COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED (*Plaintiff*) .. APPELLANT;

AND

KIWANIS CLUB OF WEST TORONTO (*Defendant*) ..... RESPONDENT.

1953

*May 8, 11
*June 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Performance by fraternal organization of copyrighted musical work in public dance hall—Whether performance "in furtherance of" a charitable object within meaning of exemption clause, s. 17 of the Copyright Act—The Copyright Act, R.S.C. 1927, c. 32, s. 17 as amended by 1938 (Can) c. 27, s. 5.

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

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The second proviso to s. 17 of the *Copyright Act*, 1927, R.S.C., c. 32, as amended by 1938 (Can.), c. 27, s. 5, provides that no charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

The respondent, a fraternal organization, carried on various social, charitable and benevolent activities and as a means of raising funds for them, operated a dance hall. The appellant, the holder of the performing rights in certain musical compositions, sued the respondent for infringement, alleging that the respondent without its consent had performed or permitted to be performed the compositions in public in its dance hall. The respondent pleaded that it was a charitable or fraternal organization and that any public performance as alleged by the appellant was in furtherance of a charitable object and it specifically pleaded s. 17 of the Act as amended.

The action was dismissed by the Exchequer Court of Canada.

Held: The performance of a musical work to be "in furtherance of" a charitable object within the meaning of the exemption contained in the second proviso of s. 17 of the *Copyright Act*, must be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of a cognate character; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance: there being neither a participation in the object nor in anything incidental to it.

Decision of the Exchequer Court of Canada [1952] Ex. C.R. 162, reversed.

APPEAL by special leave from the judgment of the Exchequer Court of Canada (1) Cameron J., dismissing the appellant's action in damages for breach of copyright by the respondent, and for an injunction.

H. E. Manning, Q.C. for the appellant.

H. G. Fox, Q.C. and *G. M. Ferguson* for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—This is an appeal by a company entitled to performing rights in certain copyright musical compositions. The claim is brought against Kiwanis Club of West Toronto, the respondent, a fraternal organization carrying on various social, charitable and benevolent activities, centering around the city of Toronto. Among other things, it has leased Casa Loma which had been built as a palatial residence but which through the vicissitudes of several decades had been abandoned to taxes and allowed by the city to become almost derelict. The Club sensed the possibilities of a profitable use of the building and premises to

(1) [1952] Ex. C.R. 162.

enable it to extend its own good works and for the past few years its foresight has been vindicated by the successful results of its venture. Substantial payments in the nature of rent are made to the city, and all net profits are restricted in their application to charitable purposes.

Among the means of raising money adopted is that of holding frequent dances from which the great part of its net income is derived. The Club has availed itself of other uses such as tours of the estate, conducting tea rooms, holding musicales, concerts, sales of souvenirs and refreshments, and other forms of service or entertainment, both with and without charge.

The meetings of the Club are held in the building, including the regular weekly luncheon, which serve not only the social purposes of the Club as between its members but enable the details of its administration generally to be discussed and courses of action to be decided upon. A full-time secretary devotes himself primarily to the activities of the centre and there is a staff for carrying them out.

Against the net income of approximately $44,000 for the year 1950 and some $4,000 interest on accumulated profit investments, certain charges or appropriations were called to our attention by Mr. Manning as not being attributable to charitable purposes. Among them was a sum of $1,500 applied to general administration costs of the Club. This, it was argued, could not represent any real service by the organization to Casa Loma nor a contribution to charity. There were sums paid for carrying on a summer camp at which paying as well as non-paying guests were received; in assisting agricultural clubs to spread the knowledge of animal husbandry and in demonstration of tree culture on a particular farm; junior Kiwanis clubs were promoted, a campaign in courtesy and safety in automobile driving likewise; and a large item of over $11,000 paid to the Y.M.C.A. These appropriations of funds were claimed to show the income of Casa Loma not to be wholly devoted to charitable objects and not, therefore, within the statutory exemption claimed by the respondent. But I do not find it necessary to deal further with this feature.

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That exemption is contained in the second proviso of s. 17 of the *Copyright Act*, and is as follows:—

> Further provided that no church, college, or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

The question posed is this: is the performance of such music by an orchestra paid for its services at the dances held by the Club an act "in furtherance of . . . a charitable object" by reason of the ultimate destination of the net profits to charity? This admirable ultilization of what would probably otherwise be a wasted property is, except for its general direction by the unpaid officers of the Club, carried on as an ordinary business enterprise, in which service is rendered on a commercial footing: does that ultimate disposal of the net return bring these operations within the proviso so that it can be said that the Club may, carte blanche, use any music it sees fit regardless of copyright?

On this question we have had the benefit of thorough argument from counsel for both sides. Mr. Fox, for the respondent, says that every act done in the course of this or any like chain or group of activities is, regardless of its nature, "in furtherance" of the concluding charitable act or object. But from this it is at once seen that there can be objects immediate, proximate or remote in relation to the performance. What, then, are we to take as that or those intended by the proviso?

It is the "public performance" that is to further the object. Now undoubtedly there can be an immediate charitable object in connection with and as part of which a performance can be given. Singing or performing music in and as part of a church service is directly furthering that service, itself a charitable object; an educational meeting with musical interpolations is carried on in a charitable sense and is itself such an object; and in the relief or amelioration of poverty, the accompaniment of the music of an orchestra at a Christmas dinner given to the poor through the means of voluntary contributions is equally so. Since, then, the proviso can be satisfied by a performance in the furtherance of a charitable activity of which it furnishes one of the functions, are we justified in attributing to the proviso the

intention to embrace also an ultimate, possible and remote result following a series of disjoined business transactions?

The ends to which Mr. Fox's argument leads are plain and undisputed. The Club could organize an opera company for the same purposes as Casa Loma. Opera ventures are notoriously unprofitable, but the "object" of the proviso, as Mr. Fox conceded, cannot be made to depend on the actual accrual of profit as the end result: what is looked to is the intention with which the step involving the performance is taken. And so Mr. Britten's "Peter Grimes" could be presented to the Toronto public without payment of the fee to which the composer has the right to look for his own subsistence. And there would be no limit to the mode of business to which resort could be so made, provided it involved the performance of music.

Some light is thrown on the question by para. 7 of the first proviso to s. 17. It exempts "the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which received a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof." In *Composers, Authors & Publishers Association of Canada v. Western Fair Association* (1), this was held not to apply to the case of a paid performance by a band as part of an entertainment at a fair to which a special admission fee was charged, the object being both to entertain and to attract attendance. And in *The King v. Assessors of Sunny Brae ex p. Les Dames Réligieuses de Notre Dame de Charité du Bon Pasteur* (2), an exemption from taxation of property used for charitable purposes was held not to apply to a laundry operated by the Sisters, the net income from which went wholly to charity.

The performance, to be "in furtherance of", must, I should say, be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of cognate character; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance: there is neither a participation in the object nor in anything incidental to it.

(1) [1951] S.C.R. 596. (2) [1952] 2 S.C.R 76

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We cannot, then, treat the ultimate object here as exempting the performance from the prescribed fees: so to extend the language of the proviso would unnecessarily run counter to those principles of justice which accord to owners, particularly of property which in the truest sense they have created, the accepted privileges of ownership.

An injunction is claimed not only in respect of the unauthorized performance of the musical works mentioned in paragraphs 4 and 5 of the claim but also of all musical works included in lists which the appellant may file in the Copyright Office, the exclusive rights to the public performance of which belong to it. Whether or not an injunction can be given such a comprehensive scope, there is not, in this case, sufficient occasion to consider; the question between the parties arises out of the interpretation of the statute, and that now having been settled, the controversy should be ended.

I would, therefore, allow the appeal and direct judgment

(*a*) declaring the appellant to be the owner of that part of the copyright in the musical works mentioned in paragraphs 4 and 5 of the statement of claim, consisting of the sole right to perform them in public;

(*b*) declaring that the respondent has infringed the appellant's right by authorizing the performance of the musical works in public without the consent of the appellant;

(*c*) enjoining the respondent, its agents, servants and employees from infringing the appellant's copyright in the said musical works while comprised in the lists of such works which have been or will be filed by the appellant with the Honourable the Secretary of State at the Copyright Office in Ottawa and while the sole and exclusive right to perform the same in public remains the property of the appellant;

(*d*) damages in the sum of five dollars.

The appellant will have its costs of the action and of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Manning, Mortimer & Kennedy.*

Solicitors for the respondent: *Ferguson & Martin.*