

## ORIGINAL CIVIL.

*Before Mr. Justice Fletcher.*

LAWRENCE

v.

BUSHNELL.\*

1908

Feb. 24.

*Copyright—Infringement—Illustrations in catalogue—Portion of catalogue protected—Puffing statements—Injunction.*

The plaintiff is not prevented from suing to restrain the infringement of copyright in certain illustrations in his catalogue, by the fact that the copyright in some of the other illustrations in the same catalogue is vested in others.

*Lamb v. Evans*(1) followed.

It is no defence to an action to prevent infringement of copyright in a book, that the book contains inaccurate statements, where the statements are in the nature of puffing statements, unless a strong case of fraud on the public has been made out.

*Macfarlane & Co. v. Oak Foundry Co.* (2) referred to.

## ORIGINAL SUIT.

THIS suit was instituted by Sydney Lawrence carrying on business in London, Calcutta, Bombay and elsewhere as an ophthalmic and general optician under the name and style of Messrs. Lawrence & Mayo, for an injunction to restrain the defendant, Walter Bushnell, who is a rival optician in Calcutta, from infringing the plaintiff's copyright in his catalogue and for incidental relief.

The plaintiff alleged that for many years he had been trading, amongst other places, in Calcutta as a manufacturing optician and that he had from time to time prepared and printed catalogues containing illustrations of selections of his instruments and goods, and published the same in England, and that the catalogues had been duly registered in London under the Copyright Act. He claimed to be the proprietor of the catalogues and the copyright therein. It appears that some time during the year 1907 the defendant caused to be printed, published, issued and circulated a

\* Original Civil Suit No. 487 of 1907.

(1) [1892] 3 Ch. 462.

(2) (1888) 10 C. of S. Cas. (Ss.) 301.

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catalogue containing illustrations purporting to be illustrations of his own goods. The plaintiff charged that a large number of the illustrations in the defendant's catalogue were copies of his own illustrations and were infringements of his copyright. The plaintiff called on the defendant to deliver up to him the copies of the catalogue complained of, which were in his possession or to deface therefrom the illustrations, which the plaintiff alleged to be infringements, but the defendant refused to do so.

The defendant in his defence denied the plaintiff's claim to proprietorship of the copyright in the catalogues or in the illustrations therein, and alleged that with one exception all the illustrations in his own catalogue were exact illustrations of goods sold by him, and he denied that they were an infringement of the plaintiff's copyright. The defendant alleged that the illustrations contained in the plaintiff's catalogue were in common use in the trade all over the world and that nearly the whole of the letterpress in the catalogue was the property of other persons and had been taken by the plaintiff without leave or license, and that in the alternative the plaintiff, if he had ever had the copyright, had transferred all his rights to Messrs. Short & Mason, manufacturers of London, who were the actual manufacturers of the instruments and designs and manufacturers of the original illustrations, the user of which was complained of by the plaintiff. The defendant further alleged that the original wood-cuts, blocks or electros from which the plaintiff's illustrations were reproduced, were designed and manufactured by Messrs. Short & Mason and that the blocks and the copyright in the illustrations thereof were the sole property of Messrs. Short & Mason and had never been the exclusive property of the plaintiff. The defendant contended that it was the universal custom in the trade of opticians and manufacturers of mathematical and scientific instruments for the manufacturers to supply retail dealers, with blocks illustrating the goods sold, so as to enable the retail dealers themselves to illustrate the said goods in their advertisements. He alleged that he received from Messrs. Short & Mason the blocks of his advertisements and the electros (save four), from which his illustrations were produced, and submitted that the copyright in the illustrations was either the property of

Messrs. Short & Mason or the common property of the trade, and their use by himself was no infringement of any right of the plaintiff.

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*Mr. Garth* (*Mr. Morrison* and *Mr. Stokes* with him), for the defendant. The plaintiff's catalogue contained many false statements and misrepresentations calculated to deceive the public. The catalogue represented the plaintiff as the manufacturer of instruments, which had been actually manufactured by others. In consequence the catalogue was not entitled to protection: see *Slingsby v. Bradford Patent Truck and Trolley Company*(1), and *Leather Cloth Co. v. American Leather Cloth Co.*(2). The question is whether the plaintiff is entitled to claim copyright in the whole catalogue.

[Fletcher J. referred to *Petty v. Taylor*(3)].

The plaintiff cannot, because he has a copyright in some illustrations, add others and form a catalogue and then claim a copyright in the whole catalogue: see *Maple & Co. v. Junior Army & Navy Stores*(4) and *Petty v. Taylor*(3). He must either have the copyright in the whole book or he has no copyright at all.

[Fletcher J. Surely, although a man may not have the copyright in certain illustrations in a book, he can still have the copyright in others in the same book.]

There is no case, which holds that a man can have the copyright in one portion of a book and not in another. What is copyright? The right to multiply copies of the book. Before the plaintiff can restrain copies of his catalogue from being issued by another, he must be honest and delete the illustrations in which he has no copyright. The Copyright Act clearly has in view that, of the copyright in each book, there must be but one proprietor. *Stackemann v. Paton*(5), *Jeffreys v. Boosey*(6), and *Marshall v. Bull*(7), were also referred to.

*Mr. Pugh* (*Mr. Sinha* with him), for the plaintiff. Copyright is divisible and can be claimed for a portion of a book only. A man may have, a copyright in a part of a book, although the whole of

(1) (1905) W. N. 122;

(1906) W. N. 51.

(2) (1865) 11 H. L. Cas. 523.

(3) [1897] 1 Ch. 465.

(4) (1882) L. R. 21 Ch. D. 369, 380.

(5) [1906] 1 Ch. 774.

(6) (1854) 4 H. L. Cas. 815.

(7) (1901) 85 L. T. 77.

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the book is not protected: see *Lamb v. Evans*(1) and *Low v. Ward*(2). The plaintiff is entitled to the copyright in his illustrations, in the general scheme of his catalogue, in the arrangement and selection. The defendant cannot publish a catalogue resembling the plaintiff's in all these respects: See *Macmillan v. Suresh Chandra Deb*(3). The facts in *Slingsby v. Bradford Truck & Trolley Company*(4) were very different from the facts in this suit and that case was decided on the facts. Copyright is a creature of Statute, and it is the first edition of a book, provided it is registered, that is the foundation of copyright. Subsequent editions only protect the portions added. The plaintiff is using illustrations, which bear the trade-name of Messrs. Short & Mason. He is still selling their goods and he is entitled to advertise them in his catalogue and to continue using the electros so long as he has the instruments of Messrs. Short & Mason in stock. But the real point in issue is that the copyright in the illustrations belongs to the plaintiff and he, and he alone, is entitled to multiply them. It is no defence to an action for infringement that the book said to have been pirated contains false statements: see Copinger's Law of Copyright, IV edition, pp. 81, 193 and *Macfarlane & Co. v. Oak Foundry Co.* (5).

FLETCHER J. This is a suit by Mr. Sydney Lawrence, trading as Lawrence and Mayo, as manufacturing opticians in London, Calcutta, Bombay and elsewhere to restrain the defendant, who is a rival optician in Calcutta, from infringing the copyright of the plaintiff's catalogue.

The defendant was formerly in the employ of the plaintiff and started business on his own account in 1902. During last year the defendant published a catalogue in regard to which the plaintiff has complained in this action.

The defendant's catalogue is a small book consisting of 43 pages or thereabouts, and what the plaintiff complains of are the illustrations on pages 3, 6, 11, 14, 16, 17, 21, 22, 29, 35, 37, 38, 40,

(1) [1892] 3 Ch. 462.

(2) (1868) L. R. 6 Eq. 415.

(3) (1890) 1 L. R. 17 Calc. 951.

(4) (1905) W. N. 123;

(1906) W. N. 51.

(5) (1883) 10 C. of S. Cas. (Sc.) 801.

and 41 of that catalogue. This is a very substantial portion of the catalogue.

The defences taken to this suit are as follows:—

That Mr. Lawrence is not the proprietor of the copyright in the catalogue. That the matter stands in this way. The plaintiff, as is usual with retailers, obtains from the wholesale manufacturers electro-type blocks of goods manufactured by them and these are published by the plaintiff in his catalogue. That comprises about 70 per cent. of the plaintiff's catalogue.

The remaining portion of the plaintiff's catalogue is that in which he claims the copyright. The electro-type blocks for these illustrations (other than the illustrations which have been copied by the defendant into pages 3 and 6 of his catalogue) were obtained in the manner following: The plaintiff was a friend of an old gentleman named Mr. Short, who carried on business under the name and style of Short & Mason. Some years ago when the plaintiff was dealing with Short & Mason, he caused to be manufactured on his own account and at his own expense certain wooden blocks of instruments manufactured by Short & Mason and supplied to him. Each and every of these instruments has engraved thereon the name of Lawrence & Mayo.

The plaintiff further says that he authorised Mr. Short to use these blocks for the purposes of their wholesale price lists and on the condition that their use would be limited to that.

Now, the successors of Short & Mason have not been able to prove that during Mr. Short's lifetime, except in two isolated instances, any illustration of these blocks appeared in any of their retail customer's books other than Lawrence & Mayo's.

I think that Mr. Lawrence's story is correct that the permission given to Short & Mason was to publish these illustrations in their wholesale price-lists and in those only. To hold that the license given to Messrs. Short & Mason was wider than this, would mean that the plaintiff had undertaken the expense of having these electro-type blocks made for the use of all the retail customers of Messrs. Short & Mason, who might be his rivals in trade. I therefore hold that the license given to Messrs. Short & Mason was a license to use the electro-type blocks for the purpose of their wholesale catalogue only. Then it is said on behalf

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of the defendant that, having regard to the fact that the copyright in 70 per cent. of the illustrations in the plaintiff's catalogue is the property of other persons, the plaintiff cannot have a copyright in the remaining portion.

This contention is, in my opinion, not well founded. Simply because the copyright in some of the illustrations in the plaintiff's catalogue is vested in some other person or persons, does not prevent the plaintiff from suing to restrain an infringement of such of the illustrations as he has the copyright in. The point really seems to be covered by the decision of Chitty J. in *Lamb v. Evans*(1).

Then it is said that the catalogues of the plaintiff are a fraud on the public. Now, it is clear from what has been pointed out by Mr. Garth that the catalogues of the plaintiff do contain statements, which are not in every case strictly accurate. But these I think on the whole may be taken to be in the nature of puffing statements. It is to be noticed that no case of fraud on the public was raised in the written statement. The case in the Court of Session, *Maefarlane & Co. v. Oak Foundry Co.*(2), cited at page 81 of Copinger on the Law of Copyright, seems to me to be material on this point. The note in question says that "it was no answer to an action to prevent infringement of the copyright in a book that its author had in some incidental cases made such mistakes as might involve him in a penalty under the Copyright or Designs Act, and that as the respondent's averments did not raise the case of a book calculated to make money by misrepresentation or which had something connected with its publication against public morals, these averments were irrelevant."

But even if the defendant is entitled to raise this defence now, such defence ought only to succeed on a very strong case being made out. The number of cases, to which Mr. Garth has been able to call my attention, amounts to a very few indeed, and none of them related to the illustrations in which the plaintiff says the defendant has infringed the copyright. It would not be right, simply because Mr. Lawrence has in a few isolated instances overstated in his catalogue the merits of his instruments or led

(1) [1892] 3 Ch. 462.

(2) (1883) 10 C. of S. Cas. (Sc.) 801.

the public to believe that he is the actual maker of some of them, that this suit should fail solely on that ground. Then it is said that Mr. Lawrence is not now dealing with Short & Mason and that it would not be right to allow him to restrain the defendant, who is dealing with that firm, from using these illustrations. The evidence is that the business relations between Short & Mason and the plaintiff only terminated recently, and although the amount of business done by the plaintiff with Short & Mason in recent years is not what it used to be in former times, no case is made out that Mr. Lawrence is advertising these instruments of Short & Mason without having any of them in stock. If any such case can be made out no doubt Short & Mason would take care to protect themselves.

There remains to be dealt with the illustrations on pages 3 and 6 of the defendant's catalogue.

The defendant admits that the illustrations on both of these pages were taken from the plaintiff's catalogue. The defendant says that he gave an undertaking not to publish these, but that in my opinion is not sufficient; he ought on the commencement of this suit to have offered to consent to an injunction with regard to these illustrations. I think the plaintiff is entitled to succeed in the present suit. The defendant must be ordered to deliver up to the plaintiff all copies of his catalogue, which now remain in his possession, and must also be restrained by Injunction from continuing or repeating any infringement of the plaintiff's catalogue.

The defendant must pay the costs of this suit.

*Injunction granted.*

Attorneys for plaintiff: *Morgan & Co.*

Attorneys for defendant: *Leslie & Hinds.*

J. C.

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