

66, 1932

No. 18 of 1932.

# In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1.

29 OCT 1958

INSTITUTE OF ADVANCE  
LEGAL STUDIES

## ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT  
OF ONTARIO.

44938

BETWEEN

FLORENCE A. DEEKS (Plaintiff) - - - Appellant

AND

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

## Case

On behalf of the Respondents THE MACMILLAN COMPANY, INC., and  
THE MACMILLAN COMPANY OF CANADA LTD.

RECORD.

1. This is an Appeal from an Order of the Appellate Division of the Supreme Court of Ontario dated Wednesday the 26th day of August 1931 dismissing the Appellant's Appeal from a judgment dated Saturday the 19th day of September 1930 and signed the 2nd day of October 1930 dismissing the action of the Appellant against these Respondents and the Respondents H. G. Wells, George Newnes Limited and Cassell & Co. Limited. p. 379. p. 366.

2. The Respondent H. G. Wells is the author of a literary work intituled "The Outline of History." The said literary work was first published in England by the Respondent George Newnes Limited in fortnightly parts, the first of which parts was published on the 22nd day of November 1919. p. 324, l. 15.

3. In 1920 the Respondent, The Macmillan Co. Inc (hereinafter called "Macmillans of America") published in the United States of America an edition of the Respondent H. G. Wells' said work. p. 348, l. 10. p. 357, l. 15.

4. On or about the 8th day of August 1918 the Appellant delivered to the Respondent The Macmillan Co. of Canada Limited (hereinafter called "Macmillans of Canada") a typescript of a work of which she said she was the author intituled "The Web" with a view to the same being published by the said Respondent. The said typescript was returned by the said Respondent to the Appellant. There is a conflict of testimony as to whether the said return was made in February 1919 or in April 1919. The latter date is that given by the Appellant and the former date is the date given by the said Respondent; but the Trial Judge held that it was not important to determine which was the correct date and the judgment of the Appellate Division does not even refer to the conflict of testimony on this point. Which date was the correct date is not material to this Appeal.

p. 367, l. 34.

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5. On the 14th day of October 1925 the Appellant brought

#### THE PRESENT ACTION

against all the Respondents and Macmillan & Co. Ltd. a company registered and carrying on business in London. By Order of the Supreme Court of Ontario dated the 21st day of November 1927 service of the writ of summons against the said Macmillan & Co. Ltd. wrongly named The Macmillan Company Limited was set aside; and the PRESENT ACTION proceeded against all the Respondents to this Appeal.

p. 1, footnote.  
p. 18, l. 1.

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6. The Statement of Claim in the action was delivered on the 3rd day of September 1927 and amended on the 10th day of May 1928 pursuant to the Order of the Master dated the 7th day of May 1928. Stated shortly the allegations contained in the Statement of Claim (as amended) were that the Appellant was the author of an unpublished work entitled "The Web" and the owner of the proprietary rights and copyright therein and had obtained an interim copyright of the said work under the Canadian Statute then applicable, and that the Respondents and each of them had infringed the Appellant's proprietary rights and copyright by publishing reproducing exhibiting in public selling exposing for sale and distributing and importing into Canada a work entitled "The Outline of History" of which work the Respondent H. G. Wells was the author and which was alleged to be an infringement of the Appellant's unpublished work "The Web" in that large and substantial portions of the Appellant's work were copied taken or colourably altered and reproduced in "The Outline of History."

p. 1.

p. 2, l. 15.

p. 2, l. 18.

p. 2, ll. 21-40.  
p. 3, ll. 1-9.

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p. 3, l. 14.

7. In addition to the allegation of infringement of copyright made against all the Respondents the Appellant alleged (Statement of Claim Para. 10) that the Respondent Macmillans of Canada (and Macmillan & Co. 40

Limited of London) had illegally used and appropriated the said work of the Plaintiff entitled "The Web" by withholding the same from the Plaintiff after demand was made of them by the Plaintiff for its return, and by exposing and exhibiting the said work "The Web" to the said H. G. Wells.

8. The Respondent Macmillans of Canada by their Defence delivered 16th September 1927 admitted (Para. 4) that they had published and sold the work entitled "The Outline of History" by H. G. Wells, but denied that by such publication and sale they had infringed any copyright of the Appellant. By Para. 5 of the said Defence the said Respondent denied the allegations contained in Para. 10 of the Statement of Claim hereinbefore set out in Para. 7 of this Case; alleged that the Appellant submitted a manuscript entitled "The Web" for perusal by Macmillans of Canada but denied that the said manuscript had ever left their possession until delivered by them to the Appellant; denied that the contents of the said manuscript were ever divulged to any other person and alleged that the said manuscript was returned to the Appellant when demanded. The said Respondent further pleaded (Para. 6) that the said action was improperly constituted by reason of the joinder therein of the other Respondents other than the Respondent H. G. Wells; and by Para. 3 the Appellant was put to proof of the allegations contained in Para. 3 of her Statement of Claim.

9. By Order of the Supreme Court of Ontario dated 24th September 1927 it was Ordered that the Respondent Macmillans of America be at liberty to enter a conditional appearance in the action.

10. The Respondent Macmillans of America delivered their Statement of Defence on the 5th October 1927. By Para. 3 of their said Defence the said Respondent denied that the Appellant either at the time of the publication of the work "The Outline of History" or at any time since acquired a copyright in the Dominion of Canada in her manuscript entitled "The Web," and denied that the Appellant had at any time a copyright in the United States of America in the said manuscript.

By Para. 4 of the Statement of Defence the said Respondent admitted having published and distributed in the United States of America a work entitled "The Outline of History" by H. G. Wells, but denied that the said work contained any passage or passages copied or taken or colourably differing from any work of the Appellant and that in so publishing and selling "The Outline of History" had infringed in any way any copyright of the Appellant.

40 By Para. 6 the said Respondent pleaded that the contract between themselves and the Respondent H. G. Wells for the publication

- p. 6, l. 35. and distribution of the said work "The Outline of History" was made in the United States of America and was in no way connected with any other contract made between the said H. G. Wells and any other of the Respondents; and by Para. 10 pleaded that if they the said Respondent had been guilty of any tort against the Appellant (which was denied) such tort was committed outside the jurisdiction of the Supreme Court of Ontario and submitted that the Supreme Court of Ontario had no jurisdiction in the premises.
- p. 6, l. 19. By Para. 7 the said Respondent pleaded that the action was improperly constituted in that the other Respondents except the Respondent H. G. Wells were joined therein with the said Respondent. 10
- p. 6, l. 25. By Para. 8 the said Respondent pleaded that if (which was denied) the Appellant had a copyright in the manuscript entitled "The Web" the said Respondent was not aware of the existence of the said copyright at the date of the publication by themselves of "The Outline of History," and had no reasonable ground for suspecting that a copyright existed in the said work "The Web."
- p. , l. 30. By Para. 9 the said Respondent pleaded the Copyright Act Revised Statutes of Canada 1906 Cap. 70, and in particular sections 6, 44 and 49 thereof and also the Copyright Act 1921, 11 & 12 Geo. V. Cap. 24 and in particular section 21 thereof. 20
- pp. 8, 9, 10. 11. On the 7th day of December 1927 the Appellant delivered Particulars; but the said Particulars contained no allegation against either of these Respondents.
- p. 3, l. 18. 12. As regards the allegation contained in Para. 10 of the Statement of Claim of exposing and exhibiting the Appellant's work to the Respondent H. G. Wells it is to be observed and the Respondent Macmillans of Canada will submit that inasmuch as the Defendants Macmillan & Co. Ltd. were struck out of the action before the trial the issue raised by the said allegation at the trial of the action was the simple question of fact whether or no the Respondent Macmillans of Canada had themselves exposed and exhibited the Appellant's work to the Respondent H. G. Wells and that no cause of action in this respect would arise on evidence that the said Respondent had sent the said work to Macmillan & Co. Ltd. of London and that the latter had exposed and exhibited the same to the Respondent H. G. Wells. 30
- p. 17, l. 31. 13. The said action came on for trial in the Supreme Court of Ontario before the Hon. Mr. Justice Raney on the 2nd day of June 1930 and subsequent days. At the said trial no evidence was given that the Respondent Macmillans of Canada had ever withheld from the Appellant the Appellant's work entitled "The Web," and the Appellant herself admitted 40
- p. 50, ll. 1-9  
p. 63, l. 22.  
p. 63, l. 29.

in evidence that when she went to the office of the said Respondent to ask for the said work the same was given to her. The Hon. Mr. Justice Raney in his judgment does not notice this cause of action, and The Hon. Mr. Justice Riddell in delivering his judgment in the Court of Appeal after setting out the facts proved said "It would savour of absurdity to base a claim of conversion on these facts and the first of the three causes of action alleged falls to the ground." p. 381, l. 1.

10 14. The allegation contained in Para. 10 of the Statement of Claim above referred to that the Respondent Macmillans of Canada exposed and exhibited the Appellant's work to the Respondent H. G. Wells was, as the said Respondent will submit, completely unsupported by any evidence adduced by the Appellant. The said Respondent desires to point out that during the course of the hearing of the trial before The Hon. Mr. Justice Raney the Appellant continually altered her story as to how she alleged her manuscript got into the possession of the Respondent H. G. Wells and further gave evidence which if true was fatal to this particular cause of action against the said Respondent as will appear from the following:— p. 3, l. 18.

20 (I) Counsel for the Appellant in opening the case said that the Appellant's case was that the Appellant had given her manuscript to the Respondent Macmillans of Canada and that if wrong use was made of it they must be accountable and that the Appellant's manuscript having been entrusted to the said Respondent for a particular purpose was used through them and by the Respondent Wells. Later in his opening of the Appellant's case Counsel for the Appellant said that he did not know that he would be able to get a witness who would say that the said Respondent did send from Toronto to England this manuscript but that he rather sought to make the connection between the said manuscript and Mr. Wells altogether in another direction i.e. that by the expression of the work (i.e. "The Outline of History") he (i.e. Mr. Wells) must have had it before him. p. 18, l. 36.  
p. 19, l. 25.

30 (II) The Appellant in her examination for discovery said that she did not know where her said manuscript was in the interval between the end of July or the beginning of August 1918 and April 1919 i.e. the interval between the date when she gave her said manuscript to the said Respondent and received it back from them. p. 26, l. 18.

40 The Appellant further stated that she had information that her said manuscript was sent by the said Respondent to Macmillan & Co. Limited in England and she further stated that this belief was founded on five reasons (A) that she believed although she did not know where she got the information that all manuscripts except Canadian School Books submitted to the said p. 27, l. 2.  
p. 28, l. 42.

p. 29, l. 1.  
 p. 400, l. 35.  
 p. 29, l. 4.  
 p. 29, l. 6.  
 p. 29, l. 13.  
 p. 26, l. 44.

Respondent had to go to England (B) that the second paragraph of a letter from the said Respondent to the Appellant dated 19th March 1918 implied that her said work had to go to England (C) that from the length of time the said Respondent had been in possession of her said work she thought it might have gone to England (D) from hearsay evidence (E) from reading the Respondent H. G. Wells' book "The Outline of History." While the said evidence was being given by the Appellant, Counsel for the Appellant interposed the following remarks:—"It is not suggested that it was sent to Mr. Wells. We have never suggested that it was sent to him." 10

It is apparent, therefore, that when the Appellant handed over to the said Respondent her said work "The Web," she herself believed and expected that the said Respondent would send it to Macmillan & Co. of London; such alleged sending, therefore, cannot now be complained of as a breach of trust on the part of the said Respondent.

p. 255, l. 9.

(III) During the reading at the said trial of the evidence taken on commission on behalf of the said Respondent of Sir Frederick Macmillan Counsel for the Appellant interposed the following remarks:—"We are not pretending at all to say how it got there" (i.e. to the English Macmillans) "whether from Toronto or from Macmillans of New York." 20

p. 282, l. 13.

(IV) During the cross-examination of a witness one John C. Saul called by the said Respondent Counsel for the Appellant said "We are not confining ourselves to the suggestion that it went to the English Macmillans."

15. At the trial of the action, evidence, both oral and documentary, was adduced on behalf of the Appellant. The only evidence in support of the allegation that the book "The Outline of History" infringed the Appellant's copyright (if any) in "The Web"—assuming in favour of the Appellant that there had been (which there was not) evidence that the said H. G. Wells had previously seen "The Web"—was evidence of alleged similarities between "The Outline of History" and "The Web." The alleged similarities were said to be (A) of plan or treatment (B) of phraseology (C) of inclusion of historical facts (D) of omission or exclusion of historical facts (E) of errors. 30

16. As against the Respondent Macmillans of America no evidence was adduced on behalf of the Appellant that the said Respondent had published or sold any copy or copies of the book "The Outline of History" within the jurisdiction of the Supreme Court of Ontario. The only evidence that any copy of the edition of "The Outline of History" published in America by the said Respondent was published or sold within 40

the jurisdiction of the said Court was the evidence of the Appellant that at some date between the years 1920 and 1925 she bought a copy thereof from the T. Eaton Co. No evidence was adduced as to the circumstances in which the copy so bought by the Appellant came into the possession of the T. Eaton Co. p. 58, l. 4.  
p. 59, l. 28.

17. At the close of the Appellant's case, Counsel for the said Respondent Macmillans of America submitted that no evidence had been adduced of any tort committed by the said Respondent within the jurisdiction of the Supreme Court of Ontario, and that as regards the said Respondent the action should be dismissed at that stage. The trial Judge reserved judgment on this submission until the close of the case. p. 192, l. 3.  
10 p. 192, l. 16.

This Respondent Macmillans of America submits that the aforesaid submission was well founded, and that it having been made to the trial Judge and not decided against them it is still open to them on this Appeal.

18. At the close of the case for the Appellant, and after the submission had been made on behalf of the Respondent Macmillans of America as before stated evidence both oral and documentary was adduced on behalf of all the Respondents. The upshot of the said evidence was that all the Respondents except the Respondent Macmillans of Canada denied ever having seen the Appellant's work "The Web" or any copy thereof, or having heard of the Appellant until years after the publication of the Respondent H. G. Wells' work "The Outline of History." The Respondent Macmillans of Canada adduced evidence, both oral and documentary, to show that they had not sent out of Canada either the original typescript of the Appellant's work "The Web" or any copy thereof. p. 192, l. 3.  
p. 193, et seq.  
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19. Practically the whole of the evidence adduced on behalf of the Appellant was directed to proving from a comparison of "The Outline of History" with "The Web" that the Author of "The Outline of History" videlicet, the Respondent H. G. Wells, must have been in possession of the work "The Web" when he wrote "The Outline of History" and that he copied from it. The whole of the examination on discovery and the cross-examination of the Respondent H. G. Wells was directed to attempting to establish this. p. 193 et seq.  
p. 238 et seq.  
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20. On the 27th September 1930 The Hon. Mr. Justice Raney delivered Judgment dismissing the action against all the Respondents. p. 367.

The said Judgment occupies ten pages of the Record, and seven pages thereof are occupied in the consideration of the evidence of alleged similarities of the two works "The Outline of History" and "The Web" adduced on behalf of the Appellant. pp. 367-376.

40 After dealing at great length with the expert evidence of Professor Irwin called on behalf of the Appellant, the learned Judge said "The extracts I have quoted, and the other scores of pages of Professor Irwin's p. 374, l. 42.

p. 376, l. 1. memorandum are just solemn nonsense. His comparisons are without significance and his argument and conclusions are alike puerile. Like Gratiano Professor Irwin spoke 'an infinite deal of nothing'; his reasons are not even 'two grains of wheat hidden in two bushels of chaff.' They are not reasons at all." Later in his said Judgment the learned Judge said: "The Defendants were not, I think, called upon to offer any evidence to rebut Professor Irwin's fantastic hypotheses, but Mr. Wells and the Macmillan Co. of Toronto preferred to offer evidence."

"Mr. Wells' evidence was a flat denial. He had never seen or heard of Miss Deeks' Manuscript. The evidence called by the Macmillan Company satisfies me of the good faith of that Company and that no improper use was made of Miss Deeks' Manuscript." 10

p. 376, l. 34. The learned Judge ended his Judgment by saying: "This action ought not to have been brought; having been brought it ought to have been discontinued after the examination for discovery, and certainly it ought not to have been brought to trial. As it is, I have no alternative but to give the Defendants their costs."

p. 377. 21. Being dissatisfied with the said Judgment, the Appellant on the 6th October 1930 appealed therefrom to the Appellate Division of the Supreme Court of Ontario. 20

p. 379. 22. The said Appeal was heard on the 13th, 14th and 15th May, 1931, by the Appellate Division of the Supreme Court of Ontario consisting of The Hon. The Chief Justice of the Second Divisional Court, The Hon. Mr. Justice Riddell, The Hon. Mr. Justice Masten, and The Hon. Mr. Justice Orde; and on the 26th August, 1931, by Order of that date, the Appellant's said Appeal was dismissed.

pp. 380-391. The Hon. Mr. Justice Riddell in his Judgment dealt with the case as one in which three causes of action were alleged: (1) that the Appellant placed the Manuscript in the hands of certain of the Respondents and that they withheld it after demand made, (2) that these Respondents illegally used the said Manuscript by exposing and exhibiting it to the Respondent Wells; and (3) that all the Respondents violated her rights of copyright in a book written by the Respondent Wells. 30

p. 381, l. 1. As to the first of the said three causes of action, the learned Judge held that it would savour of absurdity to base such a claim on the facts proved.

p. 381, l. 32. As to the second of the said three causes of action the learned Judge held that on the Appellant's own evidence it was plainly not proved that it was impossible that the contents of the Appellant's Manuscript had become known, if they had become known, through some channel other 40



than the Respondent the Macmillans of Canada; and after dealing with the contention of the Respondents that the Appellant must rely upon the statutory right of Copyright—her common law right being merged therein—the learned Judge held that neither the Respondent the Macmillans of Canada nor the Respondent H. G. Wells had at common law any right to make any use whatever—whether or no, such use was an infringement of statutory copyright—of the Appellant's manuscript, and stated that without deciding that point against the Respondents other than Macmillans of Canada and H. G. Wells, he would discuss the case on the footing of all the Respondents being in the same position in that respect.

The learned Judge then dealt with the argument and the evidence in regard to a comparison of the Appellant's work "The Web" with "The Outline of History" and in connection therewith he said: "Without quoting the alleged maxim of a well-known English Judge as to expert witnesses, I am wholly in accord with the view of the trial Judge as to the weight to be given to this evidence in this case."

The learned Chief Justice—with whose Judgment The Hon. Mr. Justice Masten agreed—also held that the Appeal must fail. The learned Chief Justice was of opinion that the evidence was convincing that the Respondent Macmillans of Canada did not at any time part with the Appellant's Manuscript, but that it remained in the said Respondent's vault until demanded, when it was promptly returned to the Appellant.

The Hon. Mr. Justice Orde also agreed that the Appeal must be dismissed. The learned Judge treated the action as one in which two distinct causes of action were set up, viz., infringement of Copyright and breach of trust.

As to the first the learned Judge was of opinion that the true test was whether if the Appellant's work "The Web" had been published and distributed widely throughout the World an action for infringement of the Copyright therein could have succeeded by reason of the publication of "The Outline of History," assuming that it was proved that the Respondent H. G. Wells had made use of a published copy of "The Web." Applying that test the learned Judge was of opinion that such an action would fail on the ground that infringement of Copyright must, as a general rule, consist of the copying of the words of another in the order in which he has used them and that the use of the same historical facts or of the same ideas is not enough.

23. The Appellant being dissatisfied with the said Order of the Appellant Division applied for an Order admitting her appeal therefrom to His Majesty in Council, and by Order of the said Appellate Division dated 29th October 1931, it was ordered that her appeal to His Majesty in Council therein be admitted, and the present Appeal has accordingly been preferred.

24. It is apparent that the trial Judge and the majority of the Appellate Division either decided or without deciding assumed in favour of the Appellant all questions of law arising in this Action, and that the decisions in favour of the Respondents from which this Appeal is brought were decisions on questions of fact. These Respondents submit that the said concurrent findings of fact in their favour were not only justified by the evidence and findings to which a tribunal might reasonably have come, but that on the evidence any finding adverse to these Respondents would have been perverse and a miscarriage of justice.

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

### REASONS.

- (1) BECAUSE the Appellant failed to prove or to adduce any evidence that the work "The Outline of History" was published, sold, or distributed by the Respondent Macmillans of America within the jurisdiction of the Supreme Court of Ontario.
- (2) BECAUSE the Appellant failed to prove or to adduce evidence in support of the allegations against the Respondent Macmillans of Canada contained in paragraph 10 of her Statement of Claim. 20
- (3) BECAUSE the evidence given by the Appellant disproved the allegations contained in paragraph 10 of the Statement of Claim.
- (4) BECAUSE the Appellant failed to prove that the work "The Outline of History" infringed any copyright or proprietary right of the Appellant in the work "The Web."
- (5) BECAUSE the concurrent findings of fact in favour of the Respondents arrived at by The Honourable Mr. Justice Raney and the Appellate Division were arrived at after due and adequate consideration of all the evidence and were justified by and in accordance with such evidence. 30
- (6) BECAUSE the Judgments of The Honourable Mr. Justice Raney and the Appellate Division were right for the reasons given therein and for other good and sufficient reasons. 40

ARTHUR T. MACMILLAN. 40

**In the Privy Council.**

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**ON APPEAL**  
*From the Appellate Division of the Supreme  
Court of Ontario.*

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**BETWEEN**  
**FLORENCE A. DEEKS** (Plaintiff)  
*Appellant*  
**AND**  
**H. G. WELLS, THE MACMILLAN CO.,  
INC., THE MACMILLAN CO. of  
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LTD., and CASSELL & CO., LTD.**  
(Defendants) - - - *Respondents.*

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## **Case**

On behalf of the Respondents **THE  
MACMILLAN Co., INC., and THE  
MACMILLAN Co. OF CANADA, LTD.**

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