Privy Council Appeal No. 164 *of* 1927.

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

v.

The Famous Players Canadian Corporation, Limited - - *Respondents*

FROM

THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
VISCOUNT SUMNER.
LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The appellants, the plaintiffs in the action, are the owners by assignment of the performing rights in Canada of a very large number of musical works, the copyright in which is still subsisting.

The action in which the present appeal arises was an action under the Copyright Act 1921, of Canada, against the respondents for an injunction and damages in respect of the infringement by the respondents of the exclusive performing rights in Canada of two of the said musical pieces.

The respondents, amongst other grounds of defence, alleged that the appellants could not maintain the action because of their failure to register the grants under which they claimed title as required by section 39 of the above-mentioned Act.

The action was tried before Rose J., who on the 7th March, 1927, delivered judgment over-ruling the various grounds of defence other than that of failure to register, but allowing the latter ground. He therefore dismissed the action with costs.

The appellants thereupon appealed to the Appellate Division of the Supreme Court of Ontario which, by a unanimous judgment dated the 20th May, 1927, dismissed the appeal with costs.

By an Order of His Majesty in Council dated the 3rd November, 1927, special leave was given to enter and prosecute the present appeal. The facts are not in dispute.

At the date of the assignment next hereinafter mentioned, the exclusive right of performing in public in all parts of the world the musical pieces, the subject of the action, was by virtue of certain prior assignments vested in the Performing Right Society, Ltd. (hereinafter called the British Society).

By an indenture dated the 15th February, 1926, and made between the British Society, thereinafter called the assignor of the one part and the appellants thereinafter called the assignee of the other part, the assignor assigned to the assignee the right of performance in Canada of the music of (amongst a large number of other musical works) the musical works, the subject of this action.

At the date of the said indenture the British Company by virtue of section 41 (1) of the Copyright Act of 1921 was entitled to the sole right to perform the said musical works in public, and such right was by virtue of section 11 (2) of the same Act effectually transferred to the appellants by the said indenture.

The infringement of the appellants' right by the respondents is admitted, and but for the several grounds of defence above referred to the appellants' right to maintain the action is clear.

Inasmuch as their Lordships agree with the view of the Courts below on the point on which the case was decided in Canada, it is unnecessary to consider any of the other grounds of defence set up by the respondents.

The question turns entirely on the construction of section 39 (2) of the Copyright Act, 1921. Section 39 of that Act is as follows :

> "(1) Any grant of an interest in a copyright either by assignment or license may be registered if made in duplicate upon production of both duplicates to the Copyright Office and payment of the prescribed fee—one duplicate shall be retained at the Copyright Office and the other shall be returned to the person depositing it with a certificate of registration.
>
> "(2) Any grant of an interest in a copyright, either by assignment or license, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice unless such assignment or license is registered in the manner directed by this Act before the registering of the instrument under which a subsequent assignee or licensee claims, and no grantee shall maintain any action under this Act unless his and each such prior grant has been registered."

The appellants are indisputably "grantees," their "grant," viz., the assignment to them executed by the British Company, has not been registered, the action is an action under the Act; therefore, reading the words literally, they are precluded from maintaining the action. The above is the effect of the several

judgments in Canada, and their Lordships can see no answer to the respondents' case as thus stated.

Strenuous efforts, however, have been made by Counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one.

Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.

One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship. On this point it may be pointed out that though the Act received the Royal Assent on the 4th June, 1921, it did not come into operation until the 1st January, 1924, and there was ample time for persons interested to point out defects and endeavour to obtain their removal.

Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises. The main endeavour on the part of Counsel for the appellants was to show that the concluding words are a complement to the earlier part of the sub-section, and are to be confined to cases where the action is one between competing grantees, and stress was laid on the words "each such prior grant" as referring, they maintained, to the grant to which that of the "subsequent assignee" mentioned in the section, is subsequent in point of date. But in the first place "each such prior grant" suggests that there may be more than one, and in the second, there is a sensible meaning for the words which fits in with the wider construction adopted by the Courts in Canada. The words to be construed are "his," *i.e.*, the grantee's, "and each such prior grant," viz., "his grant and each such prior grant." The natural meaning of these words is, in their Lordships' opinion, "his grant and each grant such as his own and prior in date thereto." The statute would then require him to register his own grant and every prior grant of the same nature, comprising the same subject-matter and conferring the same interest therein as that made to himself. So construed, the words would distinctly point to grants forming part of the chain of title as those to be registered. If the words are construed, as the appellants say they ought to be, they might require the grantee, who has registered his grant and as against whom therefore the prior grant is void, to register that grant before he could bring an action against the holder of it—surely, a most unreasonable requirement.

The first part of the sub-section it is true left open the question what if any right of action would be in the holder of either grant if neither was registered, but the legislature by the general words it has used has covered this point by making registration an essential condition to the maintenance of any action.

For these reasons, their Lordships are of opinion that the order appealed from ought to be affirmed and this appeal dismissed with costs. They will humbly advise His Majesty accordingly.

In the Privy Council.

THE CANADIAN PERFORMING RIGHT SOCIETY,
LIMITED,

v.

THE FAMOUS
PLAYERS CANADIAN CORPORATION, LIMITED.

DELIVERED BY LORD WARRINGTON OF CLYFFE.

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

1929.