

66,1932

No. 18 of 1932.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.I.
29 OCT 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

44937

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ONTARIO.

BETWEEN—FLORENCE A. DEEKS APPELLANT

AND

H. G. WELLS, THE MACMILLAN COMPANY INC.
THE MACMILLAN COMPANY OF CANADA
LIMITED, GEORGE NEWNES LIMITED and
CASSELL & COMPANY LIMITED RESPONDENTS.

CASE

For the Respondents H. G. WELLS, GEORGE NEWNES LIMITED and
CASSELL & COMPANY LIMITED.

1.—This is an Appeal from an Order of the Appellate Division of the Supreme Court of Ontario, dated the 26th of August, 1931, dismissing an Appeal brought by the Appellant from a Judgment given by the Honourable Mr. Justice Raney in the Supreme Court of Ontario, dated the 8th day of September, 1930. App., p. 379 App., p. 366

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2.—The only question raised by this Appeal so far as these Respondents are concerned is whether the learned Trial Judge was justified in coming to the conclusion upon the evidence before him that none of these Respondents had ever committed the acts alleged against them by the Appellant.

10 3.—The Appellant is the authoress of an unpublished literary work called "The Web." The said work consists of a short history of the world, intended to be published in one volume. The desire of the Appellant in writing the said work was "to feature feminism in history" and the Appellant obtained her material for the said work from numerous well-known historical works which have had world-wide publication. App., p. 43 App., p. 43

4.—The said work was written by the Appellant between the years 1914 and 1918, the Appellant obtaining an interim copyright in respect of the said work under the Copyright Act of Canada 1906 Ch. 70 by Registration dated June 28th, 1916. The manuscript of the said work was submitted for publication App., p. 42 App., p. 44

App., p. 46 to the Respondents the Macmillan Company of Canada Limited in August 1918, and the said Respondents kept the said manuscript until either February or April 1919 (the precise date was in dispute at the Trial and is immaterial). The said manuscript was then returned to the Appellant by the said Respondents at her request.

App., p. 193 5.—The Respondent H. G. Wells is the Author of a published literary work called "The Outline of History." The said work (like the Appellant's said work) consists of a short history of the world, but the said Respondent had no intention or desire to stress feminism in history. The object of the said Respondent was to write a universal history to take the place of a national history. 10

App., p. 193 6.—The said Respondent had had such a work in mind for very many years. App., p. 199 The actual writing thereof was begun by the said Respondent in August or September, 1918, and the said work was written in collaboration with (amongst App., p. 229 others) Professor Gilbert Murray, Professor Barker and Sir Ray Lankester. App., p. 256 The publication of the said work was refused by Macmillan & Company Limited of London (which said Company own and control the Respondents the Macmillan Company Inc. and the Macmillan Company of Canada, Limited) and was first published in fortnightly parts by the Respondents, George Newnes, Limited, which said publication commenced in November, 1919. The said work was subsequently App., p. 324 published in two volumes by the Respondents the Macmillan Company Inc., and App., p. 357 also in one volume by the Respondents Cassell & Company, Limited. 20 App., p. 339

7.—The Appellant delivered her Statement of Claim upon the 3rd day of September, 1927, and amended it upon the 10th of May, 1928. The Appellant in her Amended Statement of Claim in substance claimed as against these Respondents that they had infringed her proprietary rights and copyright in the said work "The Web" by publishing and reproducing or by causing to be published and reproduced without her consent substantial parts of the said work "The Web" in the said work "The Outline of History." The Appellant further claimed that the said work "The Outline of History" contained articles and passages copied, taken or colourably altered from the said work "The Web." 30

The Amended Statement of Claim is set out in the Appendix.

App., p. 1 8.—These Respondents delivered Statements of Defence each dated the 22nd day of March, 1928. By their Defences these Respondents (so far as is material to this Appeal) in substance each denied that he or they had any knowledge of the said work "The Web" or of the Appellant's copyright or other rights therein, and denied that he or they had in any way committed any of the acts alleged against them in the Statement of Claim.

App., pp. 10, 12 and 13 The said Statements of Defence are set forth in the Appendix.

9.—Examination for discovery of each of the parties having taken place the case was heard before the Honourable Mr. Justice Raney upon the 30th May and the 2nd, 4th, 5th and 6th of June, 1930. 40

10.—At the said hearing the Appellant made no attempt to prove directly that the Respondent H. G. Wells or any of these Respondents ever had any access

to or knowledge of the said manuscript "The Web," or even that the said manuscript ever left the premises in Toronto of the Respondents the Macmillan Company of Canada Limited. The Appellant relied solely upon the following alleged circumstantial facts in support of her case, viz. :—

- (A) That the said manuscript was in the possession of the Respondents the Macmillan Company of Canada Limited for a sufficient time for it to have been sent to England and returned ; App., p. 29
- (B) That the said manuscript when returned to the Appellant appeared to be more or less worn, with pages turned down ; and App., p. 50
- 10 (c) That a comparison between "The Web" and "The Outline of History" must drive one to the conclusion that the author of the latter had access to the former. App., p. 19

From these alleged facts the Appellant sought to draw the conclusion that the said manuscript "The Web" must have been sent by the Respondents the Macmillan Company of Canada Limited to either the New York Company the Respondents the Macmillan Company Inc. or to the English Company Macmillan & Company Limited and that the Respondent H. G. Wells received the said manuscript through one of the two said sources. App., p. 255

As regards (A) and (B), these Respondents will submit that these allegations 20 by themselves are not evidence against them even if true. As regards (C) these Respondents will submit that in the whole of the voluminous evidence given by the Appellant and her supporting witnesses Professor Irwin, Professor Burpee and Professor Brett there is not a single instance given which even raises the slightest suspicion that the Respondent H. G. Wells or any of these Respondents had any access to the Appellant's work, or made any use thereof. These Respondents will therefore submit that the conclusion sought to be drawn by the Appellant was wholly unjustified.

11.—On behalf of these Respondents and the other Respondents there was strong affirmative evidence given (which said evidence was accepted by the learned 30 Judge at the trial) that the said manuscript never left the custody in Canada of the officials of the Respondents the Macmillan Company of Canada Limited ; that the said manuscript was never received either by the New York Company the Respondents Macmillan & Company Inc., or by the English Company Macmillan & Company Limited, and that none of these Respondents ever at any time had any knowledge of or access to the said manuscript of "The Web."

In addition to other evidence the following evidence was given in support thereof, viz. :—

- (A) The Respondent H. G. Wells, Professor Gilbert Murray and Professor Barker stated definitely that at the time of the writing of the said work 40 "The Outline of History" none of them had ever heard of the Appellant, or knew anything about her said manuscript of "The Web." App., pp. 233
241 and 250
- (B) The Respondents the Macmillan Company of Canada Limited gave evidence that their records showed that the manuscript had never been sent either to the New York Company or to the English Company, and App., pp. 279
and 288

further gave evidence to show that the said manuscript never left their premises in Toronto, except upon one occasion when it was probably taken by one John Cameron Saul upon a journey to Winnipeg for the purpose of reading the same.

App., pp. 276
277 and 283

(C) Sir Frederick Macmillan, the Chairman of the English Company, Macmillan & Company Limited, and H. I. Geikie (who at all material times was in charge of the manuscript books of the said Company Macmillan & Company Limited) gave evidence that the said manuscript was never received by the Macmillan Company Limited in England, and that the said Company had no knowledge of its existence at any material 10 time.

App., pp. 255
and 264

(D) George P. Brett, the President of the Respondents the Macmillan Company Inc., and Harold S. Latham (who at all material times was in charge of the Publication Department of the said Respondent Company) gave evidence that the said manuscript was never received by the said Company ; and

App., pp. 351
352 and 363

(E) Evidence was given both on behalf of the Respondents George Newnes, Limited and the Respondents, Cassell & Company Limited that no officer of these two Companies had any knowledge of the Appellant's manuscript at any material time. 20

App., pp. 325
327, 330, 337,
338, 339 and
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12.—Upon the 27th of September, 1930, the Honourable Mr. Justice Raney delivered Judgment in favour of all the Respondents. In the course of the said Judgment the Honourable Mr. Justice Raney said :

App., p. 368

(A) That there was no evidence that the Appellant's manuscript was sent to England, or that Mr. Wells or anyone else in England knew of its existence.

App., p. 368

(B) That there was no evidence that the Macmillan Company of Toronto or anyone else in Toronto knew that Mr. Wells was writing or had in mind to write a History of the World.

App., p. 368

(C) That the Appellant was not able to point to any paragraph in "The 30 Outline of History" that corresponded verbally with any paragraph in her manuscript, or even to any sentence.

App., p. 374

(D) That the evidence of Professor Irwin (the chief witness relied upon by the Appellant to establish a similarity between the two books) was just solemn nonsense, that his comparisons were without significance and his arguments and conclusions were puerile.

App., p. 376

(E) That the Respondents were not in his opinion called upon to offer any evidence to rebut Professor Irwin's fantastic hypotheses.

App., p. 376

(F) That the evidence of the witnesses called by the Respondents the Macmillan Company of Canada Limited satisfied him of the good faith 40 of that Company, and that no improper use was made by them of the Appellant's manuscript.

App., p. 367

The said Judgment is set forth in the Appendix.

13.—By Notice dated the 6th day of October, 1930, the Appellant gave Notice of Appeal against the said Judgment given by the Honourable Mr. Justice Raney.

The said Notice is set forth in the Appendix.

App., p. 377

14.—The said Appeal was duly heard by the Honourable the Chief Justice of the Second Divisional Court, the Honourable Mr. Justice Riddell, the Honourable Mr. Justice Masten and the Honourable Mr. Justice Orde upon the 13th, 14th and 15th days of May, 1931, and the said Judges gave Judgment upon the 26th day of August, 1931, unanimously dismissing the said Appeal.

App., p. 379

10 The Judgments are set forth in the Appendix.

App., p. 380

15.—In the course of his Judgment the Honourable Mr. Justice Riddell, who gave the principal Judgment, said that he had gone over the alleged common errors and could find none peculiar to the two books in question, and that he could not find anything like proof that an experienced writer like the Respondent H. G. Wells could not write the book he did without the assistance of the Appellant's work. Further, the Honourable the Chief Justice Latchford said in the course of his Judgment that the evidence was convincing that the Canadian Macmillan Company did not at any time part with the Appellant's manuscript.

App., p. 388

App., p. 391

20 16.—These Respondents submit that this Appeal to His Majesty in Council should be dismissed, and that the Order of the Appellate Division of the Court of Ontario should be affirmed for the following amongst other

REASONS.

- (1) Because the Honourable Mr. Justice Raney was right in holding that the Appellant had not adduced evidence in support of her case sufficient to call upon these Respondents or any of the Respondents to answer the same.
- (2) Because the evidence called by these Respondents and the other Respondents established beyond reasonable doubt that none of these Respondents ever saw or knew of the Appellant's manuscript at any material time.
- (3) Because the Judgments of the Honourable Mr. Justice Raney and the Court of Appeal of Ontario were right and ought to be affirmed.

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GILBERT J. PAULL.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF
THE SUPREME COURT OF ONTARIO.

BETWEEN

FLORENCE A. DEEKS ... APPELLANT

AND

H. G. WELLS, THE MACMILLAN
COMPANY (INC.), THE MACMILLAN
COMPANY OF CANADA LIMITED,
GEORGE NEWNES LIMITED and
CASSELL & COMPANY LIMITED

RESPONDENT

CASE

For the Respondents, H. G. WELLS,
GEORGE NEWNES LIMITED and
CASSELL & COMPANY LIMITED.

GEDGE, FISKE & CO.,
10, Norfolk Street,
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Solicitors for the above-named Respondents