"Polly" goes to Court.

Mr. Frederic W. Austin sues the Columbia Graphophone Company for Infringement of Copyright. Protracted Litigation.

JUDGMENT FOR PLAINTIFF.

SITTING in the Chancery Division on July 3rd, Mr. Justice Astbury commenced the hearing of a suit of considerable importance and interest to musical circles, because it raised vital questions of copyright. The plaintiff was Mr. Frederic W. Austin, a well known musical composer and opera singer, who wrote the music of "Polly" and "The Beggar's Opera," the charming and unique operas by Mr. John Gay, that have attracted large audiences at the Lyric Theatre, Hammersmith, and the Kingsway and Savoy Theatres, London. He sued the Columbia Graphophone Co. Ltd., for damages (1) for infringement of his musical copyright in "Polly," and (2) for passing off gramophone records purporting to be "Selections from 'Polly,'" which were, he said, produced from his work. The defendants denied the passing-off and infringement, stating that their records were produced from a score prepared from the original airs in Gay's appendix to the opera by Mr. A. Ketèlbey, also a musician of eminence and popularity. The action drew to the court a large number of well-known musical people. Naturally, the evidence was of a highly technical nature, the two opposing scores being examined practically bar by bar and often note by note, and the judge and counsel expressed the difficulty they experienced in dealing with the subject. However, judging from the expert manner in which the legal advocates handled the subject that difficulty apparently actually presented no terrors for them and it was not long before they had as good a grip of matters as their clients. The hearing was also enlivened by musical illustrations by the plaintiff and Mr. Ketèlbey, both singing passages of music to the judge to emphasize points in their evidence.

Mr. LUXMOORE, K.C., who appeared for Mr. Austin, explained at some length his client's case. After describing "The Beggar's Opera," which was written by Mr. Gay in 1729, counsel told how "Polly" was presented as a sequel. "Polly," he said, was not produced for some years later, and then it was practically heard no more of by the general public until 1922, when it achieved great success at the Kingsway Theatre. Meanwhile, "The Beggar's Opera" had acquired fame at the Lyric Theatre, Hammersmith. It appeared that "Polly" had with it a number of airs of a traditional nature, and Mr. Austin had collected those airs and, from them, had composed an up-to-date musical foundation for the opera, Mr. Clifford Bax having prepared the lyrics. Plaintiff's case was, said counsel, that the defendants had taken his orchestral score as a basis and had, with the aid of Mr. Ketèlbey, written another score of "Polly" and made from it gramophone records which they placed upon the market. The Gramophone Co., who had the first call on the plaintiff's music, were beaten by defendants by one week,—defendant's records, which the public had reason to believe were of Mr. Austin's music, being placed on the market earlier than the Gramophone Co.'s. The result was that plaintiff suffered much damage. Under the Copyright Law, the unauthorised usage of plaintiff's music by the defendants was a breach of copyright, and in this case plaintiff claimed that defendants had usurped his rights and deprived him of a privilege of first production, a privilege which gramophone companies would pay highly for.

The JUDGE pointed out that defendants said that Mr. Ketèlbey took such music as Gay had in his schedule and made their own score of it, as they had a perfect right to do.

Mr. LUXMOORE replied that they had taken plaintiff's music and adapted it into their score and he could prove it without doubt.

After a humorous observation by the judge, who enquired if counsel were going to sing parts of the opera to him, Mr. LUXMOORE explained that the copyright in Gay's opera had disappeared. It was not produced in Gay's lifetime because the Lord Chamberlain forebade it, most likely from political reasons. Gay's idea was to "lash the reigning vices," and Mr. Bax, when he took the thing in hand, made a satirical production into a pleasant light opera, sacrificing portions of the text and lyrics and altering the plot. Plaintiff in his turn wrote new music to the altered play, and there emanated a commercial success. Some fifty out of seventy-one of Gay's airs were used as the musical foundation.

Sir DUNCAN KERLY, K.C. (for defendants), said theirs was an independent product on Gay's airs selected from the British Museum by Mr. Ketèlbey.

Mr. LUXMOORE: The strange part of it is that there is a remarkable resemblance between defendants' score and ours. Counsel then went on to explain how plaintiff, on examination of the music of Mr. Ketèlbey, had found many instances of piracy, how similar airs had been selected and identical passages of music included in defendants' score and how, he contended, Mr. Ketèlbey departed from Gay and followed Mr. Austin's work. Counsel quoted the instance of the duet between Mr. Ducat and Polly which commences "I will have my humours." That was, he said, originally written as a soprano song for Mrs. Ducat, but was altered into a duet for Mr. Ducat and Polly by Mr. Austin. Music phrases in the duet had been deliberately copied by Mr. Ketèlbey. In another case, a bagpipe passage had been introduced by plaintiff and copied by Mr. Ketèlbey.

His LORDSHIP at this stage, and later in the hearing, asked whether he could not hear the gramophone records of Mr. Austin's and Mr. Ketèlbey's scores. He thought, then, that there would not be so much difficulty in deciding whether there was any likeness between the two. Both counsel assured the judge, however, that the hearing of records would not help him, but on the contrary must have the effect of confusing him. A number of expert musicians would give evidence, his lordship was told, and their statements would throw more light on the matter than the hearing of records which would not throw into light adequately the points which the parties relied upon.

The JUDGE humorously observed that he could tell a waltz from a dirge, and he was reminded that such a musical equipment would not be sufficient to enable him to decide the case with the help of gramophone records.

Giving evidence, Mr. AUSTIN described Gay's airs in "Polly" as being traditional or based upon tunes of contemporaries of Gay's day. He had treated those airs freely as a basis of his work in "Polly" and had followed a plan of his own that was quite different from Gay's. Messrs. Boosey & Co., Ltd., had the license to print the score and the Gramophone Co. had acquired from him the right of first production as far as records were concerned. But, later, he found that the defendant company were publishing records of "Polly" which amounted to an infringement. Singing passages of his music in his splendid bass voice, Mr. Austin showed how he altered one air which ran "Cease your anguish and forget your grief" into a bass song "Drink boys, drink, and the devil take to-morrow." Passages from the song appeared in Mr. Ketèlbey's score, he said. All through defendants' score he had recognised his musical phrases, antiphonal passages, schemes and harmonic effects. Mr. Austin also described how, with the assistance of Mr. Clifford Bax, he altered another sentimental soprano and tenor duet into a rollicking bass solo and how the peculiar robust characteristics had been accentuated in Mr. Ketèlbey's score. In the pirated score, too, there appeared his imitation of the ringing of bells. Summing it all up, said plaintiff, he was of opinion that, generally, Mr. Ketèlbey's treatment had produced a distorted version of his (plaintiff's) music with the result that if people thought it was his music his reputation would suffer. Mr. Ketèlbey had taken his structural invention,—the most valuable part of a composer's work. Such a structure was far more valuable than the manner in which he decorated the structure, and by taking the structure defendants had done more harm than by imitating some of his harmonies.

Replying to questions in cross examination, Mr. AUSTIN agreed that Sir Frederick Bridge lectured on "The Beggar's Opera" in 1913, although he was ignorant of the fact that Sir Frederick suggested its performance. I took Gay's airs, said Mr. Austin, and made them into an opera of my own upon the reconstructed lyrics by Mr. Bax. It was a fact that there had been a second "Polly" on the stage known as the Chelsea version by Bath, and that was orchestrated quite differently from his. The uninformed public were of the mistaken opinion that Gay left a coherent score of music. Mr. Austin agreed that Mr. Ketèlbey was a musician and composer of eminence whose compositions sold freely, but he would not agree that not half-a-dozen consecutive notes of his music appeared in Mr. Ketèlbey's score.

After his LORDSHIP had observed that such a fund of technical evidence made a decision difficult, Sir Duncan Kerly remarked that plaintiff was speaking in what, to counsel, was an embarrassing unknown language, a statement that caused much laughter.

Mr. ERNEST NEWMAN, a well-known musical critic and writer, explained how Mr. Bax and Mr. Austin had transformed Gay's satirical opera into a beautiful comedy opera, by altering the styles of the characters and recasting the whole piece. Witness had no doubt that defendant's score was, to a great extent, a copy of plaintiff's music. In fact, he thought Mr. Ketèlbey had a more intimate knowledge of Austin's music than of Gay's.

Sir HUGH PERCY ALLEN, director of the Royal College of Music, was also of opinion that Mr. Ketèlbey's score was founded on plaintiff's music, and he could not agree that two musicians of the eminence of plaintiff and Mr. Ketèlbey would deal with a set of airs independently of each other and create scores so much alike. The fairest thing he could say was that Mr. Ketèlbey had harmonised Gay's tunes very similarly to the way Mr. Austin had and that, in his opinion, was a strange thing.

Mr. GEOFFREY SHAW, a composer, said Mr. Austin had added much of his own music to Gay's airs, with the result that the opera became a work by Frederic Austin, founded on Gay's airs. He, too, was of opinion that Mr. Ketèlbey had reproduced most of Mr. Austin's harmony into his own score.

This completed the plaintiff's case, and Sir DUNCAN KERLEY argued that the action was beyond the ambit of the Copyright Law, and if it was upheld it would lead to many similar actions. He characterised the suggestion of passing off as ludicrous, for the defendants could, and had, put upon the market records of "Polly" from a score of their own founded on Gay's airs. This was quite legal and fair, notwithstanding the fact that the plaintiff and Mr. Bax, by producing the opera, had made the thing popular. There was no monopoly in ideas and no fault could be found with defendants' actions so long as it was a fact that Ketèlbey's version was an independent one. Counsel said he would call a number of eminent musicians who would say they could trace nothing in the score of defendants than that which would come from a competent musician who set out to harmonise Gay's airs in a modern way.

Mr. ALBERT KETÈLBEY then gave evidence. After speaking of his twenty-five years' experience as a composer, he told how he obeyed a request from the defendants to produce a score of "Polly" on Gay's music and how he selected the suitable airs from Gay's edition of the opera in the British Museum. He was perfectly capable of composin a version independent of Mr. Austin's music, whic

of course he knew, and he had not the least intention of copying a line of Mr. Austin's music. Mr. Ketèlbey then gave instances of how he had followed Gay's airs in many cases, selecting the tit-bits from Gay. He had a good knowledge of Gay's airs, but he certainly paid no heed to the way plaintiff had dealt with them. He did not agree that plaintiff had composed an entirely new work because if a composer took an air and wrote music round it he (witness) did not regard that as an original work. Original work would have to have much less of Gay in it and much more of Austin. Plaintiff's was a new arrangement of the music and not a new copyright composition. Asked if he had not heard of Mr. Austin's music he would have got so near to it as he had, witness said he thought so.

His LORDSHIP: Do you really say that?—Yes; I do.

Sir FREDERICK BRIDGE, the celebrated organist who except for deafness is as alert as ever, spoke of seventy years' experience as a musician. [Sir Frederick is seventy-nine years of age.] Giving his evidence with much candour and humour he said he had studied Gay's operas and music attached to them and he regarded himself as a reviver of "The Beggar's Opera" because he lectured on it ten years ago and performed a great deal of the music. He had analysed Mr. Ketèlbey's version of Gay's songs in comparison with that of Mr. Austin because he had heard the former had been accused of stealing some of the latter's "thunder." The result was that he had spent many unhappy hours at Westminster comparing scores. He had come to the conclusion that Mr. Ketèlbey had done nothing save what an honest man should do. There might be likenesses between the two versions and that would not be surprising. He could not imagine that two good musicians like the plaintiff and Mr. Ketèlbey would be such fools as to borrow from each other. (Laughter.) Sir Frederick added that this was the first time he had ever given evidence in a court of law.

Mr. HUBERT BATH, who formerly was the musical director at the London Gaiety Theatre, and who composed, among other things, the opera "Young England," said he had arranged a musical version of "Polly," which was produced at Chelsea. After comparing plaintiff's "Polly" with Mr. Ketèlbey's, he found nothing that suggested that Mr. Ketèlbey had copied from Mr. Austin. In fact, after a study of plaintiff's score, he found in it three instances where Mr. Austin's music happened to be like his (witness's). (Laughter.) Witness did not agree that a person, after hearing Mr. Austin's music, would be bound to reproduce some of it into his own score; he thought a good composer would be less likely to do that after hearing his contemporaries' music.

Sir FREDERICK BRIDGE was recalled on July 13th, when the action had been proceeding for eight days. Answering questions, he said he had compared Mr. Ketèlbey's version with that of Mr. Austin and left Gay out of it. Amid laughter, Sir Frederick remarked: "The man who asked me to have something to do with this confounded case said to me: 'Will you have a look at Ketèlbey's music and see if he has copied Austin?' Very likely, as a wise man, I said 'Send along Gay as well;' but nobody will admit it.—they admit nothing."

His LORDSHIP: You are in very sad company.

Sir FREDERICK said he would like to look at a new score that he himself had prepared when comparing the two. But COUNSEL laughingly observed: "We don't think much of it, you know."

Sir FREDERICK: I think it might be rather troublesome to you. He added, *sotto voce*, "What an awful bore all this is!" Sir Frederick also remarked: Austin and Ketèlbey are good musicians who have no business to be fighting over this: it is not worth the trouble. They have both done what good musicians should do, and no fault can be found with their work. He added that this was a serious matter for musicians. If they were to be prevented from copying old tunes and treating them in their own way because somebody had already done so, the people like himself who went in for musical research would be afraid to go to the British Museum in case they were locked up.

Sir FREDERIC COWEN, the well known composer and conductor, who for years has conducted the Handel Festivals said those festivals only came once in three years and they hardly paid him. He had studied the two scores in this action and found no copying of Mr. Austin's by Mr. Ketèlbey. His opinion was similar to Sir Frederick Bridge's that although there may be a few coincidences in the scores they arose from the fact that the two good musicians had adapted the airs similarly. These coincidences, in his opinion, were not important so far the case was concerned. Sir Frederick said he could name a large number of composers who had subconsciously copied from each other.

At the beginning of the ninth day of the hearing (July 17th) his Lordship was told that three more experts would be called for the defence. The JUDGE said he did not feel inclined to hear three more experts. The case must be kept within limits because of the costs somebody would have to pay.

Sir DUNCAN KERLY said he had overwhelming evidence that there had been no copying. He asked to call three more witnesses and was given permission.

Sir DAN GODFREY, the well known director of music for the Bournemouth Corporation; Mr. HAMILTON HARTY, conductor of the Hallé Orchestra, Manchester and Mr. GEORGE H. CLUTSAM, composer and arranger of the music of "Lilac Time" also gave evidence to the effect that there was not a substantial similarity between the opposing scores. Each witness was of opinion that Mr. Ketèlbey's was an independent version of "Polly." This closed the evidence.

Sir DUNCAN KERLY summed up the evidence on behalf of the defendants, arguing that Mr. Ketèlbey had honestly made an independent version of the airs of "Polly." The most that could be said was that, if there was any similarity, it was subconscious on the part of Mr. Ketèlbey. He had received a letter from Sir Frederick Bridge which he would adopt as part of his argument. It ran, "The arrangement of an old air must obviously be more difficult to copyright than a piece of original music, for the old air itself is common property and without the air there could be no arrangement."

Mr. LUXMOORE (for the plaintiff) said that the success of the defendants' records made it essential that there should be some resemblance to the "Polly" that was being performed at the Kingsway Theatre, and it was obvious that, because of this, defendants had taken a great many of plaintiff's ideas and music. The evidence had been astonishing, for some witnesses had behaved as advocates, and forgot they were there to give evidence. This observation caused the JUDGE to remark: Facts seem too prosaic and commonplace for musicians to bother about.

Mr. LUXMOORE said that defendants seemed to say that they could take Mr. Austin's time and method so long as they did not take his notes, and that there was no copyright in an idea.

The JUDGE: That was the whole of the defence.

Mr. LUXMOORE added that Sir Frederick Bridge seemed to think that if plaintiff won the action, some terrible calamity would happen, and nobody would be able to examine and rearrange non-copyright airs if anybody had written music upon them before. That was based upon a fallacy, because the effect of the Copyright Act was to stimulate and protect people who did independent work. There was no copyright in an idea, but there was copyright in a combination of musical ideas and devices which made up the texture of a composer's work.

THE JUDGMENT.

In his considered judgment, which he delivered on July 24th, Mr. JUSTICE ASTBURY said that Mr. Austin was the sole owner of the copyright in the music of "Polly," and his allegation was that Mr. Ketèlbey had infringed his copyright by making, or authorising to be made, a manuscript or orchestral score and band parts in which substantial portions of plaintiff's music were reproduced. There was no doubt that plaintiff's was the only successful musical version of "Polly" ever produced in this country, and the fact that Gay's work, as it originally was, was totally unsuited to the English stage to-day was of importance in the action. There was no doubt that the defendant's gramophone records were wanted for sale to people who knew, and expected to hear, plaintiff's music.

His Lordship quoted as a significant and interesting fact that in his score plaintiff had made a mistake in the description of one of the airs, describing it as "The Buss Coat," when it should have been *The Buff Coat*, and in defendant's trade advertisement the same mistake occurred. There was no doubt that defendants wanted plaintiff's permission to use his music for their records, but when that permission was not forthcoming, they decided to make records from a score of their own. The question naturally arose: why did they employ Mr. Ketèlbey, who had seen and heard Mr. Austin's music, to make an independent version for them? The answer seemed to him to be perfectly obvious. After hearing the evidence and drawing the irresistible inferences that resulted, it seemed perfectly obvious that no stranger to plaintiff's music could possibly have supplied what defendants required, and the public, with its taste whetted by Mr. Austin's music, would buy. He was satisfied that defendants desired to get as near to plaintiff's work as they safely could.

Plaintiff, his Lordship was of opinion, was a careful, honest and reliable witness and he accepted his evidence in its entirety. His Lordship thought there were thirty or forty cases at least in which defendants had borrowed from plaintiff's music, and which could not be explained away, taking them collectively as coincidences. And the theory that the coincidences would occur in the adaptation of airs by an independent composer could not be accepted. Describing Sir Frederick Bridge's letter as a sort of posthumous judgment of the case, his Lordship said Mr. Hamilton Harty expressed such extreme views that it was difficult to explain the impression it conveyed to his mind, sitting, as he was, ignorant of the mysteries of melody and harmonisation. The witness seemed to be in a sort of musical dreamland where facts and realities and such like prosaic commonplaces could hardly be considered to merit attention. (Laughter.) Of course, he was sure the witness gave his evidence in all good faith.

On the whole, he was of opinion that the defendants had taken a very substantial part of the plaintiff's work and their score was largely made up of imitation and appropriation of Mr. Austin's "Polly." Therefore, there had been an infringement of plaintiff's copyright and there would be judgment for plaintiff and an injunction and an enquiry as to damages. Defendants must pay the costs of the action.

His LORDSHIP said he would grant a stay of the enquiry and delivering up of the records if notice of appeal was given within twenty-one days.