the notice, not having been brought home to the plaintiff, was insufficient to effect her discharge."

In Peverly v. Poole, 19 Abb. N. C. 271, the contract provided that in case the employee's services should not in the estimation of the employer be satisfactorily rendered, "it shall then be lawful" for the employer to end the contract.

Here the defendants were not bound to give any reason for their formation of their estimate of the employee's services, nor did such decision depend upon the manner in which the services were rendered, and no notice could be required.

§ 254. Place and Time of Notice.

The written contract should provide for this contingency by designating the manner and place where such notice may be posted or left; if not, any method can be employed which is fairly and consistently reasonable in the kind of business in which the employment is concerned.

§ 255. Theatrical Season.

It often occurs that an artist is engaged for a "season" and the language is such as to nullify the operation of the expressly stated two-week clause.

While a two weeks' clause is generally recognized and understood among the profession, it is merely custom and not law, and a contract, whether oral or written, is not affected thereby, unless the right of discharge under a two weeks' notice is specifically and expressly understood, and made a part of the contract. There is quite generally an opinion among theatrical people that the reverse of this statement is true. Such is erroneous, and the right to discharge or to cancel on two weeks' notice is possible only when provided for by actual agreement and made a part of the contract between the parties.

"Theatrical Season" or "Season" has a well-defined meaning, and is construed to mean the period during which a production or play is given, and is not determined by any reference to time, and is of an indefinite nature depending upon the manager's right to close when lack of profits, impossibility of booking, illness of star, or other cause compels.

A season is necessarily indefinite and is to be determined not by reference to time (unless explicitly stated), but by controlling events which may close or prolong such period.

The actor engaged for a theatrical season, or for the season of 1906-07, where no certain number of weeks is specified, cannot legally complain if at any time his engagement closes. So uncertain is the theatrical business, so dependent upon public caprice, the star, and countless other conditions, no manager can estimate the duration or term of profit of any venture. The season may, therefore, be one week or forty weeks, according as the play continues, but terminates when the play is discontinued in the final sense of the word. A contract for a theatrical "season" is an entire contract and has been repeatedly so construed, and it does not alter the case even though the actor is paid a definite sum every week he shall

play, and if idle through the fault of his manager he may recover pay for such period.

The season can by express language be made a period of certain duration, and if the contract has such a distinct reference to time, that will control, and the manager must either play his attraction during that time or pay the actors if their services are not required.

Ellser v. Brooks, 54 N. Y. Supr. Ct., 73.
Strakosch v. Strakosch, 3 N. Y. L. Journal, 645.

§ 256. Oral Evidence to Explain Meaning of Season.

The meaning of terms of art, of science, technical phrases and words of local meaning, may, when employed in an agreement, be proved by extrinsic evidence, and by so doing the rule is not violated which prohibits the introduction of evidence to alter, vary, or explain an agreement, or that a written contract cannot exist partly in parol and partly in writing. By receiving such evidence, the court does no more than when it refers to a lexicon to ascertain the meaning of a word. The word "season" can properly be explained under the rule.

Montague v. Flockton, L. R. 16 Eq., 189.
Myers v. Walker, 24 Ill., 133.
Strakosch v. Strakosch, 3 N. Y. L. J., 645.
Leavitt v. Kennicott, 157 Ill., 235.

§ 257. "Season" an Entire Contract.

The actor engaged for "the season" has an entire contract even though his salary is to be paid weekly for every week

of appearance only, and if idle through the manager's fault can recover his salary, although his services are not required.

Coghlan v. Stetson, 19 Fed. Rep., 727; 22 Blatchf., 88.
Sterling v. Bock, 37 Minn., 29.

Under a contract to serve as an actress for a period of six months, at a stated weekly salary, it was not necessary, in order to constitute a performance of the contract for a particular week, that the actress appear upon the stage, she not being called upon to do so.

Sterling v. Bock, 37 Minn., 29.

Where an actor is employed by a manager who agrees that the actor shall appear at least seven times a week and be paid $100 for each appearance, which stipulation the manager violates by failing to provide employment for the actor for a period of three weeks, the actor may recover his salary for such period and waives none of his rights by subsequently appearing under the contract and receiving pay pursuant to its provisions.

Coghlan v. Stetson, 19 Fed., 727.

§ 258. Transportation After Notice Terminating Contract.

14. *In the event this agreement is cancelled by a two weeks' notice from the party of the first part, he agrees to pay the transportation of the party of the second part from whatever place he may be to New York. If said notice is given by the party of the second part, he agrees to pay the party of the first part all the necessary expenses the party of the first part is put to in filling his place.*

This clause can be inserted to save any question as to rights of transportation; without it, no demand can be made for such, as it is not to be implied as any part of a theatrical contract when omitted. This has elsewhere been fully explained.

See *post,* Damages, § 314.

§ 259. The Signature.

15. *In witness whereof the said parties hereunto set their hands the day and date first above mentioned.*

A signature is valid and binding though made with the initials of the party only, and parol evidence is admissible to explain and apply them.

Sanborn v. Flagler, 9 Allen, 478.

A signature by the Christian name only is equally valid.

Walker v. Walker, 175 Mass., 350.

An agent may write his own name, and thereby bind his principal, and parol evidence is competent to prove that he signed the contract in his capacity as agent. On the same principle a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shown by extrinsic evidence.

Sanborn v. Flagler, 9 Allen, 477.

Nor does the law require that the signature be in the actual handwriting of the party, for he may use a stamp or stencil, but in such case it must be shown that he actually used the same or authorized its use by another intending the same to be as and for his actual signing.

Boardman v. Spooner, 13 Allen, 353.
Brayley v. Kelly, 25 Minn., 160.

In like manner a contract signed by the party's name, in his presence, though by a stranger, is sufficiently well executed, and such signing is deemed the party's own act.

A signature, when intended as such and required to be *written* or *in writing,* may include "printing, engraving, lithographing and any other mode of representing words and letters."

Finnegan v. Lucy, 157 Mass., 439.

If the party signs the agreement, although not in the usual and customary place, evidence is admissible to show that he intended to sign the same and is therefore bound.

Hawkins v. Chace, 19 Pick., 502.
Richardson v. Boynton, 12 Allen, 138.

The signature may be by pencil or by initials or any other cross or mark intended as a signature.

Bickley v. Keenan, 60 Ala., 293.
Brown v. Butchers' Bank, 6 Hill, 443.
Clason v. Bailey, 14 Johns, 484.

For it is the physical act whereby an intention of signing is evidenced that is the all-important factor, and the means employed or place used are immaterial so long as the intent to sign can be shown.

A signature by an assumed name allows suit to be brought in the right name of the contracting party.

Hathaway v. Sabin, 61 Vt., 608.

If a contract has been signed by one party, intending that the other party thereto should sign later on, and the terms or language are changed, it will not be binding in its altered condition, unless expressly and knowingly consented to.

McGavcock v. Morton, 57 Neb., 385.

§ 260. Signature of a Corporation.

When the signature to a contract is by a corporation it should be substantially as follows:

In witness whereof the said.....corporation has caused its corporate seal to be hereto affixed, and these presents to be signed in its name and behalf by A. B., its Treasurer, this first day of, etc.

The.....corporation, (SEAL.)
By A. B., Treasurer.

If another official is empowered to sign, he can do so, substituting his official capacity in the place of "Treasurer."

It is well to affix the seal and use this form even on contracts which do not require a seal to make them valid.

In Sherman v. Fitch, 98 Mass. 59, it was held that in an instrument where a seal was not essential to its validity the signature "G. R. Sampson, President of the Northampton Street Sugar Refinery" was a good execution by the corporation of a simple contract.

Fay v. Noble, 12 Cush., 1.
Blanchard v. Blackstone, 102 Mass, 343.

The party executing an agreement on behalf of a corporation must have the power to perform such act, either under a special or general delegation of authority. Unless this is given his acts do not bind the corporation, as in the absence of evidence it cannot be presumed that he has power to bind it.

See ante, § 205.
Vogel v. St. Louis Museum, etc., Co., 8 Mo. App., 587.
Dedham Inst. for Savings v. Slack, 6 Cush., 408.

"That in all cases of execution of documents and contracts, the corporation's name should appear as the party entering into the contract, and the signature should be so written as to bind the corporation. The improper execution of corporate documents, especially promissory notes, has been a constant source of litigation."

Tucker Manual of Business Corporations (2d Ed.), page 230, citing:
Rogers v. Union Stone Co., 134 Mass., 31, 36.
Produce, etc., Co. v. Bieberbach, 176 Mass., 577.

It was held in Howard v. Daly that where an actor in accepting an offer of a theatrical position mailed a duplicate copy of the agreement signed by him, that the contract was complete and executed from the time of such mailing.

Howard v. Daly, 61 N. Y., 362.

THE CONTRACT BETWEEN THEATER AND THE PLAYING ATTRACTION

NECESSITY OF CERTAINTY IN DESCRIPTION AS TO QUALITY

THE SHARING CLAUSE

METHODS OF SETTLEMENT

ADVERTISING MATTER

CANCELLATION AND LIQUIDATED DAMAGE CLAUSE

GENERAL PROVISIONS AS TO PERFORMANCES, USE OF THEATER AND SALE OF TICKETS

CHAPTER XVIII

§ 261. Contract Between Manager and Attraction.

A contract for playing an attraction differs in no wise from an agreement which provides for the furnishing of some stipulated thing, and the parties respectively have a right to expect and must furnish those things which are agreed. This right of exaction, however, depends entirely upon what the contract calls for, and is thereby fixed: nothing more can be required than is expressly stated, for a performance in kind is sufficient where the quality is not designated.

If, under a sharing contract, a certain play is promised with no qualification as to the kind of company, the contract is satisfied if a company sufficient for the purposes of giving the play appears and performs. The manager cannot complain because it is second rate, cheap or inadequate for the demands of his patrons. His failure to safeguard the quality is his fault and he may not legally complain. The law considers a contract performed by the delivery of the thing in kind contracted for and makes no moment of the quality.

Quality is matter of specific agreement, and under a general classification cannot be considered. To find from a general contract that a certain quality was the actual intent of the parties would be substituting another contract and be in violation of the legal intendment. The court will exact the stipulated play and a company of players sufficient in numbers and general ability to perform it with the properties generally required. Beyond this the law has no right to go. The question of first-class, good, ordinary or bad does not enter

into the construction of the agreement. The contract is fulfilled by doing what is required and, although the manager may have expected better quality, and first rather than third rate, the blame and loss are his for not contracting with sufficient detail. To obtain a particular quality of kind the contract should contain a clause requiring it. If the company or production is to be satisfactory, the party can protect himself in the manner already explained. See *ante,* § 248.

Even under a general contract for furnishing an attraction a manager is not obliged to accept a company without its advertised star, or specialized features.

Spalding v. Rosa, 71 N. Y., 40.

§ 262. Necessity of Certainty in Description as to Quality.

If it is thought inadvisable or impossible to describe the company or attraction with sufficient detail, a clause can be inserted providing that "*said company or attraction is to be satisfactory to the party of the first part in all respects and details.*" This clause is open to objection as giving the manager of the theater too much power. For his protection, however, he should have the company or attraction so explicity described as to insure his getting what his contract calls for, otherwise he is without remedy and must accept what is offered so long as it generally conforms in kind. The performance provided must correspond in species and kind with that contracted for, but the same obligation does not arise as to the quality of the performance when clear and explicit words are not used which amount to a warranty, for if no describing terms are used it is clear that words of "kind or species" do not import any particular quality of that species. Thus, if the contract provides for a performance

of "Camille," this gives no assurance that it shall be by a first-class company, with appropriate scenery or elaborately staged. The principle arises under the well-established doctrine of warranty, which demands express and controlling words as to quality in order that there may be some standard by which the court can enforce the intent of the parties. Unless words are used which amount to a warranty of a particular kind of performance, the law will not imply a warranty, except to the extent that the attraction furnished under the contract shall correspond in kind with the matter contracted for. To avoid confusion the contract should specifically state the exact kind of performance, production or entertainment expected, and if the language is sufficiently clear and explicit, the same can be required before there is a proper fulfillment of the agreement.

Gossler v. Eagle Sugar Refinery, 103 Mass., 331.
Whitman v. Freese, 23 Me., 212.
Winsor v. Lombard, 18 Pick., 57.

§ 263. Contract Between Theater and Company.

This is generally referred to as a "sharing" or "house contract," and provides the terms and conditions under which an attraction plays a theater. The terms are simple and need little explanation. The usual clauses are governed by the same principles of law already discussed in the preceding chapter.

STAR THEATER SHARING CONTRACT

BOSTON, MASS.

1. *THIS AGREEMENT, made and entered into this first day of January, 1907, by and between John Brown, party of the first part, and Henry Jones, of New York, Manager of the Tin Soldier Company, party of the second part.*

The same rule of law applies here as to names and date as explained, *ante*, § 233.

§ 264. The Sharing Clause.

2. *WITNESSETH, That the said party of the first part agrees to play the attraction of the said party of the second part an engagement of one week, which shall include the usual evening, matinée, and holiday performances at the Star Theater, commencing on the first day of January, 1907, giving the said party of the second part fifty per cent. of the gross receipts of each evening and matinée performance that said Company may play during the above-mentioned engagement, and said party of the second part hereby agrees to play said attraction at said theater on the said terms during the above-mentioned time.*

"Usual evening, matinée, and holiday performances" means the performances usually played at the theater with which the contract is made and does not refer to other theaters in the

city or town, the custom of which cannot be cited to qualify or limit the particular contract. Gross receipts comprehends all moneys taken in for the contracted performance, without deduction for anything whatever, and the amount is ascertained by counting all tickets and receiving the stipulated per cent. of the amount of the tickets sold. This is arrived at by the act of "counting up," which takes place after or during each performance between the manager of the theater or his representative and the manager of the attraction or his representative, at which time a statement in duplicate is prepared and usually signed by both parties, answering the purposes of a receipt or voucher for the gross receipts as divided.

§ 265. Method of Settlement.

3. *A settlement shall be made during each performance from the box office statement controlled by tickets in the doorkeeper's boxes, the party of the first part to furnish all tickets and pass-out checks, to have the exclusive right to sell books and photographs, unless otherwise agreed, and free admission shall be under mutual control.*

This clause can be altered to suit the conditions of any particular contract and covers matters generally agreed upon.

One of the forms of sharing contract in general use contains the following clauses, which are applicable where the party of the first part is the playing attraction and the party of the second part furnishes the theater or hall. These forms are more proper for booking of one-night stands than in a theater regularly used, which generally has its own form of sharing contract, framed for its particular needs.

The party of the first part reserves the right to furnish all tickets and pass-out checks if he so desires.

The party of the first part has exclusive right to the sale of books and photographs.

It is further agreed that during this engagement no performance or rehearsal other than herein stipulated shall take place in the above-mentioned building without the consent of said first party, first obtained in writing.

The regular officers of the house are to have control of the doors and box office under the supervision of both parties to this contract, who are to have free access to the box office at all times, the keys of ticket boxes to be held by the party of the first part.

A settlement to be made after first act, both from the ticket seller's statement (which is to be furnished previous to counting the tickets taken at doors) and the box count.

It is also agreed that free admission shall be mutually agreed upon on arrival of advance agent.

§ 266. Specific Things Required of the Theater Manager.

This contract generally contains a list of the specific things which are to be furnished by each party thereto, and the agreement must enumerate everything which is necessary for its proper performance. The party of the first part generally agrees to furnish the theater or hall "well cleaned, lighted and heated, together with the scenery, properties and equipments contained in said theater or hall."

The following list of required service and properties can be added to or changed in accordance with the circumstances of each particular case, and may serve as a memorandum of things usually required:

Regular stage hands.

Carpenter and assistant.

Regular flymen.
Ushers.
Electrician.
Property man.
Janitor.
Ticket sellers.
Doorkeepers.
Regular orchestra.
House programmes.
Licenses.
Regular billboards.
Bill posting.
Distributing of lithographs and other printing.
Stage furniture contained in house.
Properties not perishable contained in house.
Assist taking scenery and baggage to and from stage and dressing-rooms free of charge on week days.
Usual newspaper advertisements.

In the above the number or quality of persons or things should be designated to save contention and confusion. General requirements are too vague for any judicial determination as to what might be particularly desired or wanted. A general clause is satisfied by a general compliance.

§ 267. Matters to be Furnished by Playing Attraction.

4. *The party of the second part agrees to furnish the services of .....and company, said company to be composed of artists, satisfactory to the party of the first part, a list of whom shall be furnished to the party of the first part at any time on application, and to give the entire stage performance, subject to the rules of the theater, in a manner satisfactory to the party of the first part during the time stated, to pay all royalties and furnish all perishable properties, eatables, drinkables, live animals of any kind, red fires, cigars, blank cartridges, powder, caps, or any article required in the play or act which is destroyed during performance, and any extra stage hands required for the production of plays or acts, supernumeraries and extra ballet, calcium lights, special scenery, mechanical effects, and music necessary for said performances.*

And said party of the second part also agrees to deliver to the party of the first part, two weeks in advance, prepaid free of all charge, the following printing, to-wit:

.....Complete stands of pictorial printing.

.....Three-sheet Lithographs.

.....Lithographs of the same to be full sheets.

.....Stretchers One-sheets Half-sheets.

.....Eight-sheets for special locations.

Said printing to contain proper reference to the dates and times and place of said performances.

Anything which may be required out of the usual and ordinary should be the subject of a special provision in the contract, for otherwise it cannot be required or expected. And if not stipulated and afterwards demanded, the manager

has a right to ask reasonable compensation therefor before furnishing.

§ 268. Duty to Furnish Advertising Matter.

The party of the second part must furnish the attraction stipulated for and has no right to substitute another or make any material change from what is required. It is a breach of the contract not to furnish the specified printing. Much depends on proper advertising, and if the manager has no printing with which to cover his billboards and stands, he can well refuse to proceed with the contract, for one of the principal means of attracting patronage is withheld, and as it is a matter peculiarly within the province of the playing manager to provide, no alternative presents itself.

It is an express condition and should be strictly complied with as to time and amount. An acceptance without protest of a part of the printing or at a later time the whole, is a waiver of any claim of damages and cannot afterward be made the subject of litigation. Even if accepted under protest the matter of claim should first be discussed and settled, for while a cancellation is allowable for a breach of this important provision, it would be impossible to show any particular injury of a specific nature after the acceptance of the printing or of a part thereof. The settled rules of law would prevent a recovery of more than nominal damages.

In such matters it is impossible to show the extent of damages occasioned by the playing of a production where the terms of the agreement are violated. If the contract is performed and to bad business, it is merely speculation as to what caused it. The fact that the company was not first-class, the scenery bad, or the printing deficient can be shown, but there

is no certain proof capable of establishing the damages in any definite amount.

It necessarily follows there should be an out-and-out cancellation if it is expected to recover in an action at law any appreciable amount, for otherwise the recovery will be wholly inadequate unless the contract provides a sum in the nature of liquidated damages for such contingency.

Under such a provision it is possible to protect the rights of the manager and to insure the production and its presentation in a fitting manner. See *post,* Chapter 23, Damages.

A provision in a theatrical contract, wherein the defendant was to furnish his theater for a week and the plaintiff a company, that a violation thereof by either party should cause the sum of five hundred dollars to become payable on demand as liquidated damages, is not in the nature of a penalty, since it was competent for the parties to fix their liability in a reasonable amount, a recovery of such sum can be had.

Mawson v. Leavitt, 37 N. Y. Suppl., 1138.
See post, § 332.

§ 269. Protection Guaranteed by Clause for Liquidated Damages.

The importance to a theater in booking an attraction to have it furnished as represented is apparent, and in no better way can the manager safeguard his interests than by the insertion of a clause which stipulates a reasonable sum as liquidated damages in case of a necessitated cancellation or a failure to provide an attraction, the printing or other important element, as stipulated for in the agreement.

This method of liquidating the amount of injury by agreement is allowed and recommended as a method to avoid liti-

gation on subjects incapable of the direct and positive proof demanded as a basis for more than merely nominal damages.

The right of cancellation should be made clear and distinct, giving to the manager a right to terminate the contract when the playing attraction fails to do those things which are contracted for and necessarily essential and important to financial success; the right of cancellation being reserved, it can be exercised and damages collected as provided for in the agreed amount.

If the contract contains a clause that "said company to be composed of artists satisfactory to the party of the first part," the manager has a right to insist on being satisfied, and if not, can cancel. The question of satisfaction has been discussed at length in § 248, the rules as stated governing here.

§ **270. Cancellation and Liquidated Damage Clause.**

5. *It is further agreed that if the party of the second part fails to furnish the attraction herein provided for, or if the same is not composed of artists satisfactory to the party of the first part, or does not deliver to the party of the first part the stipulated printing within the time agreed, or shall play said attraction at any other theater in Boston within the time from the signing of this contract until the fulfillment of the same, or for a period of four weeks after the engagement herein provided for, without the written consent of the party of the first part having first been obtained, that in the event of the violation of any of the aforesaid stipulations, the party of the second part shall pay to the party of the first part .. ... dollars as and for liquidated damages therefor, and the party of the first part shall have the right to cancel this contract at any time and claim said damages for the violation of any of the aforesaid causes. Said amount, to wit:..... dollars agreed upon as liquidated damages being a fair and adequate amount for the violation of any of said stipulated clauses and intended to fairly cover the loss and damage occasioned said party of the first part for a breach thereof.*

In Mawson v. Leavitt, 37 N. Y. Suppl. 1138, a like clause was held not a covenant for a penalty, but for liquidated damages and sustained.

"It is further agreed and understood by the parties hereto that, for any violation of the above-mentioned covenants by either party (Acts of Providence excepted) he or they shall forfeit or pay over to the other party the sum of five hundred dollars on demand as liquidated damages."

The amount so fixed not being disproportionate to the amount of damages that might reasonably be within the contemplation of the parties at the time, they have a perfect right to fix and limit that liability.

See *post*, § 332, Liquidated Damages.

§ 271. Causes Excusing Performance.

6. *Should fire, war, riot, legal process or any other unforeseen event make it impossible for the party of the first part to carry out the terms of this agreement he shall not be responsible for damages of any kind arising therefrom.*

As to the legal effect of this clause and implied conditions governing matters of unavoidable or unforeseen casualty, see *ante*, § 215, *et seq.*

Taylor v. Caldwell, 3 B. & S., 826.

§ 272. Miscellaneous Clauses.

The theater and stage shall be entirely at the disposal of the party of the first part for Sunday performances. It is also agreed that the Property, Scene Plots and copy for House Programmes shall be sent by the said party of the second part to the said party of the first part at least two weeks in advance.

The box office and the sale of the tickets shall be under the exclusive control of the party of the first part.

These clauses are sufficiently plain and require no detailed explanation save as heretofore given. The manager has a right to the company or subject matter for which he contracts and need not accept an inferior or indifferent one. A change of star, leading features, or play or any material weakening of the attraction gives legal ground for cancellation, under certain conditions, but it is better to state the fact than to leave it to legal implication, for then there can be no variance of opinion in respect thereto. See *ante*, § 262.

§ 273. Theatrical Contracts Demand Explicit Language Covering all Agreed Matters.

Finally, in theatrical contracts the important need is a clear and explicit statement of all the requirements and intent of the contracting parties. Whatever is omitted, even though the same may have been discussed before the contract was drawn up, cannot be considered as in any way a part of the agreement; neither custom nor law will supply forgotten or overlooked terms and conditions. The importance of a contract demands care and consideration in the attempt to have it reflect the true intent of the parties. A contract stands as made and not as it might have been made. Oral explanations, agreements or provisos, though discussed and fairly understood, form no part of the agreement as made if left out of its written terms. The final execution precludes all which has gone before and includes only so much as is written. This important principle should be continually in the mind of the layman who prefers to draft his own agreements.

The foregoing clauses, many of which are in general use, do not constitute an entire form of contract and are only referred to as important elements of a sharing agreement worth careful consideration.

LEASES OF BUILDING FOR THEATERS OR PLACES OF AMUSEMENT

CHANGE OF LAW RESPECTING USE OF SAME

CERTAIN KINDS OF ATTRACTIONS DEFINED

USE OF PREMISES FOR AN IMMORAL PURPOSE

NECESSITY OF CLAUSE TO PROTECT AGAINST CHANGE IN BUILDING LAW

FIXTURES DEFINED

DISTINCTION BETWEEN LEASE AND LICENSE

LEASE WHEN CONTROLLED BY CUSTOM

CHAPTER XIX

§ 274. Lease of Theater.

A lease of property for use as a theater or place of amusement differs in no essential detail from any lease of real estate for a specified purpose, and is governed by the same principles of law.

A general lease of real estate without a specific designation of its intended use as a theater is not broken because the public authorities forbid its occupancy for such purpose.

As a theater is a legal and proper enterprise, property leased without restriction can be put to theatrical uses, without any violation of the lease.

§ 275. Covenant to Maintain Property at Stipulated Standard.

Generally a theater lease contains a covenant whereby the lessee agrees to keep the property up to some defined standard; to maintain it as a *first-class* or *popular-priced* place of amusement. The lessor may covenant that no attraction of questionable or specified nature will be given in the theater. Such provisions are for the protection of the property and to prevent any use which would cheapen its value or subsequent rental. To this end a scale of prices may be agreed upon, covering the rates of admission, a covenant inserted prohibiting Sunday concerts, burlesque shows, or any other doubtful species of entertainment; such provisions are usual and legal as defining the specified uses to which the property may be put. Such

uses will be noticed and a violation of the prohibition prevented by injunction. See *post,* § 356.

The difficulty of defining a *first-class* or *second-class* theater is apparent and leads to a discussion involving many debatable matters. It is important for the owner of the property to so regulate the prices and performances given as to insure the continuance of an established standard for his theater or hall, and unless some such stipulation is made the lessee can make any use of the property not clearly improper from a moral or legal standpoint. The place once let for the general and unrestricted uses of a theater is subject to no further dictation or control of the lessor, and he is without remedy to prevent its use as a popular-priced house, although his desire is to have it run as distinctly first-class. These are matters to be provided for in the lease and not for implication. The law does not construe a lease, general and unqualified in its terms, as a restricted agreement over which the lessor has implied powers of dictation.

Even under a covenant providing for some designated, but general kind of use, questions arise as to the application of the definition adopted by the parties, which to be of any avail must be clear, specific and detailed.

§ 276. What Constitutes a Certain Species of Attraction.

In instances where a difference of opinion arises as to what is first-class or what may be regarded as an attraction of a questionable character the lease will, when possible, be construed according to the practical interpretation put upon such terms or definition by the parties before the litigation began. Where attractions are to be booked as for a "first-class place of amusement" and not to be "of questionable character" some difficulty arises as to a legal classification. Such terms

" are probably incapable of any very exact and precise definition, as applied to theatrical attractions. No general definition can be given which would enable everyone to classify with precision and unerring accuracy every theatrical attraction. Theatrical managers of experience and playgoers of intelligence do not differ much in their general definitions of these terms. The difficulty and difference of opinion begins when they come to classify a long list of attractions. Then the fact is disclosed that an attraction which one manager ranks as first-class, in the opinion of another manager falls below that standard. In this matter we think the parties should be bound by the practical construction which they themselves put upon their contract before this litigation began."

The test of the box office receipts cannot be applied to determine whether an attraction is first-class, for " an attraction of the highest dramatic excellence may be played at a loss and one of a highly questionable character at a profit. Plays which unite the highest dramatic excellence with large profits are, in the opinion of theatrical managers, ideal first-class attractions. Yet they all agree that plays which fall below this ideal standard are nevertheless ranked as first-class attractions."

Leavitt v. Windsor Land, etc., Co., 54 Fed., 444.

§ 277. Premises Cannot be Leased for an Illegal Purpose.

A lease being a contract, like any other agreement, is void if the premises are leased for the giving of immoral performances, the same being for a purpose opposed to public policy, and under the ban of the law.

Levy v. Yates, 8 Ad. & Ell., 129.
Pringle v. Napenee, 43 U. C. Q. B., 285.

The landlord has a right to have the lessee enjoined from any use of the demised premises which is immoral, against public policy or a nuisance. Equity can prevent any use which might result in an irreparable injury.

See *post*, § 366.

§ 278. Necessity of Clause Protecting Lessee in Case of Change in Law as to Use of Real Estate for Theatrical Purposes.

It is important to remember that a general lease of real estate allowing the use of the premises for a theater or place of public amusement is not limited to such use, and according to the rule laid down in Taylor v. Finnegan (*ante*, § 213) a change in the statute law or city ordinance which prohibits the use of such property as a theater or place of public amusement does not relieve the lessee from paying the stipulated rental, because such use is only one of many to which the property can be put. Hence the necessity of providing against such contingency in the lease.

A change in the requirements of a State building law or the passing of some stringent ordinance to protect the public from fire or panic may stop the occupancy of the property for amusement purposes, as the structural conditions, location or plan of the building may prevent a remodeling which can make the structure conform to the new law. Such is a serious and unavoidable hardship. The legislature, however, has full power in this respect and exercises it in its duty of protecting the public. For this reason no lease should be accepted by a manager unless it provides for a cancellation or abatement of rent whenever public authority interferes with the use of the property *as a theater or place of public amusement.*

This provision must be clear, explicit and open to no

ambiguity, for otherwise the general, rather than a special, occupancy will be created, and an interference with specific use will afford no excuse on the part of the lessee to break his covenant to pay the stipulated rental.

In these times when changes in the laws governing the construction and maintenance of buildings to which the public resort are frequent and drastic, careful consideration should be given to the preparing of a lease, so there may be a placing of the responsibility of making the change and bearing the expense, either on the lessor or lessee, with a provision for an abatement of rent while changes are being made or so long as the occupancy is prohibited. As already explained, only under a distinct provision does such change in law work an implied right of cancellation on the ground of an impossibility of performance created by law.

It is unwise to accept present conditions of law as governing the future, for a theater fire or disaster may lead to a general and unexpected adoption by the civic authorities of protective requirements proving a serious hardship to the owner or manager. Such contingency is of necessary consideration in the framing of a theater lease.

§ 279. Specific Performance Will Not be Decreed Compelling an Owner to Furnish His Theater to the Lessee for the Uses of a Theater.

One cannot enjoin the proprietor from refusing to furnish his theater, stage hands, orchestra, etc., according to the terms of a contract for the appearance of a company on a certain day, nor from letting the theater to another company at that time, as such a contract cannot be affirmatively specifically enforced, as before a contract will be so enforced there must exist a mutuality therein, so that it may be enforced either

way, nor will equity grant an injunction which will indirectly enforce a part performance of a contract only.

Welty v. Jacobs. 171 Ill., 624.

§ 280. Remedy at Law.

The proper remedy is at law for a breach of a contract of lease, and where such is broken by a notice of renunciation, prior to the time for its performance, the damages are such as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss.

Grau v. McVicker, 8 Biss (U. S.), 13.

§ 281. Right of Action Accrues on Breach.

Where one party to a contract refuses to perform, the other party has immediate right of action and need not wait for the time of performance.

Grau v. McVicker, 8 Biss (U. S.), 13.
Traver v. Halsted, 23 Wend., 66.

Where there is a distinct agreement in a lease that the premises shall be used for no other purpose than a theater, such covenant is not violated by the closing of the theater through the manager's inability to keep it open.

Croft v. Lumby, 5 El. & Bl., 648.
Leader v. Moody, L. R., 20 Eq., 145.

§ 282. Fixtures.

The term fixtures when applied to a theater includes all the fittings which are reasonably necessary to make the place

suitable for theatrical and amusement purposes. This rule must in a measure vary in each particular instance and depends upon the kind of theater which is to be maintained. If for use as a combination house, playing companies on sharing terms which furnish their own scenery, much less in the way of scenery might be expected as a fixture than under a lease of a house for stock purposes.

Forbes v. Howard, 4 R. I., 364.
Gross v. Jackson, 6 Daly, 463.

§ 283. Rule Determining What Are Fixtures.

The kind or character of the place specified by the lease has much to do with determining what can be legally required or expected as a fixture.

In considering the question of fixtures for a theater generally, the rule comprehends such articles of furnishing and furniture as are reasonable and necessary for the use of a place as such.

It comprises all proper fixtures for the fitting up of the building for the use to which it is to be applied, such as chairs, upholstery upon the seats, etc.; but not painting of the walls.

Forbes v. Howard, 4 R. I., 364.

" The only question presented in this case is whether or not the scenery and various other articles constituting the stage and scenic outfit of an opera house are such things as may properly be classed as material for its improvement. In a strict sense, these articles, or some of them, may not be fixtures; but they are nevertheless essential to the completeness of a building of that kind. They necessarily form a part and

parcel of the edifice itself. No one would ordinarily consider household furniture and belongings as a part of the premises, but everyone would naturally regard the drop curtains, wings, borders, set houses, set trees, balustrades, etc., as being parts of an opera house edifice."

Waycross Opera House Co. v. Sossman, 94 Ga., 100.

§ 284. What Are Fixtures.

Chairs, the stage, stage fixtures, and drop curtain are fixtures. The scenery is, if specially designed, fitted and constructed for the particular building, but is not if used or suitable for use in other playhouses. This is a question of intention which is controlled by evidence showing how the same was used.

Bender v. King, 111 Fed. Rep., 60.
Oliver v. Lansing (Neb.), 80 N. W., 829.
Grosz v. Jackson, 6 Daly, 463.

"In getting up a theatre the whole building, considered in reference to its uses, *makes the house contracted for;* all that serves to complete and furnish such a house for the purpose designed makes up the house and is part of it when completed."

Halley v. Alloway, 78 Tenn., 523.
Sosman v. Conlon, 57 Mo. App., 25.
N. Y. Life Ins. Co. v. Allison, 107 Fed., 179.

§ 285. Remedy to Prevent Wrongful Removal.

An injunction will issue to prevent the wrongful removal of fixtures where such act can be shown to be of irreparable damage and the question of whether the property is or is not a fixture is in dispute.

Trask v. Little, 182 Mass., 8.
Camp v. Thatcher Co., 75 Conn., 165.

See *post,* § 380.

§ 286. Distinction Between Lease and License.

A lease comprehends more than a mere license, and an oral contract will not be construed as a lease when it is really no more than a license to use the property on certain specified occasions. The question of determining the difference between a mere license to use the premises or a lease thereof depends upon the arrangement and intent of the parties to the transaction, and is at times a most important matter, governing many collateral matters.

Here time is not the controlling element, for a lease can be for a single day, and a license for a year. The lease is irrevocable, granting certain defined rights; a license is revocable and not an agreement for the sale of any interest in lands under the Statute of Frauds. To this extent, at least, a surer way is to procure a lease for even a short term rather than a license.

The authorities are well agreed on this principle, and where the owner of a hall entered into an oral contract with J by which he agreed to permit him to use the hall for dancing parties on the afternoons of four holidays at a stipulated price for each afternoon, such contract was construed from the nature and language of the terms to be a license merely and not a contract for the sale of any interest in land, and consequently not within the provisions of the Statute of Frauds, and that such an agreement was valid, though not in writing.

Johnson v. Wilkinson, 139 Mass., 3.

§ 287. Lease When Governed by Custom.

If the parties making a lease contract with a well-established theatrical custom in mind and can be fairly said to have

made the agreement in reference to it, such custom can be proved, and will be construed in conjunction with the terms of the lease. This rule depends in its application solely upon the parties' knowledge of such custom or usage, and their evident intent of contracting with it in mind, and does not change the fixed principle of law that custom or usage cannot be shown to vary or alter the terms of a distinct agreement which by its phraseology repudiates any such controlling factor.

Suit was brought upon a lease to recover a stipulated sum for the privilege of occupying a theater for dramatic performances upon certain nights of January, 1886. The defendant contended that on October 12, 1885, nearly three months previous, he gave notice of his desire to cancel the lease, and under a custom of the theatrical profession, one month's notice of a desire to cancel a lease is considered ample, and that the custom was well known to the plaintiffs.

The court held that "such a usage, if established, would be binding if the parties contracted in reference to it."

American Academy of Music v. Birt, 2 W. N. C. (Pa.), 351.
Wigglesworth v. Dallison, Doug., 201.
Van Neas v. Packard, 2 Pet., 138.

As to the rules governing the time to sue when a lease is broken or its terms repudiated, see Grau v. McVicker, 2 Biss (U. S.) 13.

§ 288. Destruction of Premises.

If the premises are destroyed, where there is no covenant that the same shall continue, the law implies that such destruction excuses the parties from a further compliance with the terms of the lease.

Taylor v. Caldwell, 3 B. & S., 826.

BAGGAGE DEFINED

LIABILITY OF COMMON CARRIER THEREFOR

STAGE PROPERTIES NOT BAGGAGE

FAILURE OF COMMON CARRIER TO DELIVER SCENERY

CHAPTER XX

§ 289. Baggage Defined.

An important distinction is to be noticed between baggage, which includes articles required for the pleasure, necessity or convenience of a passenger during his journey, and that which, though property, is transported by a common carrier as mere freight or property. Therefore, in the absence of special agreement, stage properties, costumes, scenery, paraphernalia, advertising matter and lithographs do not come within the legal classification of baggage, and in the absence of negligence, no liability can arise against a railroad company or other common carrier for its loss or destruction.

Oakes v. Northern Pac. R. R., 20 Ore., 392.
Michigan Southern R. R. v. Oehn, 56 Ill., 293.

§ 290. Liability of Common Carrier Therefor.

Baggage in the sense of the law may consist of such articles or apparel as the necessity, convenience, comfort or recreation of the passenger may require him to take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. Such a common carrier is bound to carry and for its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer and is responsible for the carriage and

safe delivery of such baggage. But it is only to such articles as may be legally termed baggage that this liability attaches, no matter what may be the contents of the bag or trunk. The question of what articles of property contained in a trunk or bag, may be deemed baggage within the rule, is to be determined by inquiry according to the circumstances of the case, subject to the power of the court to correct any abuse.

Oakes v. The N. P. R. R. Co., 20 Ore., 392.
Railroad Co. v. Fraloff, 100 U. S., 24.
Wilson v. G. T. R. R. Co., 56 Me., 62.
Jordan v. Fall River R. Co., 5 Cush., 69.

§ 291. Stage Properties Not Baggage.

"Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purpose of carrying on the theatrical business. They do not fall, therefore, under the denomination of baggage, and in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier."

Oakes v. The N. P. R. R. Co., 20 Ore., 398.

While it is true that passenger carriers are not liable for merchandise and the like when packed as baggage if the same be lost, yet if the merchandise is so packed as to be obviously merchandise to the eye and the carrier takes it without objection, he is liable for the loss. For then the carrier may be said to have chosen to treat the property as personal baggage

and having done so becomes liable for the loss, and may not complain at the outcome of its own voluntary act.

Story on Bail, § 499.
Great Northern Ry. Co. v. Shepherd, 8 Ex. 30.
Macrow v. Great W. Ry. Co., L. R. 6 Q. B., 612.

It has been held that manuscript music carried by a traveling company in its business is entitled to be regarded as baggage when accepted and carried as such where the company travel as passengers by train.

T. & P. Ry. Co. v. Faust Co., 20 Tex. Civ. Ap. 144.

A carrier is liable, having, with full knowledge of the character of the article to be transported, received and accepted the same as baggage.

Minter v. Pac. R. R. Co., 41 Mo., 503.

§ 292. Carrier Must Have Notice.

The carrier is only liable when he has notice that he is carrying merchandise and not baggage. Therefore, if a passenger delivers to a carrier as baggage a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier has no notice, the carrier, in the absence of negligence, is not liable for its loss. It is not bound to inquire as to the contents of the trunk or bag delivered to it as baggage, and has a right to assume it contains nothing but the passenger's baggage.

Haines v. Chicago, St. P., M. & O. R. R., 29 Minn., 160.
Hoeger v. The C., M. & St. P. Ry. Co., 63 Wis., 100.
Butler v. Hudson R. R. Co., 3 E. D. Smith, 571.
Hannibal R. Co. v. Swift, 12 Wall, 262.

§ 293. False Representation as to Contents of Trunk.

A traveler who presents to a carrier of passengers a trunk or valise, such as is commonly used for the transportation of personal baggage, represents by implication that it contains only such articles as are necessary for his comfort and convenience on the journey, and if, in fact, it contains merchandise, the traveler is guilty of such fraud as to absolve the carrier from the extraordinary liability of an insurer.

"The cases that hold the doctrine, that the carrier is to inquire as to the contents of the package offered, are in reference to carriers of freight and not of passengers and their baggage. There is a reason for the distinction. Carriers of freight receive all kinds of packages, some valuable and others of trifling value. This fact has been held to impose upon them the duty, in all cases, in the absence of fraud and deceitful practices, to inquire of the shipper as to the contents of the package if they would protect themselves in the carriage of valuable freights. It is their duty to receive all kinds of freight, whether of great value or otherwise. The shipper is not bound to disclose the nature of the contents of the package, unless he is inquired of concerning it. But this rule presupposes good faith in the shipper."

Mich. Cent. R. R. v. Carrow, 73 Ill., 348.
Blumenthall v. Maine Cent. R. R. Co., 70 Me., 550.
Wunsch v. Northern P. R. R. Co., 62 Fed., 878.

The carrier may rely upon the representation that whatever is offered as baggage is that and nothing else.

Mich. Cent. R. R. v. Carrow, 73 Ill., 348.
Cahill v. L. & N. W. Ry. Co., 10 C. B. (N. S.), 154.
Collins v. B. & M. R. R., 10 Cush., 506.
Balson v. Donovan, 4 B. & A., 21.

Carriers are liable if they knowingly undertake the transportation of merchandise, in trunks or boxes which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation.

Sloman v. Great Western Ry. Co., 6 Hun, 546.
Stimson v. Conn., R. R. R., 98 Mass., 83.
Stoneman v. Erie Railway, 52 N. Y., 429.

§ 294. Failure to Deliver Scenery by Common Carrier.

When a railroad company fails to deliver a car containing scenery whereby the manager is unable to give a performance, in an action brought against the carrier for breach of contract for such failure, the railroad cannot show a custom of its road or of other transportation companies to make such contracts as incidental to the transportation of the members of the company and that had it known that the members intended to travel by another route than that by which the scenery was sent the railroad would not have made the contract.

Leach v. N. Y., N. H. & H. R. R., 89 Hun, 377.

LITHOGRAPHS AND PHOTOGRAPHS
ADVERTISING SPACE
PHOTOGRAPH OF PUBLIC CHARACTER

CHAPTER XXI

§ 295. Lithographs.

Lithographs form an important element and medium in theatrical advertising. Such, when ordered, are for the special, peculiar and exclusive use of the manager, and if original can be protected as any picture or device by copyright or the title protected in equity in the same general way as dramatic compositions.

They are essential to the business, and if sufficiently original, proper subjects for protection.

The right to publish the picture of an actor as a lithograph for advertising purposes is considered under the head of *Photographs*. See also,

DisDebar v. Hoefle, 4 N. Y. L. J., 1475.

§ 296. Advertising Space.

A contract made by the lessees of a tract of land used for a trotting park, giving the other party thereto the right to use the fences, confers the right to use the inside as well as the outside of such fences and involves and includes the right of entry upon the premises to reach the inner surface of the fence, and such latter right, if not an easement, is a burden or servitude in the nature of an easement.

Willoughby v. Lawrence, 18 Chic. L. News, 180.

§ 297. Lithographs Defined.

A contract to manufacture lithographs and engravings as advertisements for the especial, peculiar and exclusive use of a theatrical manager, adapted to the names and characters of his performances, is a contract for work and labor and not a sale, and where such lithographs and engravings have been manufactured and set aside for such manager according to the contract, but he has failed to pay for them and take them away within the time agreed, their subsequent destruction by fire without fault of the manufacturer does not affect the right of the latter to recover the contract price of the work.

"These contracts may be likened to a job that a printer does for another and according to his directions when the work consists of handbills or advertisements set up in attractive form and adapted exclusively to the business of such other person and useful to no one else. The job is completed according to contract and the other party has failed to take them away and pay for them. May not the printer sue? Or an artist paints the likeness of another according to contract. It is not called for, but left a long time on the artist's hands. The work was well done and acceptable to the person who ordered it. It is of no use to the artist or of any value to anyone except to him whose likeness or picture it represents. In all these cases it is too clear for argument that the transaction is not governed by the law of sales, but of work and labor. In these supposed cases, if the handbills and advertisements in the one case, and the likeness in the other, after the time for taking them away and paying for them had expired are burned up, whose loss is it? They are put by themselves in a safe place until called for. Why should the printer

or the artist lose by the fire, and the person who ordered the work done, and who is in default in not taking it away and paying for it, and by whose negligence it was left with the artist where it was burned without his fault, suffer no loss. The law works no such injustice. These cases are alike in principle. They are clearly analogous."

The Central Litho. & Eng. Co. v. Moore, 75 Wisc., 170.
Mixer v. Howarth, 21 Pick., 205.
Goddard v. Binney, 115 Mass., 450.

§ 298. Advertisement in Program.

A contract to insert an advertisement in programs of three different theaters for the "theater season" for the sum of $8.50 per week is an entire contract and not susceptible of apportionment, and only terminated when the theaters closed and that the contract did not terminate until it became impossible to further publish the advertisements on the programs because of the closing of the theaters.

Hazzard v. Hoxsie, 53 Hun (N. Y.), 417.

§ 299. Photographs.

A individual has an ownership and right of privacy in his photograph, and while the photographer owns the negative he can be restrained by injunction from using prints therefrom for any purpose not sanctioned by the original of the picture.

The law respects the privacy of the individual and will not tolerate an invasion of such right by the making public of his portrait by another without proper consent.

§ 300. The Right of a Private Individual to Have His Picture Protected.

"Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting or the publication of private letters or of oral lectures delivered by a teacher to his class or the revelation of a merchant's books by a clerk."

Corliss v. E. W. Walker Co., 64 Fed., 280.
Duke of Queensberry v. Shebbeare, 2 Eden, 329.

"But while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author, artist or inventor who asks for and desires public recognition may be said to have surrendered his rights to the public.

"When anyone obtains a picture or photograph of such a person and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the

right to produce it, whether in a magazine, a newspaper or a book.

"It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters may be said of their own volition to have dedicated to the public the right of any fair protraiture of themselves."

One who photographs an actress in her public character, free of charge, with the understanding that she is to have as many photographs as she desires, to do with as she may please, is the owner of the photograph and the negative, and has the right to secure a copyright for his own exclusive benefit, and her right does not extend to making copies or permitting others to do so for their own benefit. When a person has a negative taken and photographs made, for pay in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture or capable of producing pictures of that person, and all the photographs so made from it belong to that person, and neither the artist nor anyone else has any right to make pictures from the negative, or to copy the photographs, if not otherwise published for anyone else.

Pollard v. Photo Co., 40 Ch. Div., 345.
Moore v. Rugg, 44 Minn., 28.

§ 301. Picture of Public Character.

But when a person submits himself or herself as a public character to a photographer for the taking of a negative, and the making of photographs therefrom by the photographer, the negative and the right to make photographs from it be-

long to him. He is the author and proprietor of the photograph, and may perfect the exclusive right to make copies, by copyright.

Lithographic Co. v. Sarony, 111 U. S., 53.
Falk v. Engraving Co., 48 Fed., 262.
Press Pub. Co. v. Falk, 59 Fed., 324.

For further illustrations of the rule as applied to public characters, see

Marks v. Jaffa, 26 N. Y. Supr., 908.
Atkinson v. Doherty, 80 N. W., 285.

The right to produce the portrait or picture of a public character after his death cannot be interfered with, when such is done in an appropriate manner. The individual right of privacy which any person has during life dies with the person, and any right of privacy which survives is a right pertaining to the living only.

Schuyler v. Curtis, 147 N. Y., 434.

DAMAGES

CHAPTER XXII

§ 302. Damages Explained.

When a theatrical contract is broken without legal justification the damages recoverable are (1) the value of the services rendered, and (2) such further damages as may be legally assessed for the breach, which must be such only as arise from facts existing at the actual time thereof.

The damage must be the direct and natural result of the failure to perform and capable of proof. The contract generally discloses what injury has been occasioned and can properly contain a clause measuring the amount thereof, which, if in the nature of liquidated damages, and not by way of penalty, will be enforced by the court. If the contract is silent on the question of damages, then evidence is required to show that a substantial loss or injury has been sustained, and unless capable of legal proof there can be no assessment thereof.

§ 303. Damages Not Given for Speculative Injury.

The injury as a matter of proof must not be speculative, but the natural and probable outgrowth of the breach or such as can reasonably be supposed to have been contemplated by the parties when they made the contract. Outside of this the damages are considered too remote for the basis of an action for recovery. Not only must the injury exist, but evidence adduced which establishes with reasonable certainty

that the breach complained of was the proximate cause thereof; otherwise, though the loss be present and actual and can be measured, the lack of evidence from which it can be inferred allows merely nominal damages.

The law will not render judgment against one unless it is clearly and specifically shown that the injury sued for caused with absolute certainty the exact amount of damages asked.

For illustration: a manager employs an artist to perform for two weeks at a weekly salary of $150. If shown that these services were rendered or that the manager prevented or did not require the artist to render them, then by reference to the contract the injury can be specifically and absolutely shown as amounting to a damage of $300, neither more nor less, and is capable of the certain and definite proof required.

§ 304. Damages Must be Capable of Proof.

The value of any labor performed may be considered and such damage allowed as may be legally assessed for the breach, which, however, is limited to facts existing at the time of the breach.

Escott v. Cram, 13 Pittsb. Leg. J. (Pa.), 412.

So where a performer contracts to appear for a certain time and fails to do so, prospective and provable profits may be recovered. It is not sufficient that they are prospective alone, for they must be provable as well.

Savery v. Ingersoll, 46 Hun, N. Y., 176.
1 Sedgwick on Damages, § 192.

§ 305. Probable Profits May be Shown by Past Profits.

After breach the wronged party is entitled to recover as general damages the loss of profits which he would have realized, and evidence is admissible to prove past profits as a basis for the estimation of probable profits.

Alfaro v. Davidson, 40 N. Y. Supr. Ct., 87.

§ 306. May Recover Provable Profits.

The rule is well established that a party to a contract may recover as damages the loss of the benefits and gains he would have realized from its performance.

This applies to damages sustained by failure to provide a theater for a performance, as well as a failure to provide a performance for a theater. The rule being the same and limited to provable and not merely speculative profits, whatever can be established as a reasonable certainty affords sufficient basis on which to compute damages.

Taylor v. Bradley, 39 N. Y., 129.
Wakeman v. Wheeler, etc., Mfg. Co., 101 N. Y., 205.
Savery v. Ingersoll, 46 Hun, 176.
Ellser v. Brooks, 54 N. Y. Super. Ct., 73.

§ 307. Damages for Failure to Produce Play.

The defendant owner of a theater agreed with plaintiff to produce a play written by him, on or before a certain date, and to pay him a stated sum for each performance. This the defendant failed to do, and in an action by the plaintiff for a breach of contract the defendant was held liable for damages only to the amount agreed to be paid for one performance.

Schonberg v. Cheney, 3 Hun (N. Y.), 677.

§ 308. Damages Must be Capable of Computation.

While a person is entitled to recover the profits he might have enjoyed had there been no breach, such must be capable of certainty of computation and not merely speculative. The damages collectible must be such as the parties must have reasonably supposed would result from a failure to perform. The law endeavors to so adjust matters that the wronged party shall obtain what he would have derived under a performance of his contract, neither more nor less. The awarding of damages must always be an adjustment and never a punishment. Hence the necessity of proof of injury limited to the rule as stated.

That under some unusual state of circumstances very large profits might have been made, is no fair test in arriving at a compensation by way of an award in damages; such is mere speculation and not capable of direct, probable, or reasonably certain proof. The law abhors that which is speculative and uncertain, demanding a showing of certainty as opposed to conjecture.

Merely speculative profits supposed to have been lost are not to be considered, as such are based upon imagination rather than certainty.

McKnight v. Ratcliff, 44 Pa. St., 156.
Bernstein v. Meech, 130 N. Y., 354.
Leach v. N. Y., N. H. & H. R. R., 89 Hun, 380.

§ 309. What Constitutes Profits.

The value of the contract to a plaintiff is in the profits and in the amount he might have realized over the expenses attending its performance. The results which would in that

respect have been produced if the contract had been performed are speculative and by no probative means ascertainable, and not being susceptible of proof, are not the subject of recovery. While unable to prove the value of profits he might have made, he can recover the expenses incurred by him in preparing and providing for such performance. These expenses must have been legitimately incurred for the purposes of the performance of the contract, and it must be shown that with a view to such purpose, the plaintiff suffered a loss to that extent. Such expenses are deemed to be fairly within contemplation when the contract is made.

Bernstein v. Meech, 130 N. Y., 354.
Griffin v. Colver, 16 N. Y., 489.
Taylor v. Bradley, 39 N. Y., 142.

§ 310. Damages Cannot, However, Include the Prospective Profits of Performances Which Have Been Announced but Have Not Taken Place.

A contract under seal was entered into between Arden of of the first part and Todd of the second part. The party of the first part engaged to play Thomas Keen and his supporting company at Northampton, Mass., for a period of one night. The contract contemplated a single theatrical performance in which the plaintff should bear the principal expenses of furnishing the place of entertainment, which was the Northampton Academy of Music, and of furnishing the music, the necessary stage hands, the advertising, billposting and the scenery and mechanical effects called for in the scene and other plots furnished. The defendant was to furnish certain stage scenery, the costumes and the performers. The party of the first part was to have seventy-five (75) per cent. of the

gross receipts, and the party of the second part twenty-five (25) per cent.

The defendant failed to play as agreed. The plaintiff had been to no expense and had not engaged or sold any tickets or seats to the play, but offered to prove by his own testimony, based upon his experience in the management of his theater and knowledge of the cash receipts of similar plays at the theater under the same auspices, what the attendance would have been and what his share of the receipts under the contract in suit would have amounted to if the defendant had fulfilled his agreement. The plaintiff's only other evidence on the subject of damages was to the effect that the defendant was an actor of high repute and popularity, especially in acting the tragedies of Shakespeare; that during the previous year the defendant had played in the said theater to a large house, and that Northampton is the seat of Smith College, an institution attended by many hundred women students who largely patronize representations of Shakespearian plays as a means of education, and by their attendance insure a crowded house.

The court held the facts put in evidence afforded no satisfactory basis of comparison on which to reckon the profits, if any, which might have been received by the plaintiff if the defendant had kept the contract. There were too many elements of uncertainty and conjecture to make it safe to rely upon opinions such as the plaintiff offered to give. Performance was to be for a single night. If a comparison was to be made it naturally would be with the defendant's performance of the year before; but it did not appear that the supporting company was the same, and nothing appeared except that the year before the defendant played to a large house.

In this case only nominal damages were awarded, for the reason that the actual and specific damages, if any, were not susceptible of absolute proof. There was nothing offered

in the way of evidence to definitely show that the plaintiff had expended in the direct line of the contract any definite amount or had undertaken or done anything of specific and actual ascertainment. His damage was merely problematical and a matter of opinion, and concerned things incapable of exact and positive proof.

The law does not allow damages to be computed in such manner, and therefore nothing more than a nominal amount could be properly assessed.

Todd v. Keen, 167 Mass., 157.
Bernstein v. Meech, 130 N. Y., 354.

The same rule allows nominal damages only, for the wrongful detention of personal property where no evidence is given of actual ascertainable injury.

Whitman v. Merrill, 125 Mass., 127.

§ 311. Fright and Mental Anguish as Subjects for Damages.

In actions which grow out of a breach of a contract, mental anguish and distress occasioned thereby (except in contracts to marry) cannot be made the basis for a recovery of damages. Such to be the basis of an action must be connected with a physical injury, which is purely a matter of tort and not contract.

In Houston v. Freemansburg (61 Atl. Rep. 1022), the Pennsylvania Supreme Court declares definitely and finally that there can be no recovery of damages for fright or other mere mental suffering unconnected with physical injury. "In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance, but it is only in

the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory, and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration, and even of actual fraud, in the ordinary action for physical injuries from negligence; and if we opened the door to this new invention, the result would be great danger, if not disaster, to the cause of practical justice." The decision is in line with the weight of authority.

This rule is of importance in estimating damages for the revocation of a license when conferred by the sale of a ticket. Here a revocation is within the power of the management, and the act affords no remedy in trespass; the only action which can arise is one of contract, and hence mental anguish and distress occasioned thereby is no ground for damages.

See *ante,* § 146.

§ 312. Damages Arising from Revocation of License to Enter as Conferred by Ticket of Admission.

As the revocation of such license is at all times allowable, no matter whether there is cause or not, no action of trespass will lie.

The ticket of admission having been acquired as the result of a contract which calls for certain benefits to the licensee, such right cannot be violated and a breach of the contract occur without entitling the ticket-holder to recover in an action of contract the money paid for the ticket and all legal damages which he has sustained on account thereof.

McCrea v. Marsh, 12 Gray 211.
Horner v. Nixon, 61 Atl. Rep., 1088.
See ante, chapter on Tickets, § 146, et seq.

The question of damages depends much on the manner in which the revocation is accomplished, and greater injury naturally results where the ticket-holder is ejected in such way as to injure him bodily or hurt his good name, fame and credit.

Drew v. Peer, 93 Pa. St., 324.
Smith v. Leo, 92 Hun, 242.

§ 313. Honest Mistake as Mitigating Damages.

The damages can only be compensatory, and hence limited to such injury as is actually sustained. The question of good faith or honest mistake in selling seats will prevent the award of vindictive damages when the purchaser is deprived of their use because of a prior sale to another.

Smith v. Leo, 92 Hun, 242.
MacGowan v. Duff, 14 Daly, 315.

§ 314. Measure of Damages Where Property Has Been Acquired or Expenditures Made.

Where, under a contract to perform a stipulated kind of service, one party is prevented from performance by the other party, the measure of damage is such an amount as the contract would have yielded had its terms been performed, and if the compensation has been agreed upon, that, of course, will be the measure of damages, for the plaintiff should not be allowed to recover for loss of services more than the amount he has contracted to receive for the same. If no provision of this kind appears in the contract, then it is a question of what loss has been occasioned by the failure to perform, which includes any reasonable expense sustained or incurred in preparing to perform the contract in the way of costumes, material or other personal property reasonably acquired for such

specific use. This does not include things which are fit and useful for general purposes, but merely such as can be shown to have been acquired distinctly for and reasonably necessary to the performance of a particular contract, the loss of the value of which necessarily follows from its breach.

For instance, recovery can be had for a costume designed and suitable for a particular part, but not general clothing, the use of which is not limited and which is of general value and use outside of the particular contract. The rule is narrowly drawn in this respect and allows only such damages as are reasonably proximate and naturally flow from the failure of performance. Damages are not punitive, and in theory are supposed to place the wronged party in a financial position equal to that provided for by the terms and inducements of his contract.

Escott v. Cram, 13 Pittsb. Leg. J. (Pa.), 412.

In an action for breach of contract for failure to employ an artist, damages cannot be given for the expense of a trip to the place where performance of the contract was to begin, unless it appears that such journey was undertaken in direct consequence of the contract, and consistently an expenditure necessitated and made in actual reliance upon the same.

Benziger v. Miller, 50 Ala., 206.

§ 315. Uncertainty of Amount No Bar to Recovery.

"When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the

breach. A person violating his contract should not be permitted entirely to escape liability, because the amount of the damages which he has caused is uncertain. . . . Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits. . . . As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy."

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y., 205.

§ 316. Must be Proximate and the Natural Result of Defendant's Wrong.

Damages must be proximate, and the natural result of the wrong complained of. They must result from the wrongful act or are too remote. This is a matter clearly of evidence and properly left to a jury to ascertain.

The damages resulting to a theatrical company through the delay of a train, owing to the particular character of their business, which was unknown to the railroad company, are too remote to be recoverable.

Georgia R. R. Co v. Hayden, 71 Ga., 518.
Gordon v. R. R. Co., 52 N. H., 596.
Noxon v. Hill, 2 Allen, 215.
Ehrgott v. New York, 96 N. Y., 264.
Hadley v. Baxendale, 9 Exch. R., 341.

§ 317. Damages Under Contract Legally Terminated.

When a contract for personal services is terminated for a legal cause, the party employed thereunder can only recover such amount as was due him under the terms of the contract at the time of his discharge. The contract may have been

terminated by its dissolution, caused by the illness or death of one of the parties or by a breach justifying a discharge because of incompetency, drunkenness, immorality, disobedience or impertinence; if the discharge was legally unjustifiable, damages are recoverable. These causes and the cases governing the same are discussed under their respective titles.

See *ante*, § 243, *et seq.*

The amount due may depend upon the question of whether the contract is in its terms entire or divisable. If entire, a complete performance is a condition precedent to a recovery of any amount; otherwise of a contract of divisable nature.

§ 318. Contract Terminated by Disability or by Act of Law.

The illness of the employee, when of such a nature as to promise incapacity for some or an indefinite time, dissolves the contract, leaving the employer free to engage another in the place of such employee. The employee thus discharged by action of law has a right to recover for his services up to the time he actually ceased to render them and for no more.

Prior v. Flagler, 13 Misc. (N. Y.), 115.
Hubbard v. Belden, 27 Vt., 645.
See ante, § 216, et seq.

When a contract is terminated by act of law, whether legislative, executive or judicial, the party is entitled to be paid for his services to that date only and has no further claim for damages against the party employing him.

Pollard v. Schaffer, 1 Dallas, 210.
Ball v. Liney, 44 Barb., 505.
People v. Globe Ins. Co., 91 N. Y., 174.
See ante, § 210.

§ 319. Wrongful Discharge Ground for Damages.

If the discharge of the employee is wrongful, he can obtain damages for such injury as results from his dismissal. The rule is stated in

Everson v. Powers, 89 N. Y., 527.

§ 320. Loss of Property by Carrier.

In case of the loss or destruction of property (not baggage) by a carrier, such must result from the carrier's negligence and not from some intervening cause beyond its control.

"It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions (2 Parsons on Contracts, 456). The rule is not limited to cases in which special damages arise, but is applicable to every case in which damage results from a contract violated or an injurious act committed (2 Greenlf. Ev. § 256, 2 Parsons on Con. 457). And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it.

Story on Bailments, 586.
Angell on Carriers, 201.
Morrison v. Davis, 20 Pa. St., 171.

"In the last named case, it is said there is nothing in the policy of the law relating to common carriers that calls for any different rule, as to consequential damages, to be applied to them."

Denny v. New York Central R. Co., 13 Gray, 481.

§ 321. Duty of Injured Party to Reduce Damages.

When there occurs a breach of a contract the aggrieved party is bound to do all which is reasonably possible to reduce the damage. He cannot stand by and make no attempt to better the condition the breach places him in, for the law will not award damages for a loss he might have prevented; thus the burden is on the claimant to show he did what any reasonable man would have done to arrest resulting injuries. The rule is founded on the best of reason, and prevents an abuse of legal redress. When one is employed by another for a specified term, which contract is unfulfilled for any reason not attributable to the party wronged, he should at once make reasonable efforts to obtain other employment, for the law does not encourage idleness. If that employment cannot be secured, he then may claim full compensation for the period, but if he earns anything in the interim, that is to be considered in reduction of his damages, for it would be manifestly unfair were he to have double or additional compensation over the contract rate. This requires of him only a reasonable effort according to the circumstances of the particular case, and to this end he may go to reasonable expense in the effort. If this additional outlay is unsuccessful, and has been reasonably undertaken in an honest effort to reduce losses under the breach of contract, this element of expense may be considered as an additional element of damage in a suit for the injuries sustained, for it has been undertaken in good faith to reduce the injury and should not be an additional burden on the wronged party.

French v. Vining, 102 Mass., 132.
Loker v. Damon, 17 Pick., 284.
Warren v. Stoddart, 105 U. S., 224.

§ 322. Offer of Other Employment Can be Shown in Mitigation of Damages.

In an action brought by an actor for breach of a contract to employ him at a stated salary, it can be properly shown for the purposes of mitigation of damages that he had an opportunity to play elsewhere, which offered engagement he did not accept.

Howard v. Daly, 61 N. Y., 377.
Everson v. Powers, 89 N. Y., 527.
Parry v. American Opera Co., 19 Abb. N. Cas. (N. Y.), 269.

§ 323. Necessity of Reasonable Effort to Save Loss.

"The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

Warren v. Stoddart, 105 U. S., 224.
Miller v. Mariner's Church, 7 Me., 51.
Russell v. Butterfield, 21 Wend., 300.

§ 324. Under Clause "Not to Perform Elsewhere."

It would seem that a defendant cannot be permitted to offer in mitigation of damages proof that the plaintiff could have obtained an engagement elsewhere during the time he remained idle, if, by the terms of the contract, the plaintiff expressly bound himself "not to perform in any other the-

ater," as he could not have accepted a position under another management without himself violating the contract.

Coghlan v. Stetson, 19 Fed., 727.
McGowan v. Duff, 14 Daly, 315.

§ 325. The Reasonable Effort Required.

The reasonable effort to reduce such damage is necessarily controlled by the facts of each particular case, and is in effect what an ordinarily prudent man of business affairs would do. The diligence required is capable of no actual specific definition, as it is controlled by the immediate circumstances of the contract under consideration. What might be reasonable in one instance would be highly unreasonable in another, and any action undertaken in good faith and reasonably continued is generally sufficient. The effort and not the result is the essential requirement.

Then again, the attitude or promises of the party who has broken the contract may excuse the wronged party from any attempt whatever in the required direction, as where an early resumption of the interfered-with employment is promised, or a placing in some other enterprise assured. Here the party prevents the other, or rather, excuses him, from the attempt to mitigate the injury and cannot complain of the results of his own interference.

It is believed this rule will be readily understood, for it is, after all, merely a definition of what one in common justice and sense should undertake to do when actuated by sound business judgment. The authorities are universally agreed on this point and are only useful in showing the application of the rule to particular cases.

Where the contract is for personal service of a particular

kind, as in the capacity of an actor, singer, or musician, the law requires a reasonable attempt to procure a like employment, but the required attempt is limited to the particular service contemplated by the contract, and is not extended to the procuring of any work which will yield compensation; although if some other and different service is obtained, the amount earned therefor should be considered in mitigation of the damages.

Fuchs v. Koerner, 107 N. Y., 529.
Howard v. Daly, 61 N. Y., 362.

Nor is such employee required to accept work of a lower grade or to render a different species of service merely to earn something to reduce his claim for damages.

Briscoe v. Litt, 19 Misc. N. Y., 5.

§ 326. Unnecessary or Unsuccessful Effort.

Where one was employed to furnish a concert and on arrival at the place found the hall closed because the defendant had decided that a severe storm would prevent the entertainment, it was held that no duty rested on the plaintiff to show that he sought employment elsewhere, for such requirement would have been unreasonable and inconsistent. There was a special engagement and any attempt to mitigate the damage was out of the question.

Hathaway v. Sabin, 63 Vt., 527.

Under the rule which requires one after a wrongful discharge to seek other employment, such effort is sufficient if reasonably diligent, although entirely unsuccessful.

Leatherberry v. Odell, 7 Fed., 647.
Shannon v. Comstock, 21 Wend., 457.
Farrell v. School Dist., 98 Mich., 43.
Fuchs v. Koerner, 107 N. Y., 529.

§ 327. Enticing Away Employer from Another's Service.

That an action at law will lie by a person against anyone who knowingly entices away his employee or wrongfully prevents him from rendering his services during the existence of that relation, is well settled law in America.

The wrong consists in the act of persuasion by the defendant of a third party to break a contract existing between such third party and the plaintiff. It is a natural and probable consequence of such act of persuasion that the third party will break his contract. If it becomes the actual consequence, the right of action accrues.

Walker v. Cronin, 107 Mass., 555.
Bixby v. Dunlop, 56 N. H., 456.
Jeter v. Blocker, 43 Ga., 331.
Noice v. Brown, 39 N. J. L., 569.
Note to Bowen v. Hall, 20 Am. L. Reg. (N. S.), 587.

That the action may be maintained, it is necessary to prove the relation of employer and employee, and the employee to have been at the time complained of in the actual employment of the plaintiff and under some form of contract or at least at will. If the employee on his own responsibility has wrongfully left the employment and is then engaged by another, no action can arise, as there has been no enticing him away, and no wrong is attributable to the new employer. There, of course, should be no collusion between the parties, and the action can be maintained whenever one in the employment

of another is induced to leave it for the service of a new employer.

Butterfield v. Ashley, 2 Gray, 254.
Coughey v. Smith, 47 N. Y., 250.
Sargent v. Mathewson, 38 N. H., 54.

§ 328. Time When Action May be Brought for Damages.

Where one party to a contract refuses to perform, the other party has immediate right of action and need not wait for the time of performance.

There are frequent cases where contracts run for years, and it would be most unreasonable to require a party to wait the expiration of the term before he could institute an action against the delinquent person for damages. The right of action arises immediately on the refusal to perform, and whatever arises afterwards or may arise in consequence of the time's not having come, or not having expired, should be considered in estimating the damages.

For instance, if in consequence of the discharge of an actor, or of the refusal of a manager to require or receive any of the contracted service which would take time, the actor has the opportunity, which he should endeavor to utilize, of engaging in other employment which can be shown in mitigation of damages. It is further competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover.

Grau v. McVicker, 8 Biss., 13.
Hochster v. DeLatour, 20 Eng. L. & E., 157.
Traver v. Halsted, 23 Wend., 66.

As to failure of common carrier to deliver a car containing scenery of a theatrical company, see

Leach v. N. Y., N. H. & H. R. R., 89 Hun, 377.

NOMINAL AND LIQUIDATED DAMAGES

CHAPTER XXIII

§ 329. Nominal Damages.

The common law only awards damages as a compensation for actual provable loss, but this rule has been gradually extended until it is now well and universally settled that where a legal right has been invaded and no evidence is obtainable showing actual loss, at least nominal damages may be recovered.

This is on the ground that damages are not merely pecuniary in nature, for an invasion of another's contractual right constitutes in and of itself an injury importing damage. So, regardless of evidence showing a positive and definite loss, or where the exact injury cannot be ascertained on a basis of offered evidence, or where the injury is so small as to be difficult of estimation, then, if it is shown that some injury has really been occasioned, the court will allow a finding for nominal damages. This award would seem to be the recognition of an invasion of right, by giving damages for such injury, rather than the assessment of damages for a definite and computable injury, and is not dependent on any proof of actual damage.

§ 330. Definition of Nominal Damages.

Nominal damages is a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Wherever an act injures another's right, an action may be

maintained for an invasion of the right without proof of any specific injury, and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown, will award a trifling sum, as a penny, one cent, etc.

Bouvier's Law Dict., Tit., Nominal Damages.
Todd v. Keene, 167 Mass., 157.
McAneany v. Jewett, 10 Allen, 151.
Taylor v. Bradley, 39 N. Y., 129.
Radloff v. Haase, 196 Ill., 365.
Barnes v. Brown, 130 N. Y., 372.
Smith v. Loag, 132 Pa. St., 301.
13 Cyc. 14.

§ 331. Application of Rule.

Where the defendant employed the plaintiff as an actress until the close of the season, her compensation to be one-half of the profits, and the failure of the enterprise caused the defendant to break his contract, while it was held improper to show receipts by plaintiff under an agreement made with a third party five years prior to the one with the defendant, which required similar services, and also improper to show the fact that plaintiff purchased certain costumes to be used by her, it not appearing that she was obligated by the contract so to do or that she suffered any loss thereby, and, although these facts disclosed no elements of damage, yet she was allowed to recover nominal damages, although had the defendant carried his agreement through as made, it would have resulted in a positive injury to her in a financial way. For even where a benefit has resulted from a wrong done, yet for the injury of the breach, nominal damages may be recovered.

Ellser v. Brooks, 54 N. Y., Sup. Ct., 73.
Pond v. Merrifield, 12 Cush., 181.
Newcomb v. Wallace, 112 Mass., 25.

§ 332. Liquidated Damages.

The question of damages depends on the facts of each particular case, and the application of the general rules is not without much difficulty and the resultant recovery often disappointing. The ascertained damages arrived at through the admissible evidence of injury seldom keep pace with the plaintiff's expectation, especially where the breach concerns profits. This uncertainty, both of proof and recovery, makes clear the wisdom of settling such possible contention by a clause in the contract providing for agreed or liquidated damages in case the contract fails. Here is a provision for damages certain and understood, and the parties cannot dispute the provided measurement of the value of the breach.

The advisability of this method is self-evident and is commonly adopted in agreements concerning profits which are to be acquired.

Mawson v. Leavitt, 37 N. Y. Suppl., 1138.

§ 333. Clause in Contract Providing for Liquidated Damages.

Where, from the nature of a contract, the injury resulting therefrom, in the event of a breach, would be difficult to ascertain or impossible to estimate in a pecuniary sense, and where the parties to the agreement are in a position from their intimate knowledge of the subject matter to compute their probable damages, they may do so and provide therefor in the agreement for a specified amount which shall be treated as and for liquidated damages.

As in many theatrical contracts the ascertainment of damages for a breach thereof by either party would be difficult of proof or ascertainment, owing to the nature of the matter

contracted for, it is customary to insert a clause, providing that a failure to perform by either party the covenants in the contract shall give rise to the payment of a specified sum on demand as *liquidated damages,* and in this respect the law allows the parties to fix their own terms, provided the same are reasonable, and that some substantial damage resulted from the failure to perform the contract.

Mawson v. Leavitt, 37 N. Y. Suppl., 1138.

"It is the duty of courts to enforce the lawful contracts of competent parties fairly made upon good consideration, and when, in such contracts, the parties have agreed to liquidate the damages resulting from a breach, the jury is bound to find the amount agreed. Whether in any particular instance the sum named is to be regarded as a penalty or as liquidated damages will depend upon the intent of the parties as gathered from the terms of the whole contract applied to the subject matter. The mere use of the words 'liquidated damages' is not decisive. In applying the rules of interpretation, forfeitures are not favored, and, if possible, the sum named is treated as a penalty, because then the defendant is permitted to show the actual damage."

Leary v. Laflin, 101 Mass., 334.

§ 334. Construction of Clause for Liquidated Damages.

"The true mode of arriving at a just interpretation of the stipulation for damages is to take into view the subject matter of the contract, the nature of the agreements into which the parties have respectively entered, and the surrounding circumstances, in order to ascertain whether the intention was to pro-

vide for a fixed measure of damages or only to stipulate for a penalty. Where the intention is clear that the entire sum should be paid it is the duty of the court to enforce the agreement, however hard or inequitable the exaction may seem. If the parties go to the extent of making an agreement in clear and explicit terms to pay a certain sum on the non-performance of a covenant to pay a smaller sum, it is impossible to avoid giving effect to such a contract. It is only when the whole instrument is taken together and the intention is left doubtful that it becomes necessary to resort to the established rules of construction in order to determine on which side of the line a particular stipulation falls. Some of the adjudged cases have gone very far in applying these rules, so as to defeat the clear and unequivocal language of the particular stipulation for the payment of damages in order to carry out the plain general intent of the parties as indicated by other parts of the instrument."

Lynde v. Thompson, 2 Allen, 456.
Murdock v. Martin, 147 Pa. St., 203.
Bagley v. Peddie, 16 N. Y., 469.
Meyer v. Estes, 164 Mass., 457.
Gay Mfg. Co. v. Camp, 65 Fed., 794.
Powell v. Burroughs, 54 Pa. St., 329.

§ 335. Under Clause for Liquidated Damages No Proof of Damage is Required.

In an action to recover liquidated damages provided for in a contract, there is no necessity of proving that any actual damages have been sustained.

Stanley v. Montgomery, 102 Ind., 102.
Gibson v. Oliver, 158 Pa. St., 277.
Watson v. Russell, 149 N. Y., 388.

§ 336. Computed Damages Must be Fair and Consistent.

The provision for liquidated damages will be recognized and enforced by the courts whenever it is fair and consistent with the idea of liquidated or computed damages. If it appears to be merely a penalty in the nature of a punishment rather than a reasonable adjustment of a damage contemplated on account of a possible breach, the courts will not enforce such an unjustifiable hardship. Here the matter ceases to be compensation for an injury, and becomes a penalty. The reasonableness of the amount stipulated according to the circumstances of the particular case governs, and each contract is necessarily considered by itself.

In framing such a clause and in fixing the amount this rule should be borne in mind. It must not assume the proportions of a penalty or be other than a consistently fair compensation.

In Mawson v. Leavitt, 37 N. Y. Supp. R., 1138, it was held that a provision in a contract by which defendant agreed to furnish his theater for a week and plaintiff agreed to furnish his theatrical company and play in the theater for said week, proceeds to be divided, and that on any violation of the mentioned covenants by either party the sum of $500 on demand as liquidated damages should become immediately due, is not a covenant for a penalty, but for liquidated damages, since it was competent for the parties to fix their liability in a reasonable amount and that a recovery of the same could be had.

McCaull v. Braham, 16 Fed., 37.
Mapleson v. Del Puente, 13 Abb. N. Cas., 144.
Hahn v. Concordia Soc., 42 Md., 460.

§ 337. Words "Liquidated Damages" Need Not be Used.

Whether the term *liquidated damages* is used or not, the purpose of the court is to ascertain, if possible, the actual damages sustained, and if this is possible, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages.

Radloff v. Haase, 196 Ill., 365.
Brinkerhoff v. Alp, 35 Barb., 27.
Jaquith v. Hudson, 5 Mich., 123.
Smith v. Bergengren, 153 Mass., 236.

§ 338. A Fine Not Liquidated Damages.

A fine, when provided as such and for penalty purposes, will not be enforced by the court. See *ante*, § 247.

Clement v. Cash, 21 N. Y., 253.
Bradstreet v. Baker, 14 R. I., 546.

REMEDIES PROVIDED IN EQUITY

PREVENTION OF IMPENDING INJURY

PROTECTION OF COMMON-LAW AND COPYRIGHT TITLE

SPECIFIC PERFORMANCE OF PERSONAL CONTRACTS

RESTRAINT OF ARTIST FROM PERFORMING ELSEWHERE

THE ENGLISH AND THE AMERICAN RULE

SERVICES OF A UNIQUE AND EXTRAORDINARY NATURE

RESTRAINT OF USE OF MISLEADING ADVERTISEMENTS

INJUNCTION AGAINST AN IMMORAL SHOW

INJUNCTION TO PREVENT NUISANCE

INJUNCTION TO PREVENT WRONGFUL USE OF PHOTOGRAPHS, LITHOGRAPHS AND WOOD CUTS

PREVENTION OF CONTINUED BREACHES OF CONTRACT, AND WRONGFUL REMOVAL OF FIXTURES

PARTIES TO PROCEEDINGS IN EQUITY

NOTICE OF INJUNCTION

CHAPTER XXIV

§ 339. Remedies by Injunction.

The doctrine of injunction, an important and separate branch of jurisprudence, cannot here be discussed at length, and reference is only made to certain specific instances of equitable remedy and relief founded thereon as applicable to the subject matter of this work. The process of injunction, peculiarly serviceable in preventing wrongs and preserving rights, is well adapted to the many questions which arise from the breach of theatrical contracts, and matters concerning public amusements. The deficiency of the common law in providing adequate remedies in such matters is apparent, and equity here prevents threatened or irreparable injury.

It should be remembered that an injunction does not issue, as a matter of right, but is always within the sound judicial determination of the court, and when issued it rests upon such terms and conditions as the court sees fit to decree. It is equally within the same discretionary power to modify, dissolve or continue the injunction as justice may require, and the court can compel a party to furnish a bond of indemnity for protection against loss and costs occasioned by the granting or dissolving of an injunction

Richardson's Notes on Equity Pl. & Pr., 121.
Ashburner's Principles of Equity, 476.
2 Daniell's Ch. Pl. & Pr., 1666.
Foster v. Goodrich, 127 Mass., 176.

§ 340. Equity Prevents Impending Injury.

Equity prevents impending injury which cannot be adequately compensated for in an action at law, and accomplishes this by injunction.

The threatened injury must be actual and impending, and unless it appears to be of a substantial and positive nature the court will not interfere. An injunction will not issue to prevent acts which, though irregular and unauthorized, are such as can have no injurious results. The damage must be actual and impending and not a mere threat or statement that a certain thing will be done. Some clear necessity must be shown for affording the protection sought and not a vague and indefinite reason.

The injunction issues to prevent an irreparable injury to the complainant, and that such is actually impending must be shown as a basis for the intervention of the court. It is not necessary to show that damages have already resulted, but facts must appear of sufficient importance to warrant a fair inference that damage is threatened and impending.

A large variety of matters are of such peculiar nature as to lose their value when wrongly used or infringed, for no rule of damage could provide adequate compensation for their invasion. Mere matters of injury which can be ascertained and adequately compensated for by an award of damages are left to an action at law for adjustment. Damage sustained by the wrongful use of a dramatic or musical composition, the avoidance of a professional contract, and the refusal to abide by the terms of some definite agreement, are matters which are generally better adjusted in equity than at law, as the injury is serious and material and not possible of adequate compensation. There may be a plain action at law which is not adequate or susceptible of measurement in damages.

An injunction will not be granted unless the plaintiff discloses a case which is clearly within the jurisdiction of equitable relief. Equity requires a full and complete disclosure of all the material facts, and grants no relief unless these clearly appear, and then only in the court's discretion. Chancery follows this rule strictly, and the allegations and proof must satisfy it.

Spelling's Injunctions and Other Extraordinary Remedies, § 12 (2d Ed.).
Rogers v. Michigan, S. & N. I. R. Co., 28 Barb., 539.
Bond v. Wool, 107 N. C., 139.
Platt v Jones, 49 N. Y. Supr. Ct., 279.
N. Y. Cent. & H. R. Co. v. Haffen, 35 N. Y. S., 806.

§ 341. Equity Cannot Prevent Crimes or Assess Damages for a Tort.

Equity cannot be invoked to prevent a wrong in the nature of a crime, and an immoral contract can have no protection in equity. The relief sought must be clearly against an infraction of a civil and legal right.

"It is well known that equity has, in general, no jurisdiction to restrain the commission of crimes, or to assess damages for torts already committed. Courts of equity often protect property from threatened injury when the rights of property are equitable, or when, although the rights are legal, the civil and criminal remedies at common law are not adequate."

Worthington v. Waring, 157 Mass., 421.

§ 342. Facts Entitling to Relief Must be Clear and Explicitly Stated.

The facts showing the ground of action must be clear, positive, absolute and explicitly stated in the bill of complaint, and the one seeking the remedy must be without fault on his part, for he who seeks equity must do equity, and cannot compel another to do right when he is in the wrong.

The remedy at law which will preclude relief in equity must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity, and as satisfactory.

Holden v. Hoyt, 134 Mass., 185.
Rice v. Winslow, 182 Mass., 273.

Not only must there be no plain and adequate remedy at law, but to entitle the plaintiff to relief the injury of which he complains must be certain and substantial and not slight or theoretical, and such fact must appear in the bill of complaint.

Downing v. Elliott, 182 Mass., 28.
Chicago Gen. R. Co. v. Chicago, etc., R. Co., 181 Ill., 605.

§ 343. An Adequate Remedy at Law Prevents Intervention of Equity.

"In order to sustain an objection to the jurisdiction of a court of equity on the ground that there is a remedy at law, it must appear that no substantial and essential part of the case is within the appropriate jurisdiction of that court. For if any part of the case is within such appropriate jurisdiction of a court of equity, that court, having taken cognizance of

the case for such part, will retain it and determine the whole case."

Richardson's notes on Equity Pleading and Practice, p. 3, and cases cited and note.

"When equity has jurisdiction for one purpose, it will go on and do complete justice between the parties, and will not send them to a court of law because part of the relief may be purely legal relief."

Holden v. Holden, 24 Ill. App., 117.

§ 344. Priority of Service Determines Jurisdiction.

The court, whose process is first served, obtains jurisdiction of all questions which flow out of the subject matter, and if an action at law has been commenced, equity will not take subsequent jurisdiction. Equity is opposed to multiplicity of actions and seeks to control all controversies and parties in one proceeding. It will not assume jurisdiction over a part of an issue or some one person when substantial justice can only be arrived at by a hearing of the whole issue and all persons concerned therein.

U. Mut. Life Ins. Co. v. Univ. of Chicago, 6 Fed., 443.
Worthington v. Waring, 157 Mass., 421, 429.
Nash v. McCathern, 183 Mass., 345.

§ 345. Benefit of Right Conferred in Equity Contrasted with Remedy at Law.

Many infractions of legal rights, while giving rise to actions for damages, would receive meager practical relief if no other protection was available.

The impecunious manager who pirates another's play or opera is often financially unable to satisfy a judgment for damages, and if he was, the amount recovered would seldom reflect the real loss such injury occasions, it being a matter incapable of adequate money compensation.

A play is property of a peculiar nature; its handling and production, its novelty, its success in some well-known locality, its favorable comments, and originality, all contribute to make its peculiar and indefinable value.

The manager often spends large sums before his production is accepted by the public, his experiments in cast, scenery, situations and advertising are of great expense, and he looks to its future success for financial profit. To pirate his play, allow its use by others and merely give an action for the injury sustained would be manifestly unfair, for no rule of damage could adequately measure the real injury done, as it is incapable of any absolute, certain proof.

So vague and indefinable is the question of a successful production, a matter dependent on so much which is problematical, that no rule of law can be invoked satisfactory in its measurement of actual injury and fit compensation.

The rule of damage in an action at law is one which must be entirely arrived at by actual definite proof; it is not a matter of speculation or belief; no damage is assessable unless distinctly established by evidence. It must be capable of definite ascertainment. Such rigid measurement applied to the vague and intangible questions of dramatic rights and their invasion affords little satisfaction and leaves many real sources of injury uncompensated for. No other rule at law can obtain; its very inadequacy gives rise to the protective measure of injunction in chancery.

This, at least, averts or stops a wrong and affords more

nearly ideal justice than an inadequate assessment of damages under the common-law rule. The owner does not have to submit to a taking of his property and await the awarding of damages by a law court, but can avert injury by securing an injunction, whereby his rights will be protected.

§ 346. An Injunction Will Issue to Prevent the Unauthorized Use of a Dramatic or Musical Composition Whether the Same is Copyrighted or Not.

An injunction will issue to restrain any unauthorized production of a dramatic or musical composition whether the same is copyrighted or not. In the case of a composition which has been duly copyrighted the jurisdiction is in the Federal Courts, as they have sole supervision over such matters; in other instances the State courts have jurisdiction.

Before issuing an injunction the court requires that the complainant prove an absolute and complete title, that the composition is original, that an unauthorized use is threatened and that the work is not immoral or indecent. This protection extends, not only to a play, opera or musical composition, but to any original idea which forms a part of matter not original. This question is elaborately and clearly explained in the opinion of Mr. Justice Blatchford, in the case of Daly v. Palmer, 6 Blatchf. 256.

See *ante,* Chapter 5, as to title in dramatic and musical compositions at common law and under copyright.

All matters of dramatic or musical composition which are either capable of common-law ownership or copyright protection can be protected from wrongful invasion by injunction.

The remedy is allowed on the clear ground of preventing an injury for which the common law cannot adequately com-

pensate in an allowance for damages. The remedy, providing the elements of threatened invasion, title, originality and decency exist, is well established. The bill of complaint should show on its face the elements of title, originality, wrongful invasion and legality of subject matter, all being matters of necessary allegation.

Martinette v. Maguire, 1 Abb. (U. S.), 356.
Shook v. Daly, 49 How. Pr., 366.
Daly v. Palmer, 6 Blatchf., 256.
Reade v. Lacey, Johns. & H., 526.

This remedy is not only available to the author, but to his vendee, assignee, licensee, or a part owner.

Palmer v. DeWitt, 47 N. Y., 532.
Crowe v. Aiken, 2 Biss., 208.
Aronson v. Fleckenstein, 28 Fed., 75.

Good faith in using the manuscript, even though the defendant believes himself the actual owner, is no defense to this process for relief against an unauthorized use.

Shook v. Daly, 49 How. Pr., 366.

§ 347. Publication or Abandonment a Defense.

There is no relief granted, however, if it can be shown that the composition has been legally published or abandoned and thereby dedicated to the public. Such is an absolute defense. Exhibiting a manuscript or composition to others is not deemed sufficient to constitute a publication which will deprive the author of his exclusive right.

French v. MacGuire, 55 How. Pr., 471.

To entitle the plaintiff to this remedy he must allege and prove his title or right to use the play, opera, production or device (his common-law or copyright title), and that it has never been so published, dedicated or abandoned as to make it public property, and that the same is original and moral. Certainty of allegation and proof in these respects is vital, otherwise the relief sought will be denied. For cases involving this remedy see *ante,* § 65 *et seq.*

§ 348. Necessity of Proof of Title as a Basis for Obtaining Relief.

Where protection is sought in equity for a dramatic or musical composition, the plaintiff must prove his title, either as author or proprietor, and the originality of the matter sought to be protected, for if the defendant can show that the composition is a mere copy, or imitation of another's work, either as a whole or in essential parts, the court will consider the parties *in pari delicto* and refuse to interfere. The complainant must show his exclusive right to the composition, which must be original.

Martinette v. Maguire, 1 Abb. (U. S.), 356.
Martinette v. Maguire, 1 Deady, 216.

Ante, § 52.

§ 349. An Injunction Will Issue to Prevent a Party to a Contract Wherein he has Stipulated to Render his Services to the Plaintiff from Rendering Like Services Elsewhere During the Period Agreed Upon, but Specific Performance of the Agreement Will Not be Decreed.

Where one is under contract to act, appear, perform or sing, subject to the direction of another, if allowed to break such agreement the manager would be left to an action of law

which provides a totally inadequate remedy in damages. In instances of this kind the personality and reputation of the performer is the matter of contract value, and his failure to appear works irreparable injury for which no rule of legal damage can compensate in any degree of fairness. For this reason of inadequacy of legal redress, equity affords relief in certain instances by the process of injunction.

The wrongdoer is prevented by an order of court from rendering to another what he is under contract to do for the plaintiff; this, however, only where the services which are the subject of the agreement, require particular skill or are unique or extraordinary in their nature. Ordinary or usual abilities are easily procured, and whatever damage has been occasioned by the loss of such can be adequately compensated for by process at law. Equity does not interfere in such instances and will grant relief only where the service depends on the ability, skill, fitness or educational training of the person in question. This fitness, whether physical or mental, must be of an extraordinary nature, which is of such a peculiar value as to be impossible of estimate by any recognized standard of values.

The purely physical might well embrace the services of a dwarf, giant or so-called freak; while the mental, the services of a singer, player or actor of well-known ability, which ability has been recognized by the public, thereby establishing a unique or peculiar value in the same.

The rule calls for some personal or mental attribute which is distinct and not possessed by the general run of individuals in the particular class of service in question. This naturally follows from the reason of the rule, which merely seeks to prevent a wrong which would result in irreparable loss. It is not enough to show a loss which would naturally result from the breach of contract, for to adjust such common instances,

actions at law were devised; the loss must mean more and threaten an injury beyond the usual calculation of damages. And as equity does not allow its processes to deprive one of work unnecessarily, the complainant must show that he is in a position to utilize and employ the service required, and is ready to avail himself thereof.

The injunction is granted to prevent the breach of a covenant not to perform an act of a personal character or relating to personal property, only on the ground that the performance of the wrongful act would produce irreparable damage. Consequently, when no damage can result, there can be no injunction. And if the complainant has no place in active operation where the artist can appear or cannot show whereby he is losing custom, it follows that no damages are resulting, or can be anticipated to result from the act which it is sought to enjoin, for which reason an injunction will not issue.

The need of this remedy must appear in every instance, also the kind and species of service involved in the issue, and its peculiar elements, physical or mental. Its extraordinary nature cannot be too clearly or specifically alleged in asking for equitable relief. Such relief is naturally more adequate than a mere assessment of damages, for it, by preventing a rendering of service elsewhere, compels an adjustment. Equity will not concern itself to prevent the rendering of ordinary or usual service, for such is capable of easy procurement and its loss adequately compensated for in money.

De Pol v. Sohlke, 7 Robt. (N. Y.), 280.
Burton v. Marshall, 4 Gill, (Md.), 487.

See *ante*, § 235, Personal Services.

§ 350. There can be No Specific Performance of a Personal Contract.

The relation established by the contract is of such a personal character that a specific performance of the contract itself could not be decreed as against an unwilling party with any chance of ultimate or real satisfaction. Here specific performance does not lie, as the contract is too personal in its nature to be under the specific orders and continued direction of a court in equity.

It was formerly laid down that where the positive part of an executory contract could not be performed by the court, it would not enforce the negative by injunction. For example, where an actor had agreed to act at a certain theater, that being a contract which the court could not enforce, it refused to restrain him by injunction from acting elsewhere (Kemble v. Kean, 6 Sim., 333), and where there was a contract for hiring and exclusive service during seven years, and for partnership at the end of that time on such terms as should be mutually agreed upon, the contract being one which the court could not perform as a whole, it refused to enforce by injunction the covenant for exclusive service. (Kimberly v. Jennings, 6 Sim., 340.)

Frye on Specific Performance, § 833.

§ 351. That an Artist can be Restrained from Performing Elsewhere is Well Settled Under Certain Contracts.

This question was discussed in the case of Lumley v. Wagner, 1 DeGex, M. & G., 604, and is generally referred to as establishing the right of a manager to restrain by injunction a performer from acting elsewhere, provided the contract con-

tains a *negative* clause. Johanna Wagner and father entered into a contract with plaintiff to sing twice a week during a season of three months, at a salary of $400 a month, to which was added an agreement that defendant "engaged herself *not* to use her talents at any other theater, etc., without the written consent of the plaintiff." The defendant made an engagement to perform at another theater, and an injunction being asked was obtained. The Lord Chancellor cited the case of Kemble v. Kean, 6 Sim., 333, which, like Kimberly v. Jennings, 6 Sim., 340, denied an injunction in a like case, and said: "I am bound to say that in my opinion that case was wrongly decided and cannot be maintained."

The next English case of importance was Fechter v. Montgomery, 33 Beav., 22, which, though on different facts, was decided in line with Lumley v. Wagner.

The case of Montague v. Flockton, 16 L. R. Eq., 189, firmly established the doctrine and is undoubtedly the strongest case on this subject. There the defendant accepted an engagement to perform at the Globe Theater, London, in the following terms: "I accept the engagement for the Globe Theater, under the management of H. J. Montague, at a weekly salary of £5, and if required to go into the provinces, traveling expenses paid and twenty per cent. on my London salary. Line of business, old man and character business." A renewal contract of the above was made at the expiration of the first. The court said in granting an injunction: "It appears to me that an engagement to perform for nine months at theater A is a contract not to perform at theater B, or any other theater whatever."

§ 352. The Rule in America.

In America the decisions are numerous and the earlier ones somewhat conflicting, and do not generally follow Montague v. Flockton. The later decisions have only granted an injunction under contracts containing a negative clause not to perform elsewhere or language clearly showing such an agreement, and refuse to imply such clause.

In some of the earlier cases, where the contracts contained such negative stipulation, an injunction was denied; the reasons for such decisions were on different phases of the agreements, and on examination do not really affect the soundness of the later and more generally accepted rule.

Sanquirico v. Benedetti, 1 Barb., 315.
Hamblin v. Dinneford, 2 Edw. Ch., 529.
DePol v. Sohlke, 7 Robt. (N. Y.), 280.
Burton v. Marshall, 4 Gill (Md.), 487.
Butler v. Galletti, 21 How. Pr. (N. Y.), 465.

Contra, however, in

Hayes v. Willis, 11 Abb. Pr. (N. S.), 167.
Daly v. Smith, 49 How. Pr. (N. Y.), 150.

§ 353. The Rule in England.

In accordance with the now established English rule following Lumley v. Wagner an injunction will be granted on a contract for personal services to prevent performance elsewhere, whether the agreement contains a negative stipulation to perform or not, and the courts will restrain an artist from performing elsewhere during the period of the first engagement. Formerly the reverse of this rule obtained, and contracts for personal service, notwithstanding the difficulty

of their being carried out, were specifically enforced under the decree of the court.

Ball v. Coggs, 1 Bro. P. C., 140.
Wallis v. Day, 2 M. & W., 273.
East India Co. v. Vincent, 2 Atk., 83.

§ 354. The Rule Generally.

The rule now, however, is well settled, both in England and America, that specific performance of a contract, involving personal service, special ability or confidence, will not be decreed, because the execution of such contracts depends upon the skill, volition and fidelity of the person who has been engaged, and is therefore a matter of too much detail for the court to supervise and carry out under a decree for specific performance.

Clark v. Price, 2 J. Wills, 157.
Lumley v. Wagner, 1 De G. M. & G., 604.
Fredricks v. Mayer, 13 How. Pr., 566.
Butler v. Galetti, 21 Id., 465.
Ikerd v. Beavers, 106 Ind., 483.
Mowers v. Fogg, 45 N. J. Eq., 120.
Sloan v. Williams, 138 Ill., 43.
DeRivafinoli v. Corsetti, 4 Paige, 264.

According to the English rule and a very few early American decisions, where the contract amounts to an undertaking, express or implied, from the general wording of the agreement, not to perform such services for anyone else, equity will enjoin the party from engaging in such competitive service. Following the doctrine of

Lumley v. Wagner, 1 De G. M. & G., 604; 16 Jur., 871.
Webster v. Dillon, 5 W. R., 867.
Montague v. Flockton, L. R., 16 Eq., 189.
Whitewood Chemical Co. v. Hardman, 2 Ch., 416.
Duff v. Russell, 14 N. Y. S., 134.
Fredricks v. Mayer, 13 How. Pr. (N. Y.), 566.

Under the prevailing American rule, where one has engaged to perform certain specified services for another and expressly covenants *not to enter any competing service,* although equity cannot compel a specific performance of such services, it will, however, enjoin him from entering any competing service and doing for another that which he should do for the complainant under the contract.

Whitewood Chemical Co. v. Hardman, 2 Ch. 416.
Burton v. Marshall, 4 Gill (Md.), 460.
Metropolitan Exhibition Co. v. Ward, 9 N. Y. Suppl., 779.
Hahn v. Concordia Society, 42 Md., 460.
Greenhood on Public Policy, § 761.
Cort v. Lassard, 18 Oregon, 221.
McCaull v. Braham, 16 Fed., 37.
Duff v. Russell, 133 N. Y., 678.
Philadelphia Base Ball Club v. Lajoie, 202 Pa. St., 210.

While several English cases support the view that an engagement *not to serve elsewhere* is fairly to be implied from a contract in general terms, to perform under one manager or at one establishment, American judges have generally refused to interfere unless there was an express negative stipulation concerning the service sought to be enjoined. In other words, in this country a simple engagement to serve leaves the employee quite at liberty to take other service, provided he faithfully performs the first engagement. See note to McCaull v. Braham, citing

Burton v. Marshall, 4 Gill, 487.
Butler v. Galletti, 21 How. Pr., 465.
Wallace v. DeYoung, 98 Ill., 638.

See *ante,* § 235.

For cases where the contract of the parties, by liquidating

the damages or otherwise, precludes this right of injunction, see

McCaull v. Braham, 16 Fed., 37.

§ 355. Joinder of Second Employer Advisable.

"Several of the cases indicate that it is proper to join the second employer as co-defendant, and to draw the injunction so as in terms to forbid him to employ the chief defendant, as well as prohibit the latter from performing."

Note to McCaull v. Braham, 16 Fed., 48.
Clarke v. Price, 2 Wils. Ch., 157.
Lumley v. Wagner, 1 DeGex M. & G., 604.
Burton v. Marshall, 4 Gill, 487.

§ 356. An Injunction Will Issue to Prevent the Wrongful Use of Premises.

An injunction will be granted to restrain a lessee from using premises for other than the stipulated and agreed purposes or from carrying on a business therein prohibited by the terms of the agreement.

Electric City Land, etc., Co. v. West Ridge Coal Co., 187 Pa. St., 500.
Hall v. Solomon, 61 Conn., 476.
Haskell v. Wright, 23 N. J. Eq., 389.
22 Cyc., 859, 860, 861.

§ 357. An Injunction Will Issue to Prevent the Seduction of an Employee from Another's Service.

While an action at law will lie against anyone who knowingly induces an employee to leave the service of another, such remedy for damages may in a particular instance prove

inadequate, since irreparable injury can be caused by enticing away another's employee or skilled artist at an important period, by which the employer's business may be stopped or at least greatly embarrassed in its operation. An artist or star may be under contract for the season, the supporting company engaged and contracts made throughout the country to play in various theaters. Such service cannot be replaced or supplied from other sources; it is of peculiar value, and courts of equity have power in such cases to forbid a party from employing another's employee who is under positive contract to remain a stated time with his employer, and also to forbid the employee from leaving and going into the service of another; in other words, the courts can indirectly compel specific performance of a contract for personal service whenever, though the remedy at law is plain, it is not adequate.

See *ante*, § 327.

Lumley v. Wagner, 1 DeGex M. & G., 604.
Daly v. Smith, 49 How. Pr. (N. Y.), 150.
Bennett's note, 20 Am. L. R. (N. S.), 589.

§ 358. Services Must be Unique or Extraordinary to Merit Intervention of Equity.

While the remedy is clear and has latterly been applied in cases where there is a contract between employer and employee containing a covenant that the latter will not render services for anyone else during the period of the contract, it is now settled in America that relief will not be granted when the contract fails to contain such covenant, although a few of the earlier cases have held *contra*.

In order to merit this relief according to the general rule

it must be alleged and shown, as an essential element of the plaintiff's case, that the artist's abilities, whether personal or mental, are of a peculiar and uncommon order, something more than ordinary and usual. The performer, actor, singer, lecturer or "freak" must have a personal ability or element which is distinct; otherwise someone else could be procured to fill his place, and the remedy for breach of contract is plain and adequate, with a measure of damages simple of ascertainment. This is more apparent in a case involving the services of an artist of local or national reputation, and evidence to establish this principle of uncommon ability would hardly be required; but in the case of one little known, explicit evidence would have to be adduced, establishing his extraordinary and special artistic abilities or his individual or personal fitness for the service contracted for.

The services must be shown to be of special or unique merit and not readily duplicated. "It results then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such services were ordinary, and without special merit and such as could be readily supplied or obtained from others without much difficulty or expense." And where the performers were acrobats who were not admittedly of special or unique merit, but were merely considered "great," "pretty good," "do a fair act," etc., and where their performances were merely that of the ordinary acrobat, and where there would be no trouble in sup-

plying their places, the injunction was denied, the facts not showing a case within the principle in which equity allows relief for breach of contract for personal services.

Cort v. Lassard, 18 Oreg., 221.
Carter v. Ferguson, 58 Hun, 569.
Met. Ex. Co. v. Ward, 24 Abb. N. C. (N. Y.), 393.
Daly v. Smith, 38 N. Y. Supr. Ct., 58.
DePol v. Sohlke, 7 Robt. (N. Y.), 280.

It can readily be seen that the court might restrain by injunction a well-known actor from playing at another theater in violation of his contract, while it would not restrain an agent from quitting his employ or an actor who was not possessed of special, unique or extraordinary qualifications.

Bronk v. Riley, 50 Hun, 489.
Carter v. Ferguson, 12 N. Y. S., 580.

§ 359. Proof Required of Extraordinary Ability and that Loss of Same is Irreparable.

That the services contracted for are of special merit and of extraordinary ability, naturally implies that their loss to the complainant would be irreparable. The decisions require, however, the allegation and proof of both elements to obtain an injunction.

McCaull v. Braham, 16 Fed., 37.
Cort v. Lassard, 18 Oreg., 221.
Met. Exhib. Co. v. Ewing, 24 Abb. N. Cas. (N. Y.), 419.
DePol v. Sohlke, 7 Robt. (N. Y.), 280.

An injunction will not issue where the services are material, mechanical or purely physical as distinguished from intellectual; as such are not peculiar or individual the party

will be left to his action for damages, for the services are of such a nature as can be adequately compensated by an action of damages. And this principle is true even where, through long employment, one's knowledge of his employer's business is valuable and it would be difficult to replace him. This, while entailing some degree of hardship, does not establish a service either unique or extraordinary.

Kemble v. Kean, 6 Sim., 333.
Wm. Rogers Mfg. Co. v. Rogers, 58 Conn., 356.
Allegheny Base Ball Club v. Bennett, 14 Fed., 257.

§ 360. Necessity of Negative Clause.

In all instances of this kind, the courts, in America at least, require that the contract sought to be so enforced contain a covenant wherein by fair construction of the language used, the performer stipulates that he will not appear elsewhere or perform for anyone else during the period of the contract, and do not follow the English doctrine in this respect as established in Montague v. Flockton, for while recognizing the jurisdiction, the American courts hesitate to apply it, save in cases where the negative stipulation exists as a part of the expressed contract.

Cort v. Lassard, 18 Oreg. 221.
McCaull v. Braham, 16 Fed., 37, and note.
Duff v. Russell, 60 N. Y. Supr. Ct., 80.
Duff v. Russell, 133 N. Y., 678.
Hahn v. Concordia Soc., 42 Md., 460.

§ 361. The Prohibition Must be Clear and Explicit.

It follows that the courts will not enforce this doctrine unless the covenant or stipulation not to engage elsewhere

is clear and definite, leaving no doubt as to the exact understanding of the parties. Nor can there be any indefiniteness or ambiguity; if such exists and cannot be satisfactorily explained by reference to other parts of the contract, the remedy will be denied.

Metropolitan Exhibition Co. v. Ward, 24 Abb. N. C. (N. Y.), 393.
Metropolitan Exhibition Co. v. Ewing, 42 Fed., 198.

The court is bound to look to the substance and not to the form of the contract, and may find a clause negative in effect, from the language of the agreement, though not expressed in definite terms in a separate covenant. Such must be found, however, as an actual part of the contract.

Duff v. Russell, 14 N. Y. S., 134.

§ 362. The Massachusetts Rule.

The Massachusetts rule in this respect is that equity will not specifically enforce contracts for personal service, though it may grant an injunction and thus give relief where an express covenant appears not to enter into the service of a competitor in business, by restraining a person from doing so; but this will depend upon the circumstances of the particular case, as the court is reluctant to do that which must result in compelling enforced idleness.

Ropes v. Upton, 125 Mass., 258.
Rogers Mfg. Co. v. Rogers, 58 Conn., 356.

An injunction will not be granted to restrain an artist from singing for others than the plaintiff when the latter is

unable to pay the salary due her, and in default ot payment, she is not obliged to take a bond as security for the stipulated payment.

Rice v. D'Arville, 162 Mass., 559.

§ 363. The Contract Must be Just, Fair and Reasonable.

An injunction will not be granted in restraint of personal services unless it appears that the contract is in its terms just, fair, and reasonable, not alone to the manager, but to the performer as well; it must not be oppressive and inequitable. Equity never lends its aid to the enforcing of an agreement which is harsh and unconscionable in its terms, and which would, if enforced, operate oppressively. The contract must be fair and reasonable as well as plain and explicit.

Mapleson v. Del Puente, 13 Abb. N. C. (N. Y.), 144.
Hill v. Haberkorn, 53 Hun, 637.
Fechter v. Montgomery, 33 Beav., 22.
Metropolitan Ex. Co. v. Ward, 24 Abb. N. C., 393.

§ 364. Equity Will Enjoin the Use of Misleading Advertisements.

Equity will restrain by injunction the use of a misleading advertisement which would reasonably tend to deceive the public as to an offered attraction. The courts recognize the value of a name of a play or opera and protect the owner of a dramatic or musical piece, not alone from invasion and piracy, but from advertisements or announcements which tend to deceive the public and cause it to patronize a similar or copied attraction. To do otherwise would be the indirect toleration of a fraud which might result in irreparable injury. This being a matter where the damages are not possible of

exact ascertainment, equity prevents a loss of profits by granting an injunction and thus preventing a wrongful diversion of patronage.

The Iolanthe case, 15 Fed., 439.

§ 365. An Injunction Will Lie to Prevent the Giving of an Immoral Show.

An owner of a theater may obtain an injunction restraining the production of an immoral or indecent show on the ground that such is likely to hurt the reputation of his theater. This injunction will extend also to the prohibiting of the lessee from advertising such performance.

Reeves v. Territory, 13 Okla., 396.

§ 366. An Injunction Will Issue to Prevent a Nuisance.

While an injunction will not be granted on the application of a private person to protect purely public rights, yet relief is granted from such matters as are regarded by the common law as nuisances, and hence erections of every kind solely adapted to sports or amusements having no useful end, and which collect and have a tendency to collect disorderly crowds, as well as all indecent exhibitions, can be regulated by injunction, and come under the head of " Nuisances."

§ 367. Nuisances Defined.

A lessee of a theater has been held liable for obstructing the access to adjacent premises by reason of the assembly of a crowd before the doors of the theater were open to let them in, and a circus may become a nuisance if conducted so close

to a residence that the occupants thereof may be disturbed by the crowds and attendant noise.

The same rule applies to bowling alleys and any other form of amusement which is maintained solely for the purpose of attracting the public, and which may tend to encourage public disorder and noisy crowds.

For establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and deter them from their business. When built and kept for gain the owner is interested to invite and procure as full an attendance as possible day after day, and for this purpose temptations, beyond mere amusement, are often resorted to.

Structures of every kind, whether temporary or permanent, solely adapted to amusements or sports, having no useful end and which induce or tend to induce the collection of disorderly crowds, and all immoral or indecent exhibitions, are regarded as nuisances under the common law, and can be reached by injunction.

The lessee of a theater has been held liable for obstructing access to an adjoining building because of the crowd which assembled before the theater doors were open; a bowling alley and a circus have been considered nuisances when conducted so near to shop or dwelling house as to cause the inmates to be disturbed by the noise of attending crowds. This rule is not applied save under very clear and controlling circumstances. In cities particularly, such an element to be a legal nuisance must be disturbing and more than ordinarily so.

Reg. v. Saunders, 1 Q. B. Div., 15.
Walsh v. Wiggins, 19 Chic. Leg. N., 169.
Barber v. Penley, 2 Ch. Div., 447.
Tanner v. Albion, 5 Hill (N. Y.), 121.
Inchbald v. Robinson, L. R. 4 Ch., 388.

"The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood outside the grounds, in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainment is liable to be enjoined, even though he has excluded all improper characters from the grounds, and the amusements in the grounds have been conducted in an orderly way, to the satisfaction of the police. But the mere assembling of crowds of persons going to or coming from the performances at a circus, held in a covered building, is not necessarily a nuisance which a court of equity will restrain; and yet a perpetual injunction was granted to restrain the performances of a circus on the ground that the performances caused an amount of noise such as to interfere with the ordinary peace and quiet of the occupiers of an adjacent dwelling house."

Spelling's "Injunctions and Other Extraordinary Remedies," Part 1, § 434 (2d Ed.), citing:
Walker v. Brewster, L. R. 5 Eq., 25.
Inchbald v. Robinson, L. R. 4 Ch., 388.

§ 368. Restraint of Lawful Business as a Nuisance.

"Where the prosecution of a business, in itself lawful, in the neighborhood of a dwelling house, renders the occupation of it materially uncomfortable by reason of noises alone, the carrying on of such business, while it produces such results, will be restrained by a court of equity."

"A skating rink erected within a short distance of a dwelling, when the noise from the skating and attending it is of such a character as to materially interfere with the comfort and enjoyment of the inmates of such dwelling, is properly enjoined by a court of equity."

Ray's Negligence of Imposed Duties, § 11, citing:
Snyder v. Cabell, 29 W. Va., 48.

That a disorderly and disreputable theater may be enjoined, although a common nuisance, see

Reeves v. Territory, 13 Okla., 396.

Where a theater had been in use fifteen years the court refused to issue an injunction because the noise, caused by the removal of scenery at night, disturbed the rest of persons living in the neighborhood. While this might have been a private nuisance, the acquiescence of the complainant, or delay in seeking relief, gave him no right of redress.

Appeal of Penrose (Pa.), 21 A., 364.

It would seem, however, that if the performance is in accordance with the terms of a license granted by statute and the use of the building is in conformity with the license granted, it would not subject the owner to injunction.

White v. Kenney, 157 Mass., 12.

§ 369. Liability of Manager Criminally for Presenting a Common Nuisance.

In People v. Daly, *et al.* (New York), reported in Vol. XXXV, No. 38, *N. Y. Law Journal*, p. 1199, it was held that a theatrical man was not liable for committing a public nuisance by the presentaton of a play called "Mrs. Warren's Profession," because "it appears that instead of exciting impure imagination in the mind of the spectator, that which is really excited is disgust; that the unlovely, the repellent, the disgusting in the play, are merely accessories to the main purpose of the drama, which is an attack on certain social

conditions relating to the employment of women, which, the dramatist believes, as do many others with him, should be reformed. Tried by this rule, the play does not come within the inhibition of the statute, and the defendants are acquitted."

§ 370. An Injunction Will Issue to Prevent the Wrongful Use of a Photograph.

Equity grants an injunction in all cases where there is a valid contract, and a breach thereof would cause damages irreparable in nature. For this reason a photographer who had taken a negative from which he was to supply his customer with photographs, was restrained from the sale or exhibition of copies on the ground of an implied condition in the contract not to use the negative for such purpose, and also on the ground that such use was a breach of confidence.

Pollard v. Photographic Co., L. R., 40 Ch. Div., 345.

This is well-established law, and a person's right to the privacy of his own picture is clearly recognized and the unauthorized publication, sale or exhibition of such freely prevented by injunction.

Pollard v. Photographic Co., 40 Ch. Div., 345.
Marks v. Jaffa, 26 N. Y. S., 908.
Moore v. Rugg, 44 Minn., 28.

See *ante*, § 299.

Injunction was granted against the publication of a photograph in a newspaper, with an invitation to readers to send in votes as to the question of the popularity of the plaintiff as compared with another whose picture was also published.

Marks v. Jaffa, 26 N. Y. S., 908.

Injunction will not lie, however, to restrain the publication of a photograph of one who is a "public character."

Corliss v. E. W. Walker Co., 64 Fed., 280.

§ 371. Protection of Lithographs and Wood Cuts by Injunction.

Equity will enjoin the wrongful publication or use of a portrait produced by any method, to the same extent and in the same manner as a photograph; pictures, devices and forms of original advertising are treated as literary compositions and their protection discussed in Chapter 3. As to obtaining a copyright on the same see *ante,* § 62.

Marks v. Jaffa, 26 N. Y. S., 908.

§ 372. An Injunction Will Issue to Prevent the Invasion of a Common-Law Right.

Equity prevents the violation of a common-law right where its invasion could not adequately be compensated for in damages. The publication or representation of a play, opera, song or sketch acquired without the author's consent by means of phonographic reports, memory, theft or other surreptitious means, is such violation of the common-law rights of ownership as will entitle the owner to an injunction restraining such improper use.

See *ante,* § § 64, 65 and cases cited.

§ 373. An Injunction Will Issue to Prevent a Breach of Confidence.

Where an actor has committed a part to memory, he can only use it in the service of its rightful proprietor and can

be enjoined from using his remembrance of a part in an unpublished play or opera in another and unauthorized production. This is true, though he has not entered into an express contract not to do so, for independent of agreement, to make such unauthorized use of another's unpublished composition, is a breach of confidence which equity will enjoin.

See *ante*, § 74.

§ 374. Protection of Name or Title of Dramatic or Musical Composition by Injunction.

The title of a dramatic or musical composition can be protected, as explained in § 104, *et seq.*, *ante*.

While the application of this principle of ownership of name or title is limited and extends only to a clear case of originality and not to words of general signification, yet if bad faith exists, another rule prevails, and if one adopts a title, though of general signification, and uses it to profit by another's work or to injure another's play or business, such wrongful use will be considered as an invasion and enjoined in equity.

Isaacs v. Daly, 39 N. Y. Sup. Ct., 511.

§ 375. An Injunction Will Issue to Restrain the Use of Manuscript Wrongfully Acquired.

An author's right to use his uncopyrighted composition is only lost by dedication or abandonment, both of which acts depend upon his actual intent. Neither can be accomplished by an unlawful or surreptitious obtaining of the manuscript or by an unauthorized or felonious retention thereof. The use of a composition so obtained cannot prejudice the true owner's rights, and although its wrongful use by another

might amount under other circumstances to a dedication, the intent of the real owner lacking, equity will restrain such unlawful use and prevent others who may be acting in good faith from the use thereof, although they paid a fair consideration to the apparent but wrongful owner. In such instances strict allegation and proof showing that the title to the composition is in the complainant is required.

See *ante*, § 76.

Shook v. Daly, 49 How. Pr. (N. Y.), 366.

§ 376. To Restrain Issuing Free Tickets.

The management of a place of amusement may grant tickets of free admission at his discretion, but this practice, if carried so far as to become an injury to the stockholders or other interested parties, may be restrained by injunction.

Baker's Appeal, 108 Pa. St., 510.

§ 377. Injunction Lies to Prevent Continued Breaches of a Contract.

This rule does not, however, preclude the right of injunction in cases where a breach is not a final disposition of the terms of the agreement, and where the violations may be continued or repeated, or of a variety, and it does not clearly appear that all such instances are protected by the phraseology of the clause providing liquidated damages; then, on the ground of the prevention of a multiplicity of actions and because of the inadequacy of the provisions provided for liquidated damages, equity will interfere by injunction.

Diamond Match Co. v. Roeber, 106 N. Y., 173.

§ 378. Stand Overlooking Exhibition Grounds.

Equity will not enjoin the use by a landowner of a stand erected on his premises from which persons are allowed to witness games of baseball played on adjoining grounds, it not appearing that persons viewing the games from the defendant's stand would have otherwise paid the admittance fee charged by the other grounds or that he in any way prevented them from so doing.

If in such a case the complainant has been pecuniarily injured, his remedy at law is entirely adequate.

Detroit Baseball Club v. Deppert, 61 Mich., 63.

§ 379. Equitable Process Will Not Issue to Compel Lease of Theater.

Equity will not compel an owner to furnish his theater to a lessee for theatrical uses, nor will an injunction be granted to prevent a lease of the theater to another.

Welty v. Jacobs, 171 Ill., 624.

§ 380. Injunction to Prevent the Wrongful Removal of Fixtures.

An injunction will issue to prevent the wrongful removal of fixtures, if such removal would work irreparable injury, and the question of whether the property is or is not a fixture is in dispute.

Trask v. Little, 182 Mass., 8.
Camp v. Thatcher Co., 75 Conn., 165.

§ 381. The Agreement for Liquidated Damages Bars Proceedings in Equity.

An injunction will not issue when the contract contains a stipulation providing for the payment of a specific sum as liquidated damages for any violation of the contract. The parties, themselves, have settled the amount of damages resulting from a breach of such stipulation, and the complainant is not left to the mere chance of any damages which a jury may choose to give. Having by his own contract fixed the extent of the injury by an agreed valuation, he is precluded from resorting to equity for relief by injunction.

Hahn v. Concordia Soc., 42 Md., 460.
McCaull v. Braham, 16 Fed., 37.
Mapleson v. Del Puente, 13 Abb. N. C. (N. Y.), 144.
Martin v. Murphy, 129 Ind., 464.

§ 382. The Rule Changes in Instances of Penalty, and an Injunction Will Issue.

Where the nature of the provision in the contract is a penalty and not liquidated damages, it is well settled that such will not prevent a remedy by injunction, as its plain object is to secure a performance of the covenant and not intended as the price or equivalent to be paid for a non-observance of it, and a stipulation for the forfeiture of a week's salary under certain conditions is not for the payment of a certain sum as liquidated damages, but only for a penalty, *i. e.*, for the forfeiture of a week's salary.

McCaull v. Braham, 16 Fed., 37.

§ 383. Liquidated Damage Clause.

A clause is often inserted in theatrical contracts providing for the payment of a specified sum as and for liquidated damages in case of a breach. As the violation of such a contract necessarily makes a fatal breach thereof and gives an immediate right to sue for damages, the same having been agreed upon as to amount, an injunction could accomplish nothing of greater benefit or adequacy, and will not be granted.

Nessle v. Reese, 29 How. Pr. (N. S.), 382.
World's, etc., Exhib. v. United States, 56 Fed., 630.

Ante, Chapter 23, Liquidated Damages.

§ 384. Injunction to Prevent the Doing of a Prohibited Act.

The injunction will be granted, however, even where liquidated damages are stipulated if the construction of the contract clearly shows that the defendant has no right to do certain prohibited acts on paying the stipulated sum, for in such cases the actual intent of the parties clearly shows that the prohibition of the act, rather than a payment for doing it, is the essential purpose of the agreement, and hence equity should interfere.

Ropes v. Upton, 125 Mass., 258.
Diamond Match Co. v. Roeber, 106 N. Y., 473.
22 Cyc., 870.

§ 385. The Remedy by Injunction Must be Sought Without Unreasonable Delay.

It is a settled principle of equity that when one discovers another's invasion of his rights he should seek the protection

afforded by the chancery court within a reasonable time after knowledge of the wrong. Unwarranted delay, when there is actual notice of this invasion of legal right, constitutes a bar to the relief finally asked. Equity demands a reasonable attention to violated rights when the party aggrieved is in full knowledge of the facts; otherwise the complainant is guilty of laches, and is denied relief, as such long-continued delay amounts to acquiescence.

The modern rule is more reasonable, however, in this respect and has gone quite far in allowing relief where the circumstances show elements of delay.

Avery v. Meikle, 85 Ky., 435.

Laches can only arise in a case of delay where knowledge of the wrong exists. No one can be expected to protect his rights until he shall know of their invasion by another, and mere ignorance of a fact can be no bar to protection when finally discovered.

Strahan v. Graham, 17 L. T. (N. S.), 457.
Latour v. Bland, 2 Stark, 382.
Heine v. Appleton, 4 Blatch. (U. S.), 125.

§ 386. Necessity of Prompt Action.

The safer way is to act with reasonable diligence when aware of the wrong done. Equity provides a remedy which will be withheld, however, if there is a long delay after reasonable knowledge of the facts. As to what is reasonable in this respect varies according to the conditions and subject matter at issue and must be determined in each particular case.

To allow an open and undisguised use of another's dra-

matic composition for an appreciable period of time at a well-known theater, the same being generally advertised, would demand earlier action than an occasional use under less conspicuous circumstances. Delay constitutes laches on the theory that it amounts to a tacit consent or legal acquiescence and the complainant is barred from relief because of his own wrong in so unreasonable a delay.

Boucicault v. Wood, 2 Biss., 34.
Maxwell v. Somerton, 30 L. T. (N. S.), 11.
Heine v. Appleton, 4 Blatch. (U. S.), 125.
Amoskeag Mfg. Co. v. Garnar, 6 Abb. N. Y. Pr. (N. S.), 265.
Avery v. Meikle, 85 Ky., 435.

It is an unreasonable delay to wait until after the salary period expires before commencing proceedings.

Mapleson v. Del Puente, 13 Abb. N. Cas. (N. Y.), 144.

§ 387. The Parties to Proceedings in Equity.

In seeking relief in equity it is necessary and important that all of the parties interested or involved in the subject matter of the controversy be joined.

The matter complained of, if owned by more than one, or so held as to involve several and distinct rights, should be presented to the court by all having an interest therein, provided any element or condition of an interest is involved in the instituted proceedings. Equity requires a full and complete showing of title and interest, and adjusts a matter as a whole and not piecemeal. To do otherwise would prevent real and equitable relief. A plaintiff might be merely a licensee or assignee with rights so limited as to prevent independent action, or the original owner may have sold his

rights or obligated himself not to appear in any proceeding; here an allegation showing the right under which the complainant claims, is material. The court looks with disfavor upon a complainant who withholds material facts, and requires clear allegations as to ownership or title, sufficient to justify the asking for relief. If one is an assignee, licensee or vendee from the original owner, of any right, that fact should appear, as establishing his actual interest; partners, joint owners, joint licensees and others who have a community of interest in the subject matter of the suit, should be made parties to it. The bill must show the plaintiff's interest.

May v. Parker, 12 Pick., 34.
16 Cyc., 196, and cases cited.
19 Cent. Dig., Tit., "Equity," §§ 266, 267.
22 Cyc., 915, and cases cited.

"The general rule is that all parties interested in the subject matter of a suit in equity, whether directly and immediately or incidentally and remotely, are to be made parties, so that complete justice may be done between all parties interested in one suit. This is an important rule, as it avoids multiplicity of actions, and enables the court to do justice between persons having conflicting interests, and to avoid the injurious consequences that might follow from the decision of a cause grounded on a partial consideration of its real merits."

Crease et al. v. Babcock, 10 Met., 525.
16 Cyc., 181.
Story Eq. Pl., § 76.
1 Daniel, Ch. Pl. & Pr., 284.
Story v. Livingston, 13 Pet., 359.

If there is any person who has some apparent interest and ought to be made a party and is not, the reason why he is not

should be stated in the bill of complaint as explaining an apparent defect in the allegations.

Palmer v. Stevens, 100 Mass., 461.
Wilkinson v. Stitt, 175 Mass., 581.
McCaull v. Braham, 16 Fed., 37, note.

§ 388. Notice of Injunction.

Service of an injunction should be made by an officer when possible. In order to give effectual notice of the injunction to a party to whom it is directed, it is not necessary, however, that it be served on him by an officer. Actual notice is sufficient to put him under the obligation to obey it. It is the duty of every person, whether directed to him by name or otherwise, to obey an injunction, and persons may be bound by the injunction, though not mentioned in it by name.

Notes on Eq. Pl. & Prac., Richardson, 124.
2 Beach on Modern Eq. Pr., § 894.
1 High on Injunctions, § 17, Vol. II., § 1444.
In re Debs., 158 U. S., 575.
In re Lennon, 166 U. S., 554.
Ex parte Lennon, 64 Fed., 320.

§ 389. Necessity of Specific Allegation.

In proceedings for equitable relief all the elements which constitute the basis of the asked for remedy must be alleged and set forth with clearness and precision. A failure so to do presents a matter lacking equity and open to a sustainable demurrer. The Chancery Court requires that the pleadings show on their face the complete elements which constitute a right to seek relief. The recital of an invasion of another's rights demands a further allegation and showing of title and such facts as clearly show a wrong, which equity can recognize as within its rules for protection or prevention.

The need of explicit and complete averment is arbitrary and absolutely necessary in any petition for relief.

LEGISLATION CONCERNING THE THEATRICAL AND AMUSEMENT BUSINESS

THE EMPLOYMENT AND ADMISSION OF CHILDREN

SUNDAY PERFORMANCES

LICENSES

THE NECESSITY FOR NEW LEGISLATION TO GOVERN AMUSEMENT ENTERPRISES

CHAPTER XXV

§ 390. The Rule of Police Regulation of a Private Business.

While the operation of a theater or other place of amusement is recognized as a private business enterprise, it is nevertheless subject to the police power of the government. This constitutional right is vested in the legislature, and confers on it the authority to make, ordain or establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, provided they are not repugnant to the Constitution; such laws must be limited to regulations which are for the good and welfare of the commonwealth and of the subjects of the same. "It is difficult, if not impossible, to define the police power of a State; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the State, in the interest and for the welfare of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or so restraining personal action, as manifestly to secure or tend to the comfort, prosperity or protection of the community, no constitutional guarantee is violated, and the legislative authority is not transcended."

People v. Ewer, 141 N. Y., 129.

As said by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (Mass.), 85: "It is much easier to perceive and

realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments and where its fitness is so obvious that all well-regulated minds will record it as reasonable." This power is both protective and preventive in the sense of regulating private business for the good order, health, protection, comfort, convenience and morals of the community, but must at all times be confined to such matters as are reasonable and proper within these limitations for the public welfare.

People v. Ewer, 141 N. Y., 129.
Rochester v. West, 29 N. Y. App. Div., 125.
Webber v. Virginia, 103 U. S., 344.
Champer v. Greencastle, 138 Ind., 339.

This rule of law is intended to insure to every citizen the right of pursuing and exercising his individual labor or business so far as it shall not interfere or conflict with a like enjoyment of another.

The theatrical and amusement business, though private in nature, like any other enterprise must be so operated and conducted as to protect the health, lives, comfort and quiet of the community. Individual interests may not be exercised so as to invade and disturb the rights of others. This is true of the enjoyment of any vocation. While the enforcement of allowable and legal regulations in the interest of the public may interfere with the use of some particular place or compel a change in the conduct of a certain business, there is in such instance no wrongful invasion of property rights as a prohibition upon the use of property for purposes that are considered by legislation to be injurious to the safety, health or morals of a community, and it cannot in any sense be deemed

such an interference with private property as to violate the operation of the rule that property cannot be taken without due process of law.

Mugler v. Kansas, 123 U. S., 623.

These regulations are always limited to the extent that the legislature has no right, under the guise of protecting health, or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation.

Matter of Jacobs, 98 N. Y., 98.
People v. Marx, 99 N. Y., 377.
People v. Gillson, 109 N. Y., 389.
People v. Rosenberg, 138 N. Y., 410.

§ 391. Regulations Concerning the Erection, Protection, and Maintenance of Places of Amusement.

In the constitutional right of the legislature to protect the lives and welfare of the community is included such police regulation as concerns the erection, maintenance and regulation of any building, structure or place used for amusement purposes. This is a matter properly under the inspection and regulation of State and local authorities, and a permit for the use and occupancy of any such structure may well be required as a guarantee that it has been judged safe by competent officers for the intended use. For the same reason the legislature may enact laws compelling structural changes, the maintenance of specified appliances for fire protection, the keeping of aisles and passageways clear, and can go to any reasonable extent in the direction of regulation so long as the requirements are for the good protection of the general public. While

all such regulation is clearly an invasion of a private business and an interference with the rights of an individual, it is legally proper, for here the need of operating the business in a manner to insure the protection of the public is apparent and well within the constitutional rights of a legislative body. Such enactments are wise and necessary, and afford reasonable and needed protection.

While, strictly speaking, such laws are undoubtedly an interference with a man's private business, yet, in a broader sense, they only compel him to so regulate and manage it as to avert the chance of injuring the public which he invites to his place of amusement. In this respect the public is entitled to protection, for it has neither the time nor opportunity before entering to investigate the condition of the building or determine the security of its construction, the solidity of its foundation, or the condition of the auditorium. It cannot be supposed to know that certain fixtures are insecure, that a decoration may fall, that a floor tread is weak, or that a trap door is improperly open. The public, accepting the manager's invitation to attend, is entitled to protection, and the State does not transcend its authority in enacting laws to that end; for one individual owes it to another to so conduct his business, particularly when it has certain public elements, as not to cause him bodily harm or injury. These restrictions must be within reason and should not be vexatious, and the legislation must have some relation to this intendment, for, to quote the expression of Mr. Justice Field in the Slaughter House Cases, 16 Wallace 36, "under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded."

See *ante*, § 28 *et seq.*

§ 392. Regulations Prohibiting Immoral Things.

The next important kind of legislation recognized as within the limit of the police power is the passage of laws which conserve the good morals of a community; here the State clearly has every right to prohibit anyone from offering to the public performances or exhibitions which are treasonable, immoral, impure or against the general religious sense of the community at large. Religion being here broadly defined and not confined to any particular creed or sect. The fact that a business is private affords it no superior right to deny God and the fundamental principles of religion or to offer to the public those things which are condemned by the policy of the law as immoral, obscene, and therefore hurtful to the good of the community. This is not alone true of the amusement business, but applies as well to any other trade or vocation which offers the public anything beyond the pale of decency. While this, too, is an invasion of a private right, it is legal and properly within the rule of compelling and protecting decency; hence the entire validity of legislative acts which prohibit the individual from giving public entertainments which are obscene and immoral; the right of protecting the morals of a community is superior to any individual or business.

Pringle v. Napanee, 43 U. C. 2 B., 285.
Cowan v. Milbourn, L. R. 2 Ex., 230.
Walsh v. Wiggins, 19 Chic. L. N., 169.

§ 393. Right to Require a License Does Not Make the Business a Public One.

The fact that a legislature may require a license covering the giving of amusements does not, as has been intimated by some writers, constitute and make the amusement business a

public one, for while a theater caters to the public and from it gets financial support and encouragement and is subject to legislative control, it still remains a private business in every sense of that term, otherwise the business could not be conducted. At stated in Purcell v. Daly (see *ante,* § 151), the theater is in no sense a public enterprise, and is consequently not governed by the same rules which relate to common carriers or other public institutions of like character.

While it is true that the manager pays a license for the privilege of giving public amusements, this in no way changes the character of the institution from a private to a public one. As a result, while the legislature may regulate this business in the interest and safety of the public, may prescribe the giving of certain kinds of entertainments and compel a license, yet to no greater extent can it go, for in the conduct of the business itself, outside of these controlling rules, the manager may do as he wishes with his property, may give or discontinue performances, charge whatever price of admission he pleases and offer such attractions as in his own judgment are advisable. Any interference in respect of these matters is clearly unconstitutional, vexatious and illegal. The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges, when it has been sought thereby to regulate and control in the interest of the public the conduct of corporate or individual business transactions.

Munn v. State of Illinois, 94 U. S., 113.

The application of this rule and the determination of the constitutionality of legislative enactments thereunder necessarily depends upon the conditions surrounding each particu-

lar instance. They must not be unnecessary, vexatious, or transcend common sense and reason. What might be reasonable in one instance or locality might be entirely unreasonable in another. The rule of construction applied to such legislation depends to a greater or less extent upon sound judgment and reasonable protection of apparent instances, and is not of a general and inflexible nature. What might be reasonable regulation in a city might be entirely unreasonable for a town.

See ante, § 29.

§ 394. Various Enactments Held a Proper Regulation of the Amusement Business.

In re Considine, 83 Fed. 157, it was held that a statute was constitutional which forbade the employment of women in a theater or any place of amusement where intoxicating liquors were sold. Within the same classification comes the right of the legislature to prohibit any gambling or lottery scheme in conjunction with admission to a place of amusement. And laws have been held valid which prohibit the carrying on of a gift or prize enterprise or the giving of anything as a premium because of the purchase of a ticket or the holding of a reserved seat coupon. Gambling in any form is considered against public policy and the subject of statutory prohibition. The same element of chance that makes a gambling business illegal invalidates an amusement business which employs such an element in its transactions.

Under the head of public convenience and expediency may come certain regulations properly within the police power which are more clearly applicable to business of a quasi public nature, such as railroads, common carriers and inn keepers. Here railroad companies, common carriers or inn keepers in

the conduct of their business may be compelled to do certain things for the equal convenience of the public which could not be expected of an individual or corporation carrying on a clearly private business. While it would be proper to require a railroad company to make certain connections for the convenience of public traffic at certain hours, to issue transfer checks and provide places of shelter, it would not be reasonable and within the legislative power to compel a theater or place of amusement to open at certain designated hours, to prohibit it from selling reserved seats, or require the management to issue return checks which would be good for a reentrance. These requirements would be a vexatious and unreasonable interference with a private business, which, though a convenience to the public, cannot be compelled or required as in the case of the conduct of a business which enjoys a franchise from the public and necessarily must operate for the public convenience. As has already been seen, if an act cannot be done without a license or a business cannot be engaged in until such license has been procured, the doing thereof without a license is illegal. It is clearly within the powers of the legislature to allow the amount of the license fee to be fixed by the local authorities. Where police regulation is the entire reason of compelling a license there is more or less conflict as to the amount which can be charged as a condition precedent to the obtaining of a license. The generally accepted rule seems to be that the amount must be reasonable, having in view the expense attendant on the supervision over the particular business in question, and if in a place of public amusement certain duties of inspection and policing are required by the law, it is not unjust or unreasonable to place the amount of the license high enough to cover these expenses; although on the other hand it would seem that

if this is entirely in the interests of protecting the public and not the manager, it should not be wholly charged to the manager in the form of a license fee, as the expense of police is included and really a part of the general tax scheme to insure the protection of the public and its property.

Baker v. Cincinnati, 11 Ohio St., 543.
Dent v. West Virginia, 129 Ala. 361.
Van Hook v. Selma, 70 Ala., 361.
Finch v. Gridley, 25 Wendell, 469.
8 Cyc., 876, and cases cited.
See ante, § 29.

§ 395. Regulation Preventing Admission or Employment of Children in Places of Amusement.

The power of the legislature to prevent the admission of children of tender years to places of public amusement or their appearance in theatrical or other like performances has been recognized for a long time, and is a limitation which comes within the rights of police regulation tending to promote the health and moral well-being of the members of society. "By preventing the exhibition of children of tender and immature age upon the theatrical or public stage, the legislature is exercising that right of supervision and control over the child which, in every civilized state, inheres in the government and which nothing in the legal relations of parent and child should be deemed to forbid. The proposition is indisputable that the custody of the child with the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and as its natural guardian is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for and that the duties of support and education be

performed by the parent, or guardian in order that the child shall be cared for and that the duties of support and education be performed by the parent, or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race, the better it is prepared for holding its own."

This legislation does not deprive the parent of the child's custody, nor does it abridge any just rights. "It interferes to prevent the public exhibition of children, under a certain age, in spectacles or performances which by reason of the place or hour or the nature of the acts demanded of the child performer and of the surroundings and circumstances of the exhibition are deemed by the legislature prejudicial to the physical, mental or moral well-being of the child, and hence to the interests of the state itself.

"The right to personal liberty is not infringed because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed. The inalienable right of the child, or adult, to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the state or sovereign, as *parens patriae,* recognizes as proper and safe."

People v. Ewer, 141 N. Y., 129.

In the application of a prohibition of the appearance of a child at any specified place or in any mentioned employment under certain years the actual age of the child is the all-important question, and although he may apparently be older than the required age or has misrepresented his years, this

does not excuse the application of the rule. The prohibition is absolute, and the admission or employment under the age limit can afford no excuse for the doing of the act, although the attendant circumstances would undoubtedly be considered by any court in mitigation of sentence or fine. The recognition, however, of a contract based thereon is a legal impossibility, and no action can lie which involves contractual rights founded on the evasion of such a statute.

Burkitt v. Chattertown, 13 R. I., 299.

The only safe and possible rule in these matters is to be absolutely certain as to the exact age stipulated by the statutes of the State wherein the child is to be admitted or employed, and then to investigate in such a manner as to make sure of the infant's age. Most States have statutes which positively prohibit the admission of children under a certain age to places of amusement after sunset and refuse them the right to appear upon the stage in any form of public amusement. The reason of the rule has been stated and there is no constitutional defense against its enforcement.

See ante, § 204.

§ 396. Statutes Regulating the Amusement Business.

A careful consideration of the statute law of the State in which an amusement enterprise is to be conducted is necessarily important, and while many States have the same general laws, each varies sufficiently in detail to make it imperative to consult them if the manager desires to escape fine, imprisonment or civil liability.

§ 397. Corporations.

1. First in importance is the necessity of a strict compliance with the laws regulating and controlling foreign corporations. As we have already seen, the only right that a company organized in one State has of doing a legal business in another, is by a strict compliance with the laws of the latter State respecting foreign corporations. The requirements of the various States differ in many particulars, but generally there must be the appointment of an agent for the acceptance of service in case of suit and the annual filing of information concerning the assets and liabilities of the company. The necessity of a compliance with these regulations is apparent, and a failure to conform thereto in some States has the effect of invalidating contracts and making the corporation and its officers subject to fine or other punishment.

See ante, § 205.

§ 398. Licenses.

2. The necessity of obtaining a license for an amusement business has already been discussed and requires no further explanation. To do business without such license is the carrying on of an illegal enterprise and inexcusable.

See ante, § 32 et seq.

§ 399. Children.

3. Statutes prohibiting the employment of children under a certain age in any theatrical or public amusement are general, although in some States there exist exceptions which allow

appearances under certain conditions. The general statutory rule prevailing in most States is that children of tender age are not allowed to perform or appear on the public stage, and a strict adherence to the rule is the safer course to pursue. These laws are admittedly wise in a general way, yet on the other hand the appearance of a child in certain plays is absolutely necessary for their success, and it would seem that if the child while employed has proper schooling and is safeguarded in matters of health and morals that no harm can result from an exception to the general rule. This exception should be in the discretionary power of some board or official who could under proper circumstances grant a license or permit for the child's appearance on satisfactory assurance that the child was well cared for and no harm was resulting to him physically or mentally. A definite law which prevents the employment of children under a certain age in any kind of business, although drastic, is for the best interest of the community at large.

The application of any law beyond a certain point becomes ofttimes a hardship or an absurdity. There seems to be no particular need of absolutely prohibiting all children from appearing in a play or other stage entertainment, especially where the child has marked ability, is properly fitted for the work in question, and necessary to the entertainment. The possible chance of the abuse of a child or an encroachment upon his mental or physical development should at all times be properly safeguarded, yet where the child has distinct and recognized abilities and their exercise in public does him no harm, the advisability of providing an exception to the general statute rule is reasonable. Many of the better plays require children in the cast, and their appearance is often allowed even in oppo-

sition to the statute law. These plays would be senseless and absurd without the appearance of a child. When such exception is a matter for proper consideration and allowance, it is better to sanction it than to hold to a strict statutory proposition, the breaking of which is allowed in certain instances and interfered with in others in the same State, and often in the same city. The manager naturally desires the right to avail himself of the privilege allowed to others even though he violates the law in exercising it. Until some reasonable limitation is provided there can be no protection to the manager who employs a child under the statutory age to appear in his performances. The exception which should be recognized to the general rule is one of practical common sense rather than logic, and needs to be governed more or less according to the circumstances of each particular case. Within such limitation but a small number of children would be employed, and then only in such a way as to afford reasonable protection to their health, mind and morals.

These statutes are narrowly construed, and a license given for a child to perform in a play does not permit singing or dancing.

In re Stevens, 70 Hun, 243.

§ 400. Sunday Laws.

4. The almost universal and enforced observance of the Lord's day creates a peculiar confusion in statutory laws. The recognition of Sunday was early compelled by legislative enactment, and the regulations pertaining to the day were very severe and far reaching in the latter part of the seventeenth century. Since then the law has been changed in various ways, but always in trend of allowing the doing of certain and

additional things which new conditions of progress demand and make imperative.

In earlier times the church and its needs reigned supreme and the laws were directly framed to compel a religious and absolute observance of the day. Such being the original intendment of these statutes, the prohibition against any form of public amusement was distinct and far reaching. The legislature reluctantly interferes with laws of this kind, and instead of enacting provisions to meet the spirit and demand of the times, are prone to allow the doing of certain acts under a classified list or delegating some official to license or permit the doing of certain prohibited things on Sunday. The result is an evasion of the spirit of the law by doing that which does not violate its phraseology. Some statutes have excepted from entertainments prohibited on the Lord's day concerts of sacred music, and under such classification the authorities in certain States allow the giving of any kind of an entertainment, although the same is neither a concert nor sacred. The result is necessarily confusing and leaves the entire intendment of these statutes ridiculous and completely out of accord with the original or the present modified Sunday law. Public sentiment in certain localities permits the giving of entertainments on Sunday in violation of the statutes without interference from the police. This tacit consent to law-breaking continues until some popular change calls for the enforcement of the statute, and what has been tolerated and allowed is stopped, and the givers of the entertainment punished. In other localities various kinds of entertainments are allowed, and others prohibited by common consent, although the statute expressly prohibits even the entertainments given. As a necessary result laws regulating Sunday are in a great measure disregarded, although at times unreasonably enforced. The

legislation, while advisable within certain well recognized bounds, if not in accord with the public idea of fairness, leads to lax and unsatisfactory enforcement and hence at times unreasonable hardship when enforced. For these reasons a manager in giving an entertainment on Sunday must well consider the law as it actually is and ascertain if he is within any exemption provided by the statutes; if so, he is justified in opening his place of amusement to the public; otherwise he faces the possible chance of arrest for the violating of a distinct though generally unenforced statute.

§ 401. Modern Legislation.

In many States, legislatures, in an attempt to bring the Sunday restrictions within the limits of their usual observance by qualifications and exemptions of the original law, have opened the way to many absurd and unreasonable methods of doing prohibited things; as allowing a concert if licensed by some official, an entertainment provided it is of sacred music or any kind of amusement provided the whole or a part of the proceeds are to be devoted to a charitable purpose. The absurdity of such legalized exceptions to a general prohibitory law is apparent. An entertainment given on Sunday is either right or wrong, and a play given for a charitable purpose, or a concert of sacred music, both violate the original intendment and spirit of the law. The sentiment of keeping an obsolete blue law and providing legal ways in which it can be violated seems neither wise nor necessary, and an abuse of legislative power. From a legal standpoint an entertainment is an entertainment, and the degree thereof matters little. The invasion of a recognized Sunday by a play in costume with the usual

accessories simply because a portion of the proceeds are for charity or because it is labeled a sacred concert is neither logical nor sensible. The amusement is equally right or wrong whether called sacred or under the auspices of some charitable corporation. Why such uncalled for classification when it is intended that the amusement is to be allowed? There should be no half-way point in the matter of Sunday amusements.

A statute should prohibit or permit; the amusement is either right or wrong, and should be definitely defined. To do otherwise only gives an unfair advantage to some to enjoy the benefits prohibited to others; the inconsistency is apparent, both in theory and practice. The difficulty of ascertaining the exact law on these matters in a particular State is clear, and although puzzling to analyze in certain jurisdictions, no manager can afford to undertake such business without an understanding of his rights and limitations.

Statutory enactments, while founded on police right, are not always reasonable in application or entirely fair when enforced, for an unpopular law which is violated by general consent is none the less a valid law, the evasion of which is punished. The enforcement of unpopular legislation, although condemned as absurd, sometimes occurs, and a change in the attitude of the enforcing power may come about unexpectedly, thereby making the tacitly permitted an offense against the public weal and liable to punishment.

The decisions uniformly agree that a law which prevents the doing of anything on Sunday is well within the police power of the legislature and a requirement proper in protecting the interests and quiet of the community. If an exception is provided by statute, the courts insist that the conditions which are required to bring the case within the exception be strictly

adhered to, and such enactments are narrowly construed as against the person who seeks to bring himself within the allowed limitation.

The general law in respect of these matters in its attempt to carry out proper police regulations and prevent any invasion of those things which are for the good of the general community has gone too far in many respects when considered from a modern and reasonable standpoint. Not but what this kind of legislation is good and wise and should protect the community up to a certain point; but when it is so far reaching and general as to interfere with those things which public sentiment expects and requires, the legislature should pass such exceptions as will enable the legal doing of certain things which are allowed and tolerated by general consent. While a certain element of a community may disagree in respect of matters which enter into the amusement business, apart from that which is clearly harmful and interferes with others' rights, the wishes of the general public should be considered.

§ 402. The Necessity for New Legislation for the Amusement Business.

The amusement business, like any other, is competitive, and unless the manager meets the demands and ideas of the public he must submit to financial losses. The amusement business cannot thrive when opposed to public favor. The manager who prefers to obey the law and refuses to take the chance of a violation which the authorities tacitly consent to, loses business and is placed upon an entirely unfair footing with the manager who takes the risk and does not heed the law. An unrepealed law, though disregarded, is never obsolete and is often invoked to cause unexpected and serious hardship. It

is evident that people engaged in amusement enterprises have not taken sufficient interest in legislative matters to protect themselves and get their rights fairly before the public. For many years legislation has been entirely directed to safeguarding the people against amusement enterprises without considering that such business is designed and carried on to give the public enjoyment, and unless it fulfills that purpose and gets sufficient patronage the enterprise is a failure. The general laws which regulate a mercantile or manufacturing business do not in every respect apply intelligently to the amusement business. There is but little similarity between the two. In most States public amusements are prohibited and only allowed under the permission of a license, which is entirely optional and can be withheld by the board or official having the power of granting the same. At the time of the original enactment of so-called amusement laws anything pertaining to the stage was considered harmful, and the authorities were generally opposed to everything connected therewith. From a small beginning the amusement business has grown to be a recognized and important power in every large community; its managers own and lease valuable real estate, employ many people and require much in the way of material and labor from other industries. Theater and amusement property is generally situated in the most convenient and hence valuable part of a city or town, is taxed and is a permanent and lasting business. The old idea of the necessity of a license to insure the morality and decency of the entertainment to be given is now absurd. When first a license was required it controlled a business which was small and considered immoral; it was at best an uncertain enterprise in which but little in the way of money was involved. To-day theaters represent a permanent and large investment, and the business of managing them

is conducted by responsible men. As in any other business, the general laws concerning the public morals regulate and control, thus doing away with the need of an amusement license. While all public amusements should be properly regulated and policed, it is entirely unfair to make a well-recognized and financially responsible business the subject of a condition precedent in the form of a license which is controlled solely and arbitrarily by the judgment of one official or some board or commission. With as much propriety could a license be required of any industry of a private nature on the assumption that at some time it might possibly deal in a commodity which was against the well-being of the community. On the same general principle a license could as well be required of all publishing and picture houses on the theory that at some time they might manufacture and circulate matter of an obscene nature. The amusement business is not in itself bad or pernicious, requiring such unreasonable regulation; licenses are generally granted for a year and without any knowledge of the entertainments which are to be given; in fact, as the theatrical business is now conducted, no theater at the beginning of a season can possibly supply a list of the attractions which will appear during the year. That such license can be revoked after it is granted affords no better guarantee of propriety in the conduct of the business than statutes which prohibit anything of an immoral or dangerous nature. The license serves no purpose that cannot be provided for in the general laws, and only makes a business of a private and important nature subject to the discretion, will or caprice of some board or individual who may err in judgment and thereby deprive an owner of the use of his property and the right to conduct his business. Such laws, founded as they are on obsolete reasons and for almost forgotten purposes, should be repealed, and intelligent

legislation, more in accord with the times, enacted. Provide every reasonable regulation, but not an unfair condition in the matter of license. The Sunday laws should be revised and made to reflect the desires of the community at large, thereby giving no advantage to the law-breaker over the man who prefers to keep within the spirit of an obsolete law.

Legislation which, because of popular clamor, opens the door to evasions, perjury and wrongdoing as a possible way to do a prohibited thing, which adheres to musty and disregarded laws, with a knowledge of their unfitness and everyday violation, is as pernicious as it is unwise, and as unfair as it is unnecessary. The theatrical and amusement business has every right to ask and expect sane legislation, which shall recognize its importance and be based on a proper conception of its standing and necessity, rather than on the old idea of prohibiting and making onerous a calling anciently considered immoral and unnecessary. The original intent and text of amusement legislation makes reasonable amendments impossible. Entirely new and consistent legislation is needed, which, disregarding old conditions and past reasons, starts anew, making laws which, while protecting the amusement business, recognizes its rights and eliminates unnecessary and unjust discretionary powers which control its very existence. The business is in no sense so dangerous to the peace, health and morals of the community as to need licensed control; it can be governed as any other industry, and if present laws are not sufficient for every contingency, new ones can be made which will safeguard the public. As a business, however, it should be permitted without licensed permission, and if improperly conducted, promptly interfered with. The license affords too many opportunities for unfair dealing without the accomplishment of anything beneficial for the public; the sole power of

granting and revoking it is beyond the people, who have no voice or choice in the matter, and being discretionary, is even exempt from judicial interference. The needed protection is clearly through prosecution for a violation of those rules which the need of safety and good morals dictates, and which insures the conduct of the business within determined limits. Any other method of regulation is neither fair nor satisfactory to state or individual.

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