Privy Council Appeal No. 18 *of* 1932.

Florence A. Deeks - - - - - - - - *Appellant*

v.

H. G. Wells and others - - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD NOVEMBER 1932.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD THANKERTON.

[*Delivered by* LORD ATKIN.]

This is an appeal from the judgment of the Second Appellate Division of the Supreme Court of Ontario, which affirmed the judgment of Mr. Justice Raney in the Supreme Court of Ontario which dismissed the plaintiff's action. The action is brought by the plaintiff, Miss Florence Deeks, for breach of copyright, but in substance the action is for breach of confidence in permitting the plaintiff's unpublished manuscript to be used without the plaintiff's consent. The action is brought against the Macmillan Company of Canada, which is the company to which the plaintiff entrusted her manuscript, it is brought against Mr. H. G. Wells, who is said to have used the manuscript of the plaintiff improperly as the foundation of his book, "The Outline of History," and it is brought against the Macmillan Company, Incorporated, of New York, Messrs. George Newnes, Limited, and Messrs. Cassell & Company, Limited, for having published the work of Mr. Wells which had been so composed.

Now whether or not the book was used, handed over to Mr. Wells, and whether it was improperly used by him are pure questions of fact. Upon those questions of fact both Courts have

come to a conclusion against the plaintiff; and it would follow that, in accordance with the usual practice in dealing with appeals of this Board, there being two concurrent findings of fact, the Board would not hear an appeal which suggested that these findings were wrong. But Miss Deeks appears in person, she evidently thoroughly believes in her case, and it was important, their Lordships thought, in the interests of everybody that the case should be fully heard. They therefore made a special exception in her favour and have allowed her to open the case at length, and their Lordships proceed to decide it without any reference to the general rule as to concurrent findings.

The position is that Miss Deeks in August of 1918 entrusted her manuscript entitled "The Web" to The Macmillan Company of Canada. The manuscript was of a work which involved the whole history of the world from its very beginning to the present day, with the special object of emphasising the important part that women had played in the social development of the world. The book was entrusted to the Macmillan Company in Canada on the 8th August, 1918. It was left with them by Miss Deeks for two purposes. One purpose was to ascertain whether there would be any objection to the use by her of certain extracts from Green's "Short History of the English People," the copyright of which was owned by Messrs. Macmillan in London. Together with a request that they should afford her information on that point, they were generally asked to advise her as to the prospects of the work as a publication. Apparently Messrs. Macmillan in London control the Macmillan Company of Canada and the Macmillan Incorporated Company of New York.

The manuscript was examined by Mr. Saul, who occupied the position of editor of their works and was the person before whom manuscripts would naturally come. The exact story of what he did with the manuscript is not quite clearly recorded; but it is quite plain, their Lordships think, that he took the manuscript, he read it once and then he read it a second time, and his recollection is that he took it with him to Winnipeg and the Pacific Provinces and returned with it to Ontario at some date in November. He left the employment of Macmillans in Canada in January of 1919. The writ was not issued until 1925, and a long time had elapsed, no doubt, since he had occasion to deal with the question of the manuscript, though it appears that some reference had been made to him before the writ had been actually issued. There is an entry in the book that records the dealing with manuscripts to the effect that the book was received on the 8th August of 1918 and was returned in February of 1919. In the opinion of their Lordships that record is incorrect. It seems that the manuscript was not returned in fact to Miss Deeks until April of 1919. There is an entry of another manuscript in the record book, which is called "The Dawn," which happens to be the title of the first chapter of Miss Deeks's book, which in their Lordships'

opinion is also an incorrect entry, because it is not adequately explained what that manuscript is. It is recorded as being returned in July of 1919, and it appears to their Lordships plain that the manuscript which was returned in July of 1919 is not a manuscript which was or could be described as " The Dawn." That is left uncertain, and all their Lordships can say about it is this, that in view of the period that elapsed between the time when the manuscript was being dealt with by the Macmillan Company of Canada and the time in 1925 when they were first challenged with their dealing with it, it is not at all unnatural that there should be difficulties in explaining records which, as they stand, do not give satisfactory information to anybody and raise slight difficulties which have not been entirely cleared up.

During that period between August, 1918, and April of 1919 Mr. Wells appears to have completed the manuscript of his book, " The Outline of History," which book also is written as a history of the world from the beginning, dealing, as an ultimate object, with history from a rather different point of view from that which had been undertaken by Miss Deeks. Therefore, so far as the coincidence of time is concerned, if the manuscript had left Canada and had reached London it is, of course, possible that Mr. Wells might have had an opportunity of seeing the work and using it ; and, of course, direct evidence had to be given in respect of this matter.

The evidence of Mr. Saul was that, so far as he was concerned, to his knowledge he had not parted with the manuscript ; and it is difficult to see who could have dealt with the manuscript except Mr. Saul himself. The evidence on behalf of Macmillans in London, the evidence of Sir Frederick Macmillan, the Chairman of the Board, is that every manuscript would come before the Board and that the Board had certainly never seen such a manuscript and, indeed, had not heard of Miss Deeks. The evidence of Mr. Wells is quite clear and definite, that he had never seen the manuscript, he did not know of Miss Deeks, he had not taken any part of the information that she had put in her manuscript from that manuscript or from Miss Deeks herself ; and there is no direct evidence on behalf of Miss Deeks that the manuscript ever did in fact leave Canada.

So far as that goes, the Courts have accepted the evidence of Mr. Wells and the evidence given by the Macmillan Companies, and they have come to a conclusion quite definitely that the plaintiff's case is unfounded and that the manuscript was not handed to Mr. Wells, and that Mr. Wells had in fact never used it.

But, apart from the direct evidence, Miss Deeks relies upon the intrinsic evidence to be derived from a comparison of the two works ; and she says that when you compare the one work with the other you will find that there is such an accumulation of similarities, of like omissions, of plan, of phrases, of mistakes, that the inference is irrestible that Mr. Wells did in fact have her work before him before he composed his work. Now their Lordships

are not prepared to say that in the case of two literary works intrinsic evidence of that kind may not be sufficient to establish a case of copying, even if the direct evidence is all the other way and appears to be evidence that can be accepted; but such evidence must be of the most cogent force before it can be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the Court.

Therefore, it becomes necessary to consider the class of evidence that is brought forward on behalf of the plaintiff in respect of this comparison and the inference that ought to be drawn as the result of the comparison. Miss Deeks relied in the Courts below upon the evidence of three literary gentlemen of considerable reputation who were entitled to be treated as experts on this subject. They pointed out coincidences, similarities, identical omissions, and so forth, which in their view led to the inference that one work was the copy of the other. Their Lordships have read that evidence, and they notice that the expert witnesses were allowed in the Court below to give evidence as to the result of their opinions, and as to the effect of them, which appeared to their Lordships not to be within the domain of expert evidence at all. The witnesses were apparently permitted to say, not only that there were similarities, but that in their opinion the result of the similarities was such that in fact Mr. Wells did copy from this work—which, of course, is not a matter for expert testimony at all—and, indeed, one witness was permitted to give evidence to the effect that in his opinion Mr. Wells wrote his own book with the manuscript of Miss Deeks's book upon the desk before him—evidence which quite plainly was not a matter for expert opinion. However, such evidence was given, and it was before the Court and it was considered by the learned Judges.

Now the points upon which the experts rely have been correctly summarised by Miss Deeks in this respect. She says that the copying took place as is shown by similarities with regard to the plan—that means the plan of the book, the scheme of the book; that the opening chapters and various passages appearing in Mr. Wells's book are mere colourable alterations of "The Web"; that there are certain phrasal identities and similarities, and there are certain mistakes; that the similarities, though trifling in some instances, are so numerous that an accumulation of them afford the strongest evidence of copying; and that there were common sources used for both works which could be shown to have been used in both cases together with the original additions made by Miss Deeks, so that when you compared the two you found that Mr. Wells had used not only the common source but had also modified it by using in addition to that the original manuscript of Miss Deeks. She relied on the choice and the sequence of the order of details, and she relied on the emphasis and proportion given to certain topics. Those matters were carefully discussed in the Courts below; they have been dealt with by the judgments in both Courts, and they have been very fully discussed before

their Lordships by Miss Deeks who in the course of her case has given every assistance to the Board and made it quite plain that the whole strength of the case has been put forward upon this appeal. Their Lordships wish to repeat what was said in the Courts below, that Miss Deeks has argued the case with great candour and with great force.

Now their Lordships do not propose to go into the details of all these matters. They wish it to be understood that they have carefully considered all the points that have been put before them, and, having considered them, they are quite convinced that the case made in this respect is quite insufficient to displace the conviction that is derived from the direct evidence that there was in this case no copying in fact. The suggested similarities can be explained by the nature of the work, which has common elements, and by the fact that both writers must have had recourse to authorities which were common to both. After all, neither Miss Deeks nor Mr. Wells was present at the beginning of the world or until a very considerable time later, and they have had to rely upon the accumulation of information which has been made by many authors before them and to which they have had to have recourse in writing such a work as this. Their Lordships do not pause to deal with the details of the evidence that was given, but in a great many cases it is quite properly described by one of the Judges as fantastic, and such actual coincidences as do exist are quite explicable, and should be explained, in the manner suggested.

The result is this : that in the opinion of their Lordships not only did Miss Deeks fail to make out her case, but that it was definitely established that the manuscript in this case did not leave Canada and that Mr. Wells did not have any access to it and did not use it at all in the preparation of his work. It is very doubtful whether anything that this Board says or that any Court says will be likely to alter Miss Deeks's opinion of the merits of her case, but at any rate she will have the satisfaction of knowing that the case has been very fully considered now by three Courts and that the conclusion must be the same in all of them, namely, that the case that she made was definitely disproved. The result of that is that their Lordships must humbly advise His Majesty that this appeal should be dismissed, and the appellant must pay the costs of the appeal. There was a petition for leave to adduce further evidence or add to the record, but that petition was not opened.

Nothing need therefore be said about the petition, except that no order is made upon it.

In the Privy Council.

FLORENCE A. DEEKS

v.

H. G. WELLS AND OTHERS.

DELIVERED BY LORD ATKIN.

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