

his agent, and he had not done that in this case. The evidence of the musical director himself had put the matter out of court. The plaintiff was entitled to judgment, but the question arose as to what damages he had sustained. It had been admitted that five days after being told that his services were not required he obtained another appointment at double the salary. Under these circumstances there would be judgment for the plaintiff for 25s. and costs.

ROBL AND ANOTHER v. PALACE THEATRE AND ANOTHER. — "THE BROKEN MIRROR."

In the King's Bench Division, Mr. Justice Hamilton began the hearing of the action brought by Robl and another against the Palace Theatre and another. Mr. McCall, K.C., and Mr. Doughty (instructed by Messrs. Judge and Priestley) represented plaintiffs, while Mr. Gilbert Beyfus (instructed by Messrs. Beyfus and Beyfus) appeared for the defendant company, and Mr. J. R. Atkin, K.C., and Mr. E. F. Lever (instructed by Robert Seyd and Co.) appeared on behalf of the second defendant, Mr. Laurie Wylie.

The facts upon which the plaintiffs relied were outlined by Mr. McCall, K.C., who said that the action was brought to obtain an injunction to restrain the defendants from infringing the plaintiffs' rights in a dramatic sketch called *The Broken Mirror*, and also to obtain damages. When the case was started application was made in chambers to Mr. Justice Horridge for an injunction, and an order was then made for a speedy trial. The plaintiffs were father and son, and were music-hall performers, acting under the stage name of Schwartz. Some time before 1910 they had written a play or a dramatic sketch called *The Broken Mirror*, which depended for its central point upon two servants having broken a mirror, and being anxious to escape reproach, one of the players represented behind the mirror the reflection of the master and persuaded him that he saw his own reflection. The play was produced on January 25, 1911, at Gorlitz, in Germany. In April it was presented in Hanover, and was seen by a theatrical agent named Passpart, carrying on business in London. With a view to its production in London Passpart was appointed plaintiffs' agent, and negotiations ensued between them and the manager of the Palace for the purpose of securing the performance for the defendant company. The negotiations went on for some time in June, and on July 7 the play was produced at Worthing, and was licensed by the Lord Chamberlain three days later. In the meantime the play had been disclosed to Mr. Wylie, and counsel alleged that Wylie and Passpart prepared a play called *Early Morning Reflections*, which in every essential was a copy of the plaintiffs' play, the story being the same, the accessories the same, and the by-play precisely the same. The way in which it was produced by the defendants would be proved to his lordship by a statement made by the manager to the defendants in the presence of Passpart. It came to this, that Passpart, having ceased to be the agent of the plaintiffs, who had transferred their business to another agent, determined to have his revenge, and gave the plaintiffs' play to Wylie, who produced *Early Morning Reflections*, which was a copy of *The Broken Mirror* more or less disguised. According to the law of Germany it was not necessary that the author of a play should register it, but it was necessary that he should perform it, and in order to do that he had to get the permission

of the police authorities. That permission was given before the production of *The Broken Mirror* at Gorlitz. The plaintiffs registered their play on June 14, 1911, having produced it at the Canterbury Music Hall two days earlier. The state of the negotiations between the plaintiffs and the manager of the Palace was shown by two letters, dated July 6 and 7, when Mr. Butt, the manager, had practically completed a contract. The first letter was from the plaintiffs' solicitors to Mr. Butt, and stated that they understood he was nervous about confirming the contract, in the belief that someone else had a right to the Schwartz Brothers' sketch. They reminded Mr. Butt that not only was the play copyright and playwright in Berlin, but that the plaintiffs' English rights were secured, as the Berne Convention gave the author the rights of production and translation in the protected countries. The solicitors added that they were instructed to proceed against anyone infringing Schwartz Brothers' rights.

To this Mr. Butt replied that he was given to understand that there was a sketch in London of a similar kind, and for that reason he had said that he could not book the Schwartz Brothers without an undertaking from them that he had the right to cancel the contract should a similar sketch be given by other artists in London before they (the Schwartz Brothers) had fulfilled the suggested contract. If they said that it would be impossible for other artists to do the sketch he saw no reason why they should have objected to the clause suggested.

The result, counsel continued, was that *Early Morning Reflections* was taken by Mr. Butt, who produced it on July 23. It was still running, and if the plaintiffs were entitled to the sole right of the production of the play, the damage they had sustained must be very heavy. They had produced their own sketch at the Hippodrome, but the fact that a similar play was going on at the Palace must have seriously diminished the profits which they would have otherwise have derived, and to which they were entitled under the International Copyright Act and the Berne Convention.

Evidence was then called. Mr. Karl Robl, one of the plaintiffs, said that he and his father were the authors of *The Broken Mirror*, which the latter started to write ten years ago. They finished it at the end of 1910, and produced it for a week at Gorlitz last January. The plot was that two servants smashed a mirror, and to cover the damage one of them went behind the empty frame and copied every movement of the master, so that the master believed it was himself in the mirror. At the finish of the act the master crossed the stage before the mirror, and the servant knocked over the mirror, took a piece of the glass, threw it over the mirror, and the master believed that he himself had smashed it.

He first saw Passpart in Hanover last April, when the latter asked for permission to do business for him in England and get him an engagement at the Palace and also a twenty weeks' tour. About the beginning of July witness had a discussion with Mr. Percival, of the Palace, about *The Broken Mirror*. Mr. Percival asked him about *Early Morning Reflections*, and whether he had heard there was a copy of witness's act performed at the Canterbury. He added that there was a copy, and that witness was too late in England, and therefore could not get an engagement. Witness explained to the Court that it was not until June 29 that he heard that there was a copy, and he immediately travelled from Berlin to London to take steps. He told the manager of the Palace

that *Early Morning Reflections* was a copy of his act, and that he should have to take steps against the company. He then went to his solicitors, and sent to nearly every manager in the country a warning that *Early Morning Reflections* was an infringement on his father's and his rights.

Mr. Doughty: Have you ever seen *Early Morning Reflections*?—Yes, twice, and it is a copy of my play.

In what respect?—The whole story is the same; the business is also the same. Everything is the same, but the dialogue is changed. Some words are just the same.

Answering further questions, the witness said that under the arrangement with Passpart the latter was to get 10 per cent. on witness's salary of £70 a week. He took the matter out of Passpart's hands because he could not arrange an engagement at the Palace. He was always offering a less sum than £70. After witness had placed the matter in the hands of the agent Marinelli, Passpart visited him at Berlin and offered the salary desired. Witness told him it was too late. Passpart stated that he had the signature of the manager of the Palace, but he did not show it, and witness asked him to get confirmation by telegram. Passpart then sent a wire to Mr. Butt, who wired the reply, "Certainly contract will be confirmed." Witness said it was not a confirmation, as his name was not mentioned in the telegram, and he asked Passpart to leave the contract with Marinelli. He offered Passpart a new arrangement, which was accepted at first but refused the next day.

In cross-examination the plaintiff said that he was twenty-eight years of age, and that his father and he wrote the play. Neither of them had ever made any agreement for the sale of their rights. The play was printed on February 28. His father was born in Austria, but had lived in Germany for forty years, and witness was a German. The play was translated into English in the middle of May by a German.

Mr. Atkin, K.C.: The idea of a person standing in front of a looking-glass, imagining someone is copying him, is not a new idea on the music-hall stage?—I have seen the mirror dance.

Did you see a sketch in Vienna in September last year in which there is a looking-glass with one man in front and one behind?—No.

I daresay you are not familiar with English plays, but have you ever seen *My Friend the Prince*?—No.

In your play the mirror has already been broken before the play begins?—It is just breaking when the curtain rises.

And in our play the mirror is broken on the stage?—Yes.

It is broken because the servant girl is startled by the appearance of a policeman?—Yes.

In the defendants' play there is an elaborate business of shaving?—Yes.

The master shaves before the glass, and the policeman, imitating him, catches up the hearth-brush and uses it for lathering his face? You do not do that?—No.

Nor is it in your manuscript?—No.

Mr. Frederick Trussell, stated that, in his opinion, there was a great similarity between the two sketches. It was impossible for them to have had independent origin. *Early Morning Reflections* was a complete copy of *The Broken Mirror*, he declared emphatically; the most complete copy he had ever seen.

Herr Karl Norhaus, for eighteen years a judge in Germany, and now carrying on a practice at London Wall as an adviser on German law, stated that there was no German

law under which an author registered his play. When he finished writing it, he became entitled to the copyright and the playwright, and it was not necessary to publish or perform it.

Mr. Beyfus, cross-examining, inquired if the witness was acquainted with the decision of the German courts that the leading ideas of a work might be taken from it in so far as they were worked out in a manner so original that the production might be looked upon as the reproducer's own intellectual creation.—The witness answered that he was not aware of the decision, but he disagreed with it.

Counsel was putting further questions, when the judge inquired if witness had seen the sketches. He replied that he had not, whereupon his lordship held that Herr Norhaus could not possibly reply to what was asked him as to the free use of the characters.

Frederick Bert Howell, the London agent of Marinelli's Agency, declared that he did not see how the one sketch could have been produced without a knowledge of the other.

Mr. Hamby said that the impression made upon him was that one sketch was a copy of the other, and that it would be impossible to write one without a full knowledge of the other.

Mr. Beyfus: The chief thing is the business?—No, the form in which it is presented.

Mr. Beyfus, addressing the judge, said there were two questions for his lordship to decide. The first was whether defendants' sketch was derived from the plaintiffs'; secondly, supposing it was so derived, was it an infringement? He maintained that even if the question of fact were decided in plaintiffs' favour there was no case in law, because what had been copied was not literary matter, which the Acts were designed to protect, but "stage business." As regards this, the plaintiff admitted that he changed his "business" to suit his audience. If "business" were to be subject to copyright, there would be no certainty at all. The plot, counsel argued, was as old as the hills.

The Judge: But if there is a plot at all, it is subject to copyright.

Mr. Beyfus: If there is a substantial plot which is taken directly, it is subject to copyright in so far as it is a copy of a fact printed and published. Counsel asserted that there was no literary resemblance between the two sketches.

The Judge: The words cannot be the same, because in one the words are in German and in English in the other, and I daresay the German translator would translate them differently from the English composer. But they translate the same sentiments.

Mr. Beyfus: I think you will find they do not describe the same sentiments. They are not the same matter except so far as the situations are similar.

The Judge: It is a slender plot; but it is a plot, is it not?

Mr. Beyfus: It is a plot, but if you will look at it as printed and published you will not find any resemblance between them. Counsel contended that no infringement of words had been shown, or any sentiment or idea between the words. Until that was done he submitted it was impossible to hold that any case had been made out for an infringement of copyright. The Act was designed to protect literary matter, and however many resemblances there might be between "stage business," the scenes, and the "crag business," it was absolutely impossible for the judge to say that a case had been made out.

Mr. Lever made a similar submission.

His Lordship: May I draw your attention to this: I have a copy of the shorthand writer's notes, and I have a translation of

the German, which I judge to be made by an American gentleman. I find that the protagonist in each case is going to play some part in the dramatic performance. In the plaintiffs' piece he has to recite, "You have grown pale in the face. I will kill you with my own hand. No, I will shoot you. Where is my revolver?" In the other, "Añ, ha! Villain, scoundrel! At last we meet face to face! You reptile in human-form! Where is the partner in your crime? You think you can shield her from the consequences of your wrong. Die, scoundrel, villain!" There is a resemblance even from the literary point of view.

Mr. Lever said he would accept that as the test of the whole case. He submitted that the words were not the same, although there was a casual similarity between some of them.

The Judge: I should infer from the length that the German public would stand more of this sort of thing than the English. But in the compressed form I see a certain amount of reflection in the English piece from the German.

Later his Lordship read another passage, and after further argument decided to hear evidence for the defence.

Mr. Lawrie Wylie then entered the box, and stated that he was appearing with Maskelyne and Devant, and also in *Early Morning Reflections* at the Palace. There was nothing new in the idea of a man behind a mirror. He saw such a scene in *My Friend the Prince*. He began to write the sketch in April, the idea having been suggested to him by a mirror in use at St. George's Hall, this mirror having reminded him of *My Friend the Prince*. He informed Mr. Devant of what he was writing. At no time had he seen or read the plaintiffs' play, either in English or German.

Is it true you procured the play out of revenge?—No. I wrote it before I knew Passpart. Witness admitted that he owed one or two suggestions to the latter. He registered the play on June 14, and was still playing it. It had a different opening, different business, and different words from the plaintiffs' sketch.

Mr. McCall, K.C. (cross-examining): Was that your first attempt at playwriting or plagiarising?

Mr. Atkin objected to the question.

Mr. McCall: Was this your first attempt at any sketch, whether original or otherwise?—Yes.

Answering further questions, witness said it was in April that he first put pen to paper to write *Early Morning Reflections*, and the dialogue was completed in May.

Where are the original papers?—I cannot tell you. I tore them up.

When?—I do not know. Witness mentioned that he made a copy, which was torn up as well.

The central idea of the sketch is the same?—The idea of reflection in the mirror.

In both sketches the mirror is broken?—I believe so. Mine gets broken after the curtain rises.

Witness agreed to points of resemblance in the two plays, and Mr. McCall inquired if those resemblances were mere coincidences.

Witness: Certainly; they must be.

Mr. David Devant, of St. George's Hall, W., described a mirror which he used for illusionist purposes, and said that Mr. Wylie told him in May that he was writing a sketch in which there was a mirror as a "sort of delusion." Wylie added, "I was joking; it isn't a delusion. On hearing about this mirror I was reminded of what I saw in *My Friend the Prince*. I am going to write a music-hall sketch on the same idea."

Mr. Frederick Kay, actor, of Amesbury Avenue, Streatham Hill, who played in *My*

Friend the Prince at the Garrick in 1897, described the part taken by the broken mirror in the production. Behind it a man imitated the actions of the man looking into it.

In answer to Mr. McCall, the witness said he did not think the play had been given in London since 1897.

Mr. Lionel Walter Rignold, actor, of Northdale House, Highgate, stated that he appeared in the provincial tour of *Nell Gwyn* in 1894. In the second act there was seen the interior of the miser's house, and in order to avoid the beadle Buckingham had to step behind the framework of a mirror and imitate the beadle's actions. The beadle, who was "elevated," admired himself, and thought what a handsome fellow he was. Mr. Kay, he added, had accurately described the scene in *My Friend the Prince*.

Mr. McCall: It looks as if the mirror scene in *My Friend the Prince* had been taken from *Nell Gwyn*.—Witness agreed.

Mr. Benjamin McClachan, manager of the New Victoria Palace, described a mirror scene which he had witnessed in Vienna.

The case was continued on November 16.

Mr. Passpart, European manager to the Orpheum Circuit, said that he first saw *The Broken Mirror* in Hanover in April. In May Wylie told him that he was going to produce a sketch, and witness's daughter was engaged to play in it. At Wylie's request he went on a Sunday to see the sketch rehearsed, and he made some suggestions.

Mr. Atkin, K.C.: How did that come about?—In cleaning the looking-glass they took out two pieces of rag, and I suggested that one should take a white handkerchief and one a coloured one. I had seen this on the Continent at the Schwartz Brothers' performance.

Witness added that he also suggested that Wylie should force the comedy more, and that the players should run round so that the cook might hit the mirror frame and the policeman throw it down in order to make the master believe that he himself smashed the glass.

Mr. Atkin: Is there any truth in the suggestion made the other day that you told Mr. Wylie all about the play in order to revenge yourself upon Messrs. Schwartz?—No.

Mr. Doughty cross-examining, the witness admitted that he was very angry with the plaintiffs about the way in which they had treated him.

You told Mr. Howell how badly they had treated you?—Everybody knew, and when I came back everybody laughed at me.

The witness declared that when he went to Berlin to see the plaintiffs he had no knowledge that a copy of their play was going to be produced. He did not know Wylie personally until the middle of May, when they were introduced to each other by Julian Wylie.

For what business were you introduced?—Wylie wanted to put on a sketch. I did not know the title.

You knew what the sketch was to be about?—No; I only knew it was about a looking-glass.

Counsel: Do you ask us to believe that the similarity between the two plays is entirely accidental?—Yes, it may be.

Yes, but is it?—I guess it is.

Mr. Julian Wylie, variety agent, brother of Mr. L. Wylie, declared that Passpart had never advanced him any money for the production of *Early Morning Reflections*. The production would cost about £5. He first heard about the proposed sketch of his brother's early in May, when the whole outline was described to him. He proceeded to try to place it, and visited Passpart. Two or three weeks after hearing about the outline he saw the manuscript, which consisted of rough bits of paper, which he threw away after typing two copies. At

the rehearsal Passpart made the suggestions already mentioned.

Mr. Gilbert gave evidence to the effect that he had translated the German sketch.

Dr. Schuster, a member of the English Bar and an expert on German copyright law, expressed the opinion that an entirely new dialogue would amount, in Germany, to an original work.

His Lordship asked if according to German law it was necessary to show, in a case where there was a strong resemblance in the ideas of the two works, that the producer of the second had resorted to the first. The witness answered in the negative.

His Lordship also inquired if there would be an infringement supposing no evidence was adduced to show that a second producer had resorted to the work of the first, but that from his own ingenuity he had evolved a similar work.

Dr. Schuster replied that, assuming that the coincidence was so strong that the second production was practically identical, it would, he should say, be an infringement.

This closed the case for the defence.

Legal arguments followed, in the course of which his Lordship said that he was not disposed to think that Passpart was the means of communicating anything to Wylie, with the exception of the suggestions which had been mentioned by him in evidence. There was no direct evidence that Mr. Wylie had had communicated to him even the outline of the germ of the play or the subject-matter down to the time that he had completed his libretto.

Mr. Doughty, for the plaintiffs, asked why the defendants should be so eager to produce the sketch when, as Mr. Atkin, K.C. asserted, the idea was as old as the hills. Why should not someone have produced one before if the plot was so ancient?

The Judge: Audiences nowadays are not so old as some of us who can go back to the time of *Nell Gwyn*. Things become fresh again after a few years.

In delivering judgment, Mr. Justice Hamilton said that the case was interesting, as it appeared to raise a point of dramatic copyright law hitherto undecided, although very weighty opinions had been expressed about it. The case made by the plaintiffs was that Mr. Lawrie Wylie had appropriated the fruits of their originality and work, and with alterations which from the hypothesis must have been purely colourable had tried to make his own something which by law and in common honesty was theirs. Mr. Wylie's story was that he composed *Early Morning Reflections* absolutely independently of the plaintiffs' composition, and, with the exception of two small incidents added later, independently of Mr. Passpart and his advice. Plaintiffs stated that he (the judge) ought to infer from what it was alleged Passpart told Howell, from the situation between the plaintiffs and Passpart, which was one of mutual annoyance, and from Passpart's opportunities of knowledge, that *Early Morning Reflections* could not be independently arrived at, but must have been derived from the plaintiffs' work, and through the channel of Passpart, or possibly through his daughter. He need offer no criticisms on the propriety of Passpart's suggestions of improvements in the comic business, though it did not seem to his Lordship to have been very improper. Having heard Mr. Wylie and his witnesses, he had come to the conclusion that the plaintiffs had not made out their case that Mr. Wylie got his idea, or a very substantial part of it, before the two comic incidents, from the plaintiffs and their sketch.

Continuing, the Judge said that it was pos-

sible that there was a point where the probability of two inventions became so unlikely that a whole crowd of dramatic authors and their friends swearing to the contrary would produce the impression upon one's mind. But in this case there was no such intrinsic evidence. He thought the intrinsic evidence pointed in the other direction. There could be nothing novel in introducing a play by the entrance of a servant girl followed by someone making love to her. Neither was there anything novel in making a servant break something or in deceiving her master, and he did not think there was anything novel in the idea of the master being deceived when the curtain was rung down. Those seemed to be the commonplaces of many centuries of dramatic effort, and he should have thought they were rather outworn. The whole thing appeared to him to be so elementary as a matter of composition that he should have thought that any gentleman with some experience of stage business and some aptitude for dealing with comic parts could have devised it in the course of a few evenings. He did not see in the subject-matter or the words anything in the defendants' play to lead him to the conclusion that they must have been taken from the plaintiffs' composition and transferred to the other, and to enable him to get over the positive evidence, very fairly given by Mr. Wylie and Mr. Passpart, in contradiction to the suspicions—and they amounted to nothing more—entertained by the plaintiffs. There were, however, in *Early Morning Reflections* incidents which, it was admitted, had been furnished by Passpart, but he did not understand that Wylie knew they came from the Schwartz's play. He found that the similarity between the two sketches to which witnesses had testified was merely a coincidence, although no doubt it was considerable when seen on the stage and when the comic business was attended to. He found, nevertheless, that the defendants' play was derived independently from the common stock of dramatic notions and was adapted, thanks to Mr. Wylie's recollection of *My Friend the Prince* and to his experience of the stage. They had, therefore, two similar plots and two similar pieces of business not derived directly or indirectly from the other.

As to the new point of law, finding as he did that the similarity between the plays, though considerable, was merely a coincidence, and that both plays were derived independently from the common stock of dramatic ideas, was the producer of the first play entitled to protection under the Act of 1833? The matter had been considered by Mr. Justice Scrutton in his book on Copyright, and the conclusion there came to (Note h, p. 83, of fourth edition) was that to which his own reflection during the progress of this case would have led him. He considered, therefore, that where the similarity was a mere coincidence there was no breach of copyright. He found that Wylie's work was not such as infringed any legal right which the plaintiffs had regarding *The Broken Mirror*. He thought that if there had been any real ground an injunction should have been applied for very much more promptly than it was. There would be judgment for the defendants with costs.

CLARK v. HART.—ARTIST RECOVERS DAMAGES FROM AGENT FOR NEGLIGENCE.

Before His Honour Judge Parry, at Lambeth County Court, Mrs. Kathleen Clark, of 15 Chrysell Road, Brixton, claimed damages from Samuel Hart, of Endymion Road, Brixton Hill, for loss alleged to have been sustained through the defendant's negligence.