Privy Council Appeal No. 27 of 1929.

The Performing Right Society, Limited - - - - *Appellants*

v.

The Urban District Council of Bray - - - - - *Respondents*

FROM

THE SUPREME COURT OF SAORSTAT EIREANN.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH APRIL, 1930.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD HANWORTH.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* the LORD CHANCELLOR.]

On the 16th September, 1926, the Performing Right Society, Ltd., hereinafter called the appellants, issued a writ against the Urban District Council of Bray, hereinafter called the respondents, claiming an injunction to restrain the respondents their servants or agents from infringing the appellants' copyright by performing in public the musical works known as "Venus on Earth" (Lincke) and "Lilac Time" (Schubert, Clutsam). The learned Judge (Johnston J.) decided in favour of the appellants. His judgment was reversed by an order of the Supreme Court (Kennedy C.J. and Fitzgibbon J.) dated the 15th November, 1927. The present appeal is from that order.

"Venus on Earth" was composed by a German national, and was first published in Germany in 1896 or 1897, and the performing right in it was assigned by the composer to the appellants on the 19th May, 1925. "Lilac Time" was the work of an English national, and was composed in the autumn of 1921. It was assigned by the composer to Messrs. Chappell & Co., Ltd.,

on the 31st May, 1922, and the performing right was assigned by Messrs. Chappell to the appellants on the 1st June, 1923.

The statement of claim alleged that the respondents, by their agents or servants, infringed the appellants' copyright by performing in public at their bandstand at Bray an item from " Venus on Earth " and another item from " Lilac Time " and/or by authorising the performance thereof in public without the consent of the plaintiffs.

The respondents had in fact hired a well-known Dublin band known as the St. James's Brass and Reed Band, to give concerts at the said bandstand during the summer season, and the two items in question were performed by them.

The appellants claimed :—

(1) An injunction under Section 2 (1) of the Copyright Act 1911 to restrain the respondents from infringing the plaintiffs' copyright by performing in public such items, and

(2) An injunction under Section 2 (3) of the Copyright Act 1911 to restrain the respondents from permitting the bandstand to be used for the said performance for their private profit without the consent of the appellants.

The defence put all matters in issue and further contended that the Copyright Act 1911 was not in force in the Irish Free State at the material time.

The case raises questions as to the effect of the Treaty between Great Britain and Ireland, the constitution of the Irish Free State and the enactments consequent thereon, and as to the validity and effect of certain sections of the " Commercial and Industrial Property Protection Act " passed by the Oireachtas in 1927. The learned Judge of first instance decided in favour of the appellants and granted the injunction asked for. On appeal to the Supreme Court, that Court directed that notice of the appeal stating the constitutional questions involved should be served upon the Attorney-General, and he was represented by Counsel who appeared and argued on his behalf. The Supreme Court reversed the decision of the Judge of first instance, holding that the Copyright Act 1911 was not in force in Ireland after, at latest, the 31st March, 1922. It is true that the Act of 1927 above referred to, Part VI of which is a copyright Act, purported to repeal the Copyright Act 1911. This repeal was to be retroactive and to operate as from the 6th December, 1921, the date of the Treaty above referred to, but the repeal was not to prejudice rights " acquired before that date." This saving was, however, in the view of the Supreme Court, of no avail to the appellants because though both the works in question had acquired protection in Ireland before the 6th December, 1921, the appellants, who took by assignments executed after that date, had not in the opinion

of the Supreme Court "acquired their right before the 6th December, 1921." And since the Act of 1927 did not otherwise preserve or create copyright except in works first published in the Irish Free State, or of which the authors were citizens of, or resident in, the Irish Free State, the appellants were in their view without any protection at all. On the question of fact, as to whether the respondents had committed a breach of the Act of 1911, supposing that Act to be in operation, the Supreme Court held as follows :—

> "It appears from the evidence and admissions in the case that upon August 11th, 1926, the St. James's Brass and Reed Band performed in a bandstand upon the Bray esplanade a programme of music which included a waltz from 'Venus on Earth' and a selection from 'Lilac Time.' The bandstand was surrounded by an enclosure and a charge was made for admission. An attempt was made by the defence to show that the performance by the band was under a licence from the plaintiffs, but this ground of defence was practically abandoned and the case proceeded upon the basis that if the plaintiffs possessed the copyright they claimed, the defendants had infringed it and were liable accordingly."

Although the Supreme Court made this statement counsel for the respondents, before dealing with the constitutional questions involved, advanced in the forefront of their argument the contention that no constitutional question arose for decision at all because (assuming that the Copyright Act, 1911, applied and determined the rights of the parties) upon the facts of the case, no infringement of copyright had been committed within the provisions of that Act.

Objection was taken by the appellants that such a contention was not open to the respondents—on the grounds (amongst others) that the trial Judge had found infringement upon the facts and that in the Supreme Court, as was stated in the judgment of that Court, "the case proceeded upon the basis that if the plaintiffs possessed the copyright they claimed, the defendants had infringed it and were liable accordingly." The appellants were, however, willing that the point should be open to the respondents upon the terms that certain correspondence which was scheduled as read in the order of the trial Judge should be available for this Board notwithstanding that only one of the letters had been included in the record.

It appeared to their Lordships that it would be impossible for them to attempt to reconsider a finding of fact by the trial Judge without having before them all the materials upon which, according to his formal order, he had relied, and which the Supreme Court must have taken into consideration had they been invited to review the judge's finding of infringement. Accordingly their Lordships while allowing the respondents to raise the contention of no infringement, admitted the full correspondence which is scheduled to the order of Johnston J. and were supplied with copies thereof.

In respect of "Venus on Earth" and "Lilac Time" two infringements by the respondents were alleged, viz., (1) an

infringement under Section 2 (1) of the Copyright Act, 1911, by performing them in public or authorising the performance of them in public without the consent of the appellants and (2) an infringement under Section 2 (3) by permitting the bandstand on the esplanade at Bray to be used for such performance for their private profit without the consent of the appellants.

The respondents, who are the Urban District Council of the town of Bray, Co. Wicklow, engaged the St. James's Brass and Reed Band to play music in the respondents' bandstand on the Bray esplanade for the enjoyment of residents and visitors on various dates in the summer of 1926, one of such dates being the 11th August, 1926. The band were in no sense the servants of the respondents ; they were paid a fee for each visit and certain expenses ; but they submitted for the approval of the respondents the programmes of the music which they proposed to perform on different dates. The programme actually performed on the 11th August, 1926, included " Venus on Earth " and " Lilac Time," and had been approved of beforehand by the respondents. Before such approval had been given the respondents had received from the band's secretary a letter dated the 20th June, 1926, in the following terms :—

> " *Re* your letter of 18th inst., I am instructed by my Committee to inform you that they, on behalf of our Band, have pleasure in informing you that we, the Band, are Members of the Performing Rights Society Ltd., consequently we can perform in Public any or all music in or out of print without fear of infringing of copyright. Enclosed please find a return sheet which I must ' fill in ' after a Band performance irrespective of place or time. Trusting you understand that your Amusement Committee will not be liable for any ' item ' we play as our licence covers our performance anywhere."

In fact the only justification for the statements contained in that letter was the existence of a licence of the 13th July, 1925, which is hereinafter referred to.

The respondents made charges for admission to an enclosure of part of the esplanade round the bandstand and for the purchase of programmes. In the respondents' band account for the 1926 season the payments consist of the sums paid to the various bands engaged by them and the wages of certain attendants employed by the respondents : the receipts consist of gate receipts, and payments for chairs and programmes (amounting to £228 9s. 1d.) and the proceeds of a 1d. rate (amounting to £130). For the season 1926 a surplus of receipts over expenses is shown amounting to some £69. In respect of the performance on the 11th August, 1926, the payments to the band exceeded the takings on the esplanade. As already stated, the performing rights in the two compositions in question were vested in the appellants as to " Lilac Time " by an assignment of the 1st June, 1923, and as to " Venus on Earth " by an assignment dated the 19th May, 1925.

It is necessary now to consider the defences which have been raised on the facts.

As regards the breaches alleged under Section 2 (1) it is suggested (1) that the performance of the two works was authorised by the licence held by the band and that accordingly there was no performance " without the consent of the owner," and (2) that although the band performed the works, the respondents neither performed them nor authorised their performance.

In their Lordships' opinion both these defences fail.

As regards the first defence. this turns upon the true construction of the licence. The authorisation is contained in Clause 1 of the document and is in these terms :—

> " to perform publicly any and every Musical Work for the time being in the Repertoire of the Society and of the Societies or Unions for the time being affiliated thereto for Great Britain and Ireland for occasional performances in the United Kingdom at Flower Shows, Bazaars, Public Balls, and similar entertainments of an ephemeral nature, at premises having no permanent responsible management, being premises where music is not usually performed as a part of a public entertainment, not exceeding seven consecutive days computed from Sunday to Saturday at any one place of entertainment."

In their Lordships' view the seven consecutive days refer to and impose a limit on the performances under the licence, and the licence only extended to performances at entertainments at premises which have no permanent responsible management and where music is not usually performed as part of a public entertainment. Neither the Bray bandstand nor the Bray esplanade can be said to be premises which answer this description. The performances of the two works accordingly took place without the consent of the appellants. It is true that by the letter of the 20th June. 1926, the respondents were told that the band could perform any item without infringement of copyright, but even assuming (what was not proved) that the respondents believed and relied upon the statement. innocence is no defence to a charge of infringement of copyright under Section 2 (1).

As regards the second ground of defence under Section 2 (1), the correspondence and the answer to the sixth interrogatory establish that the respondents approved to be performed by the band. a programme which was performed and which contained the two pieces in question. and accordingly in their Lordships' opinion the respondents authorised the performance in public of " Venus on Earth " and " Lilac Time." Here, again, innocence of infringement is no answer. The offence is complete if (as is the fact) the respondents authorised the performance of a programme which in fact included the two works in question.

In the result the defences to the charge under Section 2 (1) fail, and the appellants have made out their claim to an injunction. Their Lordships, however, think that it would have been more appropriate in the present case to restrain the respondents from authorising the performance of the works rather than to restrain them from performing them.

As regards the breaches alleged under Section 2 (3), the respondents raised three contentions, viz. : (1) That the licence authorised the performances ; (2) that the performance was not for private profit ; and (3) that they were not aware and had no reasonable ground for suspecting that the performances would be an infringement of copyright.

The first point has been considered above : the licence did not authorise the performances in question.

As regards the second point, their Lordships are in agreement with the views expressed by Roche J. in the case of the *Performing Right Society* v. *Bradford Corporation* (MacGillivray's Copyright Cases, 1917–23, p. 309), viz., that although the profit, if any, made would only be applicable in relief of the ratepayers, nevertheless the respondents were acting for their private profit within the meaning of the subsection in that they desired to make a profit out of the concerts so that they should not be a burden on the rates.

As regards the third point, this appears to their Lordships to be a defence which the respondents under the terms of the subsection were bound to prove affirmatively. This they made no attempt to do, and there was no evidence upon which the Court could have found that the defence had been established. The letter of the 20th June, 1926, does not establish it and indeed is not of itself evidence against the appellants at all.

For these reasons their Lordships are of opinion that if the Copyright Act, 1911, applied to the Irish Free State on the 11th August, 1926, and if the judgment falls to be framed in accordance with the rights of the parties as they existed at the date of the suit, then the appellants would be entitled to succeed on this appeal.

Their Lordships now turn to the important constitutional and other questions involved. It is urged by the respondents—

1. That the Board has no jurisdiction to hear this appeal.
2. That the Copyright Act of 1911 was not in force in Ireland after midnight of the 5th December, 1922, or at any rate only to a limited extent as hereinbefore mentioned.
3. That by Section 174 of the 1927 Act passed by the Oireachtas the Copyright Act of 1911 was in fact repealed with no saving of the appellants' rights, and, lastly,
4. That, by the Act of 1929, entitled " The Copyright (Preservation) Act, 1929," passed by the Oireachtas, on the 24th July of last year, this Court is prevented from giving any remedy in respect of past infringements by reason of Section 4, the terms of which are set forth in a later part of this judgment.

On the 6th day of December, 1921, there was concluded an agreement for a Treaty between Great Britain and Ireland, which provided, amongst other things :—

"**Article 1. Ireland** shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

"Article 2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

"Article 18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation."

By Article 17 provisional arrangement for the administration of Southern Ireland during the interval between the 6th December, 1921, and the constitution of a Parliament and Government of the Irish Free State in accordance with its terms, was made. The "Articles of Agreement for the Treaty" were submitted to Dail Eireann, and that assembly by a majority vote passed a resolution on the 17th January, 1922, approving of the Treaty. Upon the 14th January, 1922, the Treaty was submitted to a meeting summoned for that purpose of the members elected to sit in the House of Commons of Southern Ireland, and was passed by the unanimous vote of the 66 members present. The meeting then proceeded to constitute a Provisional Government consisting of eight ministers and of such other persons as might from time to time be determined by the ministers for the time being.

On the 31st March, 1922, by the Irish Free State Agreement Act, 1922, the Imperial Parliament gave the force of law to the "Articles of Agreement for the Treaty" above referred to, as from the date of the passing of that Act. Upon the 1st April, the Privy Council passed the "Provisional Government Transfer of Functions Order," 1922, which recited that "departments of the Provisional Government in Ireland had been constituted by that Government to discharge the functions therein mentioned as assigned to them." This was in accordance with Article 17 of the Treaty above referred to, and the Irish Free State Agreement Act, 1922, and the functions in connection with the administration of public services in Southern Ireland heretofore performed by existing Government Departments and Officers were transferred to the Departments and Officers of the Provisional Government.

On the 27th May, the Provisional Government issued a summons for election of members to serve in a Parliament to meet in Dublin on the 1st July to frame a constitution for the Irish Free State. It is unnecessary to go into further details of historical facts, and it is sufficient to say that the elections were duly held. The Parliament was prorogued from time to time and did not actually meet till the 9th September, and upon the 15th October it enacted the present constitution of the Irish Free State. Upon the 5th December, 1922, the Imperial Parliament passed the Act known as "The Irish Free State Constitution Act," 1922, Session 2, the preamble of which recited :—

> "Whereas the House of Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State, has passed the Measure (hereinafter referred to as the Constituent Act), set forth in the Schedule to this Act, whereby the Constitution appearing as the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State; and whereas by the Constituent Act the said Constitution was made subject to the following provisions, namely: the said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty), which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereto or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and shall do all such other things as may be necessary to implement the Scheduled Treaty."

Section 1 provides that the Constitution set forth in the First Schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be the Constitution of the Irish Free State, and shall come into operation on the same being proclaimed by His Majesty in accordance with Article 83 of the said Constitution, and the Constitution itself is contained in the Schedule to the Imperial Act of Parliament.

It will thus be seen that the Constitution has been passed by the Parliaments in both countries, but it is to be construed with reference to the Articles of Agreement for the Treaty.

The Constitution consists of 83 Articles, the last of which provides :—

> "the passing and adoption of this Constitution by the Constituent Assembly shall be announced as soon as may be and not later than the 6th December, 1922, by proclamation of His Majesty, and this Constitution shall come into operation on the issue of such proclamation."

As above stated, the 1922 Act was passed by the Imperial Parliament on the 5th December, of that year, and upon the next day the proclamation referred to in Article 83 was made and the Constitution came into operation.

Although, therefore, many interesting legal questions may

arise as to the effect of what happened when the Irish Free State became a self-governing Dominion, the solution to many of these will be found by referring to and properly interpreting the Articles for the Treaty and the Irish Free State Constitution.

Their Lordships now turn to the various points above-mentioned. As to the first point—that there is no jurisdiction in the Board to hear the appeal :

The argument advanced by the learned Counsel for the respondents upon this point ranged over a variety of topics and historical incidents, some of which appeared to their Lordships to be hardly germane to the debate. They traced the original jurisdiction of the Privy Council, admitting that anybody in His Majesty's dominions had a right to appeal to the prerogative in the exercise of which His Majesty would be guided by the advice of this Board, but they contended that this right had never been applied to Great Britain or Ireland as they were separate kingdoms to which the doctrine did not apply. In their Lordships' opinion, however, this point has been concluded by the Constitution of the Irish Free State itself. Articles 64 to 69 set up the Courts of the new Irish State, and Article 66 states :—

> "The Supreme Court of the Irish Free State (Saorstat Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever :
>
> "Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

It will be observed that this proviso declares "that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." Although these words would appear to be plain and beyond dispute as applied to a case in which such special leave has been duly given, it was contended by the respondents that the proper reading of the words was that nothing should impair the right, *if any*, of any person to petition His Majesty for special leave to appeal, and that there was no right at any time for any person from Ireland so to petition His Majesty in Council. Appeals from Ireland lay to the House of Lords, and therefore there was nothing for the proviso to operate upon.

Their Lordships think that this is a wrong reading of the proviso, which is found in the clauses of the Constitution which are to be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland, and therefore with reference to Article 2 of the Treaty which provides that the position of the Irish Free State in relation to the Imperial Parlia-

ment and Government and otherwise shall be that of the Dominion of Canada and that the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Accordingly the proviso specifically ensures that the right to petition His Majesty in Council shall subsist by stipulating that nothing shall impair it.

Then it was said that the words " His Majesty in Council " must refer to the Irish Privy Council and not to the Privy Council in England. Their Lordships, by the same reasoning as above, cannot think that the words " His Majesty in Council " as used in the Irish Free State Constitution and in both Acts of Parliament to which it is scheduled mean anything else than the Privy Council on whose advice His Majesty acts in dealing with appeals from the Dominions. Section 10 of the " Adaptation of Enactments Act," 1922, which runs as follows :—

> " Wherever it is provided in any British Statute that any act or thing shall or may be made or done by Order in Council, or by the King (or Queen) in Council, or by Proclamation of the King (or Queen) or of the King (or Queen) in Council, then every such act or thing may be made or done in Saorstat Eireann by an Order of the Governor-General of the Irish Free State upon the advice of the Executive Council of the Irish Free State."

appears to refer only to Orders in Council which in Ireland are now effected by an Order of the Governor-General of the Irish Free State upon the advice of the Executive Council of the Irish Free State. Section 10 has not anything to do with the matter under discussion, nor could it alter the plain meaning of the Treaty between the new Irish Free State and Great Britain.

Lord Haldane, in the case of *Alexander Hull* v. *McKenna* (1926 I.R. 402, p. 404), said :—

> " The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case I need refer to where there has been any modification. In Ireland, under the Constitution Act, by Article 66, the prerogative is saved, and the prerogative therefore exists in Ireland just as it does in Canada, South Africa, India, and right through the Empire, with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes, in Australia."

The Right Honourable Charles Andrew O'Connor, the Master of the Rolls, in the case of *The King* v. *The County Court Judge of Wicklow* [1924], 2 I.R., 139, p. 147, said, discussing Articles 66 and 73 :—

> " If therefore the Courts of the Irish Free State have jurisdiction under the Act (*i.e.*, the Workmen's Compensation Act) for persons living in Great Britain, they have been deprived of a legal right previously vested in them. True, there is a right to petition His Majesty for special leave to appeal to His Majesty in Council. But this is not the same thing."

It is not without interest to observe that in the carefully drawn case of the respondents in this appeal as many as twenty reasons were given why the appeal should not be allowed. The point under discussion does not find a place in any of the twenty reasons so carefully prepared, and emerged for the first time on the second day of the hearing of the appeal.

As to the second point, that the Copyright Act of 1911 was not in force in Ireland after midnight on the 5th December, 1922, or alternatively that it was only in force to such limited extent as protected persons who were citizens of or resident in the Irish Free State, or works first published in the Irish Free State ; it is on this question that the Supreme Court differed from the Court of first instance. The reasoning by which the Supreme Court arrived at their determination was as follows :

The Copyright Act 1911 provides by Section 25 (1) that the Act shall extend throughout His Majesty's Dominions provided that it shall not extend to a self-governing Dominion unless declared by the legislature of that Dominion to be in force therein. The legislature of the Irish Free State has made no such declaration. Section 35 of the Act defines " self-governing dominion " as meaning the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and Newfoundland, but the Supreme Court held that at latest by the 31st March, 1922, when the legislation was passed which gave the force of law to the Treaty between Great Britain and Ireland, the Irish Free State acquired the status of a self-governing dominion and in the words of Fitzgibbon J., who gave the judgment of the Court :—

> " though not one of the self-governing dominions named in the Copyright Act of 1911 because it had not then been in existence at all, the Irish Free State became a self-governing dominion within the terms of the Copyright Act, and from that date the Copyright Act of 1911, by the express terms of Section 25 (1) ceased to extend to the Irish Free State."

Their Lordships are of opinion that this reasoning is not correct. It might be sound if there was no definition of the phrase " self-governing dominion " in the Act, for then any part of the Empire which became a self-governing dominion subsequent to the passing of the Act might enjoy the advantages conferred by the Act upon such territories. Unfortunately, however, for the argument, as above pointed out, by Section 35 " self-governing dominion " is specifically defined and restricted, and the definition does not include Ireland. The proper way to interpret the Act would be wherever the words " self-governing dominion " occur to read in the definition, and it would then be immediately seen that the words would be " Canada, Australia, New Zealand, South Africa and Newfoundland." It is only by reading into Section 35 of the Copyright Act, 1911, words that it does not contain that the Supreme Court arrived at their conclusion.

An interesting, but not very sound, argument was advanced by the learned Counsel for the respondents when he repeatedly

asked the question " what laws ' came over ' to Ireland with the Treaty ? " and he cited *The Mayor of Lyons* v. *The East India Company* (1836 1 Moore P.C.C. 175), where Lord Brougham laid down the principle governing the introduction of the English law into a conquered or ceded country ; and *The Lauderdale Peerage Case* (1885 10 A.C. 692), where Lord Blackburn discussing what laws applied to the early English settlers in America said, on page 744 :—

> " When the province of New York was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges and laws of England. The settlers who go out carry out the law so far as it is applicable to the new situation."

Interesting as these questions are, their Lordships do not think they are relevant to the matter under debate. It cannot be said that the position in Ireland was in any way equivalent to the position in America when the Pilgrim Fathers landed there ; on the contrary, Ireland was a highly civilised country which had for generations been living under a code of law, and it is not a question of what laws the Free State " took over." The Free State had laws and institutions at the time of the alteration in the relationship between the two countries, and moreover it is provided by Article 73 of the Constitution that :

> " Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstat Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

Their Lordships think that it is not a question of what laws " came over " at the critical moment, but that the right view to take is that by virtue of Article 73 all such laws as were in force immediately before the 6th December 1922 continued and remained in force except so far as they were inconsistent with the constitution, and they cannot hold that the Copyright Act 1911 and its provisions were in any way inconsistent with the constitution. In this their Lordships are confirmed by the attitude and opinion of the Irish Parliament itself ; by the Industrial and Commercial Property (Protection) Act, 1927, S. 4, it was provided that " the Acts mentioned in the First Schedule to the Act are repealed " and one of the Acts so repealed was the Copyright Act 1911. The Irish Legislature evidently thought that the Copyright Act was still in existence, and not only so, but having repealed it, by Part 6 of the Act it re-enacted a new code of copyright. Learned Counsel for the respondents, faced with this difficulty, was obliged to argue in the somewhat rhetorical phrase already referred to, that although the whole Copyright Act had not " come over," part " came over " ; namely the part referring to works by persons who were citizens of or resident in the Irish Free State, and to works first published in the Irish Free State, and therefore it was necessary for the Irish Free State Parliament to repeal that part of the Act which had

" come over." The short answer to this argument is that there is no trace of any such idea to be found from first to last in any document, whether Act, Treaty or Constitution, and no facts and no reasons were given to support it. There is no suggestion in Article 73 that a law may continue but in an amended or modified form; on the contrary such laws as are continued by Article 73 are by its express terms continued " of full force and effect." It is not necessary to lay down what laws did or did not continue in force. One instance of a law that did not continue in force may be found in the case of *Wakeley* v. *The Triumph Cycle Company, Limited* (1924 1 K.B.D., p. 214), where it was held that the Judgment Extension Act had ceased to operate in the Irish Free State. This was clearly a case where a new system of judicature having been appointed under the Constitution the Judgment Extension Act could not operate in regard thereto. Their Lordships are therefore of opinion that the Copyright Act 1911 was in force in Ireland after the coming into operation of the Constitution.

Their Lordships now turn to the third contention, that by Section 174 of the Industrial and Commercial Property (Protection) Act, 1927, the Copyright Act 1911 was repealed with no saving of the appellants' rights.

This depends upon the meaning of the word " acquired " in Section 174 (1), which provides as follows :—

> " The repeal of the Copyright Act, 1911, by this Act shall not, save as otherwise expressly provided in this part of this Act, add to, derogate from, or otherwise affect any copyright or other right acquired before the 6th day of December, 1921, under or by virtue of the Copyright Act, 1911, or any Order made thereunder."

The contention of the respondents, which was supported by the Supreme Court, was that as the rights which the appellants were seeking to enforce had been acquired by them only after the 6th day of December, 1921, since they had taken by assignment after that date, the section gave the appellants no assistance. Their Lordships think that the words " rights acquired " cannot be read in a sense which limits them to the acquisition of, and devolution of, title, but they must embrace the inception of the right. There seems to be no possible reason why the rights of an author who has not assigned should remain, while such rights if they have been assigned to an assignee should be lost. It must not be forgotten that the original right is not only a right to the copyright, but a right to assign it.

Their Lordships are therefore of opinion that this contention is incorrect, and that the appellants were right in contending that Section 174 (1) reserved their rights.

Their Lordships now come to the final point, the effect of the Act of 1929. Section 1 provides :

> " Every copyright which was subsisting in the late United Kingdom of Great Britain and Ireland on the 5th day of December, 1921, under or by virtue of the Copyright Act, 1911, or any Order made under that Act, shall

(notwithstanding anything contained in the Industrial and Commercial Property (Protection) Act, 1927 (No. 16 of 1927), but subject to the provisions of this Act), subsist and be deemed always to have subsisted in Saorstat Eireann as fully in all respects, whether as to duration, force, effect, limitation, obligation, or otherwise howsoever, as the same would have so subsisted if the Copyright Act, 1911, and every Order made thereunder and in force on the 5th day of December, 1921, had always been, now were, and hereafter continued to be in full force and effect in Saorstat Eireann."

Section 4 provides :

"Notwithstanding anything contained in this Act, no remedy or relief, whether by way of damages, injunction, costs, expenses or otherwise, shall be recoverable or granted in respect or by reason of an infringement in Saorstat Eireann before the passing of this Act of a copyright by this Act declared to subsist or deemed to have subsisted in Saorstat Eireann."

The language of Section 1 is a little confusing, but translating it from the abstract into the concrete it may be put as follows: The copyright in "Lilac Time" was subsisting on the 5th day of December, 1921, in the United Kingdom. The section may therefore be read "the copyright in 'Lilac Time' shall subsist and is to be deemed always to have subsisted in Saorstat Eireann, as the same would have subsisted if the Copyright Act, 1911, had always been, now were, and hereafter continued to be, in full force and effect in Saorstat Eireann."

The difficulty in the appellants' way is Section 4. By the hypothesis upon which their Lordships are now founding, it must be granted

1. That there was copyright in "Lilac Time" and "Venus on Earth" on the 11th August, 1926, and
2. There has been an infringement.

The Irish Legislature in effect has expressly declared that the copyright in "Lilac Time" and "Venus on Earth" subsists and shall be deemed always to have subsisted in Saorstat Eireann.

But it has also by the above Section 4 enacted that no remedy or relief whether by way of damages injunction costs expenses or otherwise shall be recoverable or granted in respect of or by reason of an infringement before the passing of the Act of any such copyright. A reference to Article 43 of the Constitution may be sufficient to explain the insertion in the Act of some such provision. The Legislature assumed, it would seem, that the decision of the Supreme Court in this case correctly declared the law at the date it was given. The law, however, as so declared by the Supreme Court did not command the approval of the Legislature, which embodied and made effective its disapproval in the declaration in a contrary sense contained in Section 1. But Article 43 of the Constitution provides that :

"The Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission."

With this article in view the Legislature may well have thought it necessary to insert Section 4 in the Statute. That the

law of the Irish Free State, as now appears from this judgment, was in truth at the date of the decision of the Supreme Court what the Oireachtas in this Statute has declared it to be and always to have been cannot abridge the effect of Section 4, which, until repealed, as it may now be, must have full effect given to it by all Courts.

With the provisions of Section 4 in view it remains now for their Lordships to determine the advice which they may properly tender to His Majesty. If they were to advise that the decree of the Supreme Court be discharged, the result might be indirectly to restore the order of the Trial Judge against the respondents. For that reason, although the basis on which the decree of the Supreme Court was rested has commended itself neither to the Irish Legislature nor to the Board, their Lordships are not in a position to recommend that it be discharged altogether.

But the order for payment of costs by the appellants contained in that decree was neither in accord with the actual rights of the parties at its date, nor is it in accord with these rights as now by Statute declared. It is right, therefore, that that part of the order should be discharged, there being nothing in the Act of 1929 which stands in the way of such a direction being given. And such a discharge need not disturb anything actually done under the order, because their Lordships were informed that the costs by the order awarded had neither been paid nor even taxed.

In these circumstances, their Lordships are of opinion that the proper course is to discharge the order of the Supreme Court appealed from in so far as it directs payment of costs, but not further or otherwise, and their Lordships will humbly advise His Majesty accordingly.

Much of the hearing before the Board was taken up with an argument by the respondents on the above questions of fact, in the course of which they set up a case, which, already neglected or abandoned in Ireland, was not in itself, as has been shown, even tenable.

In these circumstances there ought in their Lordships' judgment to be no order as to the costs of the appeal.

In the Privy Council.

THE PERFORMING RIGHT SOCIETY, LIMITED,

v.

THE URBAN DISTRICT COUNCIL OF BRAY.

DELIVERED BY THE LORD CHANCELLOR.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.