

In the Privy Council.

No. 94 of 1938.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

BETWEEN

FRANCIS DAY & HUNTER LIMITED ... (*Plaintiff*) *Appellant*,

AND

TWENTIETH CENTURY FOX CORPORATION
LIMITED and FAMOUS PLAYERS CANADIAN
CORPORATION LIMITED (*Defendants*) *Respondents*.

CASE FOR THE RESPONDENTS.

1. This is an appeal from an Order of the Appellate Division of the Supreme Court of Ontario dated 13th June, 1938, and has been entered pursuant to special leave granted by an Order of His Majesty in Council dated 4th November 1938. Record.
p. 100.
p. 104.

2. The Appellate Division allowed an appeal to that Court from the Order of The Honourable Mr. Justice J. A. McEvoy and dismissed this action with costs to be paid by the Plaintiff (*Appellant*) to the Defendants (*Respondents*) and further ordered that the *Appellant* should pay to the *Respondents* their costs of the appeal to that Court. p. 90.

10 3. The *Appellant* is a company incorporated under the laws of the United Kingdom with its registered office at London. Each of the *Defendants* is a company incorporated under the laws of the Dominion of Canada with its head office at Toronto.

4. The *Appellant* alleges that it is and was at all material times the owner of a one-half share of the copyright in Canada in a musical work consisting of the words and music of a song entitled "The Man Who Broke the Bank at Monte Carlo" which song was first published in England on 22nd April 1892 by Francis Day & Hunter a firm then carrying on business as music publishers in London and whose business and copyrights the *Appellant* subsequently acquired. p. 170,
Exhibit 8,
p. 124.
Exhibit 2.

- Record. 5. Some time during the year 1935 Twentieth Century Fox Film Corporation which is incorporated under the laws of New York in the United States of America produced in the said United States a cinematograph film or motion picture which is entitled "The Man Who Broke the Bank at Monte Carlo" and which purports to be a screen play by Howard Ellis Smith and Nunnally Johnson from a comedy in three Acts by Ilia Surgutchoff and Frederick Albert Swann entitled "The Gamble" also known as "The Man Who Broke the Bank" "Monsieur Alexandre" "Igra" and "Le Jeu."
- p. 170, Exhibit 10.
p. 116, Exhibit 23.
p. 129, Exhibit 1.
p. 170, Exhibit 9.
- p. 2, l. 14 et seq. 6. The Appellant alleges that the central idea theme melody and title of the said musical work formed the basis of the said motion pictures which it alleges was produced presented and advertised so as to lead the public to believe that it was identical in concept purpose and artistic value with the said musical work.
- pp. 129-141, Exhibit 1. Schedule A.
Schedule B. 7. The Defendant Twentieth Century Fox Corporation Limited rented positive copies of the said motion picture to exhibitors in Canada for the purpose of exhibiting the same in public on dates over a period from December 1935 to April 1937 and the Defendant Famous Players Canadian Corporation Limited exhibited the said motion picture in public on dates over the same period at theatres owned or operated directly or indirectly by it.
- p. 2. 8. The Appellant alleges that by their said acts the Defendants have infringed the copyright in the said musical work, the Defendant Twentieth Century Fox Corporation by permitting the same or a substantial part thereof to be performed in public and the Defendant Famous Players Canadian Corporation by performing the same or a substantial part thereof in public without the consent of the Appellant.
- p. 6. 9. Save for the said words of the title "The Man Who Broke the Bank at Monte Carlo" no part of the words or music of the said song were reproduced in the said motion picture as the same was exhibited in Canada and the Appellant's case for infringement rests solely on the contention that according to the law of Canada the title of a song is part of the musical work and that the throwing of the words of the title "The Man Who Broke the Bank at Monte Carlo" on the screen as the title of the motion picture constituted a performance or reproduction of a substantial part of the Appellant's song.
10. The said contention is founded on paragraph (b) of section 2 of The Copyright Act Revised Statutes of Canada 1927, c. 32. Paragraph (b) was added to that section by The Copyright Amendment Act 1931 and is in these terms :

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"(b) 'Work' shall include the title thereof when such title is original and distinctive."

11. The Respondents contend that the copyright (if any) acquired by the Appellant is such copyright in Canada as was substituted by The Copyright Act 1921 (which came into force on 1st January 1924) for a copyright (if any) subsisting in the said work in Canada immediately before that date and that the title of the said song was not part of the work either under the provisions of that Act or of the previously existing law. The Respondents contend that the amendment of section 2 of the Revised Statutes of Canada 1927, c. 32 by the Act of 1931 does not operate retrospectively so as to make the title of a work which acquired substituted
10 copyright under The Copyright Act 1921 part of the work in which copyright was so acquired. The amendment purports to enlarge the subject matter but not the content of copyright and the Respondents contend that on its true construction the amendment is only applicable to works created after the date of the amendment.

12. Alternatively the Respondents contend that even if the title in question be held to be part of the musical work which is the subject matter of the copyright (if any) subsisting therein the exhibition of a cinematograph film bearing the same title does not constitute a performance of a substantial part of such musical work.

20 13. The Respondents further contend that there is no copyright in the said musical work now subsisting in Canada or alternatively that if any such copyright subsists it does not include the sole right to perform the work (or any part of it) in public. Such contention is founded on the statutory provisions and relevant facts which are set forth in the following paragraphs.

14. Immediately before 1st January 1924 which is the date when the Copyright Act 1921 of the Parliament of Canada (11 & 12 Geo. V. c. 24) came into force the following statutory provisions relating to copyright were in force in Canada :

30 (1) By the Copyright Act 1842 of the Imperial Parliament (5 & 6 Vict. c. 45) copyright that is to say the exclusive right of multiplying copies subsisted *inter alia* in every musical work first published in any part of the British Dominions and endured for the life of the author and 7 years or for 42 years from the date of first publication whichever period proved the longer.

40 (2) By the Copyright Act 1842 and the Dramatic Copyright Act 1833 of the Imperial Parliament (3 & 4 Will. IV c. 15) but subject always to the provisions of the Copyright (Musical Compositions) Act 1882 of the Imperial Parliament (45 & 46 Vict. c. 40) performing right that is to say the exclusive right of performing the work in public subsisted *inter alia* in every musical work first performed in any part of the British Dominions and endured for the life of the author and 7 years or for 42 years from the date of first performance whichever period proved the longer.

(3) By the Revised Statutes of Canada 1906 c. 70 which re-enacted in substance The Copyright Act 1875 of the Parliament of Canada

Record.

(38 Vict. c. 88) every musical work the copyright in which had been granted and was subsisting in the United Kingdom was entitled to copyright under that Act upon being printed and published or reprinted and republished in Canada but no person was entitled to the benefit of the Act unless he had deposited in the office of the Minister of Agriculture three copies of the work and caused to be inserted on the title page or page immediately following of the several copies of every edition published a notice in these terms viz. "Entered according to Act of Parliament of Canada in the year _____ by A.B. _____ in the Office of the Minister of Agriculture." Copyright under the 10 said Copyright Act of the Parliament of Canada consisted of the sole right and liberty of printing reprinting publishing reproducing and vending the work in whole or in part for the term of 28 years from the time of recording the copyright thereof and there was a right of renewal for a further term of 14 years given to the author widow or children of the author as the case might be who were living at the expiration of the original term.

15. Before the Copyright Act 1921 of the Parliament of Canada came into force no legislation of the Parliament of Canada had granted to the authors of musical works the exclusive right of performing the work in 20 public and before 1st January 1924 no performing right subsisted in Canada except such performing right (if any) as the work might be entitled to under Imperial legislation.

16. The Copyright (Musical Compositions) Act 1882 hereinbefore referred to amended the law of the Imperial Parliament relating to performing right in musical compositions by enacting that the proprietor of the copyright in any musical composition who shall be entitled to and desirous of retaining in his own hands exclusively the right of public representation or performance of the same shall print or cause to be printed upon the title page of every published copy of such musical composition a 30 notice to the effect that the right of public representation or performance is reserved.

p. 130,
Exhibit 1.

17. On none of the published copies of the said musical work was there printed a notice to the effect that the right of public representation or performance is reserved.

18. The conditions upon which copyright in the said musical work could have been acquired under Revised Statutes of Canada 1906, c. 70 or the earlier Copyright Acts of the Parliament of Canada were never complied with.

19. By the Copyright Act 1921 the Parliament of Canada in exercise 40 of the powers conferred upon it by the Imperial Copyright Act 1911 (1 & 2 Geo. 5, c. 46, s. 26) repealed all the enactments relating to copyright passed by the Parliament of the United Kingdom subject to the proviso that the repeal should not prejudicially affect any legal rights existing at the time of the repeal.

20. On and after 1st January 1924 no copyright has subsisted in Canada otherwise than under and in accordance with the provisions of the Copyright Act 1921 as amended by the Copyright Act 1923 and now re-enacted in the Revised Statutes of Canada 1927 c. 32 and amended by The Copyright Amendment Act 1931 (21 & 22 Geo. 5, c. 8).

21. Subsection 5 of section 42 of the Revised Statutes of Canada 1927 c. 32 enacts as follows :—

10 “ (5) Subject to the provisions of this Act copyright shall not “ subsist in any work made before 1st January 1924 otherwise than “ under and in accordance with the provisions of this section.”

The main provisions of the section are as follows :—

20 “ 42. Where any person is immediately before the first day of “ January 1924 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 substituted “ 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.

“ (2) 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 “ on the first day of January 1924 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.

30 “ (4) For the purposes of this section the expression ‘ author ’ “ includes the legal representatives of a deceased author.”

* * * * *

“ FIRST SCHEDULE

“ Existing Rights.

“ Existing Right.

Substituted Right

“ (b) In the case of Musical and Dramatic Works

40 “ Both copyright and performing right	Copyright is defined by this Act.
“ Copyright but not performing right	Copyright as defined by this Act except the sole right to perform the work or any substantial part thereof in public.
“ Performing right but not copy- right	The sole right to perform the work in public but none of the other rights comprised in copy- right as defined by this Act.

Record.
 p. 124,
 Exhibit 2.
 pp. 126, 127,
 Exhibit 4 (a)
 & (b).
 p. 124,
 Exhibit 2.
 p. 129,
 Exhibit 1.
 p. 126,
 Exhibit 4 (a)
 pp. 126, 128,
 Exhibit 4 (a)
 & (c).
 p. 121,
 Exhibit 7.
 p. 1.

22. Frederick Young Gilbert who was the author of the said musical work died intestate on 12th April 1903 and the copyright subsisting in Canada under the Copyright Act 1842 would have expired 42 years after the date of first publication that is to say on 11th April 1934. The author left a widow and two daughters him surviving. The widow died intestate in 1905 and both daughters are still alive. The Appellant claims to be entitled to a one-half share in the copyright by an assignment dated 29th May 1936 from Esther Howe who is one of the said daughters. The Writ in this action was issued on 27th February 1936. If there is any copyright in the said musical work subsisting in Canada under the provisions of section 42 of the Revised Statutes of Canada 1927 c. 32 the Respondents contend that the Appellant has not on the evidence adduced established its title to one-half share thereof as claimed.

23. The Respondents contend that there is no copyright now subsisting in the said musical work in Canada because in order to acquire a substituted copyright under section 42 it was essential that there should immediately before 1st January 1924 have been a copyright in the work subsisting in Canada under Dominion legislation. It is contended that no substituted right was given by the section for rights existing under Imperial legislation only. As regards such rights section 47 enacts that they shall not be prejudiced by the repeal of the Imperial enactments and under that saving clause they continue to subsist until the expiration of the term of copyright acquired thereunder that is to say as regards the musical work in question until 22nd April 1934 but no longer. There was a period between the passing of the Act of 1921 and its coming into force in 1924 during which the Appellant's predecessors in title Francis Day & Hunter could have acquired copyright under the Revised Statutes of Canada 1906 by complying with the conditions thereof and had they done so they would have acquired a substituted copyright under the Copyright Act 1921 but having neglected to acquire copyright under Dominion Law the copyright previously subsisting under Imperial legislation has expired.

24. If however contrary to the above contention it were to be held that substituted copyright was acquired under the Copyright Act 1921 in respect of rights existing under Imperial legislation only then the Respondents contend that the only right in the said musical work which was subsisting under Imperial legislation immediately before 1st January 1924 was copyright but not performing right. The Respondents contend that the Copyright (Musical Compositions) Act 1882 was an amendment of the Copyright Act 1842 and the Dramatic Copyright Act 1833 in so far as they related to performing rights in musical works and that the amending Act applied to every territory including Canada to which the principal Acts applied. Alternatively if the amending Act did not apply to the extent of imposing the obligation to print a notice reserving performing rights on the copies of musical works first published in Canada it did apply to all musical works first published in the United Kingdom to the extent that non-compliance with the Statutory requirement by an English publisher deprived him of all performing right which he would have other-

wise acquired throughout the British Dominions. In as much as the Appellant's Case for infringement of copyright is on the pleadings limited to an allegation of unauthorised performance in public of the said musical work or a substantial part thereof the Respondents contend that the Appellant must fail on the ground that if contrary to the Respondents' contention any substituted copyright was acquired under the Copyright Act 1921 it did not include the sole right to perform the work or any substantial part thereof in public.

Record.

25. Even if it were open to the Appellant to contend that copyright was infringed by the Respondents by reproduction of the title graphically on the film the Respondents would contend that they did not thereby reproduce the musical work or any substantial part thereof.

26. The action was tried by the Honourable Mr. Justice McEvoy at Toronto Non-Jury Sittings on 25th May and 9th and 10th June 1937. p. 6.

27. At the trial the Appellant called the following witnesses :—

(1) *James Peter O'Loghlin*, Canadian District Manager for the Defendant Twentieth Century Fox Corporation Ltd. who proved that the directorate and principal officers of the company were substantially the same as those of the Twentieth Century Fox Film Corporation of New York which produced the motion picture in question in the United States and that the United States Corporation had voting control of the Canadian Company. This witness who proved that the total rental received by the Defendant Twentieth Century Fox Corporation Ltd. in respect of the hiring of the film for exhibition in Canada was \$24,315.96. p. 17.

(2) *Elliott Shapiro*, a member of the firm of Shapiro Bernstein & Co. music publishers in New York who act as agents for the Appellant in the United States. This witness gave evidence to the effect that his firm had never made any effort to sell the dramatic or cinematograph rights in the musical work in question. He stated that after having made certain searches which were not exhaustive he had not found any dramatic or musical work other than the song in question bearing the title "The Man Who Broke the Bank at Monte Carlo." p. 21.

28. At the trial the Respondents called the following witnesses :—

William Werner who is a qualified accountant and assistant comptroller of the American Corporation proved that the gross receipts from the exploitation in Canada of the motion picture in question amounted to no more than 2.74% of the total world wide receipts of \$904,340. He produced a statement of the profit earned from the exploitation of the film in Canada. He explained that in order to arrive at the true profit earned from the film in respect of the territory of Canada he had eliminated the corporate lines of the separate identity of the two companies and had debited against the Canadian receipts the proportion applicable to Canada of the cost to the United States p. 48.

p. 167,
Exhibit 19.

- Record. Corporation of producing the negative and of its sales and administrative overhead expenses. On that basis the net profit realised by the exploitation of the film in Canada was \$618.12. He said that if the Canadian Company were to be treated as an entirely separate entity the approximate net profit to that Company (excluding the 60% of the rentals transmitted to the United States Corporation as the consideration paid to it for the right to exploit the film in Canada) was \$1,600 to \$1,700.
- p. 64. *Robert Andrew Hutchon* assistant secretary of the Canadian Performing Right Society proved that most of the exhibitors of the film in Canada held the Society's licence to perform any musical work in their repertoire including the musical work in question. He stated that of the gross rentals of \$25,816.00 received for the exhibition of the film in Canada only \$2,296.59 was received from theatres which did not hold the Society's licence to perform the musical work in question.
- pp. 142, 143, Exhibit 1A.
- p. 73. *Edwin P. Kilroe* who is on the legal staff of the United States Corporation gave evidence of the result of his researches which showed that the expression "breaking the bank" in relation to gambling at Monte Carlo was in common use before the publication of the musical work in question. He produced a list showing purchase prices paid by Twentieth Century Fox Film Corporation for titles from November 1927 to March 1937 ranging for the world rights from \$1,000 to \$50.
- pp. 107-112, Exhibit 21.
- p. 148, Exhibit 25.
- p. 91. 29. The learned Judge delivered his judgment on 23rd November 1937. He held that the Respondents had infringed the Appellant's copyright in the musical work in question. He assessed the damages sustained by the owners of the copyright by reason of the infringement at \$350 and in exercise of the power conferred on him by sub-section (4) of section 20 of the Revised Statutes of Canada 1927 c. 32 as amended by section 7 of The Copyright Amendment Act 1931 he would have awarded to the owners of the copyright in addition to the damages the sum of \$1,742.70 being the amount as found by him of the profits made by the Respondents from the infringement. In as much as the Appellant claims only one-half share in the copyright he ordered that it do recover from the Respondents the sum of \$1,046.35 and its costs of the action.
30. The reasons given by the learned Judge for the judgment may be summarised as follows :—
- (1) In his opinion the whole advertisement and the title of the motion picture were based not on the play "The Gamble" but on the musical work "The Man Who Broke the Bank at Monte Carlo." 40
- (2) He found on the evidence that the said words had become world wide known to the public and that the title and song has and had a public reputation in Canada and other countries.
- (3) In his opinion the Twentieth Century Fox Film Corporation of New York deliberately used the title and permitted the Respondents

to use the same in the Dominion of Canada to the injury of the Appellant.

(4) He held that as the owners of the copyright had not complied with the Copyright (Musical Compositions) Act 1886 by printing on the musical work when published a notice reserving the right of performance they lost their exclusive right of performance of the work in Canada but there remained the question whether the use of the title alone was not an infringement of the copyright.

10 (5) He found that the title "The Man Who Broke the Bank at
"Monte Carlo" was original and distinctive within the meaning of paragraph (b) of section 2 of The Revised Statutes of Canada 1927 c. 32 as amended by sub-section (1) of section 2 of the Copyright Amendment Act 1931 and held that by taking the title the Respondents had infringed the Appellant's copyright.

(6) He held that the licences granted by the Canadian Performing Right Society did not give the licensees the right to use the title of the song otherwise than by performance of the words and music.

31. The Respondents contend that the learned Judge was wrong in holding that the title to the musical work in question was original and distinctive. The title consists of a phrase which is proved to have been in
20 common use at the time when the song was published and is a title which is accurately descriptive of the subject matter and theme of the song. The title formed no part of the musical work and was therefore not included in the copyright protection if any which the work was entitled to in Canada. Further the taking of the title only and the use of it as the title of the film does not constitute either a reproduction or performance of a substantial part of the musical work within the meaning of section 3 of the Copyright Act. The learned Judge having held that there was no performing right subsisting in the work in Canada was precluded from holding that copyright
30 had been infringed in as much as the only infringement alleged is the unauthorised performance of a substantial part of the musical work.

32. The Respondents submit that the learned Judge based his judgment solely on infringement and not on the common law doctrine of passing off but in any case this doctrine cannot help the Appellant in the present case because there can be no possible confusion in the minds of the public between a song and a cinematograph film although their titles may be the same. A song with a simple theme such as that of the song in question cannot be dramatised or reproduced in the form of a film without such radical additions and changes as would make it an entirely new work. The use of the title
40 cannot therefore amount to a representation that the film is a film version of the song and no evidence was adduced that anyone was deceived into the belief that the film was anything other than what it is that is to say a film based on the comedy in three Acts by Ilia Surgutchoff and Frederick Albert Swann entitled "The Gamble" and telling the story of a man who broke the bank at Monte Carlo and of his experiences tragic comical and emotional which resulted from that achievement.

Record.

33. The Respondents further submit that the learned trial Judge was wrong in the principles which he applied to the assessment of damage and award of profits. In each case the amount was excessive and the learned trial Judge failed to consider the following matters :

(A) Over 90% of an amount of the gross rentals received by the Defendant Twentieth Century Fox Corporation Limited from the exhibition of this motion picture in Canada came from theatres which held licences from the Canadian Performing Right Society to perform in public the musical work in question and this right of public performance must be taken to include the use of the title of the work. 10

(B) Although the Copyright Act as amended in 1931 authorises the awarding in addition to damages of such part of the profits which the infringer shall have made from such infringement as the Court may decide to be just and proper damages only should be awarded unless there has been a dishonest infringement such as would justify in other cases an award of punitive damages.

(C) An almost infinitesimal part of the profits earned from the exploitation of the film in Canada could be attributed to the use of the title. The learned trial Judge clearly erred it is submitted in awarding in addition to damages the whole of the alleged infringer's profits as 20 if there had been an infringement of the whole copyright and no other element was a factor in producing such profits.

(D) The correct principle on which the profits should have been ascertained is that stated by Mr. Werner in his evidence and it is submitted that on that basis the profits were \$613.12 and no more. The learned trial Judge erred in acceding to the contention of the Appellant's Counsel and taking the profit made by the film as being that proportion of the total net profits made by the Respondent Twentieth Century Fox Corporation Limited on its whole operations in Canada during 1936 as the gross receipts by it from the picture in question bears to its total 30 gross receipts for that year.

(E) The list of prices produced by Mr. Kilroe ignoring one which covered more than the right to use the title range from \$50 to \$1,000 and according to his evidence from 5% to 15% only of these prices would be attributable to Canada. The finding that the total damage amounted to \$350 cannot be supported having regard to the evidence.

34. The Respondents' appeal from the judgment of the learned trial Judge to the Appellate Division was heard on the 11th and 12th days of May 1938 before The Honourable Mr. Justice Middleton, The Honourable Mr. Justice Masten and The Honourable Mr. Justice Henderson. The 40 Court delivered judgment on 13th June 1938 allowing the appeal and ordered that this action be dismissed with costs to be paid by the Appellant to the Respondents forthwith after taxation thereof and that the Appellant do pay to the Respondents their costs of the appeal forthwith after taxation thereof.

35. The leading judgment of the Court was delivered by the Honourable Mr. Justice Middleton and the reasons for the judgment may be summarised as follows :—

10 (1) Upon the true interpretation of section 42 of the Copyright Act Revised Statutes of Canada 1927 c. 24 copyrights in respect of which the substituted right is given means rights subsisting in Canada by virtue of the Revised Statutes of Canada 1906 and does not include rights existing under Imperial legislation prior to the Imperial Copyright Act 1911 and which remained in force in the Dominion until repealed by Dominion legislation. The Appellant's predecessors in title might have acquired copyright under the Dominion legislation but did not do so and for that reason the Appellant's case entirely failed.

(2) Assuming without deciding that the title of the musical work in question was original and distinctive and was included in the copyright nevertheless the real work was the song set to music consisting of three stanzas and a chorus and the inclusion of the title in the copyright did not give to the owner of the song and music such an ownership in the title as would prevent its use in a totally different type of work.

20 (3) It was at least doubtful whether the Act of 1931 which enacted that a work should include the title was retrospective so as to be applicable to then existing copyrights.

(4) The Appellant could not succeed on the common law principle of passing off in as much as the moving picture was not represented as being the copyright song. No one could be misled or defrauded by what was done. There was no passing off of the Respondents' work as the work of the Appellant.

36. The Respondents humbly submit that this appeal should be dismissed and the Judgment of the Appellate Division should be affirmed for the following (among other)

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REASONS.

1. Because in as much as immediately before 1st January 1924 there was no copyright subsisting in the said musical work in Canada under Dominion legislation no substituted copyright was acquired under the Copyright Act 1921.
2. Because after Canadian legislation of 1875 the Imperial Act of 1842 and subsequent Imperial legislation ceased to have effect in Canada.
3. Because if a substituted copyright was conferred in respect of rights subsisting only under Imperial legislation the musical work in question acquired copyright but not the exclusive right of performing the work in public.
- 40 4. Because the musical work in question was published in London without any notice reserving the right of public

performance or representation and by reason of the provisions of the Copyright (Musical Compositions) Act 1882 the performing right conferred by Imperial legislation was not retained.

5. Because the only infringement of copyright alleged is that of unauthorised performance of the work or a substantial part thereof in public.
6. Because the musical work in question consists of a song set to music and even if the title be deemed to be part of the work that does not give the owner of the copyright the right ¹⁰ to prevent the title being used either by way of reproduction or performance as the title of a totally different type of work.
7. Because the provision of the Copyright Act 1931 which enacts that a work shall include the title thereof where such title is original and distinctive is not retrospective and is not applicable to previously existing copyrights.
8. Because the title "The Man Who Broke the Bank at Monte Carlo" was neither original nor distinctive within the meaning of the said provision. 20
9. Because there was no evidence that the moving picture in question was advertised or presented in such a manner as to lead the public to believe that it or any part of it was the work or included the work of the Appellant.
10. Because the judgment of Mr. Justice McEvoy was wrong except in so far as he held that non-compliance with the Copyright (Musical Compositions) Act 1882 was fatal to the existence of any performing right in Canada in the musical work in question.
11. Because the judgment of the Appellate Division was right. 30

ARTHUR J. THOMSON.

E. J. MacGILLIVRAY.

In the Privy Council.

No. 94 of 1938.

*On Appeal from the Supreme Court of Ontario
(Appellate Division).*

BETWEEN

FRANCIS DAY & HUNTER LIMITED
(Plaintiff) Appellant,

AND

TWENTIETH CENTURY FOX COR-
PORATION LIMITED and FAMOUS
PLAYERS CANADIAN CORPORA-
TION LIMITED *(Defendants) Respondents.*

CASE FOR THE RESPONDENTS.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.