

(1958) 02 MAD CK 0025

In the Madras High Court

Case No : Application No. 684 of 1955 in C.S. No. 54 of 1955

Messes. Macmillan and Company Ltd.

APPELLANT

Vs

The Little Flower Company

RESPONDENT

Date of Decision : 28-02-1958

Acts Referred:

Ceylon Independence Act, 1947 — Section 4, 4(1)
Colonial Laws Validity Act, 1865 — Section 2
Constitution of India, 1950 — Article 366(10)
Copyright Act, 1957 — Section 1(1), 2, 2(1), 24, 24(1)
Evidence Act, 1872 — Section 41, 82, 90
Fugitive Offenders Act, 1881 — Section 12
Government of India Act, 1935 — Section 292
Independence Act, 1947 — Section 18, 18(3)
India (Consequential Provision) Act, 1949 — Section 1(1)
Irish Free State Act, 1922 — Article 372, 73
Literary Copyright Act, 1842 — Section 3
Succession Act, 1925 — Section 213, 228, 270

Citation : (1959) ILR (Mad) 484

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Single Bench

Advocate : V.K. Thiruvengkatachari, General and O.T.G. Nambiar, instructed by, King and Partridge, for the Appellant; K.V. Venkatasubramania Ayyar and K.G. Ramaswami Iyengar and K.R. Krissnaswami, for the Respondent

Judgement

Rajagopala Ayyangar, J.—The relief sought in both these suits is the same, namely, injunction arising out of an alleged infringement of

copyright with other ancillary reliefs such as damages, accounts, etc. The two suits have been tried together because of certain questions of law

which arise in them but as the facts are necessarily different they have to be set out separately.

2. The Plaintiffs are Messrs. Macmillan and Company, Limited, while the Defendants are a firm of publishers carrying on business in Madras under

the name and style of The Little Flower and Company, Madras. The Plaintiffs claimed that they were entitled to the copyright by assignment in

respect of two works (i) The return of the Native by Thomas Hardy and (ii) A collection of stories by Rabindranath Tagore published under the

style of Stories from Tagore. The Return of the Native was prescribed by the University of Madras for the B.A. degree examination, 1956, Part I,

English. The Defendants published in 1954 in Madras without the consent of the Plaintiffs a Guide to the Study of Hardy's Return of the Native.

The other work Stories from Tagore, published by Messrs. Macmillan and Company was prescribed as a text-book for the Intermediate

Examination of the University of Madras also of 1956 for Part I English. In regard to this work also the Defendants published a Guide in 1954.

The complaint of the Plaintiffs" was that these two Guides reproduced substantial parts of the two original works and that though called Guide they

were in reality copies of the original works which competed with their sales of these latter and, therefore, prejudicially affected the Plaintiffs. The

Plaintiffs required the Defendants, by formal notice to cease to publish these Guides, and to render them an account of their sales on the ground

that these constituted an infringement of the copyright vested in them, but when the infringement was denied and the claim of the Plaintiffs

repudiated, the present suit has been filed for enforcing the rights of the Plaintiffs. The reliefs claimed in the suit included the grant of an injunction

restraining the Defendants from printing, publishing or selling the books complained of or other editions thereof and directing the Defendants to pay

damages and render an account of the profits arising out of the Defendants" publications and also the delivery to the Plaintiffs of copies of the

Guides which were now in the Defendants" possession.

3. The Defendants raised the following pleas:

(1) The Plaintiffs based their claim on the Imperial Copyright Act of 1911. The first plea raised was, (a) that Thomas Hardy's work Return of the

Native was first published in the United States of America and was not simultaneously published in any part of His Majesty's Dominions so as to

enable the author to claim copyright under the said Act;

(b) that the Copyright Act of 1911, being a legislation of the Parliament of the United Kingdom, ceased to be operative in India when India

became independent in 1947, and cfortiori after the country attained Republican status in January 1950.

(2) They put the Plaintiffs to proof that they acquired the right to the copyright which Thomas Hardy was entitled, assuming that Thomas Hardy

had rights under the Copyright Act of 1911 and that the rights acquired under the said Copyright Act could be enforced in India after India

became a Republic in January 1950.

(3) They denied infringement by stating that their Guide did not contain the reproduction of any substantial part of Hardy's novel.

(4) They also pleaded that in any event, their Guide was a fair dealing protected by proviso (i) to Section 2(1) of the Copyright Act of 1911.

In regard to Stories from Tagore the pleas of the Defendants were--(a) that the Plaintiffs' right based on the Copyright Act, 1911, being

inconsistent with the Republican status of India ceased to be operative after 26th January 1950 ;

(b) that the Stories from Tagore included in the Plaintiffs' volume were first written and published in Bengali by Rabindranath Tagore and that they

were not translated into English and those translations published within ten years as required by Section 4 of the Indian Copyright Act, 1914. The

Defendants, therefore, urged that there was no copyright in the said translations according to the provisions of Section 4 of the Indian Copyright

Act III of 1914.

(c) The other defences, on the merits, namely, the denial of the infringement based on their Guide being no substantial reproduction of the copyright

work and the plea of fair dealing bringing the Defendants within the first proviso to Section 2 of the Copyright Act of 1911 was the same as was

raised in relation to Thomas Hardy's work.

4. On these pleadings the following points arise for consideration in regard to Thomas Hardy's work:

(1) Does the Copyright Act of 1911 continue to be in force as part of the Jaw of India after India attained Independence in 1947 after it became

Republic when the Constitution came into force on 26th January 1950.

This point is common to both the works involved in this suit.

(2) Was Thomas Hardy's work The Return of the Native first published in America as contended for by the Defendants or was it first published

within His Majesty's Dominions as pleaded by the Plaintiffs ;

(3) Have the Plaintiffs established their title as assignees of the copyright through the author Thomas Hardy ;

(4) Does the Guide of the Defendants published constitute an infringement of Thomas Hardy's novel as containing a substantial reproduction of the novel.

(5) Is the Defendants' Guide protected as being a fair dealing with the Plaintiffs' work ; and

(6) If these issues are answered in favour of the Plaintiffs, to what reliefs are the Plaintiffs entitled ?

5. In relation to the work, Stories from Tagore, the points arising besides the point relating to the lapsing of the Copyright Act of 1911, proof of

Plaintiff's title as assignee, are:

(1) what is the effect of the translation of the stories originally written in Bengali not being made and published within ten years ;

(2) does the Defendants' publication constitute an infringement of the copyright in the Plaintiffs' work ;

(3) whether the Defendants' work is protected as being a fair dealing with the Plaintiffs' work.

6. If these issues are answered in favour of the Plaintiffs The further question for consideration would be to the reliefs to which the Plaintiffs would

be entitled.

7. The first question I shall take up for consideration which lies at the very threshold of the case is as to whether the Copyright Act of 1911, still

continues to be the law of India so as to enable the Plaintiffs to file this suit complaining of infringement of the copyright vested in them in pursuance

of that Act.

8. When the two suits were first taken up for hearing, Mr. Venkatasubramania Iyer, who appeared for the Defendants in Civil Suit No. 54 of

1955, intimated to me that he would raise a preliminary objection to the maintainability of the suit. This is what I have set down as the first point for

determination. The plea in regard to this was somewhat vague and I was unable to appreciate its full import until learned Counsel explained it. The

claim in the plaint was based on the violation of the rights conferred by the Indian Copyright Act, 1914, and the particular argument urged for the

Defendants was that the statutory right sought to be enforced in the suit was virtually-one founded on the United Kingdom Copyright Act, 1911,

and that this parliamentary statute ceased to be part of the law of India after this country attained independence and particularly after the coming

into force of the Constitution in January 1950 with the result that there was at present in India no copyright in published works. In view of the

nature of the contention and the serious results it would have, if upheld, I considered it proper to have the assistance of the learned Advocate-

General and I must express my obligation to him as well as to Mr. Venkatasubramania Iyer for the help I derived from their arguments.

9. In order to appreciate the contention urged by Mr. Venkatasubramania Iyer, it is necessary to advert to the relevant enactments and their

interpretation which was said to lead to the result I have adverted.

10. The statutory basis of the law relating to copyright in India is British Parliamentary legislation to be found in the Copyright Act, 1911, (1 and 2

George V., ch. 41). Its Section 1(1) enacted:

Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term

hereinafter mentioned in every original literary, dramatic, musical and artistic work, if--(a) in the case of a published work, the work was first

published within such parts of His Majesty's dominions as aforesaid; and (b) in the case of an unpublished work, the author was at the date of the

making of the work, a British subject or resident within such parts of His Majesty's dominions as aforesaid ;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self governing

dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, Copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material

form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; if the work is unpublished, to

publish the work or any substantial part thereof ; and shall include the sole right--(a) to produce, reproduce, perform or publish any translation of

the work ;

(b) in the case of a dramatic work, to convert it into a novel or other non-

dramatic work ;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public

or otherwise ;

(d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film or other contrivance by means of

which the work may be mechanically performed or delivered ; and to authorize any such acts as aforesaid.

(3) For the purposes of this Act, publications in relation to any work, means the issue of copies of the work to the public, and does not include the

performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the

construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture

and architectural works of art shall not be deemed to be publication of such works.

11. The works in regard to which copyright is claimed by the Plaintiffs in the suit fall within Sub-Section 1(a) above extracted.

12. The territorial extent of the application of this enactment is to be gathered from Sections 25 to 28 of the Act. Section 25(1) enacted:

This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, 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 either

without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to

adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

Section 25(2) dealt with cases where a self-governing dominion passed legislation relating to copyright, a matter not relevant to the present

context. As u/s 25, the Copyright Act did not extend *proprio vigore* to a self-governing dominion, but only as a result of dominion enactment or

adaptation, Section 26(1) specifically empowered the Legislatures of the self-governing dominions to enact legislation relating to copyright.

Sections 26(1) and (2) ran:

(1) The Legislature of any self-governing dominion may at any time repeal all or any of the enactments relating to copyright passed by Parliament

(including this Act) so far as they are operative within that dominion:

Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal and that, on this Act or any part thereof being

so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend the enactments repealed by this Act shall so far as they are operative in that dominion continue in force until repealed by the Legislature of that dominion.

13. Section 27 is a provision which is of immediate relevance in the present context as it dealt with territories other than self-governing dominions:

The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the

possession, but except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors

whereof were, at the time of the making of the works, resident in the possession and to works first published in the possession.

14. Section 28 dealt with the applicability of the Act to Protectorates which is not relevant and I am, therefore, omitting it from consideration. The

word self-governing dominion which was used in Sections 25, 26, etc., was defined in Section 35(1) thus:

Self-governing dominion means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South

Africa and New Foundland.

15. Section 37(2) dealt with the date when the Act was to come into operation and its material clauses were:

This Act shall come into operation--(a) in the United Kingdom, on the first day of July, nineteen hundred and twelve, or such earlier date as may

be fixed by Order in Council;

(b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;

(d) in any other British possession to which this Act extends on the proclamation thereof within the possession by the Governor.

16. As India was in 1911 a British possession, the commencement of the operation of the Act was governed by Section 37(2)(d) and in

accordance therewith there was a proclamation by the Governor-General in 1912 published in the Gazette of India bringing the provisions of the

Act into operation in India as and from 30th October 1912.

17. The net result of these provisions I shall now summarise. The enactment extended to India as part of His Majesty's dominions other than a

self-governing dominion (Section 25 (1)) and was brought into force by a proclamation of October 1912 u/s 37(2)(d). The Indian Legislature,

however, had a very limited power of modification and addition, conferred upon it by Section 27 limited to procedure and remedies, save in

relation to the works of authors who were residents of India and in regard to their works first published in India.

18. In this state of things the Indian Legislature passed Act III of 1914, and on its enactment the proclamation stood repealed so that thenceforth

the law of copyright in India was to be found in the Imperial Copyright Act of 1911, as modified by the Indian Copyright Act III of 1914. In

passing this enactment the Indian Legislature was exercising the power and the jurisdiction conferred upon it by Section 27 of the Imperial Act.

The preamble to Act III of 1914, set out:

Whereas it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India.

19. Section 3 enacted:

In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the

United Kingdom, is set out in the First Schedule ; the following modifications shall be made.

and then follow the modifications which are set out in five Sub-sections none of which is relevant to the present context. There are also other

modifications as regards procedure, which also are immaterial for the purposes of the present case.

20. There is now no dispute that this state of the law continued till India attained independence on 15th August 1947. The enactment by Parliament

of the Government of India Act, 1935, had made no change in the situation, for by its Section 292:

. . . all the law in force in British India (including laws enacted by the British Parliament and extending to India) immediately before the commencement of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

21. It is, however, the legal consequences of the provisions of the Indian Independence Act of 1947 and the attainment of Republican status on

26th January 1950, that have formed the subject of debate in this case. It is, therefore, necessary to refer to the relevant provisions of these

enactments and to a few others.

22. The Indian Independence Act (10 and 11 Geo. 6, Ch. 30) set up India into an independent dominion as and from 15th August 1947. Section

6 conferred on the Legislature of the newly created Dominion full power to make laws for it including laws having extra-territorial operation. Sub-

Section 2 reversed, as it were, the provision of Section 2 of the Colonial Laws Validity Act, 1865, which ran:

Any Colonial law which is repugnant to any Act of Parliament extending to the colony to which law relates ... is void to the extent of the

repugnancy, and

enacted--

Section 6(2): No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the

ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or

to any Order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or

amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

23. The effect of this, of course, was that legislation by the Indian Parliament altering, amending or repealing any Parliamentary legislation

applicable to India, would be intra vires and this would include such a law as the Imperial Copyright Act of 1911, in so far as it applied to India as

a part of His Majesty's Dominions. Section 6(4) of the Independence Act enacted:

No Act of Parliament of the United Kingdom passed on or after the appointed day (15th August 1947) shall extend or be deemed to extend, to

either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion,

24. This being in line with Section 4 of the Statute of Westminster, 1931. Section 6(5) dealt with orders, rule or other instrument of the United

Kingdom passed after the appointed day and enacted that these shall not extend to the new Dominions, as part of the law of that Dominion. The

provisions I have extracted touched, it would be seen, the future and are not, therefore, of any crucial importance. In regard to laws passed

previously and which still continued to operate, and, therefore, would be the existing law the relevant provision was Section 18, and this in the

context of the present point is, therefore, of vital significance. I shall set out in extenso the Sub-sections on which reliance was placed by the

learned Counsel in this case. They are:

18. (1) In so far as any Act of Parliament, Order in Council, order, rule, regulation or other instrument passed or made before the appointed day

operates otherwise than as part of the law of British India or the new Dominions, references therein to India or British India, however worded and

whether by name or not, shall, in so far as the context permit. So I hold the charge proved.

be construed as, or as including, references to the new Dominions, taken together, or taken separately, according as the circumstances and

subject-matter may require:

Provided that nothing in this Sub-section shall be construed as continuing in operation any provision in so far as the continuance thereof as adopted

by this Sub-section is inconsistent with any of the provisions of this Act other than this section.

25. Section 18(3):

Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed

day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof

until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in

that behalf.

26. The next matter that requires reference is the Constitution of India which

came into force on 26th January 1950. Its legal basis is not the sanction of the United Kingdom Parliament but, as the preamble sets out, it was a Constitution which the people of India gave to themselves. There was thus a radical departure from the past so far as the origin of the Constitution was concerned. This, however, did not mean that the laws which existed in India prior to the Constitution, notwithstanding that they traced their origin to either Indian Legislatures constituted under British enactments or enactments of the British Parliament which either extended of their own force or were made applicable by ancillary Indian Legislation, stood automatically wiped out. Article 372 of the Constitution provided for the continuance in force of existing laws in these terms:

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this

Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein

until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purposes of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the

President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or

expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and

modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.

27. Article 366 (10) defined Existing law thus:

Existing law means any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any

Legislature, authority or person having power to make such a law, Ordinance, Order, bye-law, rule or regulation.

28. In passing, I will only mention that the reference to the law making bodies in the definition is wide enough to include an outside body like the

Parliament of the United Kingdom.

29. I shall now set out certain pieces of post-constitution legislation which appear tacitly to have proceeded on the basis that the Copyright Act,

1911, continued in force after January 1950. Acting in pursuance of the powers conferred by Article 372(2), the Copyright Act of 1914, was

adapted though this was confined to that portion which emanated from the Indian Legislature, that is, the first portion of the enactment and did not

extend to the schedule which contained the text of the Copyright Act, 1911. The next occasion when the Indian Legislature dealt with the

Copyright Act was in the Part B States Laws Act, 1951, Act III of 1951. This enactment extended the territorial operation of the Copyright Act

so as to cover Part B States other than the State of Jammu and Kashmir and finally by the Central Act XII of 1956, the Act was extended to the

State of Jammu and Kashmir as well.

30. The question to be determined ultimately is whether the Imperial Copyright Act, 1911, either as operating *proprio vigore* or as applied by the

Indian Copyright Act, 1914, was a law in force in the territory of India immediately before the commencement of the Constitution, for if this is

answered in the affirmative it would be continued in force by virtue of Article 372(1) and the preliminary objection would have to be overruled.

31. It will now be convenient to set out the argument of Mr. Venkatasubramania Iyer in support of his contention that the Imperial Copyright Act,

1911, scheduled to the Indian Copyright Act III of 1914, lapsed and ceased to apply in India on this country attaining independence. This was

rested on two grounds: (i) that under the terms of Section 25 of the Copyright Act, 1911, itself, its provisions were inapplicable to self-governing

dominions and when India attained the status of a self-governing dominion by reason of the Indian Independence Act, the Copyright Act of 1911

ceased to apply in India, and (ii) a general contention that all Parliamentary enactments which theretofore applied to British India should be held to

be inoperative in India after it attained independence on a proper construction of Section 18(3) of the Indian Independence Act. I shall deal with

these two submissions in that order. The first contention was rested practically on the reasoning to be found in the judgment of the Irish Supreme

Court in the *Performing Right Soc. v. Bray U.D.C.* (1928) Ir.R. 506. The main question debated before that Court was whether the Plaintiffs had

copyright in two musical works *Venus on Earth* and *Lilac Time* which were both composed and published on the European continent. The

Plaintiffs claimed title to the copyright by assignments, dated 1923 and 1925, from the composers and they alleged that in breach of their

copyright, there had been a band performance in public in that Irish Free State for which the Defendants should be held responsible and brought

the action for injunction and damages. Apart from the merits, the defence raised was that the Plaintiffs could claim rights only by virtue of the

Imperial Copyright Act of 1911, but that that enactment ceased to apply in the Irish Free State after the Treaty of 1921 between England and that

State which led to the enactment of the Irish Free State Act of 1922, under which Ireland became a self-governing dominion. The trial Judge,

JOHNSTON J., repelled this contention and decreed the suit. On appeal his judgment was reversed and FITZ GIBBON J., who delivered the

judgment in appeal, held that immediately Ireland attained the status of a self-governing dominion, as expressly recited in the Irish Free State Act of

1922, the Copyright Act of 1911 ceased to apply to Ireland on the very terms of Section 25(1) which enacted that the Act would not extend to a

self-governing dominion unless declared by the Legislature of that dominion to be in force therein. The Irish Free State Act of 1922, contained a

provision (Section 73) identical in language with Article 372 of our Constitution, which continued the operation of the laws then in force until

repealed or amended by the Free State. FITZ GIBBON J., held that there was no scope for the operation of this provision because on the

language of Section 25(1) of the Copyright Act, it ceased to be a law in force in the Irish Free State. The learned Judge got over the statutory

definition of a self-governing dominion in Section 35(1) of the Imperial Copyright Act by the theory that on the Irish Free State attaining the status

of a self-governing dominion, it became automatically added to those enumerated there. Mr. Venkatasubramania Iyer urged that this was a

reasonable construction of the provisions of the Imperial Copyright Act which I should accept as governing the instant case.

32. I am wholly unable to accede to this argument. This decision of the Irish Supreme Court was taken in appeal to the Privy Council and this

construction of Sections 25 and 35(1) of the Copyright Act was expressly dissented from by LORD SANKEY who delivered the judgment of the

Board in *Performing Bight Society v. Bray Urban District Council* (1930) A.C. 377 . Dealing with the reasoning of FITZ GIBBON J., LORD

SANKEY stated:

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 New Foundland. 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.

33. Mr. Venkatasubramania Iyer urged upon me that the decision of the Privy Council, was, as such, no longer binding on this Court and that,

therefore, I was free to overlook or disregard it and reach an opposite conclusion. This may technically be so, but I find myself in entire agreement

with the manner in which LORD SANKEY has construed the provisions. I would also add that the approach to this question by JOHNSTON J.,

the trial Judge, appeals to me as sound and as based upon the application of the correct and well accepted canons of statutory construction as well

as the practical needs of the situation. The learned Judge dealing with the argument that the attainment by Ireland of the new status resulted in the

sweeping away of the private rights of the Plaintiffs said:

It is now argued that this valuable property which the Plaintiffs, or their assignees, enjoyed previously to the recent Governmental changes, was

swept clean out of existence by some malign magic in the Treaty or the Constitution. If this great constitutional change, which hitherto has been

supposed to have affected public rights and national status only, is to be regarded as having interfered with private rights of property, whether real

or personal, whether based on the common or the statute law, and whether owned by persons residing inside or outside this area the matter

becomes one of serious import, affecting not only the persons primarily concerned, but also citizens of the Free State itself who may have acquired

sub-interests in the property in question by way of mortgage, lien, assignment, or trust. It was more or less assumed during the course of the argument that the onus lay upon the Plaintiffs to show that their rights had been preserved by one or other clause of the Constitution. It seems to me, on the contrary, that the onus is on the Defendants to show that the Plaintiffs copyright in these musical pieces has been confiscated or extinguished, expressly or by necessary implication as a result of these political changes. I have not been referred to and I have myself failed to find any article of the Treaty or the Constitution which brought about any such result. I cannot believe that this great constitutional change brought with it, or was intended to bring with it, a juristic vacuum in any department of national activity. On the contrary it is plain beyond controversy that the Constitution is based upon the assumption of the existence in the Free State of a fully developed body of law, regulating all rights and duties within that territory.

34. This is just in line with the accepted view in international law that the emergence of a new state or a change of sovereignty within a State, does not bring about any change in the private rights of its citizens or the law governing such rights. This principle is pithily stated by Hyde in his International Law at page 397:

"Law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty."

35. Quoting Beale, the learned author, says in a foot-note:

There can be no break or interregnum in law . . . Once created, it persists until a change takes place, and when changed it continues in such changed condition until the next change, and so on for ever. Conquest or colonization is impotent to bring law to an end ; in spite of change of constitution, the law continues unchanged until the new sovereign by a legislative Act creates a change.

36. It is the same principle which underlies the following passages from the judgments of the learned Judges of the Court of Appeal in Ireland in

Armstrong v. Wickland (1924) 2 Ir.R. 139. Dealing with Article 73 of the Irish Free State Act (corresponding to our Article 372) PIN J., said:

They were adopted to provide for the interregnum which must elapse between the establishment of the Free State and the putting into active

operation of the powers thereby taken and granted. They were passed so that the business of the State could be carried on smoothly and without a hitch. The essential object was to prevent any change in law or jurisdiction until the Irish Legislature should have considered the changes necessary to be made and should have enacted them.

37. If Section 25 of the Copyright Act, read in conjunction with Section 35(1) of the Act is incapable of rendering that Act inapplicable merely by

reason of India becoming a self-governing dominion, the first argument advanced by learned Counsel must be rejected. In passing, mention might

be made of the provisions contained in the Ceylon Independence Act, 1947 (II Geo. 6 Ch. 7) when that country also attained the same status as

India.

Section 4(1):

As from the appointed day, the Acts and Regulations referred to in the second schedule to this Act shall have effect subject to the amendments

made by that schedule and His Majesty may, by Order in Council, make such further adaptations in any Act of the Parliament of the United

Kingdom of an earlier session than this Act, or in any instrument having effect under any such Act, as appear to him necessary in consequence of

Section one of this Act:

Provided that this Sub-section shall not extend to Ceylon as part of the law thereof.

and the schedule included the following in relation to Copyright:

10. If the Parliament of Ceylon repeals or amends the Copyright Act, 1911, as it forms part of the law of Ceylon, then--(a) except by virtue of

sub-paragraph (b) of this paragraph that Act shall no longer apply in relation to Ceylon as a part of His Majesty's Dominions to which the Act

extends, so however, that this provision shall not prejudicially affect any legal rights existing at the time of the repeal or amendment ;

(b) Ceylon shall be included in the expression "self-governing dominion" for the purposes of Sub-section (2) of section twenty-live and Sub-

section (3) of section twenty-six of that Act (which relate to reciprocity with self-governing dominions having their own copyright law) and the said

Sub-section (2) shall have effect in relation to Ceylon as if that Act so far as it remains part of the law of Ceylon, had been passed by the

Parliament thereof.

38. It would be seen that an alteration in the content of Section 35(1) was made by express legislation and secondly that this was made subject to the preservation of existing rights.

39. The second head of Mr. Venkatasubramania Iyer's argument was rested on the language of Section 18(3) of the Indian Independence Act.

His contention was that the pre-existing law of British India was to be continued as the law of the new Dominion only with the necessary

adaptations and that in this context the adaptation which was necessary, included not merely in the phraseology necessitated by the emergence of

India as a dominion, but also amendments or adaptations which became necessary by reason of the status which India attained. He further urged

that the continuance of the applicability of the Imperial Copyright Act to India was repugnant to the concept of its independence and that

consequently it should be held that the Copyright Act ceased to apply in this country, this being held to be a necessary adaptation within Section

18(3) of the Indian Independence Act. The adaptations referred to in this section, he urged, were not formal adaptations effected by an external

authority but adaptations which Courts make when interpreting or enforcing any law when the same comes up for application before them and that

I should make this adaptation now in applying the law.

40. Whatever be the width of the power of adaptation conferred by Section 18(3) of the Indian Independence Act, I cannot agree that it extends

to enable a repeal to be effected to an existing law particularly one governing rights in property recognized all the world over. India was and

continues to be a member of the Copyright Union and in that sense the conception of copyright is not repugnant to her ideas. If so, I do not see

any principle underlying the suggestion that the Court should so adapt the Copyright Act, 1914, as to eliminate the provisions in the enactment

scheduled to it, merely because the scheduled enactment operates by virtue of legislation of the United Kingdom. On the other hand, it would be in

consonance with sound principles to hold that the Copyright Act, 1911, continues with the modifications effected by Act III, 1914, until the Indian

Legislature chooses to legislate on the subject. I consider the following passage in Copinger on Copyright as describing the position correctly:

The effect of Section 18 of the Indian Independence Act, 1947, appears to be that until some further provision is made, copyright protection both in India and with respect to works originating there remains unaltered.

41. Coming next to the legal effect of India attaining Republican status on the continuance in force of the Copyright Act, 1911, learned Counsel

strongly relied on the decision of the Supreme Court in *The State of Madras Vs. C.G. Menon and Another*, , as supporting the theory that, on

India becoming a Sovereign Republic, all laws enacted by the Parliament of the United Kingdom automatically lapsed and ceased to be operative.

In that case, the Supreme Court had to consider the continued applicability of the Fugitive Offenders Act, 1881, which was applicable to India as

a British possession prior to independence. Section 12 of the Fugitive Offenders Act of 1881 enacted:

This part of this Act shall apply only to those groups of British possessions to which by reason of their contiguity or otherwise, it may seem

expedient to Her Majesty to apply the same.

42. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British

possessions mentioned in the order, and by the same or any subsequent order, to except certain offences from the application of this part of this

Act, and to limit the application of this part of this Act by such conditions, exceptions and qualifications as may be deemed expedient.

43. By orders in Council under this enactment, British India as a British possession was grouped along with Ceylon, Honkong, the Straits

Settlements, the Federated Malaya States, Johore, Kedah and Perlis, Kelantan, Trengannu, Brunei, North Borneo and Sarawak. Within this

group, special provision was made for the backing of warrants for the arrest of offenders. The question which was considered by the Supreme

Court was whether a warrant issued by a Magistrate in Malaya could be executed without any enquiry on an endorsement of a Magistrate in

Madras. Their Lordships answered the question in the negative. The reason was stated by MAHAJAN C.J., who delivered the judgment of the

Court in these terms:

It is plain from the above provisions of the Act as well as from the Order in Council that British possessions which were contiguous to one another

and between whom there was frequent intercommunication were treated for purposes of the Fugitive Offenders Act as one integrated territory and

a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws

prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a prima facie case was made

against him was dispensed with . . .

44. The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the

coming into force of the new Constitution by no stretch of imagination could India be described as a British possession and it could not be grouped

by an Order-in-Council amongst those possessions. Truly speaking, it became a foreign territory so far as other British possessions are concerned

and the extradition of persons taking asylum in India, having committed offences in British possession could only be dealt with by an arrangement

between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation . . .

45. Article 372 of the Constitution cannot save this law because the grouping is repugnant to the conception of a Sovereign Democratic Republic.

46. Before proceeding to consider the applicability or scope of this decision, I might digress to draw attention to another decision concerning the

legal effect of India becoming a Republic on the continued applicability of the Fugitive Offenders Act as between the United Kingdom and India.

This was the point considered in *Re. Government of India* (1952) 1 All. E.R. 1060. It was a motion for the issue of a writ of habeas corpus by a

Pakistani national. The applicant had been charged with having committed forgery in India and while the trial was proceeding in Bombay, he broke

his bail and fled to Pakistan and thence went to England. At the instance of the Government of India, the Metropolitan Magistrate, at Bows Street,

arrested the applicant under the provisions of the Fugitive Offenders Act, 1881, and the motion for the writ was grounded on the contention that

the Fugitive Offenders Act, 1881, ceased to govern the relations between India and the United Kingdom when the former became a republic

though continuing as a member of the Commonwealth. This contention was rejected and the application refused by a Divisional Court, the

judgment being delivered by GODDARD, C.J. The learned Chief Justice referred to the Order in Council of 1904, issued u/s 12 of the Fugitive

Offenders Act, applying the Act to India when it was then a part of the Sovereign's dominions and to the changed status of India a republic and

added that the Act continued to operate by virtue of Section 1(1) of the India (Consequential Provisions) Act, 1949, which provided for the

continuance of all existing laws, until provision to the contrary was made by the authority having power to alter the law--to have the same operation

in relation to India and to persons and things in any way belonging to or connected with India, as it would have if India had not become a republic.

He, therefore, held that the Magistrate had jurisdiction to effect the arrest.

47. I am making a reference to this decision merely for the purpose of showing that it would not be correct to regard that the Fugitive Offenders

Act, 1881, had ceased to operate for all purposes as far as India is concerned. The State of Madras Vs. C.G. Menon and Another, was

concerned with the political ties brought into being between disparate units of the British Empire by legislation of the Imperial Parliament and with

the question as to how far these ties bound a unit whose status had undergone radical alterations. Be. Government of India case (1952) 1 All. E.R.

1060 proceeded on the same lines and but for the parliamentary enactment of 1949, possibly the same result might have been reached. I do not,

however, pause to consider as to what the position in India would be vis a vis the United Kingdom, because of the absence of Indian Legislation

corresponding to the United Kingdom Act.

48. I am unable to see how the decision in The State of Madras Vs. C.G. Menon and Another, or I would add Re. Government of India case

(1952) 1 All. E.R. 1060 helps learned Counsel in the contention that the Copyright Act has ceased to be a law in force on the date of the

Constitution. Notwithstanding that in its origin the Copyright Act, 1911, was a Legislation of Parliament, it was nevertheless part of the private law

of this, country and governed the rights and obligations between its inhabitants in regard to one type of property. In my judgment, the case before

the Supreme Court was not concerned with a law governing property rights of individuals within the country. The Fugitive Offenders Act is really

part of the public law of the State, a matter which would have been the subject

of extradition treaties if the units had been independent countries and it stands to reason that such a law might undergo alterations by reason of radical changes in the status of the concerned parties. The objection that was upheld by the Supreme Court was that the grouping of India with other British possessions could no longer be valid after India ceased to be a British possession. Those principles of public law, however, have no application for the determination of private rights and it would be subversive of all principles of international law to hold that the inter se rights of individuals concerning their property was affected by political changes. Possibly there might be cases where there might be some inappropriateness in applying the provisions of an enactment to new situations arising, it might be, by reason of political changes, though I find it difficult to formulate this with any precision. But such exceptional instances apart, I am unable to find any basis for the argument that the only laws in force at the date of the Constitution and which survived the emergence of India as a Dominion or as a Sovereign Republic were those laws which were enacted by the Indian Legislature and that British Parliamentary legislation theretofore applicable to India automatically ceased to operate on 15th August 1947, or on 26th January 1950. If the argument of learned Counsel were pushed to its full length, it would follow that as the British Indian Legislatures were themselves the creatures of British Parliament, the laws passed by them would have to suffer a similar eclipse with the resultant position that there would be a complete vacuum created so far as statutory law in India was concerned. This logical result is sufficient to show that the argument is unsound and must be rejected.

49. It would be seen that in the above discussion I have not always kept distinct the two dates, 15th August 1947 and 26th January 1950, and would, therefore, add just a word about it. The argument regarding the earlier date was with reference to (i) the effect of Section 25(1) of the Copyright Act, 1911, and (ii) the adaptation u/s 18(3) of the Independence Act, 1947, and as regards the latter that the status of India as a republic rendered all previous parliamentary enactments, theretofore, applying in India inoperative--Relying on the decisions of the Supreme Court in *The State of Madras Vs. C.G. Menon and Another*, , and I have dealt with both these aspects of the question.

50. The learned Advocate-General sought some assistance from the fact that the Imperial Copyright Act was modified and incorporated into the text of the Indian Copyright Act III of 1914, and that, therefore, it must be taken that the enactment scheduled to the Indian Copyright Act must be treated on the same footing as an Indian enactment.

51. I am unable to agree with his contention because the modification was by virtue of the provisions of Section 27 of the Imperial Act and the legal basis upon which the Imperial Act applied in India was not by virtue of its incorporation in the schedule, but by reason of its being a Parliamentary enactment applicable to India. Nor is there much point gained by reason of the Copyright Act of 1914, having been adapted by the adaptation Order of 1950 or by its amendment by Central Act III of 1951 or LXII of 1956, because that adaptation or amendment had reference only to Act III of 1914, though undoubtedly they proceeded on the basis that the Copyright Act, 1911, scheduled to the Copyright Act of 1914 continued still to be part of the law of the country.

52. I, therefore, hold that the rights of the parties are governed by the Imperial Act of 1911, as modified by Act III of 1914. The preliminary objection is overruled and the issue is answered in favour of the Plaintiffs.

53. The next point is in relation to the Return of the Native not having been first published within His Majesty's Dominions.

54. Section 1(1) of the Copyright Act of 1911 which confers a statutory right named copyright is in these terms:

Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's Dominions to which this Act extends for the term

hereinafter mentioned in every original, literary . . . work, if--

(a) in the case of a published work, the work was first published within such parts of His Majesty's Dominions as aforesaid and

(b)

but in no other works,

55. Within His Majesty's Dominions is denned in Section 35(3) in these terms:

For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's Dominions to which this Act extends,

notwithstanding that it has been published simultaneously in some other place

unless the publication in such parts of His Majesty's Dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public . . .

56. The basis for the Defendants' case that the Return of the Native by Thomas Hardy was first published in America without being published in

England is a passage in A. Biographical Study of Thomas Hardy by Richard Little Purdy, a book published in 1954. Referring to the first edition of

Thomas Hardy's work, Return of the Native, the learned biographer says:

The Return of the Native was first printed serially in BELGRAVIA from January to December 1878 . . . The books are here untitled but provided

with brief arguments, not printed . . . The novel was also published serially in America in Harper's New Monthly Magazine from February 1878 to

January 1879 . . .

57. We have no evidence as to when it was commenced or finished but the first seven chapters were written by 28th August 1877 and the first

two books by 8th November and publication was begun in Chatto and Windus' Belgravia in January of 1878. The Return of the Native was

published at 31 Section 6 d. in an edition of thousand copies on 4th November 1878. . . The novel was published in America by Henry Holt &

Co. in their Leisure Hour Series in December 1878.

58. To this the author adds a foot-note:

This edition has sometimes been described as the true first edition of the novel . . . No accession records or deposit copies remain at the Library of

the Congress nor has any evidence survived at the publishers", but the absurdity of the idea (which rests solely on the evidence of advertising end-

papers in one or two copies variously, dated 18th September and 28th October 1878) is apparent from the fact that Holt's "priority claim" was

not published until 2nd December nor was the novel advertised ; as ready before 14th December. The plate for the map, it may be observed was

not in existence by 18th September.

59. The Plaintiffs have filed a photo-stat copy of the title page of the London Magazine, Belgravia, which shows that the Return of the Native was

first published in January 1878, exhibit P-5.

60. The entire case of the Defendants is based upon the correctness of Holt's

Priority Claim which is discredited by Mr. Richard Little Purdy. Mr.

Purdy's book also records that The Return of the Native was first published as a novel in England on 4th November 1878, whereas the first

advertisement in America was only in December 1878. I feel unable to uphold the defence claim that Thomas Hardy's book, Return of the Native

was first published in America. I have omitted to mention the reference made by the Defendants to Carl Webber's work Hardy in America where

also the priority claim of Holt is mentioned but is discounted for the same reasons as have been adduced by Mr. R.L. Purdy. This point is

therefore, decided in favour of the Plaintiffs.

61. The next question for consideration is as to whether the Plaintiffs have established their title to the copyright claim in it. Thomas Hardy wrote

his work, Return of the Native in 1877 and the book was published in 1878. u/s 5 of the Copyright Act, 1911, as also under the earlier law in

force at the date of the publication of the work, Thomas Hardy as the author of the book, was the first owner of the copyright in the work. Section

3 of the Copyright Act, 1911, enacted that the term for which the copyright existed shall be the life of the author and a period of fifty years after his

death. There is a proviso to this section which is not relevant to the present context. Thomas Hardy died on 11th January 1928, and, therefore,

subject to the provisions of this Act the copyright subsisted in Thomas Hardy or his representatives till 10th January 1978. Thomas Hardy,

however, entered into an agreement with Messrs. Macmillan and Company, Limited, on 2nd April 1902, assigning his rights in the work to the firm

by which the assessment was to subsist during the legal term of the copyright. Section 24 of the Copyright Act, 1911, dealt with copyright in the

works which existed before the commencement of the Act and it was by virtue of this provision that the rights conferred by the Act became

attached to the work published before its commencement. Section 24(1) of the Act enacted:

Where any person is, immediately before the commencement of this Act entitled to any such right in any work as is specified in the first

column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substantial right set forth in

the second column of that schedule, or to the same interest in such a substituted

right, and to no other right or interest, and such substituted right

shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had

been one entitled to copyright thereunder:

Provided that--

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the

commencement of this Act has, before that date assigned the right or granted any interest therein for the whole term of the right, then at the date

when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express

agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall

determine ; . . .

62. The previous law governing copyright was the Literary Copyright Act of 1842 and the term of the Copyright was contained in its Section 3

and it extended

till the-life of the author and seven years thereafter or forty-two years from the date of its first publication whichever period was longer.

63. In the case of the book, Return of the Native the right of the author would have terminated seven years after his death, that is, by 10th January

1935, this being the longer period and u/s 24 of the Copyright Act, 1911, the copyright in the work would, on that date, have reverted to the

Thomas Hardy's representatives. There could, therefore, be no claim now under the assignment of 1904.

64. The Plaintiff-company are, therefore, now claiming under an assignment from the legal representatives of Mr. Thomas Hardy. Thomas Hardy

had left a Will, dated 24th August 1922, which was probated in England. The probate is dated 22nd February 1928, and is marked as exhibit P-7

and the Will annexed to it forms part of the probate. Lloyds Bank, Limited, were appointed to be trustees and executors of the Will. After

providing for specific legacies the author bequeathed the residue of his real and personal estate to his children, if any, and to his wife, brother and

sister. Thomas Hardy left no children so that the residuary legatees under his Will were three, viz., his wife, brother and sister. The brother and the

sister who had under the ""Will, each a third of the residuary estate executed a gift deed, dated 19th October 1928, marked as exhibit P-8

conveying their shares to Florence Emily Hardy, the widow of Thomas Hardy. Emily Hardy thus became the owner of the entirety of the residuary

estate and, therefore, the sole legal representative of Thomas Hardy in relation to the copyright in his works.

65. Emily Hardy herself died on 17th October 1937, leaving a Will, dated 10th May 1937, which has been probated, the probate being marked

as exhibit P-9. Emily Hardy in her turn also appointed Lloyds Bank, Limited, and in addition one Irene Cooper ""Wills as joint executors of her

Will. After some pecuniary and specific legacies, the testatrix bequeathed the residue of her estate which included the copyright of which she

became possessed under the ""Will of her late husband, to her sister Eva Anne Dugdale absolutely.

66. On 30th June 1944, a tripartite agreement was entered into between Lloyds Bank, Limited, Irene Cooper Wills, the joint executors of Emily

Hardy's Will of the first part, Eva Anne Dugdale, sister of Emily Hardy to whom the copyright was bequeathed under Emily Hardy's ""Will as part

of the residuary estate of the second and Messrs. Macmillan and Company, Limited, of the third part. Under this agreement Macmillan and

Company, Limited, paid to the executors (as the legal representatives of Emily Hardy), and to Anne Dugdale as the beneficial owner, a sum of

£40,000, in consideration of which the parties of the first and the second parts conveyed to Messrs. Macmillan and Company, Limited

the sole right to print and publish in any form in any part of the world the whole or any part of all or any of the literary works specified in the first

schedule.

67. One of the works so included in the schedule was the *The Return of the Native*. If the Plaintiffs are able to establish their title so far, there

could be no dispute that they would have the right to maintain the suit.

68. The contentions raised by the Defendants on this part of the case were two-fold.

69. They objected to the reception in evidence of exhibits P-7 to P-10 as not properly proved according to law and contended next that even

assuming that these documents were held proved the Plaintiffs were precluded

from asserting any rights in the copyright, because they could do so only as the representatives of Thomas Hardy and Emily Hardy and as the wills of these two individuals had not been probated in India, Section 213 of the Indian Succession Act was a bar to the enforcement of such rights.

70. First in regard to the formal proof of the documents ; this may be considered under two heads: (i) the two probates which have been marked as exhibits P-7 and P-9 and (ii) the other two documents inter vivos, exhibits P-8 and P-10. As regards the first two documents, viz., the two probates, I have no hesitation in holding that they are being certified copies of the probates granted by the Probate Division of the High Court of England are admissible in evidence u/s 82 of the Evidence Act. I do not consider it necessary to extract any portion of that section. I hold that exhibits P-7 and P-9 are sufficiently proved by the production of the certified copies of the two probates and, therefore, they will be admitted in evidence.

71. In regard to exhibit P-10, the tripartite agreement between the executors of Emily Hardy, the beneficiary under Emily Hardy's will, and Messrs. Macmillan and Company, Ltd., there is formal proof before the Court in the shape of the evidence of an employee of Messrs. Macmillan and Company, Ltd., who has identified the signature of Morris Macmillan in the tripartite agreement. I, therefore, hold that exhibit P-10 has been formally proved and is accordingly admitted in evidence. The only difficulty is about exhibit P-8 which is dated 19th October 1928. It is not a document, over thirty years old, to attract the provisions of Section 90 of the Evidence Act and, therefore, if formal proof were insisted on there has to be proof of the signatures of the parties to the document. No such proof was adduced. learned Counsel for the Plaintiffs submitted that what was produced before the Court was the original of the agreement, that there could be no dispute about the genuineness of the document and that if formal proof of the signatures was insisted on, he would make a request for an adjournment to enable a commission to be issued to witnesses in England to comply with his formality. I could not properly refuse this request and when I expressed myself so, learned Counsel for the Defendants did not persist in his attitude and, therefore, the document has been permitted to be marked as proved.

72. The other question that arises on this part of the case is as regards the effect of Section 213 of the Indian Succession Act on the claim of the

Plaintiffs. This section enacts--

(1) No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India has granted probate

of the will under which the right is claimed, or has granted letters of administration with the will of with a copy of an authenticated copy of the will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans ; and shall only apply in the case of Wills made by any Hindu,

Buddhist, Sikh or Jaina where such wills are of the classes specified in Clauses (a) and (b) of Section 57.

73. Neither the Will of Thomas Hardy nor of his wife is covered by Sub-Section 2 and hence it is Sub-section i that applies to the present case.

One point urged by Mr. Nambiar, learned Counsel for the Plaintiffs was that Lloyd Bank, Ltd., in the case of Thomas Hardy's Will and Lloyd

Bank, Ltd., and Irene Cooper Wills in the case of Emily Hardy's Will were not functioning as executors but as trustees under the Will and that,

therefore, this section did not bar the assertion of rights by the Plaintiffs. There is no substance in this contention because in the Will, the

executorship is in reference to their function to carry out the dispositions and they are referred to as trustees for the legatees in regard to such

property as remained in their hands for the latter's benefit. The designation of the executors as trustees does not, therefore, affect the applicability

of Section 213 of the Succession Act.

74. If the executors were precluded by Section 213 from asserting their rights to the copyright, Messrs. Macmillan & Co. as assignees from those

executors, would stand in no better position.

75. Mr. Nambiar referred me to Section 41 of the Indian Evidence Act which enacted that an order of a competent Court in the exercise of

probate jurisdiction so rendered is relevant when the existence of the legal character or the title of any such person is relevant and urged that the

probate granted by the High Court of England clothed the executors with title to the copyright of the deceased which should be recognised by

Indian Courts and that this would enable the Plaintiffs to maintain the suit

without the production of a probate granted in India.

76. This argument is also without substance and it proceeds on a misapprehension of the relative scope of Section 41 of the Evidence Act and

Section 213 of the Indian Succession Act. Section 213 of the Succession Act enacts a rule of evidence and constitutes the procedural requirement

of the *lex fori*. In considering this it is necessary to advert to Section 228 of the Succession Act--

When a Will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of State whether within or beyond the

limits of India and a properly authenticated copy of the Will is produced, letters of administration may be granted with a copy of such copy

annexed.

77. The title which the Will and the probate confer on the executor which is rendered relevant evidence u/s 41 is given effect to by the provision in

Section 228 of the Indian Succession Act and on the production of the English probate, what might be termed an ancillary probate is directed to

be granted with the Will annexed to enable such executors to assert their rights to the estate of the deceased in India.

78. Section 213 of the Succession Act, however, would certainly not apply to a case where, under the provisions of the Indian Succession Act, a

person who asserts his rights as a legatee or as an executor is disabled by law from obtaining a probate from any Court in India. This section is

primarily concerned with Wills of Indian nationals and those executed in India. Section 228 of the Succession Act is an extension of the rule and

enables the granting of an ancillary probate in the case of foreigners. It stands to reason that Section 213 of the Succession Act cannot be

construed as insisting on the production of a probate which no Court in India is competent to grant in regard to a Will for which probate has been

granted by a foreign Court of competent jurisdiction. If this were the proper construction of Section 213 of the Succession Act, and I do not

entertain any doubt as to the correctness of this position, the foreign probate would be sufficient proof of title of the legatee or the executor and

admissible in evidence u/s 41 of the Evidence Act in proof of that right. The question, therefore, comes back to this. Could any competent Court in

India have granted an ancillary probate of these two Wills u/s 228 of the

Succession Act ?

79. In this context the relevant provision is Section 270 of the Succession Act which enacts:

Probate of the Will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court if

it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate as the case may be, at the

time of his decease had a fixed place of abode, or any property, movable or immovable within the jurisdiction of the Judge.

80. Section 270 merely copies the principle of the English ecclesiastical law that it was the presence of the personal property of the deceased that

was the foundation of jurisdiction to grant probate. It is not necessary to cite many of the English decisions because the point is too well settled for

controversy. I will only refer to *Evans v. Burrell* (1859) 4 S.W. & Tr. 185 where SIB C. CRESSWELL stated:

It does not appear from the affidavits that the deceased left any property in this country. Unless he did so there is nothing upon which the grant

asked for would operate and I should have no jurisdiction to decree letters of administration to be granted.

and the observations of Sir J. P. Wilde in *The Goods of Thomas Hannah Tucker* (1864) 3 S.W. & T.R. 583:

The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this

case, the deceased had no property within this country and the Court has, therefore, no jurisdiction.

81. No doubt the Legislature has intervened in England and has enacted the Administration of Justice Act, 1932, under which the Court is vested

with power to grant probate even when there was no property within its jurisdiction. But neither this enactment nor the decisions on its construction

are of much relevance to the question now under consideration.

82. The first question, therefore, is whether the copyright which is the subject-matter of this suit could be deemed to be an item of the personal

property of the deceased situated within this country. In the case of tangible movable property, the problem is quite simple and such property will

be deemed to be situated where it is found but when we pass from the region of

tangible to the other class of choses in action or other species Of
intangible property the question ceases to be simple.

83. Dicey in his Conflict of Laws (Sixth edition, page 303) expresses himself thus:

In most instances the situation of property, i.e., whether it is or is not situate in England does not admit of doubt; but it sometimes happens that

there is a real difficulty in affixing to property especially where it consists of debts or other choses in action, its due local position . . .

Of the latter it was formerly said *mobilia sequuntur personam*--that they had no locality. But this view is not generally accepted in English , law. In

the determination of the locality property assignable to the different kinds of personalty which have been owned by a testator or intestate, the High

Court is in the main guided by maxims derived from the practice of the ecclesiastical tribunals. These maxims, as modified by statutory enactments,

are based on two considerations; the first is that property so far as it consists of tangible things must in general be held situate at the place where at

a given moment it actually lies ; the second is, that property may in some instances, and especially where it consists of debts or choses in action, be

held to be situate at the place where it can be effectively dealt with, . . . and so goods lying in a warehouse in England, are to be held situate in

England and debts due from debtors resident in England, such as deposits in banks, are also to be held there situate ; *Commissioners of Stamps v.*

Hope (1891) A.C. 476, 481, *Royal Trust Co. v. Attorney-General for Alberta* (1930) A.C. 144, 150 . . . But where a simple contract debt may

be held in law to be situate in more than one place, the Court will consider in which place it is more properly payable under English law though a

foreign Court might take a different view. If the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding. A

cause of action in contract or tort is situate where action may be brought upon it.

Patents and trade marks are on the same principle as shares in Companies. Patents and trade marks are situate where they can be transferred.....

The inference, however, must not be drawn that because no personal property of the deceased would be liable to the payment of probate duty if

such duty still existed, therefore, there is nothing belonging to the deceased so situate in England as to give the Court jurisdiction to make a grant ;

and this for two reasons: (i) *English Scottish and Australian Bank, Limited v.*

Inland Revenue Commissioners (1932) A.C. 238 probate duty was chargeable only on property situate in England at the time of the deceased's death; (ii) the character of the thing or the property on the situation whereof the jurisdiction of ecclesiastical Courts depended and the jurisdiction of the High Court mainly depends. The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, e.g., a debt owing to the deceased. The jurisdiction of the Court depended on there being in England some thing--if the word thing be used in a very wide sense--for the dealing with which the representative of the deceased required a grant. These two things may, but they may not, coincide . . .

Further, revenue cases are not always safe guides as to the situs of property from the point of view of jurisdiction because it is natural for revenue purposes, for instance, to take debts as situated where the creditor is.

84. It might be noted here, that Dicey in his treatise has not specifically dealt with the situation of such an intangible asset as copyright.

85. Cheshire in his Private International Law animadverts upon the habit of classifying movables into tangible and intangible things and prefers to

draw a distinction between choses in possession and choses in action. Dealing with the situation of choses in action, with reference to the question

of the jurisdiction to grant administration--testamentary or intestate--the learned jurist says:

Except in the case of tangible movables there may be some difficulty in establishing the situation of property especially in the case of choses in

action such as debts and shares. For the purposes of jurisdiction to make a grant of probate or administration, however, it has long been settled

with respect to choses in action and title to property that judgment debts are assets where the judgment is recorded . . . and simple contract debts,

where the debtor resides at the time of the testator's death A share of stock, transferable only by registration is situated not in the place where

the certificate happens to be, but in the country where the shares effectively be dealt with as between the shareholder and the company, i.e., in the

country where registration must be effected.

86. Again I have to mention that Professor Cheshire either does not express any opinion as to the situs of the right of copyright.

87. The question, therefore, as regards the jurisdiction of grant probate--whether a local Indian situation could be attributed to the right to

copyright such as is sought to be enforced in these suits, has to be determined on principle without the assistance of any decision or even the

opinions of authorities on Private International Law.

88. Prima facie three matters appear to me to be relevant in this connection:

(i) the fact emerging from the right in question originating from Indian Legislation in the shape of the Copyright Act, III of 1914 ; (ii) the general

principle which fixes situs with reference to the jurisdiction where the right could be enforced; and lastly (iii) the analogy furnished by comparable

intangible rights such as patents and trade marks. (As to patents see English and Scottish and Australian Bank, Ltd. v. Inland Revenue

Commissioners (1932) A.C. 238, 249, 256.)

89. If the intangible right whose situs has to be determined is a statutory right and owes its existence to a statute enacted by a particular country, it

appears to me to be consistent with principle to attribute to it a situs within the country which conferred that right. Normally the territory of a State

enacting the law conferring that right would be the limit within which that law and that right could operate. No doubt that right might be recognised

elsewhere, for instance, by reciprocal treaties or by reason of membership of International Conventions, but still the fountain of authority for

recognition outside the territorial area of the State conferring the right would be the sovereign act of the other State. If, therefore, the copyright

sued on in the present case could be held to originate in an Act of the Indian Legislature, I feel no doubt whatsoever that that right should be

deemed to be situate in India for the purpose of enabling an ancillary probate to be granted u/s 228 of the Indian Succession Act. The position,

however, in this regard is complicated by the fact that the right to copyright is traceable to the United Kingdom Copyright Act of 1911, which

proprio vigori extended to the entirety of His Majesty's dominions and possessions including India. However, some little power was reserved to

the Legislatures of these possessions. No doubt u/s 27 of the Act, the Legislatures of British possessions were enabled to modify or add to any of

the provisions of the Act in its application to the possession but with the rider however, that except so far as such modifications and additions

related to procedure and remedies they should apply only

to works the authors whereof were at the time of the making of the work, resident in the possession, and to works first published in the possession.

90. The copyright involved in the present case was, therefore, not (until 1947) subject to any modification by the Indian legislation except as to procedure and remedies.

91. Does then the fact that the Indian Legislature by its Act III of 1914 appended the Copyright Act of 1911 to its enactment, by itself make any

difference in the position ? This question can be answered only in the negative, because of the basic assumption underlying Act III of 1914. The

preamble to the Indian enactment runs:

Whereas it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to (province of India).

92. Again the opening words of Section 3 run:

In the application to (the provisions) of the Copyright Act (a copy of which Act . . .) is set out in (the First Schedule) the following modifications

shall be made.

93. Words to a similar effect are to be found in the opening portions of Sections 4 and 5. The entire foundation of the Act III of 1914, therefore,

was that the United Kingdom Copyright Act, 1911, operated in India of its own force and the Indian enactment was merely designed to modify its

application to this country in regard to a few details. Whatever might be the position in those cases where the right sought to be enforced is one

which has been modified by the Indian Act, I do not consider that in cases where there is no such modification it could be predicted that the right

was under an Indian enactment. There is, therefore, no point gained to the solution of the present problem by reference to Act III of 1914, and if

the situs of a statutory right has to be determined by reference to the situs of the Legislature which granted or created the right, it should be deemed

to be a United Kingdom right and therefore, not in any sense an Indian right.

94. I shall now take up for consideration the second of the matters I have set out above, namely whether a local situation could be attributed to

that jurisdiction where the right could be enforced. It would seem that one of the tests, if not the main, formulated for determining the locus of the

chose in action--which stems from practical considerations, is to find out the place or the country in which the right to the chose could be

effectively enforced. For instance, in the case of simple debts, the residence of the debtor is treated as the situs of the debt because it could be

recovered by an action in that jurisdiction. A similar rule based on a similar principle is applied to determine the situs of share in companies:-

Applying this principle to the type of right now under consideration the position would appear to be somewhat as follows: The right having

originated under a statute of the United Kingdom and particularly by the publication in the United Kingdom of the work by an author resident in

England, the right of copyright undoubtedly had its locality in the United Kingdom as the place which gave its birth ; but with the United Kingdom,

so to speak, as its focal point, it extended beyond that territory and covered territories not subject to the jurisdiction of the Courts of the United

Kingdom. Any infraction of the right, committed outside the United Kingdom could be enforced only in those Courts which had jurisdiction over

the area where there was an injury to that right. In such a situation, is there any inappropriateness in attributing to such a right, a situs in each area

to which the right extended ? Though in the absence of assistance in the shape either of direct authority or even dicta covering the point, I naturally

hesitate to venture any answer with certainty, I should consider on the principle flowing from the rule of effective enforcement, that the question

must be answered in the affirmative. Just by way of illustration, let me take a case where there is a simple debt jointly payable by several debtors,

each of whom resides in different jurisdiction at the time of the death of the deceased. The application of the accepted principles ought to lead one

to attribute a multiple situs to the chose in action, and to deny any simple local situation to such a debt. This, therefore, points to the correctness of

the conclusion which I am inclined to draw in the case of rights such as we have in the present case, extending in more than one country.

95. Again let us take a case where there is a threat to the right to copyright or a denial of that right in India. Undoubtedly a suit for injunction or for

a declaration of the right could be filed against the person who threatens or denies the right and I am unable to conceive of the possibility of such a

course without attributing a local situation to that right.

96. Earlier I have set out instances of intangible rights like patents and trade marks as affording an analogy for reaching a decision in relation to copyright. The basis of the rule in those cases is to be found in the two principles which I have set out, i.e., the right being traceable to the legislation of a particular country and the principle of effective enforcement of rights to which I have referred. The third matter, is really an application of the other two which I have already discussed. The analogy, therefore, supports the approach that I have made to the question now under consideration.

97. The result of this discussion, therefore, leads me to attribute a local situation in this country to the right which is sought to be enforced in this suit. If the right had such a local situation it would undoubtedly be property within jurisdiction in regard to which an ancillary probate could have been obtained u/s 228 of the Indian Succession Act.

98. Upto now I have proceeded on the basis that jurisdiction in the matter of granting ancillary probate or as it is termed in England the resealing of probate granted by a foreign Court is exactly identical with that, in relation to the grant of the primary probate of a Will of the deceased. This, however, does not appear to be the correct position, the jurisdiction to reseal being apparently wider than in the other case. "What I have in my mind is the decision in the goods of Sanders (1900) P.D. 292 by the eminent probate judge, GORRELL BARNES J. The judgment consists merely in a note that resealing was ordered. The facts of the case are as follows:- One Frederick Sanders bequeathed to his brother a sum of ₹½ 256 and in a stated contingency provided that the legacy was to be paid to the personal representative of his brother. The brother was domiciled in Victoria, Australia and died there. The Supreme Court of the Colony of Victoria granted Letters of Administration to the widow of the deceased, Jane Sanders. The brother left no estate in England. A probate was granted by the Courts in England in regard to the will left by Frederick Sanders the testator. When the widow of the brother who had obtained Letters of Administration in Victoria applied for the payment of the sum of ₹½ 250 as the personal representative of the deceased, the executors of Frederick Sanders required that they should have a proper discharge for the payment, and for this purpose an application was made for the

resealing of the colonial grant obtained by the widow. The objection to the grant was that the intestate brother left no estate in England and that

consequently English Courts would have no jurisdiction to reseal the colonial grant. The Court however, allowed this to be done.

99. I am, therefore, satisfied that the Plaintiffs should have obtained an ancillary probate u/s 228 of the Succession Act, and consequently their

failure to produce such a probate is a bar to the enforcement of their right in the suit u/s 213 of the Succession Act. The suit in relation to the claim

for infringement of the copyright in Thomas Hardy's *Return of the Native* must, therefore, fail.

100. I shall, however, proceed to record my findings on the other matters in controversy in relation to the Plaintiff's claim. First as to whether the

Defendant's *Guide* constitutes an infringement of the copyright in Thomas Hardy's work. Section 2(1) of the Copyright Act of 1911 enacts

Copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole

right to do which is by the Act conferred on the owner of the copyright. I shall consider the provisos which follow this provision and their

applicability a little later.

101. Section 1(2) constitutes the provision where the sole right which is referred to in Section 2(1) is contained. This provision reads:

Copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.

102. The rest of the provision is not relevant and I, therefore, omit it.

103. In the light of these provisions the question for consideration is whether the Defendants' work, the *Guide* constitutes a reproduction of the

Plaintiffs' publication or any substantial part thereof. Bearing in mind that what is concerned in the present case is the right to literary copyright, I

might make a few observations as regards the scope of copyright protection in regard to such works. As this is well-settled by authority and is not

really in controversy before me, I shall merely extract a passage from Copinger on Copyright (ninth edition, page 143), dealing with the matter:

What is protected is not original thought or information but the original expression of thought or information in some concrete form. Consequently it

is only an infringement if the Defendant has made unlawful use of the form in

which the thought or information is expressed. The Defendant must, to be liable, have made substantial use of this form ; he is not liable if he has taken from the work the essential idea, however original, and expressed the idea in his own form or used the idea for his own purpose.

104. The next question is as regards what constitutes a substantial part of the work the reproduction of which constitutes an infringement of the sole right conferred on the owner of the copyright. The question is one of fact to be determined with reference to each case, but there is no controversy as regards the principles to be applied for determining what is substantial. Copinger puts the matter thus:

It is unusual for infringement to consist of an exact reproduction of the whole of the Plaintiff's work. Consequently difficult questions arise as to the amount of copying and the degree of resemblance necessary to constitute infringement. First as to the amount to copying The Act of 1911 uses the expression substantial part in defining the sole right to reproduce, . . . The expression substantial is not and was not, however, defined and some guidance as to its meaning may be obtained from the pre-1911 decisions . . .

It was decided that the quality of the piracy was frequently more important than the proportion which the borrowed passages bore to the whole work.

MORTON J., stated in *Johnstone v. Bernard Jones Publications, Ltd.* and *Beauchamp* (1938) I. Ch. 599.

" Of course it is clear that the word substantial does not denote the bulk or the length of extracts."

LORD COTTENHAM in *The Case of Bramwell v. Halcomb* (1836) 3 My. & Cr. 737, 738 said: "When it comes to a question of quantity it must

be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not

only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.

105. The test ultimately seems to be Is there an appropriation or more appropriately misappropriation, of the labour of another in the matter of

expression ? Before passing from this topic it is only necessary to add that an infringement of copyright is in the nature of an invasion of a right to

property and, therefore, the intention of the infringer is immaterial provided there is infringement.

106. In the written statement, two matters were set out in answer to the complaint that the Defendants' Guide constituted an infringement of the

Plaintiffs' copyright work. The first was that there was no substantial reproduction and the second that the Defendants' work constituted fair

dealing and was, therefore, protected by the proviso to Section 2(1) of the 1911 Act.

107. I shall first deal with the question as to whether the work constitutes an infringement in the sense of its being a substantial reproduction of the

Plaintiffs' copyright work, because it is only when there is such a substantial reproduction that there is need to invoke the proviso, for the proviso

proceeds on the assumption that but for it the infringement would have been established.

108. The questions to be considered are: (i) is there a reproduction of a substantial part of the copyright work quantitatively; and (ii) what is the

quality of the work abstracted and does it constitute a valuable portion of the copyright work? First as to quantity: The Return of the Native as

published by the Plaintiffs occupies four hundred and eighty pages of print and the Defendants' Guide which is intended for enabling the students

appearing for the University examination to understand Thomas Hardy and his work and be in a position to answer questions in relation to the

work, covers two hundred and eighteen pages and consists of five portions-- Introduction, Chapter summaries, Topical Essays, Character sketches

and Critical and General Essays. There is no complaint, however, of any infringement of any portion of the copyright work except with regard to

what is termed Chapter summaries. This occupies pages seven to one hundred and twenty-six in the Defendants' Guide. These chapters are

divided into six portions just as in the original and each chapter is headed almost similarly as in Hardy's original work. Though learned Counsel for

the Plaintiffs laid some emphasis on the headings of these chapters, I do not consider them as of much importance.

109. Learned Counsel for the Defendants has made a rough Calculation of the words contained in the two works. The original work was stated to

contain 1,64,000 words while the Defendants' Guide 42,000 words. learned Counsel stated that out of the 42,000 words only 4,000 words had

been alleged to have been copied from the original. I might here mention that I suggested to the learned Counsel for the Plaintiffs that he might

mark these portions of the original which were stated to have been copied in the Defendants' work, number them serially and indicate the passages

with the corresponding numbers in the Defendants' work and it was as a result of the calculation made on the basis of this marking that the learned

Counsel for the Defendants submitted to me the above computation. learned Counsel for the Defendants also pointed out that there were several

pages of the copyright work particularly those after page one hundred and eighty-two where there was very little copying. I have examined the

marked portions in the two works, exhibits P-1 and P-1 (a) very closely and I have reached the conclusion that a substantial part of the work had

been reproduced so as to constitute an infringement. I consider that the test afforded by comparing the number of words copied from the original

with the total number of words in the original work is somewhat misleading in the present case. What the person who prepared the Guide

apparently did was to eliminate all those passages from Hardy's work which contained colourful descriptions either of the countryside or touching

the characters in the novel, and copied only those portions which were essential for the narration of the story. The method adopted appears to

have been to incorporate the language of the original to narrate the story, leaving out those portions which constituted what might be termed purple

patches in the work. This seems almost to fall within the description of the type of abridgement referred to by LORD ATKINSON in *Macmillan*

and Co., Ltd. v. Cooper (1923) ILR 48 Bom. 308 (P.C.).

the text of which consists of a number of detached passages " selected from an author's work often not contiguous but separated from those which

precede and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the

appearance as far as possible of a continuous narrative.

110. I shall endeavour to make my meaning clear by reference to a few passages selected at random and which I shall set out in parallel columns:

Copyright work. Defendants' Guide.

Page 146- Page 45½

Your first outing will be "" They all agreed to have their

Monday night I suppose ?"" first outing on Monday night in Mrs. Yeobright's house. She

"Yes. At Mrs. Yeobright's, ... was getting up a bit of a party as it was the first Christmas that her

" She has got up a bit of a party, son Clyrn had been home for a because 'tis the first Chrtstmas long time.

that her son Clym has been home men prepared to leave the When Eustacia heard that Mrs. premises and Eustacia returned Yeobright was giving a party she to her fireside. She was wished that her family had been immersed in thought, but not for on friendly terms with her so that long. In a few minutes the lad she might now have had an Charley, who bad come to ask opportunity- of being invited. But permission to use the place as that was not to be she was returned with the key to the immersed in thought. kitchen. Eustacia heard him

and i ½

The lad was surprised. He In a few moments the lad Char- entered the front room not ley who had come to ask for without blushing for he like many, per-mission to use the place had felt the power of this girl's returned with the key. face and form. Eustacia heaid him in the passage and called out to him.

She pointed out to a seat by the Charley was surprised that fire and entered the otherside of Eustacia should call him into her the chimney corner herself. room. He blushed in the presence of Eustacia for he felt the power of the girl's face and

form.

I will next take a passage at page 266 of the copyright work where the learned Counsel for the defendants pointed out that the copying was less substantial.

Copyright work. Defendants' Guide.

Page 266 1/2 Pope 75 1/2

" O yes I once heard of an Italian" Wildeve said that he knew of who sat down at a gaming-table an Italian who sat at the gaming with on y a louis (that is a foreigntable with only one sovereign in sovereign) in his pocket. He his pocket. He said that he played i on for twenty-four hoursplayed for twenty-four hours and won ten thousand pounds, and won ten thousand pounds. stripping the bank he played Then he said that there was against. Then there was another another man who first lost a man who had lost a thousand thousand pounds and had gone pounds, and went to the broker"sto a broker to sell all his stook next day to sell stock, that he so that he might pay the debt. might pay the debt. The man to The man to whom he owed whom he owed the money went money went with him in a with him in a hackney coach ; haokney coach and to pass the and to pass the time they tossed time they tossed who should who should pay the fare. The pay the fare. The ruined man ruined man won and the other won and the other was tempted was tempted to continue the to continue the game and they game and they played all the played all the way. At the end of way. When the coachman the drive the coachman was stopped he was told to drive asked to drive home back, horre again; the whole thousand because the thousand pounds pounds had been won back by had been won back by the man the man who was going to sell. " who was going to sell.

Ha-na splendid ! exclaimed
Christian," Go on-go on ! These stories produced an
extraordinary impression on
"The THERE WAS A man of Christian. He asked if there
London who was only a waiter atwere any other examples.
White"s club-house. He began Wildeve said that there was a
playing first half crown stakes, man in London who was only a
and then higher and higher till he waiter at a club. He Said that he
became very rich, gob an began playing with half-crowns
appointment in India and rose to stakes at first then higher and
be the governor of Madras; ½ higher till he became very rich,
got an appointment in India and
Wonderful !woderful ! rose to be the Governor of
Madras. This again was a
And once there was a
wonderful story. Then Wildeve
youngman in America who
said that there was a youngman
gambled till he had lost his last
in America who gambled till he
dollar. He staked his watch and
had lost his last dollar. Then he
chain; and lost as before ; staked
staked his watch and chain and
his umbrella; lost again; staked
lost them. Then ho staked his
his hat; lost again; staked his
umbrella and lost it. He staked
coat; and stood in his shirt-
his hat and lost it his coat and

sleeves ; lost again. Began taking
lost it. At last an onlooker gave
off his breeches, and then a
him a trifle for his pluck. With
looker-on gave him a trifle for his
this he won. He won back his
pluck. With this he won. Won
coat, won back his hat, won
back his coat, won back his hat,
back his umbrella, watch,
won back his umbrella, his
money and went out a very rich
watch, his money and went out of
man. This story was indeed
the door a rich-man.
wonderful. Christian was
tempted to see how lucky he
" O 't is too good-it takes away
himself might be by trying
my breath ! Mr. Wildeve I think I
another shilling with Mr.
will try another shilling with you,
Wildeve. Wildeve agreed to
as I am one of that sort ; no
oblige Christian,
danger can come out and you can
afford to lose

Copyright work. Defendants' Guide.

Page 290½ Page 81½

O ! it was too humiliating to be Eustacia said that she was humili-

asked if he had received any "liated by being asked whether money from him or encouraged she had received money from him or something of the sort. Mr. Wildeve and encouraged him or something of the sort.

I don't exactly know what"..... Clym was surprised how his mother could have asked such a "How could she have asked you question. He was sure that there that ? She did.

must have been some meaning in it but Eustacia would not go any Then there must have been some further or give any explanation.

meaning in it. What did my She said that she was feeling mother say besides ?... I would miserable and asked him to take rather not say. It may have been her to Paris and go on with his the fault of circumstanoes, which old occupation. Clym, however, were awkward at the very least.

said that had quite given up that 0 Clym I cannot help expressing, idea, that he had made no secret .it.

of it and that it was mutually

This is an unpleasant position that agreed between them that you have placed me in. But you Eustacia should not press for it. must improve it. Yes, say you will

for I hate it all now. Yes take me
to Paris and go on with your old
occupation, Clym !

"But I have quite given up that
idea," said Yeobright with
surprise.

Page 291½ Page 81½

Next day the mystery of the The next day the mystery of the
guineas was explained. Thomasinguineas was explained. The man
paid them a hurried visit, and paid a hurried visit and Clym's
Clym's share was delivered up to share was given to him by her
him by her own hands. Eustacia own hands. Eustacia was not
was not present at the time. present at the time. Clym now
understood that this was what

Then this is what my mother his mother meant by asking
meant, exclaim Clym. ""Thomasin, Eustacia whether she had
do you know that they have a received the money from
bitter quarrel ?"" Wildeve.

And so it goes on almost to the end.

111. I will take only two more passages almost at the end of the book.

Copyright work-. Defendants" Guide.

Page 390½ Page 105½

I confess that I wilfully did not "" She confessed that she did
undo the door the first time she wilfully shut the door the first
knocked but I should have time Mrs. Yeobright came, but
unhas-tened it the second. If I she said that she thought Clym
had not thought you had gone to himself would have gone to open
do it yourself. When I found you it the second time. When she
had not found that the had not opened it
she herself went to the door but

Mrs. Yeo-bright was gone by
that time. That, she said was the
extent of her crime. Now she
said that she wou"d leave him for
ever and ever. Clym asked
whether Wiideve was the man
who was in that house with her
on that day. Eustacia said that
she cou"d not tell. She proposed
to dress and leave the place for
B I opened it but she was gone. ever.
That is the extent of my crime-
towards her. Best natures
commit bad fau"ts sometimes,
don"t they ? I think they do.
Now I will leave you for ever
and ever.
Tell all and I will pity you. Was
the man in the house with you,
Wideve ? I cannot tell, she said
desparately through her sobbing.
Don"t insist further. I cannot tell
I am going from this house. We
cannot both stay Lere. You need
not go. 1 will go. You can stay
here. No, I will dress and then I
will go.

112. Except that what occurs in the original in the first person is converted in the Defendants" Guide into a narration in the third person it will be seen that the Defendants" work is a copy of the passages from the Plaintiffs"

work. The last instance that I shall take it as regards a passage which stretches from pages 429 to 435 just to show the method employed.

Copyright work. Defendants' Guide.

Page 429½ Page 116

But the least part of Thomasin The rain still continued and while was in the house for her heart Clym was going Thomasin was being at ease about the little girl mentally following him on his upstairs. She was mentally journey. After some time she felt following Clym on his journey .that she could not stand the . . She hastily fetched the infant, suspense. She thought that it wrapped it up, cloaked herself would perhaps be better to go as before and shovelling the back, again instead of staying at ashes over the fire to prevent Clym's, So she hastily took up accidents went into the open air.the infant in her arms, wrapped . . O .ving to her baby who it as before and started once somewhat impeded Thomasin's again in the rain. But as it was view forward and distracted her dark and her mind distracted mind she did at last lose the she lost the track. She

5

track This mishap occurred whenwandered hither and thither in she was descending an open the hope of coming to the right slope about two thirds home. track. But at length she only Instead of attempting by reached a hollow in which she wandering hither and thither, she could see Diggory's van. Sure hopeless task of finding such a enough the reddleman was mere thread she went straight onthere. Thomasin thought that she trusting for guidance to her could take a little rest in that van general knowledge. and went up to it.

At length Thomasin reached a But there was none in the van. hollow and began to discern She stood doubting whether she

through the rain a faint blotted should get in or not. Just then radiance,.. "O Diggory !don't Venn came from somewhere. He you know me" taid she. But of asked whether she had not been course you don't wrapped up crying and whether she had not like this, what do you mean ? I gone that way just then taking have not been crying here and I her for Eustaoia. But when he have not been here before. Whatcame near and saw Thomasin he is it he continued when they was vary much surprised. He stood within. learned from her that she had lost her way from Blooms-End

I have lost my way coming fromand promised to lead her home Blooms-End and I am in a great immediately. He told her that he hurry to get home. Please show heard the rustling of a woman's me as quickly as you canĩ½. clothing only five minutes earlier That is strange. I was lying downand thought that he heard here asleep about five minutes sobbing or crying. Evidently it ago with the door shut to keep must have been Eustacia and she out the weather when the must have been going to brushing of a woman's clothes Wildeve. Thomasin, therefore over the heath-bushes just asked Diggory Venn to take her outside woke me up. (for I don'tas soon as possible. Venn took sleep heavy) and at the same the baby into his arms, so that time I heard a sobbing cry from they might walk faster. When the same woman. they were still about one-fourth of a mile from the Inn, Thomasin wanted Diggory to walk fasterĩ½.

I must go all the way said In despa"r she wished to rush as Vann. There is a quag between early as possible but the us and that light and you will reddleman told her that there

walk into it up to your neck was a quag between them and unless I take you round.... that light and that they should walk round if they should avoid

"Yes" answered Venn, swerving it. So Venn led her while asking round in obedience ; and after a while what exactly the great pause, " I wish you would tell trouble was but Thomasin did me what this great trouble is. I not have the heart to divulge the think you have proved that I can matter to Venn.

be trusted".

113. I consider that both by reason of the quantity as well as the nature of the matter extracted, the Defendants' Guide contains a substantial reproduction of the Plaintiffs' work so as to constitute it an infringement u/s 2(1) of the Act.

114. Learned Counsel for the Defendants urged that one at least of the prime tests as to whether the reproduction is substantial would be to consider whether the Defendants' work was intended to or did compete with the sale of the Plaintiffs' copyright work and that in the present case there could have been no such competition. This was based upon the fact elicited in the evidence of the witness for the Defendants in Civil Suit No.

215 of 1954 which though not strictly evidence in this suit was treated by both sides as proof of the general practice in such matters, that the college authorities insist on the students studying the original and not be content with getting up the matter in the several guides which were

published as aids to students preparing for the examinations. I have no doubt that both in High Schools and Colleges, lecturers and professors do

insist upon their students studying the prescribed text-books and not merely cram guides or notes, but this, however, in my opinion, does not assist

the Defendants very much in this case. In the first place the effect of the Defendants' publication as a competitor with the Plaintiffs' copyright work

is only one of the factors to be taken into account for ascertaining whether the reproduction is substantial. In the present case, I cannot ignore the

fact that Thomas Hardy's work has been prescribed for non-detailed study and in that sense the students would be expected to acquaint

themselves with the broad details of the story as well as of the several incidents

which are related. If the Defendants' work consisted of a string of passages from the Plaintiffs' work, copied mostly in the author's own words but knit together by a few sentences omitting colourful descriptions, I am unable to hold that this did not constitute an infringement of the copyright. There might not be any intention to compete with the sale of the Plaintiffs' publication but the intention of the Defendants in such matters is nearly irrelevant. I cannot, therefore, overrule the possibility of competition and that is all that is necessary for determining infringement of copyright.

115. I shall deal with the defence regarding fair dealing based on the first proviso to Section 2(1) of the Copyright Act 1911, after considering the Plaintiffs' complaint regarding infringement of copyright in relation to Stories from Tagore--since this defence is common to both the works concerned in this suit.

116. The other work in regard to which relief is claimed in this suit is a publication entitled Stories from Tagore. The Plaintiffs Messrs. Macmillan & Co., Ltd., entered into an agreement on 12th May 1919 with Dr. Rabindranath Tagore (marked as exhibit P-18) by which, in consideration of the payment of a royalty, Dr. Rabindranath Tagore assigned to them the exclusive right of producing and publishing the work during the legal term of unrestricted copyright.

117. In the case of this work, therefore, the technical objection based on Section 213 of the Succession Act which I have been constrained to uphold in the case of Thomas Hardy's work, The Return of the Native does not apply.

118. The question, however, has been raised as to whether Dr. Rabindranath Tagore himself had copyright in these works for if he had not, he could not clothe the Plaintiffs with any such right. The challenge to the right of Tagore to the copyright in this work was set out in paragraph fifteen of the Defendants' written statement in these terms:

The Defendant states that these stories first appeared in Bengali and no translation thereof into English was published within ten years of their first appearance and, therefore, the sole right to publish the translation expired at the end of ten years from the date of the publication of the respective stories. The said period had elapsed according to the information of the

Defendant before the publication of The Stories from Tagore in 1918.

There is no copyright in the said translation according to the provisions of Section 4 of the Indian Copyright Act, III of 1914.

119. In order to understand this objection it is necessary to set out a few facts. The work entitled Stories from Tagore in which the Plaintiffs claim

copyright is a collection of the ten stories all of which were written by Tagore in Bengali. Of these ten stories, stories entitled Child's Return and

Postmaster were first published in Bengali in 1891. Two other stories Kabuliwala and Home Coming in 1892. A further two Once There was a

King and Subah in 1893 ; Casteaway and Babus of Nayanjore appeared in 1895. Master Mashi in 1897 and Son of Rashamani in 1911. The

translations of these stories were published in two series along with other stories which are not included in the present collection. That published in

1916 was entitled Hungry Stones and other Stories while the publication in 1918 was styled Mashi and other stories. It would thus be seen that the

English translation of stories other than Son of Rashamani were published beyond ten years from the date of their publication in Bengali. I shall now

turn to Section 4 of the Copyright Act of 1914, on the basis of which the contention in paragraph fifteen of the written statement of the Defendant

is raised. The relevant portion of Section 4 consists in its first Sub-section which runs:

4 (1) In the case of works first published in (India) copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or

publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work:

Provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such

work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall

not be subject to the limitation prescribed in this Sub-section.

120. Based on this provision the argument was that unless a translation was published within ten years from the date of the first publication of a

work there was no copyright in the translation. I am unable to agree with this construction of the provisions of Section 4 of the Act. The object of

the provisions of Section 4(1) was to confer on the author the sole right of

translation for a period of ten years. That sole right might be exercised or omitted to be exercised. If it was omitted to be exercised the result would be that at the end of the ten-year period the statutory right to copyright would not include the sole right of translation. In other words, any person could thereafter translate the work and the author of the original could not complain that his right to copyright was infringed by reason of a translation of his work. But this does not, however, mean that there was no copyright in the translation. The right to copyright in the translation is not dependent on the terms of Section 4, but it springs from the very terms of Section 1 of the Copyright Act of 1911 because the translation itself would be an original literary work ; vide, *Byrne v. Statist Co.* (1914) 1 K.B. 622. In the present case, therefore, in regard to the translation of the stories written by Rabindranath Tagore other than *Son of Rashmani*, there would be copyright in the translations as an original literary work, and if the complaint is that that copyright is infringed it is no answer to point to the work being a translation.

121. I have so far dealt with a case where beyond the period of ten years everyone was free to translate the author's work, but this would be subject to the proviso which deals with a case where the author had availed himself of the sole right to translate his works conferred upon him by the first part of Section 4(1): Where the author either himself or with the assistance of others makes a translation of his work within the period of ten years, the proviso confers upon him a further right in the shape of forbidding others from translating his original work into the same language as that chosen by the author. Taking the instant case of *Son of Rashmani*, the original story in Bengali appeared in 1911. This had been translated within the ten-year period into English and published in 1918. The result of this would be that for the term of copyright in the original Bengali the right would include the sole right to translate into English--the language in which the translation took place, and though in the case of other stories no one was precluded from translating them into English. In the case of this particular story such a translation could be injuncted as an infringement of the copyright. I would only add that this right is quite distinct from the right to copyright in the translation as an original literary work.

122. The claim in the present case is based upon the copyright inhering in the

translation as an original literary work and hence Section 4 is no bar to the assertion of such a right. The contention of the Defendant is, therefore, overruled.

123. There is one other matter which was referred to in this connection and that was that it had not been established that Dr. Rabindranath Tagore

had copyright in the translation by reason either of his having translated the stories or having them translated at his instance. For this purpose

reliance was placed on the statements to be found in the Plaintiffs' own books regarding the persons who translated these stories from Bengali into

English. For instance in exhibit P-2 the Plaintiffs' publication of Stories From Tagore (1954 edition) it stated at page 169 thus:-Cabulivalah is one

of the Poet's short stories which has been of the translated. The present translation is by the late sister Nivedita. Similarly in the collection of

stories, Hungry Stones and other stories and Mashi and other stories originally published in 1916 and 1918, respectively (the latest editions of

which were those of 1950 and 1952 and which were filed as exhibits D-3 and D-3 (a)), it was stated in the title page that the stories were

translated from the original Bengali by various writers. In the preface to Hungry Stones and other stories some details are given in these words:

The stories contained in this volume were translated by several hands. The version of the Victory is the author's own work. The seven which

follow it were translated by Mr. C.F. Andrews with the author's help.

124. Victory is not included in the collection of stories entitled Stories from Tagore with which the present action is concerned. The following,

however, included in the collection of Stories from Tagore are among these, seven. Once there was a King; Home coming and Babus of

Nayanjore. Based on this passage learned Counsel for the Defendant urged that there was no proof, if this did not constitute proof contra, that

Rabindranath Tagore was the author of the translations and, therefore, the owner of the copyright in the translated collection. learned Counsel

urged that there was no evidence in the case that either sister Nivedita or Rev. C.F. Andrews translated the stories at the instance of Rabindranath

Tagore. In my opinion, this lack of evidences is of little consequence. We have in exhibit P-18, a categorical statement by Dr. Rabindranath

Tagore that the copyright in this work vested in him and in the" face of this

assertion I am not inclined to attach any significance to the paucity of evidence in this respect. I am prepared to infer, therefore, that the translations must have been done by friend of Dr. Tagore at his instance and in this connection I attach some importance also to the absence of any claim by the translators to copyright in their translation. I hold, therefore, that the copyright in the translation was vested in Rabindranath Tagore and that by the assignment of that right in 1919, it became validly transferred to the Plaintiffs.

125. I shall now take up for consideration the issue as to whether the Defendants' Guide constitutes an infringement of the Plaintiffs' copyright work, Stories from Tagore. As I have already discussed the law on the point as to what constitutes infringement when dealing with the infringement

of copyright in relation to Thomas Hardy's work, The Return of the Native, it is unnecessary to go into it again. The Plaintiffs' publication, Stories from Tagore occupies one hundred and sixty pages, each page containing about thirty-four lines. As stated earlier, it is a collection of ten stories.

The Defendants' Guide to Stories from Tagore contains roughly about seventy pages, each page containing about thirty-nine lines. As in the case

of Thomas Hardy's work, learned Counsel for the Plaintiffs has marked both in the copyright work as well as in the alleged infringing copy,

exhibits P-2 and P-2 (a) passages which are stated to have been taken from the Plaintiffs' work. learned Counsel for the Defendant gave the

following quantitative analysis of the amount of copying. The total number of words in the original work as calculated by him is 42,264 and the total

number of words in the guide is about 22,600. The offending words are said to be 6,543. If this totalling were correct it would mean that the

offending words constitute about fifteen per cent of the original and a little over thirty per cent of the Defendants' work. learned Counsel also told

me that 727 lines out of 4,580 lines in the Plaintiffs' work were alleged to have been copied and if the number of lines in the Defendants' work

were taken into account it would mean 727 out of 2,730. As I have stated in relation to Hardy's work, this method of determining whether the

copying is substantial or not is at the best a rough one and, I would add, not an entirely satisfactory one. I have, therefore, proceed to compute the

quantum of the offending passages with reference to each story. The first story is

Cabuliwallah. This occupies pages nine to twenty in the original page nineteen being taken up by picture. That would mean ten pages, roughly about 340 lines. In the Defendants' Guide the same story occupies five pages (pages ten to fourteen) and out of 340 lines in the copyright work, 138 lines have been copied these being in twenty-nine passages. To give an illustration of the type of copying I would take page thirteen of the Defendants' Guide. Out of thirty-nine lines constituting that page, over twenty-five lines are copied from the Plaintiff's work. I shall set out in parallel columns the matter from the two pages in order to demonstrate the type of copying that has been resorted to.

Copyright work. Defendants' Guide.

Page 15½ Page 13½

It was once more autumn and weAfter several years, it was once had made arrangements for our more autumn, and arrangements Mini's marriage. It was to take were being made for Mini's marriage place during pooja holidays . . . age which was to take place in the Pooja holidays. On the day of

The morning was bright. After the wedding, the morning was rains it seemed as though the air bright. The rays of the sun had been washed clean and the seemed to make the brick-walls rays of the sun looked like pure of Calcutta lanes radiant. The gold. So bright were they, that wedding pipes were sounding they made even the sordid brick- from early morning The Bhairavi walls of our Calcutta lanes tune which was being sung radiant. seemed to intensify the father's

Since early dawn the wedding pain at the approaching pipe8 had been sounding and at separation from his daughter, for each burst of sound, my own Mini was to be married that night heart, throbbed. The wail of the and would go to her father-in-the tune Bhairavi, seemed to law's house.

intensify pain I felt at the

approaching separation. My Mini
was to be married that night . .
I was sitting in my study, looking
through the accounts when
someone entered, saluting
respectfully and stood before me.
It was Rahman the Cabuliwallah.
At first I did not recognize him.
He carried no bag; his long hair
was cut short and his old vigour While Mini's father was sitting in
seemed to have gone. But he his study looking into the
smiled and I knew him again. accounts, someone entered and
"When did you come, Rahman" ?saluting respectfully stood before
I asked him. him. It was Rahman, the Cabuli-
wallah. At first it was difficult to
" Last evening," I was released recognise him for he carried no
from jail." . . . bag and his hair was out short
and his old vigour seemed to
I had never before talked with
have gone. But when he smiled
one who had wounded his fellow-
he could recognize the
man and my heart shrank within
Cabuliwallah again. The old man
itself when I realised this; for I felt
told him that he was released
that the day would have been
from jail the previous evening.
better-omened had he not
Mini's father shrank within

appeared.

himself when he realised that he
was talking to one who had
• There are ceremonies
wounded his fellow-man and he
going on," I said and I am busy".

thought that it was a bad omen
Perhaps you could come another
for the day to being with; He,
day ? He immediately turned to
therefore, told him that there
go but as he reached the door he
were ceremonies going on in the
hesitated and said, " May I not
house and that he might come
see the "ittle one, Sir, for a
another day, but the Cabuli-
moment ?" It was his belief that
walah hesitated and said that he
Mini was still the same . .

wanted to see the little one for a
He had imagined too that they moment. It was his belief that
would laugh and talk together-justMini was still a little child.
as of old. Indeed in memory of Probably he imagined also that
former days, he had brought she would laugh and talk as she
carefully wrapped up in a did in the old times. Indeed he
psperič½ a few almonds and had brought a few almonds and
raisins and grapes obtained raisin* and grapes to be given to
somehow or other from a her but Mini"s father told him
countryman. again that there was a ceremony

in the house and that he would not be able to see anyone on that day. The man seemed struck with sorrow and bidding him good morning left the place. But he returned very soon of his own accord and held out his offerings, saying that he had brought those things for the little one and that they may kindly be given to her."

I repeated. " There is a ceremony in the house, and you will not able to see any one today."

The man's face fell. He looked wistfully at me for a moment, then said " Good morning, " and went out.

I felt a little sorry, and would have called him lack, but I found he was returning of his own accord.

He came close up to me and held out his offerings with the words : "

I have brought these few things, Sir, for the little one. Will you give them to her ?

126. Comment seems to be unnecessary when one finds passage of this sort and those are not isolated. I shall next proceed to an analysis in

respect of the other stories. Home Coming is the next story in the copyright work and it occupies about eight and a half pages whereas in the

Defendants" guide four pages are devoted for this story. There are fifteen passages in this story which have been copied from the original, the total

number of lines copied in the original being ninety and in the guide about sixty. The type of copying is the same as in the story, Cabuliwallah and I,

therefore, do not consider it necessary to set out parallel passages. Once There was a King which was the third story in the copyright work

occupies nine pages and in the Defendants' Guide it occupies four pages. Sixteen passages fairly long are copied from the original. In regard to

The Child's Return which consists of eleven pages in the original and five in the Guide there are twenty-one passages which are copied. Before

passing from this story, I might mention that there are pages of this sort where over fifty per cent of the matter has been taken bodily from the

copyright work. In the case of Master Mashai which is a fairly longish one occupying twenty two pages in the original and eight pages in the guide,

there are thirty-three passages which have been copied. I must however, say that in the stories that follow, Subha, The Postmaster, The Castaway,

The Son of Rashamani and The Babus of Nayanjore, the copying is much less and indeed in regard to these stories there are whole pages in the

Defendants' Guide where there is no copying at all. But what the suit is concerned with is the work as a whole and the question that I have to

consider is in relation to all the stories put together and not as to whether there is absence of reproduction of a substantial part in any one story. So

far as the type of copying, it appears to correspond to that which LORD ATKINSON referred to as miscalled an abridgement and described in

the passage I have already extracted.

127. The test of quantity is more than satisfied to constitute the Defendants' copying an infringement of the copyright.

128. Next as to quality or character of the passages appropriated learned Counsel for the Defendant, Mr. Sundaram Iyer submitted that the

sentences in the copyright work were simple prose, not ornate or flowery and that consequently if ideas regarding which there was no copyright

had to be expressed by another author there was found to be this amount of copying unless one resorted to pedantry. I cannot accept this

submission of the learned Counsel. It is not necessary that the author's style should be high-flown in order to be protected from copying. Simplicity

with its concomitant clarity is the hallmark of good style and would, certainly be as much entitled to protection as any tricks of expression or idiom

which might be the peculiarity of any particular author. The fact, therefore, that the style employed in The Stories from Tagore is simple surely does not disentitle that work to the protection of copyright.

129. I shall now take up for consideration the defence of fair dealing which is common to both the Guides which form the subject-matter of the suit. This is based on the first proviso to Section 2(1) of the Copyright Act, 1911 which runs:

Provided that the following acts shall not constitute an infringement of copyright:

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.

130. It was the contention of the learned Counsel for the Defendants that even if the Defendants' Guides constituted an infringement in the sense

that they reproduced substantial parts of the copyright works still the Defendants would be protected by this proviso. It is neither necessary nor

useful to refer to the law before the Copyright Act of 1911. In determining the applicability of this proviso two matters have to be borne in mind.

The first is with reference to the purpose for which a substantial part of the copyright work is reproduced, the second with regard to manner of use

pertaining to that purpose. In order to receive protection it must be fair dealing. If the purpose of the reproduction is not one of those enumerated

in the statute the question for fair dealing would not arise. The enumerated purposes are private study, research, criticism, review, or newspaper

summary. The proviso employs the punctuation of a comma after each of these separate purposes so that prima facie it would appear as if each

one of them were an independent head or purpose and not qualified by the others. I am saying this in view of an observation of LORD

HANWORTH, M.R., in *Hawkes & Son (London), Ltd. v. Paramount Film Service, Ltd.* (1934) 1 Ch. 593 ; the particular passage is at page 604

where the learned Judge said:

It was suggested by Mr. Macgillivray that in a sense a news film was a newspaper but the collection of the words criticism, review, or newspaper

summary clearly points to the review or to notices of books which appear in newspapers, and not to anything of the nature that was done in the

present case.

131. It is unnecessary for the purpose of the present case, to decide whether

criticism or review which was published otherwise than in a newspaper was entitled to the protection of the first proviso to Section 2. I shall proceed on the basis that a criticism or review appearing in other than a newspaper was also a purpose within the proviso. learned Counsel for the Defendants sought to bring the Defendants' Guide under the heads of private study, research and criticism. I am clearly of the opinion that this submission should be rejected. A dealing with a work for private study is such a dealing that does not involve any publication. As stated by Copinger:

Private study only covers the case of a student copying out a book for his own use, but not the circulation of copies among other students, vide:

University of London Press, Limited v. University Tutorial Press, Limited (1916) 2 Ch. 601.

132. I find it not possible to hold that the Defendants' Guides could be said to be works of research. There is no definition of the word research in

the Act and, therefore, its meaning has to be ascertained from ordinary English usage. In Funk and Wagnalls, English dictionary, research is said to

mean. (I am extracting that meaning which appears to be most relevant to the present context.)

Diligent protracted investigation especially for the purpose of adding to human knowledge; studious enquiry.

133. In The Shorter Oxford Dictionary the meaning attributed is

An investigation directed to the discovery of some fact by careful study of a subject ; investigation, inquiry into things.

134. Understood in the light of these meanings the Defendants' Guides--chapter summaries, which constituted an infringement cannot obviously be

said to comprise quotations for the purposes of research; nor is there any substance in the contention that the Guides constitute criticism of the

copyright works. They were nothing more than summaries and a summary which extracts and reproduces substantial parts of the copyright work

for the purpose of narrating the story is not criticism.. The purpose, therefore, predicted by the first proviso to Section 2(1) is not satisfied.

135. In this view the question whether the use to which the copyright work is put is fair dealing or not would not arise for consideration but as the

matter has been argued I shall express my views on it. Two points have been

urged in connection with the meaning of the expression fair in fair

dealing (i) that in order to constitute unfairness there must be an intention to compete and to derive profit from such competition and (ii) that unless

the motive of the infringer were unfair in the sense of being improper or oblique the dealing would be fair.

136. Learned Counsel, particularly Mr. Thyagarajan, appearing for the Defendants in Civil Suit No. 215 of 1954, invited my attention to passages

in text books dealing with American Law of Copyright particularly to Literary property in the United States by Ralph R. Shaw and Nicholson's A

Manual, of American Copyright Practice as throwing light upon what constituted fair dealing. I am, however, unable to derive much assistance

from these two works because the law of Copyright in America is based upon the provisions of an Act of Congress, the Copyright Act, 1909,

which does not contain any statutory provision like the proviso to Section 2(1) of the Copyright Act, 1911, and these two authors proceed to

define the scope of fair dealing or fair use on the basis of certain decisions of the American Courts. I might however point out that in the chapter on

Quotations (Permissible) in Mr. Nicholson's work, the learned author discusses as to how much could be quoted without the specific permission

of the copyright owner, and points out how uncertain the law on the point is in America. The author says:

How much can be quoted without the specific permission of the copyright owner? Probably no other question besets publishers--and the

Copyright office--so frequently. In a form letter the Copyright office says cautiously but not very helpfully, "One must use his own best judgment"--

-which is exactly what the quoting author and publisher want to avoid. The Copyright Act is silent, the Copyright office is non-committal, and for

the most part the Courts have been evasive in defining just what reasonable quotation is.

137. The author then proceeds to treat of fair use as one of the heads of permissible quotations. This shows that not much is gained by reference to

American Law or to American decision or text books.

138. To resume the discussion of the two points urged, I shall first take up the question as to the motive to compete being necessary in order to

constitute a dealing unfair. I agree that if there were such a motive it would

render the dealing unfair, but I am unable to agree that if the works were not intended to compete, this would set at rest all questions concerning fair dealing. Here again it appears to me that one has to have regard to the substantiality of the quantity and the quality of the matter reproduced. If there were an abstraction of something of value to an appreciable degree, it appears to me to be immaterial whether the copying is or is not likely to compete with the copyright work. Most probably it will and I have already expressed myself on this topic, but even if it did not, I consider that such an amount of copying would negative fairness. The analogy of fair comment or qualified privilege in the case of defamation strikes me as affording some parallel to the question raised regarding the concept of fair dealing. For instance there might be excessive publication which deprives the Defendants of the qualified privilege and excessive user would analogically deprive the Defendants of the plea of fair dealing. In a case where the Court recorded a finding that a substantial part of the work had been reproduced to constitute infringement and dealing with the first proviso of Section 2(1) with which we are now concerned, SLESSER L.J., said:

I agree with my Lord that this reproduction is clearly a substantial part of Colonel Bogey looked at from any point of view whether it be quantity, quality or occasion . . .

139. That being so, it is clear to my mind that a fair use has not been made of it ; that is to say, there has been appropriated and published in a form which will or may materially injure the copyright, that in which the Plaintiffs have a proprietary right. As is pointed out by SIR W. PAGE

WOOD V-C in *Scott v. Stanford* (1867) L.R. 3. Eq. 718, 723: "If in effect, the great bulk of the Plaintiff's publication--a large and vital portion of

his work and labour--has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of

the appropriator will not suffice, as the Court can only look at the result, and not at the intention in the man's mind at the time of doing the act

complained of, and he must be presumed to intend all that the publication of his work effects." So far, therefore, it is clear that a substantial part

has been appropriated ; or to use the language before the Act of 1911, I should have held in accordance with the authorities that there had not

been a fair use made of the matter.

141. The second point does not need any elaborate refutation. If substantial and vital parts of the works are reproduced the intention to

appropriate to the infringer the labour of others for his own profit is made out and there need not be proof of any independent oblique motive.

142. There was one other defence raised to which it is necessary to advert. It was that a custom or usage had grown up in the publishing trade in

this country and particularly in this city according to which whenever the University or other educational authorities prescribe as a text book any

classical work or an original literary work, publishers prepared guide books in relation to such text books for enabling the students to master the

prescribed texts. It was further urged that such guide books are intended to and do in fact contain a summary of the prescribed text and as part of

the summary also included considerable portions from the prescribed works and that this practice or usage was countenanced or at least was not

objected to by the publishers of the original text books which were prescribed. The point was also urged in the slightly different form, that the

publishers of original text books who persuade the University or other educational authorities to prescribe any particular publication of theirs as

texts for examinations, in effect, invited the publishers of guides and commentaries to prepare and publish such guides with the result that the

publishers of original text books were estopped from complaining of any infringement of copyright if the guides contain considerable number of

passages copied from the original. In proof of this practice or usage the Defendants filed exhibit D-2 a guide book published by the Minerva

Publishing House in 1938, when Thomas Hardy's *Return of the Native* was prescribed as a text for the University examination; Exhibit D-4 a

guide published in relation to *Ivanhoe* and *Stories From Tagore* and exhibit D-5 (a) a guide published by the Minerva Publishing House in regard

to *Under the Greenwood Tree* by Thomas Hardy.

143. I am unable to uphold the defence based on the alleged custom or usage. In the first place, the evidence offered is much too slender for

inferring any usage much less custom. I might also point out that no analysis has been made either quantitative or according to quality in regard to

the amount of copying that there was in those guides as to constitute them

reproductions of substantial parts of the copyright work. In the absence of such analysis the mere fact that certain "guides were published furnished no proof that though the latter constituted an infringement, custom or usage in the publishing trade afforded sanction for such infringement.

144. I have upto now proceeded on the basis that usage might afford a defence for infringement. In the ease of rights created by statute which prescribes the scope of the right and defines the purposes for which substantial parts of copyright works might be reproduced, any usage of the sort pleaded, would, in my judgment, be inadmissible as being in contravention of the statute. The decision of NORTH J., in *Walter v. Steinkopff* (1892) 3 Ch. 489 and relied on by Mr. Nambiar, learned Counsel for the Plaintiffs, fully supports this position. It is sufficient to refer to one portion of the head-note for indicating the point decided:

A practice by newspapers to copy from other newspapers is no defence to a copyright action.

145. I do not consider that there is any basis for the Contentions that the Plaintiffs were estopped from suing for infringement. As if to serve as a foundation for this contention a question was put to the only witness for the Plaintiffs whether Messrs. Macmillan and Company had not approached the educational authorities to have their publications prescribed as text books for the University or S.S.L.C. examinations and the witness answered this in the affirmative. It does not however follow that by reason thereof the Plaintiffs must be taken to have licensed or authorized infringement of the copyright in their works. The point appears to me too clear to require any elaboration.

146. The result of the foregoing discussion is that if I had found in relation to the bar of Section 213 of the Succession Act in favour of the Plaintiffs

I would have decreed the Plaintiffs' suit in regard to Thomas Hardy's work, *The Return of the Native*. In view, however, of my finding on that point the claim of the Plaintiffs in relation to that work must fail, the suit is to that extent accordingly dismissed.

147. In regard to *Stories from Tagore*, however, Section 213 of the Succession Act constitutes no bar and on my finding that there has been a reproduction of a substantial part of the copyright work and that the Defendants' work cannot claim the protection of fair dealing under the proviso

to Section 2(1) the suit succeeds in regard to that work.

148. The Plaintiffs are, therefore, entitled to the appropriate reliefs, namely, (i) permanent injunction as prayed for in the suit, (ii) an enquiry into the profits made by the Defendants by the publication of the Guide and (iii) delivery over to the Plaintiffs on the remaining copies of the offending work. The claim in regard to damages which is really alternate to the claim to enquiry into profits, which I have granted is dismissed.

149. I intimated to the Counsel at the time of the hearing that evidence in relation to damages or profits might be led after my decision on the point regarding infringement and hence no evidence has been adduced on this topic up till now.

150. The suit will be referred to the Official Referee for a finding as to whether any profits were made by the Defendants and if so, how much by their infringing publication--taking into account the fact that the Defendants' Guide consists also of matter--pages one to eight and from eighty to end in regard to which there is no claim by the Plaintiffs. Both parties will be at liberty to adduce evidence before him. Time for the submission of the finding three months. The suit will be placed for further hearing after the receipt of the finding from the Official Referee. In view of the Plaintiffs having failed in regard to their claim in relation to Thomas Hardy's work there will be no order as to costs.

151. Immediately I pronounced judgment in these suits, Mr. Nambiar, learned Counsel for the Plaintiffs in Civil Suit No. 54 of 1955, made a submission that I might modify the order in the suit relating to the Plaintiffs' claim in regard to Thomas Hardy's work The Return of the Native.

learned Counsel submitted that the necessity for an ancillary probate of the Wills of Thomas Hardy and Emily Hardy as a prerequisite for the maintainability of the Plaintiffs' claims was put forward by the Defendants only at a later stage in the arguments and that I should, therefore, give the Plaintiffs some time to obtain this ancillary probate and thus clothe themselves with proper legal title to the reliefs to which they would be entitled on the other finding. Taking into account the nature of the objection and the point raised, I thought it proper to adjourn the proceedings to a future date giving time to the Defendants to make their answers to the request of the Plaintiff, and I heard Counsel on the 27th Mr. Nambiar, besides

repeating the points he submitted on the previous day, further urged that the point was technical that it was bereft of authority and that, therefore, it was not unreasonable for the Plaintiffs to have filed the suit without obtaining any ancillary probate.

152. On the other hand, Mr. Thyagarajan, who addressed me on behalf of the junior Counsel for the Defendants submitted that it was open to the Plaintiffs to have taken time for obtaining the probate immediately the point was raised but that they took the chance of succeeding their contention that no ancillary probate was necessary and that when the Court finally decided that an ancillary probate was necessary before they could claim further reliefs in the action they should not be permitted to turn round and ask that the suit should not be dismissed but that it should be kept pending in order to enable them to satisfy the requirements of the law.

153. I have considered this matter with care and I have decided to reject the request of the Plaintiffs. In an action for an infringement of a copyright, the first point to be established is the title of the Plaintiff to the copyright and this is *a fortiori* so when their title is dependent on a valid assignment. It was, therefore, for the Plaintiffs to have proved that they had the right in the copyright which had been infringed by the Defendants.

No doubt in the specific form in which the point was urged finally, it was not formulated at the earlier stages but I consider that there was nothing to prevent the Plaintiffs from applying for an adjournment when the point was finally urged, though I must not be understood as saying that if an application for adjournment had been made then, it would have been granted as a matter of course.

154. But this apart, there is one ground which appears to me to be sufficient to dispose of the matter and that bears upon the loss which the Plaintiffs would suffer by refusing to accede to their request to vary the judgment I have pronounced. It will be noted that I have found on the facts that the Defendants' guide constituted an infringement of Thomas Hardy's work *The Return of the Native*. The reliefs which would have flowed from this finding would really be an injunction restraining the Defendants from further publication of this Guide and a direction regarding taking of accounts of the profits on account of the Defendants' publication of their Guide in the past and these are exactly the reliefs I have granted to the

Plaintiffs in regard to the work *Stories from Tagore*. Thomas Hardy's *The Return of the Native* was prescribed as a non-detailed text for the B.A.

and other degree examinations, 1955 of the University of Madras. Those examinations are long ago over and, therefore, there is very little chance

of the Defendants' guides being sold in the future so that an injunction which would operate for the future would really have no practical value.

Further, if there is any invasion of the Plaintiffs' rights in the future in regard to this work, the decree of dismissal in the present suit would not be a

bar to the Plaintiffs filing a fresh action for infringement of copyright.

155. The other relief which would be denied to the Plaintiffs by my judgment as it stands would be the enquiry into past profits made by the

Defendants by their publishing the guides which constituted an infringement.

156. In regard to this it has to be borne in mind that the Defendants' Guide is a book of about 220 pages of which only about one half is

complained of as infringement. Though there is no evidence as to the exact number of copies of the Guides to Thomas Hardy's *Return of the*

Native which the Defendants have been able to sell, the evidence that was led in Civil Suit No. 215 of 1954, is some indication that the number

could not be large. Buchan's *The Thirty-Nine Steps* was prescribed as a non-detailed text for the S.S.L.C. examination, 1952, and the total

number of copies printed by the Defendants in that case was only 2,000 out of which a considerable number remained unsold. The number of

students appearing for the B.A. and other degree examinations would certainly be very much smaller than the number of candidates appearing for

the S.S.L.C. examination and it would, therefore, be no surprise if the number of copies of the Defendants' Guide printed and certainly of these

sold were less than 2,000. In these circumstances the amount of profits made in regard to that portion of the Guide which constituted an

infringement would be nothing considerable and, therefore, I do not consider that the Plaintiffs have sustained any grievous injury by way of

pecuniary loss by the decree of the dismissal being maintained. I would only add that I consider that the suit was filed merely as a test action for the

determination of the question as to how far and in what circumstances these Guides which are now-a-days so numerous constituted an infringement

of the copyright in the original works. That object of the Plaintiffs having been

achieved by the other findings recorded by me, I think the Plaintiffs may rest content with that. The request of Mr. Nambiar for modifying the judgment by granting further time to enable an ancillary probate to be obtained is, therefore, rejected.

157. In my judgment in relation to the other work--Stories from Tagore--I directed an enquiry into the profits derived by the Defendants by the sale of their Guide, and sent the case to the Official Referee for conducting the enquiry and submitting his report. The officer How points out that the post of the Official Referee is kept vacant and that, therefore, there Should be a direction as to the particular officer who should be entrusted with this duty or that I should appoint a commissioner to carry out this work. I put this to the learned Counsel on either side and they informed me that the Defendants would produce their accounts for inspection by the Plaintiffs' Solicitors and that the Counsel thereafter would furnish me with an agreed figure as to the amount of profits for which a decree should be passed so that there be no need for any enquiry of the sort I have directed. I consider this proposal very reasonable and accordingly the direction in my judgment for the reference of the matter to the Official Referee for taking of accounts in regard to the profits made by the Defendants will be deleted. I shall pass appropriate orders in substitution thereof after Counsels have informed me about the result of their mutual discussions.

158. Counsel have told me that instead of the decree for an account of profits derived by the Defendants in Civil Suit No. 54 of 1955, I might fix some reasonable figure of the damages sustained by the Plaintiff. Learned Counsel for the Plaintiff suggests Rs. 500 as the reasonable figure--the number of copies sold being about 1,400--while learned Counsel for the Defendants suggests that it might be Rs. 100. I consider that Rs. 250 would be a reasonable figure and there will be a decree for this sum in favour of the Plaintiff. No order as to costs.