

**HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.**

**THE MUSICAL COPYRIGHT IN  
"POLLY."**

**AUSTIN v. COLUMBIA GRAPHOPHONE  
COMPANY, LIMITED.**

(Before Mr. Justice Astbury.)

This was an action by Mr. Frederic Austin, the composer, against the Columbia Graphophone Company, Limited, for an injunction to restrain the company from making, selling, publishing or otherwise disposing of any record by which the music arranged and composed by him for the opera *Polly*, by John Gay, might be mechanically performed, or from otherwise infringing the copyright in such musical work. The plaintiff also seeks an injunction to restrain the company from publishing or exhibiting an illustrated advertisement or poster, headed "Columbia Records of *Polly*," or from passing off the company's records as records by means of which the plaintiff's music for *Polly* might be mechanically performed.

The original opera of *Polly* was written by Gay, and was first published in 1729 as a sequel to *The Beggar's Opera*, but it was never performed in Gay's lifetime, as it was prohibited by the Lord Chamberlain. The play as published consisted of the text in ordinary prose form, with certain added lyrics, for which simple airs with an added bass were printed in an appendix. These airs were those of folk-songs and other then current popular airs, and no music was composed by Gay. The play was entirely unknown until after the great success of the revival of *The Beggar's Opera*, which has now run for more than three years. An adaptation of the play was then written by Mr. Clifford Bax, and was produced at the Kingsway Theatre in December, 1922, and is now being performed at the Savoy Theatre. For this adaptation the plaintiff composed music, which was original, though partly incorporating the airs contained in Gay's appendix. A vocal score of the plaintiff's music, together with the lyrics written by Mr. Clifford Bax, was published by Boosey and Co., but no orchestral score has ever been published. The play as adapted by Mr. Clifford Bax is of a different character from the original work by Gay, which was of a serious and political nature, whereas the present production is a comic opera.

The plaintiff alleges that the defendant company has published records which are an infringement of his copyright. After the production of *Polly* the plaintiff was approached by both the defendant company and the Gramophone Company, which had already published records of *The Beggar's Opera*. As to the rights of production on gramophone records, the plaintiff granted the first right of production to the Gramophone Company, but he was willing to give his consent under section 19 of the Copyright Act, 1911, to the defendant company's publishing records of their own after the publication by the Gramophone Company. With a view to this an orchestral score was prepared by Mr. Kotelbey, the musical director of the defendant company, and was submitted to the plaintiff, who on February 6 approved of it, subject to the condition as to the rights of the Gramophone Company. The defendant company did not accept this condition, but, according to their account, Mr. Kotelbey, on their behalf, went to the British Museum and transcribed the airs from the original copy of Gay's *Polly* there, and from these prepared an orchestral score, records of which they were on March 3 able to offer to the trade, and which were issued by them a week before the Gramophone records.

**THE PLAINTIFF'S ALLEGATIONS.**

The plaintiff alleges that the orchestration by Mr. Kotelbey was based on the orchestration of the plaintiff's music, which he had prepared for the plaintiff's approval. The plaintiff says that in taking the airs from Gay he had varied the nature of their application, and whereas the original airs of Gay were to be seriously sung, in the present version they were turned into light music, and in many cases solos were made into choruses, and a sentimental song by a lady was converted into a pirates' chorus. He alleges that in the orchestration by Kotelbey the same thing has been done. Whereas the plaintiff had used nineteen of Gay's airs, which were about seventy in number, Kotelbey had used eighteen of these and had transformed them into the same nature as in the plaintiff's version. The plaintiff alleges that the orchestration of these airs and the band parts which were prepared by Kotelbey for the defendant company's records were infringements of the plaintiff's copyright. He also claims that the defendant company's advertisements were so framed as to lead purchasers to believe that the records were of the play *Polly* as performed at the Kingsway Theatre, and not of a separate production by the defendant company, and that they were passing off their records as records of the plaintiff's music.

Mr. Justice Astbury suggested that it might be necessary for him to have a musical assessor or musical assessors to assist him, or that the records of the defendant company and of the Gramophone Company should be played, so that he might judge whether there was any infringement.

Mr. Frederic Austin said that he composed the music for *The Beggar's Opera* and for *Polly*. A vocal score of the music of the latter was published, in the early editions of which there was an error in air 33, which was described as "The Bus Coat," which in the later editions was correctly described as "The Buff Coat." He took some of the airs in Gay's appendix and wrote round them a musical setting adapted to Clifford Bax's version and not for Gay's original. On February 7 he granted the right to produce records to the H.M.V. Company (the Gramophone Company), and subsequently he told Mr. Brooks, the manager of the defendant company, that he could only give him permission to produce records after the H.M.V. Company's records were published. He learnt that the defendant company was producing records from the poster and from the publishers' circular. The poster had a picture of *Polly* in a dress similar to that which she wore in *The Beggar's Opera* and in one act of *Polly*, and it would lead people to believe that it referred to the latter play as now performed. He had seen the notes which purported to have been made by Kotelbey at the British Museum. They were not, as they professed to be, a correct copy of Gay's music. He pointed out various discrepancies in the notes from the original music and references to his own vocal score. He compared these notes with his own vocal score, and he heard the defendants' records played. He considered that these records were a distorted version of his own score. They were substantially the same as the orchestration prepared by Kotelbey for his approval, except that one tune had been omitted and another by himself had been substituted for it. The records did not in many cases represent Gay's airs, but were like his own variations of Gay.

The witness gave instances in which he had varied the character of the airs from those given by Gay, and in which, he said, the settings in the defendants' records were similar to his own. In several instances where Gay had indicated a mournful or slow setting he had turned it into a rollicking or lively setting, which had been followed in the records. The mistake of "Bus Coat" for "Buff Coat" appeared in the title of the defendants' records.

The plaintiff's evidence had not concluded when the Court rose.

Mr. Luxmoore, K.C., and Mr. MacGillivray appeared for the plaintiff; Sir Duncan Kerly and Mr. S. O. Henn-Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co. for the plaintiff; Messrs. Withers, Benson, Currie, Williams, and Co. for the defendants.

THE TIMES, THURSDAY, JULY 5, 1923.

**HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.**

**MUSICAL COPYRIGHT IN "POLLY."  
AUSTIN v. COLUMBIA GRAPHOPHONE  
COMPANY, LIMITED.**

(Before Mr. Justice Astbury.)

Mr. Justice Astbury continued the hearing of this action, in which Mr. Frederic Austin is claiming against the Columbia Graphophone Company, Limited, an injunction to restrain the company from infringing his copyright in the music which he has written for the version of Gay's opera *Polly* (now being performed at the Savoy Theatre) by gramophone records published by them. The plaintiff also seeks an injunction to restrain the defendants from issuing an advertisement or poster or otherwise passing off their records as records of his music for *Polly*.

The facts of the case were reported in *The Times* of this morning.

Mr. Frederic Austin, continuing his evidence, said that his setting would not have been agreeable to the views of music at the date of the original opera. He used in places an antiphonal scheme, which in the original play would be absurd. He gave instances of different schemes of harmony and special figures in the accompaniment which he had introduced, and in doing so he sang certain phrases to illustrate his meaning. He then gave instances where, he said, the same features appeared in Mr. Kotelbey's music, and a similar scheme was followed when it was not suggested in the original, and also instances in which he alleged that where he had made alterations in the character of songs the same alterations appeared in Mr. Kotelbey's music. He considered that Kotelbey's music was a distorted version of his own. Hearers who were not very musical might take the records as being records of the music of the opera, but musical persons would be struck by the lack of taste, and if the records were considered to be records of his music they would be prejudicial to his reputation. He complained that Mr. Kotelbey had taken the structural idea with which he had clothed the tunes in the appendix to Gay's work.

**THE PLAINTIFF CROSS-EXAMINED.**

Cross-examined by Sir Duncan Kerly.—Gay wrote certain traditional airs for *The Beggar's Opera*. He (the witness) had written an accompaniment and songs for the present production of that opera. The production was very successful, and *Polly*, which had been neglected, was brought to notice. It was known as "*Polly*, an Opera by Mr. Gay." He had thought of *Polly* as an interesting thing to work upon before the success of *The Beggar's Opera*. *Polly* required more drastic alterations than *The Beggar's Opera*. Another version of *Polly* had been arranged and put on the stage, but it was now off again. He objected to the description of the records as records of Gay's music. It was a matter of conjecture that the airs in the appendix were by Gay. At the present moment to refer to Gay's music would practically mean Austin's music. When selections from *Polly* were advertised the public would believe that they were from the present production by him.

He did not claim any exclusive right to the name of "*Polly*." The poster complained of was different from the poster advertising the performance at the Kingsway Theatre. The picture represented *Polly* as she appeared in *The Beggar's Opera*. He approved of the selection from his music brought to him by the manager of the defendant company for preparation for record. There were twenty tunes taken out of the fifty which he had chosen from Gay's appendix. He approved of them subject to the H.M.V.'s Company's rights. Even if Mr. Kotelbey had not first prepared a version of his work he would, when he heard the records and saw the poster, have thought that the records were copying his music. Musical people who had heard his version at the Kingsway Theatre and heard the Columbia records would be puzzled, while those who had not heard his version would wonder what had happened to him. His complaint was that Mr. Kotelbey's work was put on the market without being distinguished from his, and it contained reminiscences of his work. It was not true that no notes of his work had been copied. He could not say how many notes which he had not taken from Gay had been copied.

He did not suggest that any whole bar of his work had been taken by Mr. Kotelbey. He understood that Sir Duncan Kerly was not musical, and his way and counsel's of putting things was different. He disputed the statement that the notes constituting the harmonization of Gay's music were substantially different in his version and in Mr. Kotelbey's version. Actual passages in his version had been copied by Mr. Kotelbey. His substantial complaint was that his musical ideas, structure, and character had been imitated. To use a building analogy, Mr. Kotelbey had taken his girders and laid his own bricks on them. If two competent musicians were set to harmonize an old air he would not necessarily expect similarity in the results.

The cross-examination of Mr. Austin was not concluded at the rising of the Court.

Mr. Luxmoore, K.C., and Mr. MacGillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co. for the plaintiff; Messrs. Withers, Benson, Currie, and Williams for the defendants.

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Mr. Justice Astbury continued the hearing of this action in which Mr. Frederic Austin claims an injunction to restrain the Columbia Graphophone Company from infringement of his copyright in the music which he wrote for the present production of Gay's *Polly* by the making and publishing of gramophone records without his permission, and from passing off by posters and advertisements their records as records of his music.

Mr. Justice Astbury continued the hearing of this action, in which Mr. Frederic Austin, the composer of the music of the present production of *Polly* at the Savoy Theatre, claims an injunction to restrain the Columbia Graphophone Company from infringing his copyright in the music by gramophone records and from passing off such records as being records of Austin's music "by posters or advertisements."

The facts of the case are stated in *The Times* of July 4.

The facts of the case are reported in *The Times* of July 4.

The cross-examination of Mr. Frederic Austin by Sir Duncan Kerly was continued. The witness said that he did not know an edition of old English music published in 1858 in which one of the songs in the appendix to *Polly* was contained. He objected to the putting in of a parallel copy of the music there and in his version as he had found that the professed parallel of his music and Mr. Kotelbey's music which was produced yesterday contained more than one hundred inaccuracies. From the original now produced he thought that the changes made in that version and his own were almost identical. The orchestral score as performed at the theatre differed in many respects from the published arrangement for voice and piano, and it was the former which he complained had been imitated by Mr. Kotelbey.

Sir Hugh Allen, Director of the Royal College of Music, said that Mr. Austin's version was not suited to Gay's words. Mr. Austin had (1) harmonized the tunes in the appendix to Gay's play in his own way; (2) had laid them out in his own way; and (3) had orchestrated them in his own way. By "laying out" he meant blotting out tunes. He had used matter of his own composition. He had seen Mr. Kotelbey's score and had heard the gramophone records of the defendant company. The score in the main was not suited to Gay's words. There were many resemblances to Mr. Austin's music. Two musicians working entirely on Gay's music might have resembled each other in the work, but Mr. Kotelbey in many cases did not keep to Gay, and in such cases he approximated to Mr. Austin. On hearing the record played he would have thought that it was based on the Savoy music. He would have no doubt about it. Mr. Austin made many alterations to suit the present book and Mr. Kotelbey did exactly the same.

Re-examined.—He had been through the note-by-note comparison of his score and Mr. Kotelbey's, and he found an inaccuracy on practically every page. It was not right to compare his vocal score with Mr. Kotelbey's orchestral score. The whole scheme of his music did not appear in the vocal score. The method of comparison was grossly unfair apart from the inaccuracies. It proceeded on a wrong hypothesis.

The witness gave instances from the particulars of infringement in the statement of claim and he sang some phrases to indicate his meaning. In all the ten instances given he thought that Mr. Kotelbey had followed Mr. Austin. Mr. Austin's version had changed serious characters into sporting characters, who all wore the "Austin blazer," and Mr. Kotelbey's characters also wore the "Austin blazer." They belonged to Austin's club without having paid their subscriptions.

Mr. Ernest Newman said that he had been a music critic for nearly thirty years and he was now critic for the *Sunday Times*, and had written a very large number of criticisms in newspapers, journals, and magazines, both in England and foreign countries. He was familiar with the original opera of *Polly*, with Clifford Bax's version and with Frederic Austin's vocal score, and had seen several performances of the opera. He had studied Mr. Kotelbey's score and he had heard the Columbia records played. Clifford Bax's version differed very largely from the original play, which, from being a serious play, had become a comic opera. Mr. Austin's work was practically an original work based on the tunes in Gay, but appropriate to Clifford Bax's work and not to Gay's. Mr. Kotelbey's score was not appropriate to Gay's work, but had followed Mr. Austin's example, and it made a new work. He had heard Mr. Austin's evidence and he entirely agreed with his account of the similarity between his work and Mr. Kotelbey's. The similarity showed that Mr. Kotelbey had much more knowledge of the present production and Mr. Austin's music than of Gay's.

Cross-examined by Sir D. Kerly.—He thought the charge was that Mr. Kotelbey had harmonized the tunes in Mr. Austin's manner and with some reminiscences and imitations of Mr. Austin's music.

Cross-examined.—Some people would think that if Gay's opera *Polly* were mentioned, Mr. Austin's work was referred to. They thought that Gay had left music appropriate to *Polly*. The public might suppose that it was Gay's music that Mr. Austin had arranged. Mr. Austin's work was in Mr. Kotelbey's mind when he wrote his music. There were many similarities in the harmonization, but he did not form his opinion because the works were harmonically similar, but because of the similarity of ideas—in the musical signification.

Mr. Geoffrey Shaw, an expert in old music, said that Mr. Austin's work was Mr. Austin's music based on Gay's tunes, and was written for the new book and not for Gay's book. He had seen Mr. Kotelbey's score and had heard the gramophone records, and he considered that Mr. Kotelbey's music was much more like that of the Savoy production than it was like the music in Gay's appendix.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. S. O. Henn Collins appeared for the defendants.

Cross-examined.—He thought that Mr. Kotelbey had edited Gay's music in Mr. Austin's manner. There were very many imitations of Mr. Austin. The principal difference between Gay's opera and the Savoy production was that the latter was a jolly and comic opera. On the whole, where Mr. Austin had succeeded in making a jolly and comic effect Mr. Kotelbey had done the same.

Solicitors.—Messrs. Field, Roscoe, and Co. for the plaintiff; Messrs. Withers, Benson, Currie, Williams, and Co. for the defendants.

Mr. Medley, an articles clerk to Messrs. Field, Roscoe, and Co., the plaintiff's solicitors, gave evidence that on March 19 he went to several shops selling gramophone records and asked for records of the music of "*Polly*" at the Kingsway Theatre. In each case he was told that the H.M.V. records were not yet out, but Columbia records were sold to him as being records of the music of *Polly* at the Kingsway Theatre. The only places where it was said that they had none were two branches of Keith, Prowse, and Co.

Cross-examined.—He did not mention Mr. Austin's name.

**THE DEFENDANTS' CASE.**

Sir Duncan Kerly, in opening the defendants' case, said that this case was without precedent in copyright law and was without the ambit of the law as it had ever been understood. If it were successful it would bring into the Courts a number of actions dealing with matters of taste. Here they had witnesses speaking a language which was not understood by Judges or counsel. It was very different from such cases, for instance, as those where chemical matters were inquired into. The case of passing off presented was almost ludicrous. A person was entitled to call a thing by its proper name, although at the time the thing was generally known as the product of a particular shop. The plaintiff was really claiming that *Polly* was not the work of Gay but of Mr. Austin. It was as if Sir Henry Irving's production of *Hamlet* was not to be called Shakespeare's *Hamlet* but Irving's. A class name could not be appropriated by one person. These records were records of Gay's music, records of an opera written by Gay, records giving the tunes in Gay's opera. There had been great interest in *The Beggar's Opera* since it was produced at Harmsworth, and it was remembered that Gay had written an opera called *Polly*. Then the Austin-Bax version was produced at the Kingsway Theatre; the public wanted to have records of the tunes which they heard, to perform themselves; the tunes alone would not do; they must be harmonized. Mr. Kotelbey only had to orchestrate the tunes so as to make them suitable for the gramophone.

The plaintiff had to make out his case. It would be no way out of the difficulty for his Lordship to hear the Columbia records and H.M.V. records made from Mr. Austin's score. Musical and non-musical persons would take different views of the records. The defendants offered to the public means of performing favourite airs on the gramophone. Even admitting that there were resemblances, the defendants were entitled to present a record of Gay's tunes. Copyright had nothing to do with ideas. One could not prevent an idea from being made use of by someone else. One could take a story and dramatise it as long as one did not use the author's actual words. Mr. Kotelbey might have had reminiscences of Mr. Austin's work, but what he was instructed to do, and what he did, was to set out to make an original work.

Mr. Albert William Kotelbey was called. He said that when he was instructed to orchestrate Gay's work for the records, he did not make use of Mr. Austin's score, but carefully avoided doing so.

The case was adjourned until Tuesday. Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. S. O. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

JULY 11, 1923.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.

ALLEGED INFRINGEMENT OF  
MUSICAL COPYRIGHT OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE  
COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

Mr. Justice Astbury continued the hearing of this action, which had already been before the Court for four days. In it Mr. Frederic Austin, the composer of the music for the production of Gay's opera *Polly*—which is being performed at the Savoy Theatre—claims an injunction against the Columbia Graphophone Company, Limited, to restrain the company from infringing his copyright in the music by the manufacture and publication of gramophone records, and from passing off their gramophone records as records of his music.

The facts of the case are reported in *The Times* of July 4.

Mr. Albert William Ketelbey, the composer of the music from which the defendant company's records were made, denied any plagiarism of Mr. Austin's music. He was taken through the various instances in which Mr. Austin had alleged copying or plagiarism of his music, and he gave his specific denials of each case, illustrating his explanations by singing various bars both of his own and of Mr. Austin's music.

Cross-examined by Mr. LUXMOORE, K.C.—As musical director of the defendant company he had to prepare such music for records as he was told to prepare, and he knew nothing about the company's rights in the music. He did not think *Polly* a success, and he reported unfavourably on it after hearing it at the Kingsway Theatre on January 16. He saw *Polly* only once. When he started to make his orchestration of Mr. Austin's vocal score he did not remember the music. He did not suppose that the general public knew of *Polly* before it was produced at the Kingsway Theatre. He did not consider that when a composer wrote round an old air he necessarily produced a new and original work. That depended on the symphonical development. In Mr. Austin's work the airs were the most important part. He distinguished between original composition and original work. He thought that Mr. Edward German in treating Gay's work would have produced something very like Mr. Austin's music. He did not think that there was much original work in Mr. Austin's music. Much of it was new arrangement, but not new composition.

When the Columbia Company could not get the first rights in the score, which he had orchestrated with Mr. Austin's approval, he was instructed to go to the British Museum and get the original airs of the twenty tunes orchestrated by him. He did not then know that one of the tunes was not in Gay's music—the Indian music—but he had made up his mind that he should not do that as it was unimportant. He was instructed to leave out one other tune and to do eighteen. He had originally included the Indian music because he thought that it would please Mr. Austin. He was told to get the original airs so as to avoid Mr. Austin's version. He looked through the whole book, but he did not find any tune more useful than the nineteen which he had already selected. He picked out the tunes which he thought would be useful. He had not time to do all on his first visit to the British Museum. When he came back he wanted four or five more, and wrote on his notes what he thought he wanted. He wanted tunes which the public would recognise as resembling those in the Kingsway performance. When making his orchestration he did not have Mr. Austin's vocal score before him. Where Mr. Austin had not varied from Gay he might have adopted Mr. Austin's version, but there could be no copyright in that.

The cross-examination had not concluded at the rising of the Court.

During the afternoon his Lordship, owing to the heat, removed his wig and gave leave to counsel to do the same. They availed themselves of the permission.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. S. O. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.

THE MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE  
COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

This was the sixth day of the trial before Mr. Justice Astbury of this action, in which Mr. Frederic Austin claims against the Columbia Graphophone Company, Limited, an injunction to restrain the company from infringing his copyright in the music which he has written for the production of Gay's opera *Polly* (now being performed at the Savoy Theatre) by manufacturing and publishing gramophone records, and from passing off their records as records of his music.

The facts were reported in *The Times* of July 4.

Mr. Albert William Ketelbey, the composer of the music from which the records were made, was again cross-examined by Mr. LUXMOORE, K.C. He said that the error by which "Euse Coat" was written in the advertisement of the records instead of "Buff Coat" as the name of one tune, the same error as was made in the first edition of Mr. Austin's score, was not made by him, as he did not write either phrase. It must have been made by someone who had not been to the British Museum, or who had been deceived by the long-s in the score there.

The witness was then taken through the various instances of infringement given in the statement of claim, and he explained the alleged similarities, illustrating his meaning by singing certain phrases.

SIR DUNCAN KERLY asked bridge to interpose the evidence of Sir Frederick Bridge.

Sir Frederick Bridge said that he was emeritus organist of Westminster Abbey and King Edward's Professor of Music in the University of London. He had seventy years' experience of music. He had taken a great interest in Gay's music and *The Beggar's Opera*. He had seen Mr. Austin's music and Mr. Ketelbey's orchestration and he went through two songs, "Buff Coat" and "Red House." He understood that Mr. Ketelbey was accused of stealing Mr. Austin's thunder. He analysed the two and compared how near each composer had adhered to Gay and how the harmonies differed from one another. His conclusion was that Mr. Ketelbey's version of "Buff Coat" was distinctly different from the other as far as harmony went, and in some cases it was a more correct melody. Mr. Ketelbey had only one melody note which was not in Gay. Mr. Austin had altered Gay's melody in nine cases. In the "Red House" the greater part of Mr. Ketelbey's bass was Gay's bass, and was a much better bass than Mr. Austin's. He also saw the song "Prince George." He made no report on it, but he analysed it. His impression in the two songs was that Mr. Ketelbey had been perfectly honest and that if there were similarities it was no more than would be expected in the bass of two competent musicians.

Afterwards he went through all the documents, and his impression of the ten songs was that Mr. Ketelbey had made an independent work and that the charge against him was not justified. He would not be ashamed himself of the work. The old music of Gay's date was suitable for harpsichord accompaniment. As regarded the ten songs, he considered that in most of them Mr. Ketelbey's version was superior to Mr. Austin's and was not in any way a copy of it. He defined a "code" as an addition to a piece and illustrated it by a picture of a dog running down a street with a gridiron tied to its tail. The time signature 6/4 was formerly in use, but was now antiquated, and he would change it to 6/8. Six-four was not adapted for rapid singing. When he prepared the Wesleyan hymn book he made them hurry up.

Cross-examined by Mr. LUXMOORE.—He did not know that when he examined the two songs the photographic reproduction had not been made. He must have had Mr. Ketelbey's original rough score. He did not think that he then had Gay's music of *Polly*. He had lectured on *The Beggar's Opera*, but not on *Polly*. He had not looked at the British Museum copy. He did not think that he then had Mr. Ketelbey's British Museum notes. In setting music one must be influenced by the words. He had never before given evidence in a Court. Thank Heaven! he had not heard the records. He once had a gramophone, but he got rid of it. He did not require music to be played over to him.

At this stage Sir Frederick Bridge's cross-examination was postponed until Friday morning.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. Henn Collins for the defendant.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

JULY 13, 1923.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.

ALLEGED INFRINGEMENT OF  
MUSICAL COPYRIGHT IN "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE  
COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

Mr. Justice Astbury for the seventh day heard this action, in which Mr. Frederic Austin, the composer of the music for the production of Gay's opera, *Polly* (now being played at the Savoy Theatre), claims an injunction to restrain the Columbia Graphophone Company, Limited, from infringing his copyright in the music by the manufacture and publishing of gramophone records, and from passing off their records as records of his music. The facts are reported in *The Times* of July 4.

The cross-examination of Mr. Albert William Ketelbey, which was interrupted yesterday to allow Sir Frederick Bridge to give evidence, was resumed. He continued his specific denials of the allegations of imitation and infringement made in the particulars, illustrating his meaning by singing certain bars. He said that he would in the main have written the same music if he had never seen Mr. Austin's score or harmonized it with permission.

Mr. Hubert Bath, formerly musical conductor of the Gaiety Theatre and a composer of many works, said that he arranged the music for a production of *Polly* at the Oldies Theatre. That was produced after Mr. Austin's music, but was begun before that music was produced. He had compared Mr. Austin's music and Mr. Ketelbey's music, and he did not consider that there was any copying in the latter. His version of certain airs was somewhat similar to that of Mr. Ketelbey's, although he had not seen Mr. Austin's music. He went through the particulars in detail and gave his reasons for saying that they gave no cause for supposing there was imitation.

Cross-examined.—In his version he used about thirty tunes out of the seventy-one in Gay's. About twenty-five tunes were the same as those which Mr. Austin used. Only about three of these in his version resembled Mr. Austin's. There was more resemblance in Mr. Ketelbey's music to Mr. Austin's than in his own. A person hearing the three tunes in his version might think that they were Mr. Austin's. Except for these likenesses his version was quite different to Mr. Austin's. He made many alterations and developments from the original Gay's music. He had heard Mr. Austin's version described as *Polly*, and his own as "Polly with Scotch."

The evidence was not finished at the rising of the Court.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and Mr. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.

THE MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

This was the eighth day of the hearing of this action by Mr. Frederick Austin, the composer of the music of the production of Gay's opera *Polly* (now being performed at the Savoy Theatre), for an injunction to restrain the defendant company from infringing his copyright in that music by the manufacture and publishing of gramophone records and from passing off their records as records of the plaintiff's music.

The facts are reported in *The Times* of July 4.

The cross-examination of Sir Frederick Bridge, postponed from Wednesday last, was continued. He said that if there were two pieces of music for the same song, one by Mr. Kotelbey and one by Mr. Austin, and Mr. Austin's music could not possibly be sung to Gay's words, and the same was the case with Mr. Kotelbey's music, that would be an important point, and would have influence on his view whether there was any copying by Mr. Kotelbey. Originally he compared only the versions by Mr. Austin and Mr. Kotelbey, and he did not compare either version with Gay. If both came from a common source it would be important to see that source. However, though he did not recollect that he had seen Gay's music when he made his affidavit, he thought that he must have done so, as he referred to the date 1733. Later, he did check both versions with Gay. He did not think that he noticed the difference between the words, or that the words used by Mr. Austin were not Gay's. If Mr. Austin's words were not fitted to Gay's airs, and there was an alteration of the air by Mr. Austin, and he saw that the same alteration was made by Mr. Kotelbey, it would raise suspicion in his mind, and he would say "it would serve him right if he were found out." He found coincidences, but not unlikely coincidences, and they were not evidence of dishonesty.

In many cases Mr. Kotelbey's was a perfectly legitimate effect, and he would have been a fool not to have done what he did. Dr. Papusch, who did the bass for Gay's airs, was "a poor old fellow," and not to have altered such bass would have ruined the production. If Mr. Kotelbey copied any departure by Mr. Austin from Gay's music, it would not necessarily be wrong, if the idea would appeal to a musician. Gay's music unaltered would be a dull affair.

Sir Frederick Cowen, examined by Sir Duncan Kerley, said that he had conducted the Handel Festival for many years, and had conducted "many other things." He had gone through the various documents in the case, and in his opinion there was no substantial copying of Mr. Austin by Mr. Kotelbey. He thought that the coincidences were, from his point of view, in unimportant matters. The coincidences were in many cases such as must arise from the work of two musicians working on the same tunes. Mr. Austin's version and Mr. Kotelbey's version were not the same thing; they were practically walks.

Cross-examined by Mr. Luxmoore.—If he had orchestrated Mr. Austin's score and was asked to make another score, he should, if he remembered Mr. Austin's music, avoid particularly anything like it. If he had done the music a few weeks before, he would probably remember it. He had never seen Gay's book before to-day—only Mr. Kotelbey's British Museum notes of the music. He had never considered the similarity or dissimilarity of Mr. Austin and Mr. Kotelbey with reference to Gay. He had never seen Gay's words. If Mr. Kotelbey had never seen Chappell's book and had lately orchestrated Mr. Austin's music, he supposed that when Mr. Kotelbey turned a slow dirge into a rollicking song, as Mr. Austin had done, he must have had, at all events, a subconscious recollection of Mr. Austin's music.

The case was adjourned until Monday. Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerley, K.C., and Mr. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

HIGH COURT OF JUSTICE.  
CHANCERY DIVISION.

THE MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

This was the ninth day of the hearing of this action, in which Mr. Frederic Austin, the composer of the music of the production of Gay's opera *Polly* (now being performed at the Savoy Theatre), claims an injunction to restrain the Columbia Graphophone Company, Limited, from infringing his copyright in such music by the manufacture and publication of gramophone records, and from passing off their records as records of such music.

The facts of the case were reported in *The Times* of July 4.

The cross-examination of Mr. Hubert Bath, the composer of the music of another version of *Polly*, which was produced for a time at the Chelsea Theatre, was resumed. He was taken in detail through the ten tunes of Mr. Kotelbey mentioned in the particulars, which are alleged to be infringements of Mr. Austin's music, but he would not admit any resemblance. He said that there were resemblances between his own music and Mr. Austin's, but he had followed Gay's words, while Mr. Austin had written his music for the version by Clifford Bax. He thought that there was really more likeness between his own music and Mr. Austin's than between Mr. Kotelbey's and Mr. Austin's. He differed in some points from Sir Frederick Bridge and Sir Frederic Cowen, and also from Mr. Kotelbey. He had been unable to obtain his own score, though since he was in the box last Thursday, he had made inquiries, and had endeavoured to do so. He gave some description of the way in which he had treated Gay's words. His music was described as "composed and arranged by Hubert Bath." His work on Gay's music he called arrangement, and not his own composition. There was no structure in Gay's appendix. His version ran for three weeks. He did not know whether it was a success financially, but it was a success otherwise. He was not to get any royalty. It was always called "The Chelsea Polly." He had not heard of any contemporary production of *Polly* other than Mr. Austin's.

Re-examined.—Mr. Kotelbey's music was entirely different from Mr. Austin's music.

Sir Dan Godfrey said that he had had great experience of conducting and arranging music. He had considered Mr. Kotelbey's rough score and Mr. Austin's vocal score. He thought that there was hardly a bar, apart from the tunes, in which there was resemblance.

Cross-examined.—He compared the tunes with Mr. Kotelbey's copy from the British Museum. He had no other knowledge of Gay's music. He had not considered Gay's words. Gay's music was not suitable for gramophone records. He had heard the records, but not the performance of "Polly," either at the Kingway or the Savoy Theatre. He thought that what were called coincidences were common devices. If twelve musicians were told to prepare separately settings of Gay's music, they would probably be different in many respects, but alike in some.

Mr. Hamilton Harty, the conductor of the Hallé Orchestra at Manchester, substantially agreed with Sir Dan Godfrey and Mr. Hubert Bath. He considered that Mr. Kotelbey's permitted score was not the same as his score for the record.

The evidence was concluded, and Sir Duncan Kerley began his speech summing up the defendants' case.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; and Sir Duncan Kerley, K.C., and Mr. Henn Collins for the defendants.

Solicitors.—Messrs. Field Roscoe and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

JULY 19, 1923.

CHANCERY DIVISION.

THE MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE COMPANY, LIMITED.

(Before Mr. Justice Astbury.)

The tenth day of the hearing of this action, in which Mr. Frederic Austin, the composer of the music of the production of Gay's opera *Polly* (now being performed at the Savoy Theatre), claims an injunction against the Columbia Graphophone Company, Limited, to restrain them from infringing his copyright in such music by gramophone records, and from passing off their records as records of his music, was occupied entirely by the speeches of counsel for the defendants.

Sir Duncan Kerley, K.C., and Mr. Henn Collins, for the defendants, contended that no copying or plagiarism from Mr. Austin's music by Mr. Kotelbey had been shown; that what coincidences there were arose in musical commonplace; that where there was original work by Mr. Austin no such coincidences had been shown; that these could be no copyright in ideas; and that no infringement of copyright could be found, while the evidence of passing off was so slight that it could be disregarded.

A letter from Sir Frederick Bridge was read and used as part of the argument, in which he said the result of this case would be important to the future of English music, as research was discovering most valuable music, which had been forgotten for centuries. If the plaintiff succeeded here it would be dangerous for a composer to arrange an old air which had been previously arranged by another composer, and suicidal to do so if he had before heard the earlier arrangement.

Counsel cited "The Coffee Tin Case" (17 Rep. Pat. Cases, 57), "The Slave Pattern Case" (Hollinshead v. Tinsell [1894] 2 Ch. 240), and "The Living Pictures Case" (Hastings v. Baines [1907] A.C. 20) in support of their contentions. They said that there was here no competition. Mr. Kotelbey's work was not intended to be produced at a theatre or arranged as a piano score, but only to be put on records, which anyone might do on payment of a royalty. The charge really was that Mr. Kotelbey had played on the table a tune which Mr. Austin had played on the piano.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

JULY 20, 1923.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

THE MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE COMPANY, LIMITED.

(Before MR. JUSTICE ASTBURY.)

The eleventh day of hearing of this action was occupied by the speech, in reply, by Mr. Luxmoore, K.C., on behalf of the plaintiff, after which Mr. Justice Astbury reserved judgment.

The action was brought by Mr. Frederic Austin, the composer of the music of the production of Gay's opera *Polly* (now being performed at the Savoy Theatre), for an injunction to restrain the Columbia Graphophone Company, Limited, from infringing his copyright in the said music by manufacturing and publishing gramophone records, the music for which was arranged by Mr. Albert William Kettelbey, and from passing off their records as records of the plaintiff's music.

The facts of the case are reported in *The Times* of July 4.

Mr. Luxmoore said that the plaintiff did not claim monopoly or copyright in Gay's music; he only claimed copyright in his own work. He admitted that there was no copyright in ideas, but he submitted that there was copyright in the ideas and invention of the plaintiff as applied in his musical work. If the defendants had taken the plaintiff's selection of airs and the manner in which he had treated those airs, and as a result had brought about a musical effect similar to the plaintiff's, then there was infringement. The Copyright Act of 1911 was much wider than the Act of 1842. Musical copyright always stood on a different footing from literary copyright, and the cases cited on behalf of the defendants had nothing to do with the case. As to musical copyright, he cited *D'Almeida v. Boosey* (1 Y. and C. (Ex.), 238), *Leader v. Purday* (7 C.B., 4), *Wood v. Boosey* (L.R., 3 Q.B., 223), *Boosey v. Fairlie* (7 Ch. D., 301), *Boosey v. Whight* (18 The Times L.R. 82; [1906] 1 Ch., 122). In literary matters protection was given to "The Golden Treasury," an anthology of poems in an Indian case, *Mackmillan v. Sarthe Chanda*, Gay (17 Indian Rep. (Calcutta), 951), which was approved in *Moffatt and Page, Limited v. Gill* (86 L.T., 465) by the Court of Appeal. There had been no case as to musical copyright since the Act of 1911, which extended the protection, but a similar point to the present case was dealt with in the case of a dramatic sketch from a book in *Corelli v. Gray* (30 The Times L.R., 116). The defendants here had taken a substantial part of the plaintiff's structure and used it.

The Hon. S. O. HENN COLLINS replied on behalf of the defendants on the new cases which had been cited by Mr. Luxmoore.

MR. JUSTICE ASTBURY said that he would give judgment on Tuesday morning.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and the Hon. S. O. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.

JULY 25, 1923.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

INFRINGEMENT OF COPYRIGHT IN MUSIC OF "POLLY."

AUSTIN v. COLUMBIA GRAPHOPHONE COMPANY, LIMITED.

(Before MR. JUSTICE ASTBURY.)

MR. JUSTICE ASTBURY gave judgment for the plaintiff in this action, in which Mr. Frederic Austin, the composer of the music for the production of Gay's opera, *Polly* (now being performed at the Savoy Theatre), claimed against the Columbia Graphophone Company, Limited, an injunction to restrain the company from infringing his copyright in the said music by the manufacture and publication of gramophone records, and from passing off their records as records of the plaintiff's music. The hearing of the action began on July 3, and continued for eleven days, judgment being reserved on Thursday last.

The facts of the case are reported in *The Times* of July 4.

MR. JUSTICE ASTBURY said that the defendants admitted that the plaintiff was the composer of the music of the present production of *Polly*, and had selected for his purposes fifty out of the seventy-one airs in Gay. These were not Gay's music, but mostly folk-songs which were in an appendix to the opera with a bass fitted to them for Gay. The original form of Gay's opera was not suited for stage performance, and, although published in 1729, it was practically unknown until Mr. Clifford Bax's version was produced. The opera as now produced was new and original, and had won great success and popularity. In this country *Polly* meant to the theatre-going public the version produced at the Kingsway Theatre and now being performed at the Savoy Theatre. It was of importance in this action that this version was a great success, that it was the only version known to the public, and that Gay's work was unsuitable for stage production. After the play was produced on December 31, 1922, certain gramophone companies desired to produce the best airs in records, which were intended for the public who had come to know the plaintiff's music.

On January 22, 1923, the defendant company first wrote to Messrs. Boosey, the publishers of the plaintiff's music, asking for permission to arrange selections of the orchestral music, and they were referred to the plaintiff. There was an interview between the plaintiff and the defendants' manager, at which the latter produced to the plaintiff an orchestration for a band of the plaintiff's score, which had been prepared by Mr. Kettelbey, the defendants' musical director. Mr. Kettelbey had been to the Kingsway performance, and had picked out twenty tunes as the best; he had obtained the plaintiff's vocal score of these tunes, and had orchestrated them for a band for the purpose of making records. The plaintiff approved of this score, but made a condition that the records should not be published until after the records of His Master's Voice Gramophone Company, with whom he had agreed not to allow any other company to publish any records before theirs. The defendant company then determined to produce records of the airs in Gay without the plaintiff's permission, and sent Mr. Kettelbey to the British Museum to copy the airs from the original edition of Gay. There were two objects in this visit:—(1) To find out whether the twenty airs were in fact derived from Gay's appendix; and (2) to copy the airs from the original edition, so as to avoid copyright troubles. Mr. Kettelbey found that one of the tunes was not in Gay at all, and that another tune, though based on Gay, was so altered that the public would not recognize it; he, therefore, left out these tunes, and put in another from the tunes selected by the plaintiff.

AN ERROR IN AN ADVERTISEMENT.

On March 3 the defendant company wrote to the dealers with a notice of their records, and issued advertisements and posters. It was interesting to note that in the first edition of the plaintiff's score an air called "The Buff Coat" was by mistake described as "The Buss Coat," and the same error appeared in the defendants' advertisement. It was suggested that the person who got out the advertisement was deceived by the old form of "s" in Gay's work, but Mr. Kettelbey admitted that he had nothing to do with the advertisements, and that the person who did prepare them had not been to the British Museum or seen Gay's book. A question suggested itself why the defendant company, when it was preparing an independent orchestration, employed Mr. Kettelbey to do the work, who had seen the play and heard the music at the Kingsway Theatre, who had carefully studied the plaintiff's music, and had orchestrated the plaintiff's score. After hearing the evidence he had no doubt that no stranger could have supplied what the defendants wanted, which was to get as near to the plaintiff's tunes as they safely could do.

The plaintiff had been called, and, in his Lordship's judgment, he was a careful, honest, and reliable witness. He said that, in his opinion, the defendants' records were a distorted version of his own music, and that the tunes there were dealt with in the same manner as by himself. He said that he had erected a definite musical structure founded on Gay's work, and based on Clifford Bax's version, and that Mr. Kettelbey had taken much of that structure. Another version pro-

duced by Mr. Hubert Bath at the Chelsea Theatre was in no way similar to his version.

His Lordship then went through the ten tunes comprised in the particulars in the statement of claim as being those which were imitated in great detail. He said that it was evident that Mr. Kettelbey had not copied actual notes and bars, but he came to the conclusion that in each case there was great resemblance between the versions of the plaintiff and Mr. Kettelbey, and great difference between them and Gay's airs. His Lordship then went through the evidence given on behalf of the plaintiff. He said that Sir Hugh Allen, a witness of very high musical qualifications, gave his evidence admirably, and he accepted it entirely. He said that the plaintiff's music was not all suited to Gay's words, nor was that of Mr. Kettelbey, which closely resembled the plaintiff's music, and that though two independent musicians, if they kept to Gay, might have resembled each other, it was impossible that they should do so if they worked independently of Gay. He said in cross-examination that Mr. Kettelbey had edited Gay's tunes in Mr. Austin's manner with many reminiscences of Mr. Austin's music. The plaintiff's case was that he had produced an original work, which no one must imitate or reproduce.

The defendants contended that there was no imitation of notes or bars and that they were entitled to take the plaintiff's method of treating Gay's tunes, so long as they did not copy the notes. Their counsel contended that Mr. Kettelbey had honestly intended to make an original work, and that he did not set out to follow Gay's words, which was quite evident when one saw the music. There were thirty-five or forty cases in which Mr. Kettelbey had borrowed from the plaintiff in a way which could not arise from mere coincidence.

His Lordship then dealt with the defendants' witnesses. Mr. Kettelbey was a valuable witness, who thought that he was safe if he did not copy notes and bars. He said that he was given certain instructions as to the course he was to pursue, but the person who gave him those instructions was not called.

SIR FREDERICK BRIDGE'S EVIDENCE.

Sir Frederick Bridge was an amusing witness, but he had not really addressed his mind to the problem before the Court. He had come to the conclusion that Sir Frederick's evidence was really more in favour of the plaintiff than of the defendant. Sir Frederick Bridge had since written a letter to the defendants' counsel which was not evidence, but in the nature of a posthumous judgment, and which his Lordship had allowed to be read as part of the argument, though he did not altogether agree with it. Sir Frederick Cowen, also a very distinguished musician, had given evidence; he was less hilarious than Sir Frederick Bridge, but his evidence was very similar, though he had not delivered judgment after leaving the box. Mr. Hamilton Hartly gave evidence which did not answer or deal effectively with the plaintiff's evidence, but he seemed to be living in a sort of musical dreamland.

The question was whether the defendants' music was a new and original work based on Gay, and did it avoid infringing the plaintiff's copyright? Though there was no copyright in an idea, there was copyright in a combination of ideas, method, and system, making a new work. His Lordship then dealt with the Copyright Act, 1911, which extended copyright beyond what was previously given, and also with the cases which had been cited as to musical copyright—*D'Almeida v. Boosey* (1 Y. and C. (Ex.), 475); *Leader v. Purday* (7 C.B., 4); *Wood v. Boosey* (L.R., 3 Q.B., 223); and *Boosey v. Fairlie* (7 Ch. D., 317)—and held that from them it appeared that there was copyright in an arrangement of previous music which amounted to a new work. He also referred to the cases of *Corelli v. Gray* (30 The Times L.R., 116) and *Moffatt v. Gill* (86 L.T. Rep., 465). The Copyright Act, 1911, had brought gramophone films within the law of copyright. The judgments in those cases applied here. Upon the whole he was of opinion that the plaintiff was entitled to copyright in his music, and that the defendants had taken a substantial portion of the plaintiff's work, and had infringed his copyright. The plaintiff was entitled to an injunction to restrain the use of the defendants' films and for delivery up of all films which had not been sold, and for an inquiry as to damages. The question of passing off was not decided. The defendants must pay the costs of the action.

SIR DUNCAN KERLY, K.C., for the defendants, asked for a stay of execution as to the delivery up and the inquiry if notice of appeal was given within twenty-one days, which was granted.

Mr. Luxmoore, K.C., and Mr. Macgillivray appeared for the plaintiff; Sir Duncan Kerly, K.C., and the Hon. S. O. Henn Collins for the defendants.

Solicitors.—Messrs. Field, Roscoe, and Co.; Messrs. Withers, Benson, Currie, Williams, and Co.