which he was under no *moral* obligation to resist. The agreement which he has entered into under such circumstances, cannot be said to be binding. By tendering back the consideration, if any has been received, the law should place him *in statu quo*. No obligation can be of any force, if the assent of one of the parties to it is wanting; and an assent not voluntarily given is no assent in law.

We accordingly submit that it would harmonize conflicting authority and establish a principle in accordance with the present administration of law, if courts of justice would pay regard to the following propositions:—

1. That *any unlawful threats* amount to duress per minas, sufficient to avoid a contract or agreement, if such contract or agreement would not have been entered into, if the threats had not been used.

2. That the question whether a contract or agreement was entered into through fear, is a question of *fact*, for the jury to decide in each individual case, and that therefore it would be erroneous for a judge to charge *as a principle of law*, that the duress, in order to avoid the obligation, must have been such as was calculated to overcome the will of a man of ordinary firmness of mind.

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PIRACY BY MEMORIZATION.

IN *Coleman* v. *Wathen*, 5 Term R. 245 in 1793,—which appears to have been the second case in the reports in which dramatic copyright or "stage-right," as it has been not improperly called, came before the courts; it having been preceded only by *Macklin* v. *Richardson*, Amb. 694, in 1770—a new and elaborate question arose, for which they were entirely unprepared.

In *Macklin* v. *Richardson*, Amb. 694, the plaintiff was author of a farce entitled "*Love à la Mode*," in two acts, which was performed by his permission several times at different theatres in successive years, but never printed or published by him. When the performance of the farce was over, he had been in the habit of taking the copy away from the prompter; and whenever it was played at benefits or on other particular occasions, plaintiff had been in the habit of charging a certain sum for its performance, to the beneficiaries on those occasions.

Meanwhile the defendants, who were proprietors and publishers of a magazine, employed a short-hand writer upon several occasions to proceed to the theatre and take down the words of this play, and thereupon published the first act of "Love à la Mode" entire, in an issue of their magazine; giving, also, at the same time, notice that the second act would be contained in the succeeding number. Lord Commissioner SMYTHE consented to enjoin such publication, holding, very clearly, that the representation of a play is not such a publication, or such a dedication of it to the public as will destroy the author's rights therein as to a purely literary composition; that is to say, that he would still possess the right after such public representation, to publish and sell copies of his composition, should he desire to do so. And neither would it affect his right to its continued representation.

In *Coleman* v. *Wathen*, the plaintiff had purchased the copyright of a play or entertainment, known as "The Agreeable Surprise," from its author, O'Keefe, the comedian, and proceeded to represent it upon the stage of his theatre, when it was unexpectedly and concurrently produced and represented by the defendant at a neighboring and rival theatre.

The name of the play itself seems to have been ominous, for, upon the case coming into court, an "agreeable surprise" was in store, not only for the plaintiff but for the law and for equity itself. It appeared—how we are not told, but it seems to the satisfaction of the court—that the defendant had obtained his copy of the play by process, not of stenography, but of memory!

Upon this state of facts, and upon the ground, apparently, that it would be carrying the power of courts to an absurd and ridiculous degree, should they assume to enjoin exercise of a man's purely mental function, the court, BULLER, J., held that no action could lie, saying "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work."

The whole opinion upon this novel and hitherto unconsidered point, whose reasoning and conclusion has been implicitly followed by courts and legal writers for the better part of a century, is embraced in the few words above quoted.

It is to be regretted that such is the case. It would have inter-

ested the lawyer of the present day to have known from the reporter what points were raised by counsel, and to have learned by what ingenious and ingenuous arguments they were able to induce the learned and admirable Judge BULLER to enunciate the one solitary case, in which stealing is not stealing; in which piracy is not piracy, and in which theft is not theft.

The principle thus apparently occurring to the learned judge, is undoubtedly a wise one,—we say *apparently*, for the entire reported case, in the 5 Term Reports 245, is contained in thirty lines, and no word is said about the evidence of the memorization, or as to the principles involved. Indeed, the word "memory" occurs but once, and then in the few concluding sentences pronounced as above, by BULLER, J.

Still, for all that, we say the principle which apparently occurred to the learned judge, is undoubtedly a wise one. For, if courts of justice can enjoin the memory of man, there would seem to be nothing that they could not do. If one who, having witnessed a play, or having read a treatise or a story, by repeating the argument of the same to others, can be obliged to respond in damages or in equity to the author, who may fancy himself thereby deprived of the profits which might have accrued to him, if those others had been obliged to witness or to read for themselves, there would scarcely be any limits to the investigation of courts. They would soon find themselves obliged to discriminate between absolute and partial repetitions, and between partial and temporary and absolute injunctions against the exercise of a man's purely mental faculties and processes, and to proceed to lengths of absurdity beyond all speculation.

But, on the other hand, if one, deliberately, for his own profit, and to the end that the legitimate property of another shall be destroyed or diminished, sets himself down to memorize that other's dramatic or other composition; and if, after the laborious exercise of his trained memory, and the attendance night after night at the performance have enabled him to possess himself completely of its whole—dialogue, actions, properties and all—he writes the same out for the use and benefit of himself and a troupe of his own, who thenceforward produce the same—if it be a play—with the same title, scenery and effects, so that the real author or proprietor is deprived of the fruits of his own labor, it is difficult to see the

difference—in effect at least—between this and other piracies, in which other channels of transportation have been employed.

There is scarcely any achievement of which the human memory is incapable. Nor is it, possibly, more wonderful that one should commit to memory a play, after a number of consecutive attendances at its representations, and more or less familiarity with its performance, than that he should be able to catch it so accurately from the mouths of the actors, and move his hand so nimbly to and fro across a page, as to be enabled to carry away with him, in black and white, the words which he has heard uttered by actors upon a stage.

Both processes would appear to be the result of training. The one, of the ear and hand, two physical members limited in their action by certain physical laws; the other, of a purely mental and incorporeal faculty, unrestrained by any laws, and as utterly limitless as thought itself. It is certainly hard to imagine a reason why—when both of these faculties are turned to purposes of wrongful appropriation of the lawful property of another—the more volatile and potent faculty should be allowed to be used at pleasure, while the other, and purely physical process, should be restrained.

It certainly cannot be the policy of the law to permit a spoliation, merely because it happen to be accomplished with unusual skill, and by the exercise of a wonderful talent on the part of the spoiler. If it is, then we must look contentedly upon the depredations of the experienced housebreaker, who enters our dwellings deftly and robs us neatly, and it is only of the clumsy thief that we can make an example.

And again, if the feat of memorization releases from responsibility for acts committed through its means, why should not the principle obtain in the law of Defamation as well as in the law of Piracy? Why should not one who hears defamatory and slanderous words spoken of his neighbor be allowed to repeat them at pleasure, so long as he repeats them from memory, and so long as he does not transcribe them, in the first instance, from paper?

And, moreover, what provision must the law of evidence make for the question? Is the presumption to be in favor of or against the memorization? And how is either presumption to be rebutted? The best evidence obtainable must of necessity be the defendant's own unsubstantiated and impossible-to-be-impeached

testimony. Since who else but himself can swear that he does or does not repeat that which he repeats—from memory—or that he transcribes what he transcribes in the solitude of his closet from memory, or from stenographic or other notes?

"When a literary work," said ALLEN, J., in *Palmer* v. *De Witt*, 47 N. Y. 532, "is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others."

In spite of the venerable precedent which, like an ancient landmark, has been so long left undisturbed, there would seem to be no satisfactory reason why the dramatic author, or proprietor, like every other, should not be permitted to retain his right in the productions of his own brain and his own pen, until he relinquish it by contract, or by some unequivocal act; indicating an intent to dedicate it to the public. Lectures are not, by their public delivery or performance in the presence of all who choose to listen to them, or to pay for the privilege of attending them, so dedicated to the public that they can be printed and published, without their author's permission, or diverted to objects for which he did not assign them: *Bartlett* v. *Chittenden*, 4 McLean 301. The manuscript and the right of the author therein, are still within the protection of the law the same as if they had never been communicated to the public in any form. This principle is too well established in every other case than that of memorization, which we are considering, to need any citations to support it, and has been expressly enacted by statute in Great Britain: 5 & 6 Will. 4, c. 65.

If an author has any rights at all in his composition, or if courts have any power to protect him in those rights, it is difficult, we repeat, to see how the mere process employed in the piracy is to take away that right or to cancel that power.

It is just possible that BULLER, J., did not mean to say exactly what he has been understood as having said during these eighty-nine years. The concluding words of his opinion, in five lines, are: "The mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work," which is, perhaps, self-evident, as is, also, the statement that "some evidences of strength of memory are very surprising." The gist of the decision is, however, supposed to be included in the words: "Reporting anything from memory can never be a publi-

cation within the statute" (meaning the first statute of copyright) 8 Anne, c. 19.

But he does not say that *repeating*, or *delivering* or *acting* the matter "reported from memory," is not such a publication. Clearly, courts cannot enjoin the memorization, nor, if they could, could they enforce their injunction. A man can cultivate his powers of remembering to almost any extent. We doubt if he can extend, or if any court on earth could compel him to extend his powers of forgetting. As a rule, efforts to forget are always ineffectual, though efforts to remember are far from being always crowned with success. In general, the law will regard the element of deliberation as increasing, if anything, the responsibility for a wrongful or doubtful act, but in this respect, as in all others, the instance before us seems to negative every rule and animus of the law. Surely that law cannot desire to fix such a premium upon the exercise of a man's memory as to render it, in that instance alone, oblivious of the rights of others not only, but of its own policy.

It is undoubtedly true that courts cannot enjoin a man's exercise of his powers of memorizing what he hears or sees. It is quite doubtful, even, if they would attempt to enjoin, either, the manual labor of writing out the play so memorized, and the parting with the manuscript for value. In *Morris* v. *Coleman*, 18 Ves. 437, indeed, a court did enjoin the defendant from writing plays for a particular theatre, but, probably, if the plays had never been represented, there would have been no interference.

But most assuredly it seems to us, could equity enjoin *the production upon the stage of a theatre* of the play purloined by the memorization with as much consistency as it enjoined the production and representation in *Macklin* v. *Richardson, ubi supra*, and as it has been done in hundreds of cases since. Nay, more, it seems probable that equity could enjoin even the individual actors from performing a purloined play, since it has asserted the right to enjoin an actor from performing any play whatever. The Superior Court of the city of New York did not hesitate to enjoin an actress, Miss Fanny Morant, from acting for a particular manager, and that, too, in a case where it was apparent that the plaintiff had an adequate remedy at law: *Daly* v. *Smith*, Albany Law Journal, Sept. 19th 1874, p. 187.

Is it not barely possible that the above ruling of BULLER, J.,

has escaped criticism more on account of the rarity with which these cases of memorization occur; or, what is still more likely, from the fact that when they occur they scarcely ever reach a court where the principles they involve can be leisurely and carefully examined? Dramatic manuscripts, from the fact of their immediate availability, without tarrying the expensive and laborious processes of printing and manufacture, no less than because of the attractiveness of the drama, which has been for three hundred years the favorite amusement of the civilized world, have become, perhaps, the most valuable of all literary compositions; and mainly, too, because their value depends upon a season or a "run;" the cases in which the law is called upon to interfere in reference to them, make very little show in the reports or in the digests, and very seldom get beyond a mere motion or two at a special term or in Chambers. If the plaintiff obtains his preliminary injunction, defendants are usually permitted to settle, and the case ends.

There is but a single instance—so far as this writer is aware—in which the question of memorization has come before an American court, and that case never was reported and never went beyond the single motion for an injunction argued at chambers in the city of New York. In *Wallack* v. *Barney Williams*, unreported, N. Y. Supreme Court, 1st Dist. s. t. 1867, the plaintiff had brought out the play of "Caste," at his theatre in the city of New York, when the defendant, the manager of a rival theatre in that city, also produced it. Upon the plaintiff's motion for an injunction restraining this rival representation, upon the affidavit of the principal actor, Mr. W. J. Florence, in the employ of defendant, that he had obtained the version of the play used at defendant's theatre *by process of memorization.* Upon the strength of *Coleman* v. *Wathen*, such injunction was refused.

But is not the principle, for all its undisturbed antiquity, one vicious, and in contravention to well-known rules? It is a cardinal rule of the law that the parting with, by the individual, of his own property, or with the product of his own lawful labor, must be by his own voluntary act, either actually or constructively; and it is almost too late in the day to attempt a distinction between literary and any other property, so far as this principle goes. There certainly can be no valid reason why the crafty, skilful or unusual processes by which A. pirates B.'s property, should be construed, on account of its unusual or marvellous nature, into a vol-