NICHOLAS GARLAND (DEFENDANT)...APPELLANT; 1887

AND *Nov. 18 & 19.

JOSEPH A. GEMMILL (PLAINTIFF)....RESPONDENT. *Dec. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Copyright—Infringement of—Sources of information—Statutory form of notice of - Decree, form of.

The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor.

In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labor, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

The notice of copyright to be inserted in the title page of a copyrighted work is sufficient if it substantially follows the statutory form (1). Therefore the omission of the words "of Canada" in such form is not a fatal defect, and, even if a defect, such defect is removed by sec. 7 sub-sec. 44 of the Interpretation Act (2).

Depositing in the office of the Minister of Agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same when granted.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Chancellor of Ontario (3) in favor of the plaintiff.

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*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) The form required by 38 V. c.88 s.9 is as follows; "Entered according to Act of Parliament of Canada in the year by A. B. in the office of the Minister of Agriculture."

(2) R. S. C. ch. 1 sec. 7 sub-sec. 44. That section is as follows;—"Whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them.

(3) 12 O. R. 139.

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A suit was brought by the plaintiff Gemmill against the defendant Garland for infringement of a copy-right of the former, and for an injunction to restrain the defendant from publishing or selling the book alleged to be such an infringement.

One Henry J. Morgan was the compiler and publisher of a book called the "Canadian Parliamentary Companion, 1862," and in 1872 he assigned all his right and title in the copyright of said book to C. H. Mackintosh. Mackintosh during the years 1877, 1878, 1879, 1880 and 1881, issued further editions of the said book and similar books copyrighted as "The Parliamentary "Companion, 1862," and "The Canadian Parliamentary "Companion, 1874" under the style or title of "The "Canadian Parliamentary Companion and Annual "Register" for the particular year.

On the 7th July 1882, the said Mackintosh assigned to the plaintiff all his right and title to the alleged copyrights in "The Canadian Parliamentary "Companion 1862," "The Canadian Parliamentary "Companion 1874," and in the several editions of "The "Canadian Companion and Annual Register" for the years 1877 to 1881 inclusive, and the plaintiff afterwards published and copyrighted the "Canadian Parliamentary Companion, 1883."

The defendant, Garland, was the publisher of a work entitled "The Parliamentary Directory and Statistical "Guide, 1885," which Gemmill claimed to be a piracy of his books, and the publication by Garland was the cause of the present suit.

At the hearing in the Chancery Division the defendant, in addition to denying the charge of piracy, attacked the plaintiff's copyright on two grounds.

First, that before obtaining such copyright the plaintiff printed the book with notice thereon, that the copyright had been obtained and deposited two copies

under sec. 7 of the Copyright Act of 1875, (38 Vic. ch 88) which it was claimed subjected him to a penalty under sec. 17 of said act and avoided the copyright. Secondly, because the notice required by sec. 9 of the said act to be inserted on the title page or page following of every copy of the book issued was defective, such notice being as follows:—"Entered according to the Act of Parliament, in the year one thousand eight hundred and eighty three, by J. A. Gemmill, in the office of the Minister of Agriculture" omitting the words "of Canada" after the word "Parliament."

The learned Chancellor overruled both objections, the first because, though it might possibly subject the publisher to a penalty it did not invalidate the copyright, and the second because the form used was a sufficient compliance with the act; and he granted an injunction restraining the defendant from publishing, etc., his above mentioned book or any copies or future editions thereof containing matter pirated from any of the plaintiff's works.

The defendant appealed, and claimed that the Chancellor at the hearing had restricted the infringement to the plaintiff's book published in 1883, and if the defendant was liable at all the injunction should not go beyond that. The Court of Appeal, however, affirmed the decision as it stood. The defendant then appealed to the Supreme Court of Canada.

W. Cassels Q. C. and *Walker* for the appellant.

In 1862 the respondent obtained a copyright, and his book was issued in subsequent years without the notice of copyright required by the statute. That made the matter contained in the book public property, and the book issued in 1883 was a mere reproduction of such matter with a few pages of new matter interlarded. It is submitted that the book of 1883, therefore, is not properly a subject of copyright.

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The omission of the words "of Canada" in the notice of copyright required by sec. 9 of the Copyright Act, 38 Vic., ch. 88 will, it is submitted, vitiate the copyright of the respondent. He is only entitled to his monopoly upon a strict construction of the statute giving it to him.

Without the interpretation act, R. S. C., ch. 1, sec. 7, sub-sec. 44, it is clear that this omission would be fatal. *Jackson* v. *Walker* (1); *Wheaton* v. *Peters* (2); *Donaldsons* v. *Becket* (3); and the notice required by section 9 of the Copyright Act is not a form within the meaning of the Interpretation Act.

The book copy-righted in 1883 was merely a repetition of the former matter, and the authorities are clear that the protection must be confined to the new matter.

The latest case on the subject of copyright is *Pike* v. *Nicholas* (4); which follows *Cary* v. *Kearsley* (5). Both these cases support the contention of the defendant in this case.

The American authorities also are generally in our favor. Law's Dig. (6); Bump. on Copyright (7); and see Slater on Copyright (8); *Black* v. *Murray* (9); referred to in Slater p. 53.

After a work has once gone to the public neither the author nor any other person can copyright the same matter on the same plan by making a few alterations or additions. *Thomas* v. *Turner* (10); *Langlois* v. *Vincent* (11).

Arnoldi for the respondent:

The omission complained of in the notice of copy-

(1) 29 Fed. Rep. 15.
(2) 8 Peters, 591.
(3) 4 Burr. 2408.
(4) 5 Ch. App. 251.
(5) 4 Esp. 168.
(6) P. 259.
(7) P. 358.
(8) P. 37.
(9) 9 Sess. Cas. 3 ser. 353.
(10) 33 Ch. D. 292.
(11) 18 L. C. J. 160.

right is immaterial. Nobody could be misled by it and if it is a defect it is cured by the Interpretation Act.

It has been found by the Chancellor, and is apparent on examination, that the defendant's book is a slavish copy of that of the plaintiff, and the decree for an injunction should stand.

The following authorities were relied on. Slater on Copyright (1); *Morris* v. *Wright* (2); *Morris* v. *Ashbee* (3); *Kelly* v. *Morris* (4); Coppinger on Copyright (5); *Bickford* v *Hood* (6).

The judgment of the court was delivered by GWYNNE J.—The decree made in this cause not only restrains the defendant from selling the book published by him and known as *The Parliamentary Directory and Statistical Guide of* 1885 but also from publishing or selling any future edition thereof, or containing matter copied or pirated from the books of the plaintiff known as the "Canadian Parliamentary Companion for the years 1862, 1874, 1877, 1878, 1879, 1880, 1881 or 1883;" of all of which works, except the last, the plaintiff is now proprietor by assignment from the authors thereof, and from publishing or selling any book containing any portions, passages or extracts taken or colorably altered from the plaintiff's said books, and from copying from the plaintiff's said books or any edition thereof in the preparation of or for the purpose of assisting in the preparation of any future edition of the defendant's said book, or any other book. The learned Chancellor of Ontario, before whom the case was tried, having made a very careful comparison of the new matter appearing in the plaintiff's "Canadian Parliamentary Companion

(1) P. 5 and cases cited; p. 199.
(2) 5 Ch. App. 279.
(3) L R. 7 Eq. 34.
(4) L. R. 1 Eq. 697.
(5) 2 Ed. pp. 178, 203, 242-3.
(6) 7 T. R. 620.

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" of 1883," with the defendant's book of 1885, and having come to the conclusion that much in the latter book, had been copied and pirated from the plaintiff's book of 1883, made no comparison between the defendant's book and the " Canadian Parliamentary Com- " panions published in the said years prior to 1883," of which, and of the rights of the author's thereof therein, whatever those rights were, the plaintiff is the assignee. The learned Chancellor in his judgment says :—

Inhibiting the use by the defendant of the parts first published in the plaintiff's edition of 1883, will so substantially interfere with the whole of the defendant's publication of 1885, that it is not necessary to prosecute the enquiry further, as to whether there is copyright in the parts of the plaintiff's book which were published in the editions of 1874 to 1881.

The defendant appealed from the above decree to the Court of Appeal for Ontario upon various grounds of objection, which have been renewed before us, that court having dismissed his appeal. The question before us must be limited to an enquiry as to the piracy of matter contained in the plaintiff's " Canadian Par- " liamentary Companion of 1883" ; for assuming the previous books published in the years mentioned in the decree to have been registered as required by the copyright act in force in those respective years, still the defendant contends that if there be any matter contained in his book which can be found also in the books published in the years prior to 1883, of which the plaintiff is the assignee, such matter was obtained by the defendant and the authors of those respective books from common sources, some of those sources having been, as is admitted, books previously published by the authors whose rights the plaintiff has purchased as regards the years mentioned in the decree but which previous books such authors had not registered as required by the Copyright Act, and in which therefore they had acquired no copyright.

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This branch of the defence not having been entered into and adjudicated upon by the learned Chancellor the decree should not have dealt with it as if it had been entered into and adjudicated upon against the defendant. In works of this nature, where so much may be taken from common sources and where much of the information given, if given correctly, must be given in the same words we must be careful not to restrict the right of the defendant to publish a work similar in its nature to that of the plaintiff if, in truth, he obtains the information from common, independent sources open to all and does not, to save himself labor, merely copy from the plaintiff's book that which has been the result of his skill, diligence and literary attainments. We must be careful not to put manacles upon industry, intelligence and skill in compiling works of this nature.

The parts which the learned Chancellor has found, and as I think corectly found to have been copied by the defendant from the plaintiff's" Canadian Parliamentary Companion of 1883," consist of short biographical sketches of some of the members of the Parliament of Canada. It must, I think, be admitted, that the defendant set about the compiling his work in a perfectly legitimate manner by addressing circulars to each member of Parliament, requesting him to furnish a short sketch of his life for publication in the defendant's work. If all the gentlemen who received these circulars had answered them by writing in their own language, short sketches of their lives, and had sent them to the defendant for publication in his book, he would have had as much right to have published these sketches in the language in which they were sent to him, or in an abridgment thereof prepared by himself, as the plaintiff had to publish like sketches furnished to him, although the language in which both

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sketches might be expressed should be very similar; but unfortunately for the defendant, it appears that several of the gentlemen who had received the defendant's circular, instead of furnishing him with the biographical sketches he had asked for, replied to the effect that they had already supplied such a sketch to the plaintiff for publication and which was published in his book. The defendant conceiving this sufficient authority to entitle him to take from the plaintiff's book the biographical sketches of such gentlemen as so referred him to the plaintiff's work, did copy them from the plaintiff's book, and thus, ignorantly perhaps but not the less actually, was guilty of the piracy of which the plaintiff has accused him. To the extent of the matter so copied the plaintiff has established his right to have an injunction.

In view of the nature of the respective works of the plaintiff and defendant the plaintiff will obtain all the protection he is entitled to if the decree should be, and I think that it should be, in the form of the order for injunction in *Lewis* v. *Fullarton* (1); and which was followed in *Kelly* v. *Morris* (2); namely "The Court "doth order" and adjudge that the defendant, etc, (as "in decree) be and he is hereby restrained and "enjoined from further printing, publishing selling "or otherwise disposing of any copy or copies of a "book called '*The Parliamentary Directory and* "*Statistical Guide*, 1885, containing any articles or "article, passages or passage copied, taken or colorably "altered from a book called *The Canadian Parliamen-* "*tary Companion*, 1883," published by the plaintiff.

Upon the point as to the alleged defective entry in the plaintiff's book of the information required by the statute to be given of his copyright being reserved, by reason of the omission of the words "of Canada" after

(1) 2 Beav. 14. (2) L. R. 1 Eq. 167.

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the words "of the Parliament," I am of opinion that there is nothing in this objection. The object of the insertion of the entry is to give information to the world that the work is copyrighted, and that by reference to the office of the Minister of Agriculture the precise date from which such copyright runs may be ascertained. The entry as published in the plaintiff's book is sufficient for that purpose and, as I think, is sufficient independently of the enactment contained in sub-section 44 of sec. 7 of the Interpretation Act of 1886; but if the entry was defective, apart from that act, such defect is, in my opinion, removed by the above section. The references to the cases decided upon the English Act have no application as they relate to a provision in the English Act, not in our act.

Neither is there anything in the objection that the copies deposited in the office of the Minister of Agriculture, under the provision of the statute in that behalf, contained the entry of information as to copyright being secured, which is required to be inserted in every copy of every edition of a copyrighted book published during the term secured. The clause requiring such deposit to be made merely requires that two copies of the author's book shall be deposited in the office of the Minister of Agriculture, etc. Now the insertion of the entry (required to be inserted in the several copies of every edition published during the term secured,) in the copies supplied to the office of the Minister of Agriculture, cannot deprive them of their character of being the book of the author who is desirous of securing his copyright. The entry in the copies supplied to the Minister of Agriculture shows that the work is printed and ready for publication, but the point sought to be established is, that it proves that the work was published before the copyright was

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secured, and so that the copyright was lost. This may perhaps be said to be an ingenious, but it seems to be rather a very fallacious argument. Our judgment, I think, should be that the decree varied as above be affirmed with costs to be paid the plaintiff, and the appellant must pay the costs of the appeal, as he has failed on the material points. The decree being so varied, the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Walker & McLean.*

Solicitors for respondents: *Ferguson & Gemmill.*