

BASCHET v. LONDON ILLUSTRATED STANDARD
COMPANY. KEKEWICH

[1899 B. 1769.]

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Nov. 8.

Copyright—International—Fine Arts—Infringement—Principal and Agent—Penalties—Indecency of Work and Infringements—Costs—Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 6—International Copyright Act, 1886 (49 & 50 Vict. c. 33), s. 2, sub-s. 3—Bern Convention, art. 2.

The joint effect of s. 2, sub-s. 3, of the International Copyright Act, 1886, and art. 2 of the Bern Convention, is that an author suing in England in respect of an infringement of foreign copyright must prove that he is entitled to protection in the country of origin of the work, but, that right once established, his remedy depends entirely on the English law.

An author whose copyright is infringed in any manner mentioned in s. 6 of the Fine Arts Copyright Act, 1862, is entitled to recover separate penalties against every infringer, whether principal or agent, master or servant, the minimum penalty in every case being a farthing for each copy by him pirated.

Ex parte Beal, (1868) L. R. 3 Q. B. 387, and *Ellis v. Marshall & Son*, (1895) 64 L. J. (Q.B.) 757, followed.

Where an action in respect of infringement of copyright fails on the ground of the indecency of the work, and the indecency has been repeated in the infringements, the action will be dismissed without costs.

WITNESS ACTION.

Action against the publishers, printers, and four distributors of the *London Illustrated Standard* for an injunction to restrain the printers from printing, the publishers from causing to be printed, publishing, and causing to be sold, and the distributors from selling and distributing, piratical copies of the plaintiff's copyright pictures and photographs, and for an account and delivery up of copies, damages, penalties, and costs.

The plaintiff was the publisher in Paris of, and the owner of the copyright according to French law in, a series of publications entitled *La (1) Panorama*, first published in France, and he was also the owner, according to French law, of the copyright in seven pictures and photographs first published in Paris in *La Panorama*.

(1) *Sic* in the pleadings.

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The plaintiff had complied with all conditions and formalities prescribed by the French law for the protection of his copyright. Copies of the pictures having been printed, published, and circulated in the *London Illustrated Standard* without the consent of the plaintiff, the plaintiff brought this action. The defendants denied the plaintiff's title, pleaded the indecency of the pictures, and the printers and distributors also pleaded ignorance of the copyright. The printers were merely employees of the publishers. An interlocutory injunction was granted by Kekewich J. and affirmed by the Court of Appeal except as to two pictures, which the Court of Appeal considered too indecent to be entitled to copyright in England. On the action coming on for trial, it was admitted that the injunction must be made perpetual, and the only point in contest was as to the penalties, 20,000 copies of each of the five pictures entitled to copyright in England having been printed. The right of the plaintiff to penalties depended on the construction of s. 6 of the Fine Arts Copyright Act, 1862, s. 2, sub-s. 3, of the International Copyright Act, 1886, and art. 2 of the Bern Convention of September 5, 1887, incorporated by an Order in Council of November 28, 1887. (1)

(1) The Fine Arts Copyright Act, 1862, provides as follows:—

Sect. 6: “. . . If any . . . person, not being the proprietor . . . of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, . . . or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, . . . or distribution, any such work or the design thereof; or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, . . . or distribute, . . . any repetition, copy, or imitation of the said work, or of the design thereof,

made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright . . . a sum not exceeding ten pounds; . . .”

The International Copyright Act, 1886, provides:—

Sect. 2: “The following provisions shall apply to an Order in Council under the International Copyright Acts: . . .

“(3.) The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced.”

The Order in Council of November 28, 1887, incorporates the Bern

A suggestion being made that the defendants were not liable to penalties under the English copyright law, unless they were so liable under the French law, the plaintiff called a French advocate, who proved that the defendants, though not liable to any injunction, were liable to penalties under the Penal Code of 1810, which provides as follows:—

Art. 427: "La peine contre le contrefacteur ou contre l'introducteur sera une amende de 100 francs au moins et de 2000 francs au plus; et contre le débitant, une amende de 25 francs au moins et de 500 francs au plus.

"La confiscation de l'édition contrefaite sera prononcée tant contre le contrefacteur que contre l'introducteur et le débitant.

"Les planches, moules ou matrices des objets contrefaits seront aussi confisqués."

Warrington, Q.C., and *Scrutton*, for the plaintiff. The plaintiff does not ask for penalties against the distributors, as he cannot prove they knew the copies were unlawfully made. As against the publishers and printers this is unnecessary: Fine Arts Copyright Act, 1862, s. 6. They are both liable as principals, though the printers were in fact employed by the publishers. There is a separate penalty on every copy: *Ex parte Beal* (1); and in England the minimum penalty is a farthing a copy, that being the smallest English coin: *Ellis v. Marshall & Son*. (2) In that case the penalties were assessed at

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Convention in a schedule, and provides—

"(2.) This order shall extend to . . . France. . . .

"(3.) . . . The author of a literary or artistic work shall not have any greater right or longer term of copyright therein, than that which he enjoys in the country in which the work is first produced."

"(8.) This order shall be construed as if it formed part of the International Copyright Act, 1886."

The Bern Convention provides:—

Art. 2: "Authors of any of the countries of the Union . . . shall enjoy in

the other countries for their works . . . the rights which the respective laws . . . grant to natives.

"The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin.

"The country of origin of the work is that in which the work is first published. . . ."

(1) L. R. 3 Q. B. 387.

(2) 64 L. J. (Q.B.) 757.

KEKEWICH J. 26*l.* Os. 10*d.*, and it appears from Scrutton on Copyright, 3rd ed. p. 187, that there were 25,000 pirated copies. As to this plaintiff's right to recover any penalties at all, the evidence shews that the defendants are liable to penalties under the French law; but, quite apart from that, they are liable to penalties here. The International Copyright Act, 1886, s. 2, sub-s. 3, and the Bern Convention, art. 2, refer to the right, not the remedy. So long as the plaintiff has copyright in the country of origin he is entitled to any remedies open to him in the forum in which he sues. Otherwise, as the evidence shews, he could not obtain an injunction. For the same reason, the penalties must be assessed on the English and not on the French scale.

Renshaw, Q.C., and *Harold S. Simmons*, for the publishers, printers, and three distributors. Having regard to the evidence, it is admitted that the publishers are liable to penalties. The printers, being only their innocent agents, are not liable. The clear distinction drawn by s. 6 of the Fine Arts Copyright Act, 1862, between the alternative classes of those who "repeat, copy, &c.," and those who "cause or procure to be repeated, copied, &c.," implies that principals and agents are not both liable to penalties for the same offence. The section cannot have been intended to give an author two or more sets of penalties for one offence. The penalties must be assessed on the French scale, i.e., one penalty for the entire series of pirated copies.

MacSwinney, for the fourth distributor, who had submitted to judgment on agreed terms.

Warrington, Q.C., in reply.

KEKEWICH J. The manner in which the case has been dealt with in the Court of Appeal on the application for an interlocutory injunction leaves only isolated points for my decision. It is admitted that the interlocutory injunction must be made perpetual as to the five pictures entitled to protection in this Court.

The main question is as to the penalties. The plaintiff admits that he cannot sue the distributors, because they do not come within the first branch of s. 6 of the Fine Arts Copyright Act,

1862, but within the second branch, which is prefaced by the words, "knowing that any such repetition, copy, or other imitation has been unlawfully made," and as the plaintiff cannot prove knowledge against them, he cannot sue them for penalties under that section. He contends, however, that he can sue the publishers and the printers, and, subject to the question of law to which I will refer presently, it is not denied that the publishers are liable to him for penalties. But it is denied that the printers are so liable. It is urged that, being only employed by the publishers, and printing for them because they do not do their own printing, they are not liable under the section. But the words of the section will not bear that construction. It imposes a penalty on any person who, not being the proprietor for the time being of copyright in any painting, &c., "shall without the consent of such proprietor repeat, copy, &c., or cause or procure to be repeated, copied, &c., any such work or the design thereof." The printers have repeated, copied, &c., and fall exactly within the words of the section. It is argued, however, that the section points to two alternative classes of persons, namely, those who "repeat, copy, &c.," and those who "cause or procure to be repeated, copied, &c.," and that the publishers fall within the latter alternative. They would be liable if they printed themselves, and the section makes them liable for causing others to print. It is contended that the employees cannot be liable as well as their employers for the same offence. But I ought not to struggle to get out of the words of the section. The Legislature makes no distinction in this branch of the section between those who know and those who are ignorant that they are doing wrong, and the printers, being within the words of the section, cannot escape on the plea of innocent agency.

I now come to the question of law to which I referred. It arises under s. 2, sub-s. 3, of the International Copyright Act, 1886, which provides that, "The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such

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work was first produced." That is agreeable to the Bern Convention of 1887, which provides that "The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin": Scrutton on Copyright, 3rd ed. p. 286. As I understand it, the principle is shortly this: A man cannot sue here in respect of a work published in the country of origin—in this case France—unless he proves that he is entitled to protection in that country of origin; and, vice versâ, a man cannot sue in France in respect of a work published in England unless he proves to the satisfaction of the French Court that he is entitled to sue in England as the country of origin.

But it is a very large step beyond that to say that, the right to sue once admitted, the plaintiff is to have no other remedies in the country in which he sues than he would have in the country of origin. Can it be contended that, sitting here as an English judge, I am only to apply the remedies of the French Court, and, vice versâ, that the French Court can only grant English remedies, however out of place and inapplicable in that jurisdiction?

The remedy by injunction, the first remedy that an English plaintiff seeks, is unknown in France—an excellent example of the impracticability of that construction. As I read the section, "any greater right" means any greater right of protection or of copyright, and the specific provision against a longer term being conferred by the Acts shews that no other limitation was intended. In other words, a copyright owner is only entitled to protection for the term which the country of origin gives him; but everything else is left open. I cannot believe that the Court has to consider the remedies of another country. It would be impossible to work two systems of jurisprudence together in that way. I therefore hold that the plaintiff is entitled to penalties. Then comes the question what penalties I ought to award. Having regard to the large number of copies printed, I think I ought to limit the penalty

per copy as far as possible, and, following the example of Charles J. in *Ellis v. Marshall & Son* (1), I take a farthing a copy, that being the smallest coin of the realm. This will bring the penalties against the publishers and printers to about 100*l.* in each case.

The damages are really nominal. In the case of the publishers and printers I think the penalties are sufficient, and I award no damages against them; as against the distributors, I award 5*l.* in each case.

I have now to deal with the costs. The defendants, including the distributors, who must be taken as innocent infringers, have all denied the plaintiff's title to copyright, and defendants, though innocent, who seek to justify a wrong action must pay costs. As regards two out of the seven pictures, the plaintiff has failed on the ground of indecency, but the defendants are in *pari delicto* in that respect, and, as regards those two pictures, I follow the guidance of the Court of Appeal in such cases as *Newman v. Pinto* (2), and dismiss the action without costs. As regards the other five, the plaintiff has succeeded, and is entitled to costs.

The result is that the publishers, printers, and three distributors must pay five-sevenths of the costs. There will be judgment against the other distributor on the terms agreed. (3)

Solicitors: *McKenna & Co.*; *Braham Barnett*; *Seagrove & Woods*.

(1) 64 L. J. (Q.B.) 757.

(2) (1887) 57 L. T. 31.

(3) As to the minimum penalty, compare the decision of the Irish

Court of Appeal in *Green v. Irish*

Independent Co., [1899] 1 I. R. 386.

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