COPYRIGHT CASES

1922–3

BY

E. J. MACGILLIVRAY, LL.B. (CANTAB.)

OF THE INNER TEMPLE, BARRISTER-AT-LAW

Author of "A Treatise upon the Law of Copyright"
"A Digest of the Law of Copyright"
"The Copyright Act, 1911, Annotated"
and "A Guide to The Copyright Act, 1911"

THE PUBLISHERS' ASSOCIATION
STATIONERS' HALL COURT, LONDON
1923
Printed for Private Circulation

Austin *v.* Columbia Graphophone Company, Ltd.

(The *Times*, July 4, 5, 6, 7, 11, 12, 13, 14, 18, 20, 25.)

MUSICAL WORK—ARRANGEMENT OF OLD AIRS—COPYRIGHT IN IDEAS—METHODS AND DEVICES—INFRINGEMENT—NOTE FOR NOTE COMPARISON.

Chancery Division.

Mr. Justice Astbury.

1923, July 24.

Under the Copyright Act, 1911, *copyright is no longer restricted to particular forms of expression.*

Although no copyright exists in ideas, there may be copyright in a combination of ideas, methods, and devices, used and expressed in and going to form part of a new and original work. There may be copyright in the selection of common well-known musical devices and their application to the making of a new musical arrangement of an old air.

Infringement of copyright in music is not a question of note for note comparison, but of whether the substance of the original copyright work is taken or not. It falls to be determined by the ear as well as by the eye.

Copyright in music is infringed if there has been any real annexation by a subsequent composer of the work and labour and skill and taste of his predecessor.

Contrivances by means of which substantial parts of a musical work may be mechanically performed may be infringing copies of such work, and the owner of the copyright may thus be entitled to damages for

conversion on the basis that the infringing contrivances were his property unlawfully converted by the defendant to his, the defendant's, own use.

In this action Mr. Frederic Austin complained that the Columbia Graphophone Company had infringed his copyright in the music of the opera "Polly," as produced at the Kingsway Theatre, by making and selling certain disc records by means of which selections from the music might be mechanically reproduced. The opera "Polly" was written by John Gay as a sequel to "The Beggar's Opera," and was first published in 1729 in a volume containing the opera in ordinary prose form interspersed with lyrics, and with an appendix in which a number of simple airs were printed with an added bass. These airs were mostly folk-songs and other popular airs then current, and no music was composed by Gay. The added bass was the work of a Dr. Pepusch. The opera was practically unknown to the theatre-going public in this country until it was produced by the Milbourne Syndicate, Ltd., at the Kingsway Theatre on December 30, 1922. For this production Mr. Clifford Bax reconstructed the book and altered many of the lyrics, and in many cases substituted new lyrics for the old. Mr. Austin arranged and composed the music to fit Mr. Bax's reconstructed book. For this purpose Mr. Austin selected fifty out of a total of seventy-one airs in Gay's appendix and worked them up, altering, extending, and adding to them so as to fit Mr. Bax's lyrics. Many of the airs were thus adapted to an entirely different setting and musical structure from that in which they were used by Gay. For instance, Air 69 in Gay called "Buff Coat" is set for a lyric beginning "Why that languish! Ah, he's dead; he's lost for ever." This lyric is in the nature of an elegy, and the air is marked to be played slow and in conjunction with the words is obviously intended to produce the

effect of a lament. Mr. Austin uses this air in conjunction with an entirely new lyric written by Mr. Bax, beginning, "Drink, laugh, sing, boys, for the soldier has no fellow." It is a lively, rollicking, drinking song, and Mr. Austin composed his music accordingly. The original bass of Dr. Pépusch has a slow and sustained movement. Mr. Austin, on the contrary, uses accented chords with rests and marks it "allegro robusto." Air 9 in Gay called "Red House" is set to a song "I will have my humours," which is sung as a solo by Mr. Ducat. Mr. Bax has altered the words and character of the song and made it into a duet with answering phrases to be sung by Mr. Ducat and Polly. Mr. Austin's music conforms to the alteration. It is arranged for a baritone and soprano with antiphonal passages and a bagpipe scheme of harmony which is not to be found in Gay's appendix. And so on throughout the whole of the music, although Mr. Austin takes the melody from Gay's airs he alters the structure of the music and his whole scheme of harmony is a departure from Dr. Pepusch's setting of the same airs and produces a different effect to the ear. The production at the Kingsway Theatre proved an immediate success, and became one of the most popular musical entertainments of the day. In fact it was and is the only successful version of "Polly" ever produced in this country. In these circumstances certain gramophone companies desired to produce the best airs from the plaintiff's music in the form of gramophone records. In January the defendant company applied to Messrs. Boosey, who were then publishing a vocal score of the plaintiff's music, for permission to make orchestral parts of selections from the opera. Messrs. Boosey replied that the matter was entirely in Mr. Austin's hands, that Mr. Austin was in touch with the Gramophone Company, but that that was no reason why the defendants should not be getting ready. Then the defendants approached Mr. Austin and his

permission was obtained to make an orchestral selection on condition that it was not put on the market before the Gramophone Company's records. Meanwhile Mr. Ketelbey, who is the musical director of the defendant company, went to the Kingsway Theatre and picked out twenty tunes which he thought were most likely to suit the public taste and to become popular. He obtained a copy of Mr. Austin's vocal score of these tunes and orchestrated them for the purpose of enabling them to be played by a band for making the desired records. Mr. Austin was shown this orchestral score, and after making certain alterations he agreed to the score being used for the purpose of making gramophone records. On February 7 Mr. Austin wrote to the defendant company informing them that he had made an agreement with the Gramophone Company which bound him not to give permission to any one else to make any band parts of his music for the purpose of making gramophone records until such time as that company should have manufactured and publicly offered their records for sale, and that consequently the most he could do for the defendants was to let them know the date of release of the Gramophone Company's records. The defendants thereupon decided to produce records of "Polly" without Mr. Austin's consent and if possible place them on the market before the issue of the Gramophone Company's authorised records. For this purpose they sent Mr. Ketelbey to the British Museum to copy from the old edition of Gay the airs which Mr. Ketelbey had already selected as suitable for reproduction. The object of this visit was firstly to find out whether the originals of the twenty airs were in fact in Gay, and, secondly, to copy these airs direct from Gay's appendix in the hope of thus avoiding any copying from Mr. Austin's music. Mr. Ketelbey paid two visits of short duration to the British Museum. He memorised parts at all events of Gay's appendix. He took with him Mr.

Austin's vocal score of his opera and he discovered two things: First that one of the airs from the opera that he and the defendants desired to reproduce was not in Gay at all, and that it was a new and original piece of music by Mr. Austin. That, therefore, had to be omitted. He dis-discovered, secondly, that another of these twenty selected airs, although based upon the air in Gay, had been so altered as to the air itself by Mr. Austin that a reproduction of that air as found in Gay would not apparently enable the public to recognise it as the air in Mr. Austin's opera. The two visits to the British Museum paid by Mr. Ketelbey were on February 12 and 14. Between February 16 and 22 Mr. Ketelbey prepared his orchestral score. In that score he omitted the tune of which Mr. Austin was the sole author, and he also omitted the tune the air of which Mr. Austin had substantially altered from the air in Gay, and in the place of the latter he substituted another air from Gay's appendix. On February 23 the defendants' records were made, and on March 3 the defendants wrote to various sellers of gramophone records "Herewith Advance List of new Columbia Records, special issues of selections from 'Polly' (arranged by Albert W. Ketelbey), and selections from 'The Cousin from Nowhere,' the successful musical play produced in London on Saturday last. No samples are being furnished. Kindly let us have your orders by return as stock is now ready." The defendants also issued for the purpose of advertising their records a poster printed in red and black, and illustrated by a drawing of a female figure designed to represent the character of Polly, dressed in the costume in which she appears in "The Beggar's Opera" as produced with Mr. Austin's music at the Lyric Theatre, Hammersmith, and in the first Act of "Polly" as produced at the Kingsway Theatre. At the trial expert evidence was called on both sides. Mr. Austin was supported by Mr. Newman, a well-known musical critic, Sir Hugh Allen,

Professor of Music at Oxford and a director of the Royal College of Music, and Mr. Geoffrey Shaw, H.M. Inspector of Training Colleges and Schools of Music. The purport of the evidence called for the plaintiff was that the plaintiff had recast the general character of the music and made it into a new and independent work of art, and that his music was appropriate to the lyrics of Mr. Bax, and the business on the stage to which it was set, and was wholly unsuited in most instances to Gay's opera and lyrics. They were of opinion that Mr. Ketelbey in writing his score from Gay's airs had adopted Mr. Austin's treatment of these and had taken the structure and other important characteristics of Mr. Austin's music, and that Mr. Ketelbey's music produced to the ear an effect similar to that produced by Mr. Austin's music. They did not think it possible that two musicians working independently on the music as found in Gay's appendix could have produced results with so many similarities in treatment and musical effect. In cross-examination Sir Hugh Allen was asked whether his evidence did not amount to this, that the defendants had harmonised the tunes in the plaintiff's manner with some resemblances and imitations of the plaintiff's effects, and to that Sir Hugh Allen agreed. A statement was similarly elicited from Mr. Shaw to the effect that the defendants had edited Gay's tunes in Mr. Austin's manner with a great many reminiscences or imitations of Mr. Austin's effects. These two answers obtained in cross-examination were based on what was really the defendants' case, namely, that so long as Mr. Austin's actual notes and bars were not copied, and as Gay's airs simpliciter were not copyright, the defendants were at liberty to orchestrate, lengthen, quicken, introduce imitative and chorus effects, and generally dress up the tune in the same way as the plaintiff. The plaintiff's case on the other hand was that he had made and was the author of a new and original work, in which the combination and

selection of Gay's airs, with many musical, orchestral, and other methods and devices which he had selected and adopted and worked up into a new and original whole was his property, which no one else might without his consent produce or reproduce in whole or as to any substantial part in any material form directly or by way of colourable imitation.

The defendants called as their expert witnesses Mr. Ketelbey, Mr. Hubert Bath, of the Gaiety Theatre, a distinguished composer and the author of an independent version of "Polly," produced at Chelsea some months after the production of the Kingsway version, Sir Frederick Bridge, Emeritus Organist of Westminster Abbey, Sir Frederick Cowen, the well-known composer and conductor, Sir Dan Godfrey, the well-known band conductor, Mr. Hamilton Harty, composer and conductor of the Halle Orchestra in Manchester, and Mr. Clutsam, a musical composer of considerable position and the arranger of Schubert's music for the recent production in London of "Lilac Time." The evidence of all these distinguished musicians was directed in the main to explaining that the various musical devices used by the plaintiff were in themselves devices commonly known in the art. They were, moreover, of opinion that the devices used were so common and obvious that any two competent musicians setting out to adapt Gay's airs to the requirements of a modern opera would produce substantially the same result with the same musical effects. In his judgment the learned judge said that he did not accept Mr. Ketelbey's view, that he did not try to reproduce the plaintiff's version of the tune. Unless he got sufficiently near to enable the defendants' records to be sold as records of what the public wanted his work would have been useless. He believed that he did attempt to reproduce the plaintiff's version, supplying his own orchestration and not copying the plaintiff's notes to any great extent, but

otherwise treating the selected airs in a manner sufficiently resembling the plaintiff's treatment to suit the defendants' requirements. The learned judge said that the contention that the various resemblances were due merely to coincidence, and would occur as a whole in another independent version of Gay was one which he was entirely unable to accept or believe. Commenting on Mr. Bath's evidence, the learned judge said that in his opinion this gentleman was disposed to exaggerate in a way which made him feel uncomfortable. His evidence was really based on two theories: one coincidence, and the other that any one else would have dressed up Gay's airs in Mr. Austin's clothes, neither of which, having regard to the evidence called for the plaintiff and to common sense, was he able to accept. With regard to Sir Frederick Bridge, the learned judge said that he was a breezy and amusing witness, who, when he came into the witness-box to give evidence, had not, he thought, really addressed his mind to the problem which he, the learned judge, had to solve. As the result of his examination and cross-examination he had come to the conclusion that his evidence told more in favour of the plaintiff than the defendants. After giving evidence Sir Frederick Bridge, apparently believing that he had not quite produced the effect that was hoped, wrote a letter to Sir Duncan Kerly, the defendants' counsel, and the learned judge allowed this letter to be read as part of Sir Duncan's argument. In his judgment the learned judge quoted and commented on it as follows: "I allowed Sir Duncan Kerly to read this letter as part of his, Sir Duncan's, argument. It is a letter written when the writer was *functus officio* as a witness, and is a sort of posthumous judgment, as it were, upon the case, and I will read it, relying on the fiction that it is part of Sir Duncan's argument. Sir Frederick says: 'The result of this case will be of importance to English music. Among recent developments in English music

there has been an increasing interest shown in the music of those past periods, when England was prominent, if not pre-eminent, in Europe. Music which has been forgotten for centuries has been rediscovered by research, arranged by the researchers for modern requirements and performed. The fewer the obstacles placed in the way of the free use and adaptation of this music, the more readily will it be assimilated by present-day musicians, and be available to build up English music on the foundations of the great periods of the past.' If I may respectfully say so, I agree with that, subject to the qualification that if musicians doing original work in this direction are sufficiently protected by law, there is nothing to complain of in this passage. The letter proceeds: 'The arrangement of an old air must obviously be more difficult to copyright than a piece of entirely original music, for the old air itself is common property, and without the air there could be no arrangement. The question which now appears to have arisen for decision is how far can the arrangement be protected without establishing a copyright in the air itself. To the sensitive ears of the majority of musicians of the same period an air apart from the melody naturally suggests certain ideas of treatment and devices. These ideas and devices are, if it may be said, practically part of the air; they are not original, but are commonplaces drawn from the common musical stock.' I would add to that, 'But they may go to make up a meritorious, new, and original work.' Then the letter proceeds: 'It is of the use of commonplaces of this kind that complaint is made in this case. If judgment is given for the plaintiff, it would seem dangerous for a composer to arrange an air which has been arranged before, and suicidal if he has seen or heard the previous arrangement.' This is Sir Frederick Bridge's view: I do not share it. Then Sir Frederick Bridge proceeds: 'The need is for a guiding rule. The principle that there is only copyright

in a sequence of notes is a rough and ready rule which may not be perfect in its application to all cases, but it is intelligible and clear. Any other principle will certainly be very difficult for the musician to apply, and almost impossible for a lawyer, himself probably inexpert, to interpret.' I will add to that that difficulty is no reason for not doing one's best to apply the law to each case as it arises." With regard to Sir Frederick Cowen's evidence, the learned judge's comment was that except that he was less hilarious than Sir Frederick Bridge, and had not given judgment after leaving the box, he, the learned judge, thought that the same remarks applied to his evidence. The learned judge thought that Mr. Hamilton Harty was an extremely interesting witness. Of his evidence he said, "This witness expressed such extreme views that it is difficult to quite explain the effect he had upon my mind, sitting as I am in this respect as a juryman very ignorant of the mysteries of melody and harmonisation. He did not, in my judgment, in the least answer or effectively deal with the case and evidence of the plaintiff, but seemed to me to be, when giving his testimony, in a sort of musical dreamland, where facts, realities, and such-like prosaic and commonplace things were hardly considered as meriting serious treatment. I am sure, however, he gave his evidence in perfect good faith." Of Mr. Clutsam's evidence the learned judge said, "I am sorry to say that I find it difficult to take this gentleman's evidence seriously. It did not seem to me to ring true, and I certainly am not disposed to minimise the effect of the plaintiff's evidence because of anything that he has said."

After summing up the evidence the learned judge continued:

"The question which I have to determine is, *inter alia*, Is the defendants' work a new and original work based on Gay; and, secondly, does it escape the meshes of the law

of copyright as now existing in this country? The defendants' experts did not really set out to compare the plaintiff's and defendants' productions of the selected airs with the original Gay, and to find out what points of copying or resemblance there were where each departed from the original work. They so misdirected themselves as to make their real task well-nigh impossible. The defendants welcomed a poster sketch for their advertisements which did not give an impression of Polly differing from, but one resembling, the Kingsway lady. Although no copyright exists in ideas, there is copyright, and can be copyright in a combination of ideas, methods, and devices used and expressed in and going to form part of a new and original work, based though it be on old airs and made up of musical devices all in themselves old and in common use independently of the particular context and combination in which they are found. This is particularly so when one finds a defendant's work based largely on the plaintiff's. The matter cannot be determined, as the law now stands, by whether the actual notes are taken, and this is exemplified by two pieces of music handed to Sir Frederick Cowen in cross-examination. They were both well known; they were both works of well-known musicians, and the witness was handed up in each case a second document, in which not one single note of the original was taken. He had no difficulty in seeing, admitting, and stating that the second document in each case was a deliberate copy of the first.

"The law now depends upon the Copyright Act of 1911, which states in sec. 1 (1): 'Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical, and artistic work,' and in sub-sec. (2): 'For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial

part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right . . . in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.' In sec. 2, sub-sec. (1), it is enacted that 'Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright,' subject to exceptions which are irrelevant in this case. In sec. 35 (1) it is enacted that '"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act.' Now, I imagine that music must be treated by the ear as well as by the eye. In *D'Almaine* v. *Boosey*, reported in 1 Younge & Collyer, at page 288, the Chief Baron said, on pages 301 and 302: 'But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *à fortiori* they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition.' No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their

nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now, it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author'—that is, of course, where the original air was copyright—'and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. I remember in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said that a mere bar did not constitute a phrase, though three or four bars might do so. Now, it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one

instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear.' That is, of course, dealing with a case in which the piracy was of the air as distinguished from the treatment or orchestration of it.

"In *Leader* v. *Purday*, reported in 7 Common Bench, page 4, the headnote is: 'One who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as proprietor of the copyright in the whole composition. In an action by A., for the infringement of copyright in a musical composition, consisting of an "air," which was old and not the subject of copyright, of "words," which were written by B., and of an "accompaniment," which was composed by C., at the request and for the benefit of B.' I need not trouble about the holding as it was a decision on another point, but in the judgment the matter is dealt with in a way which I think assists one in deciding this case. The facts were that the alleged piracy was in an accompaniment. Two musicians called for the plaintiff thought the accompaniment published by the defendant was an infringement of the plaintiff's, assigning as one of their reasons for coming to that conclusion that they found the same musical errors in both. For the defendant the master of the military band at Woolwich stated that in his judgment the two accompaniments were totally different. The jury were of opinion that the similarity of the defendant's accompaniment to that first published by the plaintiff was not accidental but designed,

and they returned a verdict for the plaintiff. On an application for a non-suit Mr. Justice Coltman said: 'It is said, that, as the "air" was not the plaintiff's property, the declaration improperly claimed the whole combination. It appears to me, however, that no difficulty of that sort arises here. This is very like the common case of improvements in a machine, where the patent is taken out for an improved machine.' In other words, a strong Court held there that an accompaniment written round an old air formed a new and original work for the purpose of copyright although the same notes apparently were not taken. In *Wood* v. *Boosey and Another*, which is reported in Law Reports, 3 Queen's Bench, at page 223, N. had composed and published an opera in Berlin, and after his death B. arranged a score of the whole opera for the pianoforte, and in registering that arrangement in London, N.'s name was inserted as the composer. It was held 'affirming the judgment of the Queen's Bench, that the arrangement for the pianoforte was an independent musical composition, of which B.,' that is the adaptor and not N., the composer, was really the composer for the purposes of the copyright law. Chief Baron Kelly said: 'The case is simple enough. Nicolai was the author of an opera, "Die Lustigen Weiber von Windsor," which was represented and probably published in March of the year 1849; he is said to have died two months after that period. Nearly two years afterwards, his representatives, Bote and Bock, who had become the proprietors of the opera, employed Brissler, and no doubt paid him, to adapt the opera to the pianoforte, and he has accordingly become the author of the work in question, which is an adaptation of the music of the whole of the opera,—of the original score, prepared for some twenty instruments,—to the pianoforte alone. . . . The question in this case is, whether this arrangement and the opera as originally composed is really one and the same work; not,

as my Brother Parry has argued, whether the arrangement is a piracy of the original work, or would be a piracy of the work if published without the authority of the representatives of Nicolai. Now, in reference to the case that was decided in the Court of Exchequer, *D'Almaine* v. *Boosey*, I have no hesitation in saying that if Brissler had published this arrangement for the pianoforte during Nicolai's lifetime without his authority, or since his death without the authority of Bote and Bock, his representatives, he would have pirated the work; or if there had been a copyright act in force in Berlin, such as there is in this country, no doubt Nicolai or his representatives might have maintained an action for the infringement of the copyright against Brissler. But although the work of Brissler, if published without the authority of the composer of the original opera or his representatives, would be the piracy of that work, yet it may be a new and substantive work in itself, and be the subject of a copyright at Berlin.' Then the learned judge a little lower down says: 'Now let us come to what the arrangement is for the pianoforte. Undoubtedly there are portions of it which are identical, as in the case before the Exchequer, and might subject, as I have already observed, the author of the adaptation to an action if it had been published without the authority of the author of the opera. But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there

may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is of greater or less skill. In some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart's, by Mazzinghi, a work—I would hardly use the term of a great genius, but a work—of great merit and skill.' Then the learned judge says, 'But whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country as the original composer of the opera; and if any one had, by an adaptation pirated that arrangement, he would be liable to an action for that piracy.' Baron Bramwell said: 'It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense there is not, that is to say, he neither invents the tune nor the harmony; but there is invention in another sense, or rather there is composition in the adaptation to the particular instrument. Of that the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a pianoforte, would find it a great deal easier to copy what Brissler had done than to take the score and do it over again. If he took the original score there would probably be many differences between him and Brissler, and very likely, if Brissler arranged it over again, he would do it differently, because there is no rule by which a man is bound to do it in a

particular way.' Now, there it was held that there was copyright in something infinitely less than what Mr. Austin has done in this case. In *Boosey* v. *Fairlie*, reported in 7 Chancery Division, at page 317, this appears in the judgment of the Court of Appeal: 'Upon the third point, viz. that of infringement, we are of opinion that a dramatic representation in which a substantial and material part of the music of Offenbach's opera has been performed constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labour bestowed upon the unprotected pianoforte arrangement of Soumis. There is scarcely any popular opera the score of which is not, within a short time after its first performance, arranged for the piano, and if by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory,' in other words it is not a question of note for note comparison at all, but whether the substance of the original copyright work is taken or not. Now, all these cases were decided under the older and more restricted Act, when copyright was in the book and not in the arrangement as such of the work. Copyright is now no longer restricted to particular forms of expression, and under the new Act perforated rolls were made for the first time liable to penalties for infringement. There is no doubt, in my opinion, that there is plainly copyright in a selection of common ordinary well-known musical materials. In *Moffat & Paige, Limited* v. *George Gill & Sons, Limited, etc.*, reported in 87 Law Times, at page 465: 'The plaintiffs were the registered proprietors of the copyright in an annotated edition of one of Shakespeare's plays, edited by T. P., and published in 1893. In March, 1900, the defendants, G. and

Sons, published an annotated edition of the same play, edited by the defendant F. M. The plaintiffs alleged that the book published by the defendants, G. and Sons, was a colourable imitation of the plaintiff's books, and an infringement of their copyright therein in respect to general arrangement, sketches of character, literary notes, and quotations.' It was held that it was an infringement, and the decision in the first Court was reversed. The defendant, Marshall, admitted having read the plaintiff's book, but stated that his book was the result of independent labour and research, making a legitimate use of the plaintiff's book in common with the works of other commentators, very similar *qua* book to this case *qua* music. The Master of the Rolls, at page 468, said: 'I accept his statement that Mr. Page's book was not before him—that is, not lying open on the table so that he could refer to it; but I also accept his statement that he had read it carefully, and that with an excellent memory he could, and did, have present to his mind Mr. Page's treatment of the subject and the language in which that treatment was expressed. When preparing the second edition he read Mr. Page's book again in order to see what passages required to be deleted (which passages he at once struck out), and, with his memory thus refreshed, he rewrote certain characters, including Rosalind, so far as this operation rendered rewriting necessary. I think it was impossible for Mr. Marshall to compile a second edition on the same lines as the first which should not infringe the copyright. I think it was impossible for him to divorce his mind sufficiently for that purpose from the book which he knew well, and from which he had largely borrowed, especially when he had been obliged to consult it afresh and with some special care. Avoiding the use of Mr. Page's language was wholly insufficient to enable Mr. Marshall to escape the difficulty in which he had placed himself. If, therefore, I

were at liberty to treat the first edition as the subject of complaint, or to regard the second as springing from it, I should not hesitate to find on this ground alone that the plaintiff's copyright had been infringed.' The facts are peculiarly like the present case. Then, a little lower down, the learned judge said: 'What is the process that the defendant has adopted, and by which his second edition has been developed? He has in his possession the proofs of the first edition; he carefully re-reads those proofs, and he puts marks which, though they do not efface them from his view, do denote the fact that certain particular passages are such that he thinks cannot stand, having regard to what happened in the first trial. He marks those passages, but they are so marked as to be still obvious to the eye and capable of being read, although they are not to appear as in that edition. He has before his eye his own work, no doubt; but, in fact, so far as the matters in this case are concerned, it is practically the work of the plaintiffs because it is a copy of the plaintiffs' book. It is garbled to a certain extent, but it is nothing better than a copy. Having that before him, he makes certain notes indicating what passages cannot stand, and for which, therefore, some substitution must be found. We have heard, and we see as the result in the second edition, the changes of expression which he has made while conveying the same thing in substance—the alteration of the order of quotations while leaving the quotations there themselves, the retention of the string of quotations used, and the purpose to which they were applied, and, further, the same general system of analysis of character which had been originally in the plaintiffs' work.' The learned judge says, a little lower down: 'Being debarred from doing that, he is equally debarred from doing anything that is a mere colourable alteration.' Then, on page 471, Lord Collins said: 'He rather suggested that it was justified by the cases relating

to directories, which say that though you cannot, where another man has compiled a directory, simply take his sheets and reprint them as your own, you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own. Certainly, but are you at liberty to apply the same principle to a series of quotations—to take the reference given by one author, although he quotes such and such a passage as illustrating this particular matter—to say, "I will just go and see if that is correctly copied or not, and if it is correctly copied, I propose to introduce it with any other quotation which illustrates the particular passage, and I propose to adopt that as my own work"? That leaves out the whole merit; the felicity of the quotation; its adaptability to a particular end; its illustration of a particular characteristic. All those things enter into the choice of one quotation as apart from another. That is a process which may involve gifts both of knowledge and intelligence. The aptness of quotation does not depend on the particular page or number of lines in which it is found; and that is all you find if you obey a certain direction to go to a certain place and take it. It does not entitle you to annex the skill and judgment and taste which has dictated the selection. It does appear to have been the defendant Mr. Marshall's views of his rights, as his counsel has put it forward for him, that once he knew where to find the quotation, then he had a right to annex it; and that if he once knew where to look and find the quotation, and if it corresponded with what the author had written, he has a right to take it. I cannot accede to that for a moment, and it seems to me that the law is clearly such as to entitle the plaintiff to complain if quotations selected and arranged by him are imitated and adopted by the defendant, Mr. Marshall. I think that it has been abundantly shown that

in the second edition of the defendant's book not only have the quotations in substance been taken, but the letterpress connecting them has also in substance been taken in a great many instances, and particularly in the character sketches. That has been done to such an extent as to put it entirely outside those trivial and casual imitations which do not amount to a breach of copyright. There has been a real annexation by the defendant of the work and labour and skill and taste of the plaintiff.' I think that applies just as much to music as to books.

"In *Corelli* v. *Gray*, which is reported in 30 Times Law Reports, at page 116, it was held that 'the person who is the author and the owner of the copyright in a novel is entitled to an injunction to restrain the performance of a dramatic sketch containing a series of stock incidents in combination which have been taken from the plaintiff's book, even though no sentence used in the sketch is similar to any sentence used in the book.' Lord Cozens-Hardy said: 'There had been a great change made in the law by the Act of 1911. Under the old law a person who desired to dramatise a novel could do so with impunity, except so far as it could be shown that he had to a material extent taken the actual words of the copyrighted work. Subject to that limitation he had a free hand, and could use any combination of incidents with impunity.' Then the learned judge refers to the new Act, and says: 'That was an entirely new right, or such an enlarged right that it deserved to be termed a new right.' Then, a little lower down he says: 'The plaintiff's case was that on the facts it was impossible not to believe that the defendant had written the sketch with her book before his eyes or in his memory. The learned judge, in a clear and exhaustive judgment, had dealt with six incidents which were to be found in the sketch, and also in "Temporal Power," and said that not only were they to be found in both works,

but that there were most remarkable similarities or identities of language between the two documents. After going through these matters in detail the learned judge had said that there was nothing very striking or original in either the novel or the sketch. He added: "But the combination of these ordinary materials may nevertheless be original, and when such a combination has arrived at a certain degree of complexity it becomes practically impossible that it should have been arrived at independently by a second individual. In my judgment the similarities and coincidences in this case are such as, when taken in combination, to be entirely inexplicable as the result of mere chance coincidence." His Lordship said he accepted that passage as an unanswerable statement of the position in the present case, and he thought that they must approach this case on the footing that the defendant Gray had the book "Temporal Power" either under his eyes or in his memory when he wrote his sketch. No doubt it was still open to this defendant to say that he had not infringed the copyright, because he had only taken from the book something which was not the subject of copyright; but when it appeared that not merely one, two, or three stock incidents had been used, but a combination of stock incidents, every one of which had been taken from the plaintiff's book, it would be narrowing the law beyond what was reasonable to say that the plaintiff was not entitled to be protected. If it was found that a series of incidents in combination had been taken from the plaintiff's book, his Lordship thought she might obtain an injunction, even though not one sentence used in the sketch was similar to one used in the book. The result of the new Act was to give protection not merely to the form of the words in a novel but to the situations contained in it.'

"In *Rees & Melville*, which is reported in Mr. MacGillivray's collection of cases at page 168, on pages 173 and 174,

Lord Justice Swinfen Eady said that 'the defendant had read the plaintiff's play and seen it performed, and, consciously or unconsciously, as part of his dramatic experience, must have retained some knowledge and recollection of it. The question remained, had the defendant in fact infringed? In order to constitute an infringement it was not necessary that the words of the dialogue should be the same, the situation and incidents, the mode in which the ideas were worked out and presented might constitute a material portion of the whole play, and the Court must have regard to the dramatic value and importance of what, if anything, was taken, even although the portion might in fact be small and the actual language not copied.'

"In my view these authorities apply in the present case, and in my opinion the defendants have taken a very substantial portion of the plaintiff's work. The primary object of the defendants was to make records that the public would accept as the best bits of the Kingsway 'Polly,' and their work was largely arrived at, in my opinion, in imitation and appropriation.

"For these reasons I am of opinion that the defendants have infringed the plaintiff's copyright in his music by making or authorising to be made an orchestral score and band parts wherein substantial parts of the plaintiff's music are reproduced, and by making therefrom and publishing gramophone records by means of which substantial parts of the plaintiff's music may be and have been mechanically performed."

Some discussion followed as to the relief which ought to be granted to the plaintiff. Defendants' counsel conceded that on the judgment the plaintiff was entitled to an order for an injunction, delivery up of copies, and damages for infringement of copyright, but the plaintiff claimed that, in addition to damages for infringement of copyright, he was entitled to damages for conversion on the basis that

the infringing records were infringing copies of the plaintiff's work, and therefore the property of the plaintiff, as provided by sec. 7 of the Copyright Act, 1911.

The learned judge held that the plaintiff was right, and gave him judgment accordingly with costs.