

Blackwood And Sons Ltd. And Ors. vs A.N. Parasuraman And Ors. on 28 February, 1958

Equivalent citations: AIR1959MAD410, AIR 1959 MADRAS 410

JUDGMENT

Rajagopala Ayyangar, J.

1. The relief sought in both these suits is the same, namely, injunction arising out of an alleged infringement of copyright with other ancillary reliefs such as damages, accounts etc. The two suits have been tried together because of certain questions of law which arise in them but as the facts are necessarily different they have to be set out separately.

2. C. S. No. 54 of 1955 : The plaintiffs are Messrs. Macmillan and Co. Ltd. while the defendants are a firm of publishers carrying on business in Madras under the name and style of "The Little Flower and Co." Madras. The plaintiffs claimed that they were entitled to the copyright by assignment in respect of two works (1) The Return of the Native by Thomas Hardy, and (2) A collection of stories by Rabindranath Tagore published under the style of "Stories from Tagore". The Return of the Native was prescribed by the University of Madras for the B. A. degree examination 1956, Part I English.

The defendants published in 1954 in Madras without the consent of the plaintiffs a "Guide to the Study of Hardy's Return of the Native." The other work "Stories from Tagore" published by Messrs. Macmillan and Co. was prescribed as a text book for the Intermediate Examination of the University of Madras also of 1956 for Part I English. In regard to this work also the defendants published a guide in 1954. The complaint of the plaintiff was that these two "guides" reproduced substantial parts of the two original works and that though called "guide" they were in reality copies of the original works which competed with their, sales of these latter and therefore prejudicially affected the plaintiffs.

The plaintiffs required the defendants, by formal notice to cease to publish these guides, and to render them an account of their sales on the ground that these constituted an infringement of the copyright vested in them but when the infringement was denied and the claim of the plaintiffs repudiated the present suit has been filed for enforcing the rights of the plaintiffs. The reliefs claimed in the suit included the grant of an injunction restraining the defendants from printing, publishing or selling the books complained of or other editions thereof and directing the defendants to pay damages and render an account of the profits arising out of the defendants' publications and also the delivery to the plaintiffs of copies of the guides which were now in the defendants possession.

3. The defendants raised the following pleas:

1. The plaintiffs based their claim on the Imperial Copy Right Act of 1911. The first plea raised was (a) that Thomas Hardy's work "Return of the Native" was first published in the United States of America and was not simultaneously published in any part of His Majesty's Dominions so as to enable the author to claim copyright under the said Act;

(b) that the Copyright Act of 1911 being a legislation of the Parliament of the United Kingdom ceased to be operative in India when India became Independent in 1947 and a fortiori after the country attained Republican Status in January 1930.

2. They put the plaintiffs to proof that they acquired the right to the copyright which Thomas Hardy was entitled, assuming that Thomas Hardy had rights under the Copyright Act of 1911 and that the rights acquired under the said Copyright Act could be enforced in India after India became a Republic in January 1950.

3. They denied infringement by stating that their guide did not contain the reproduction of any substantial part of Hardy's novel.

4. They also pleaded that in any event, their guide was "a fair dealing" protected by proviso (i) to Section 2(1) of the Copyright Act of 1911.

4. In regard to "Stories from Tagore" the pleas of the defendants were :

(a) that the plaintiffs' right based on the Copyright Act, 1911, being inconsistent with the Republican status of India ceased to be operative after 26-1-1950;

(b) that the Stories from Tagore included in the plaintiffs' volume were first written and published in Bengali by Rabindranath Tagore and that they were not translated into English and those translations published within ten years as required by Section 4 of the Indian Copyright Act, 1914 The defendants, therefore, urged that there was no copyright in the said translations according to the provisions of Section 4 of the Indian Copyright Act, III of 1914;

(c) the other defences on the merits, namely, the denial of the infringement based on their guide being no substantial reproduction of the copyright work and the plea of fair, dealing bringing the defendants within the first proviso to Section 2 of the Copyright Act of 1911 was the same as was raised in relation to Thomas Hardy's work.

5. On these pleadings the following points arise for consideration in regard to Thomas Hardy's work.

1. Does the Copyright Act of 1911 continue to be in force as part of the law of India after India attained Independence in 1947 or after it became Republic when the Constitution came into force on

26-1-1950. This point is common to both the works involved in this suit.

2. Was Thomas Hardy's work "The Return of the Native" first published in America as contended for by the defendants or was it first published within His Majesty's dominions as pleaded by the plaintiffs.

3. Have the plaintiffs established their title as assignees of the copyright through the author Thomas Hardy.

4. Does the Guide of the defendants published constitute an infringement of Thomas Hardy's Novel as containing a substantial reproduction of the novel.

5. Is the defendants' Guide protected as being a fair dealing with the plaintiffs' work; and

6. If these issues are answered in favour of the plaintiffs to what reliefs are the plaintiffs entitled.

6. In relation to the work, Stories from Tagore the points arising besides the point relating to the lapsing of the Copyright Act of 1911, proof of plaintiffs title as assignee, are :

(1) What is the effect of the translation of the stories originally written in Bengali not being made and published within ten years;

(2) does the defendants' publication constituted an infringement of the copyright in the plaintiffs work;

(3) whether the defendants' work is protected as being a "fair dealing" with the plaintiffs work. If these issues are answered in favour of the plain-tiffs the further question for consideration would be to the reliefs to which the plaintiffs would be entitled.

7. The first question I shall take up for consideration which lies at the very threshold of the case is as to whether the Copyright Act of 1911, still continues to be the law of India so as to enable the plaintiffs to file this suit complaining of infringement of the copyright vested in them in pursuance of that Act.

8. When the two suits were first taken up for hearing Mr. Venkatasubramania Iyer who appeared for the defendants in C. S. No. 54 of 1955 intimated to me that he would raise a preliminary objection to the maintainability of the suit. This is what I have set down as the first point for determination. The plea in regard to this was somewhat vague and I was unable to appreciate its full import until learned counsel explained it.

The claim in the plaint was based on the violation of the rights conferred by the Indian Copyright Act, 1914, and the particular argument urged for the defendants was that the statutory right sought to be enforced in the suit was virtually one founded on the United Kingdom Copyright Act. 1911, and

that this Parliamentary statute ceased to be part of the law of India after this country attained independence and particularly after the coming into force of the Constitution in January 1950 with the result that there was at present in India no copyright in published works. In view of the nature of the contention and the serious results it would have, if upheld, I considered it proper to have the assistance of the learned Advocate General and I must express my obligation to him as well as to Mr. Ven-katasubramania Iyer for the help I derived from their arguments.

9. In order to appreciate the contention urged by Mr. Venkatasubramania Iyer it is necessary to advert to the relevant enactments and their interpretation which was said to lead to the result I have adverted.

10. The statutory basis of the law relating to copyright in India is British Parliamentary legislation to be found in the Copyright Act, 1911, 1 and 2 George V. C. 46. Its Section 1 (1) enacted :

"Subject to the provisions of this Act copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work --

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(b) in the case of an unpublished work the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid; but in no other works except so far as the protection conferred by this Act is extended by orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever to perform or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished to publish the work or any substantial part thereof; and shall include the sole right

(a) to produce, reproduce, perform or publish any translation of the work;

(b) in the case of a dramatic work to convert it into a novel or other non-dramatic work;

(c) in the case of a novel or other non-dramatic work or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise ;

(d) in the case of a literary, dramatic or musical work to make any record, perforated roll, cine-matograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication in relation to any work, means the issue of copies of the work to the public and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art but for the purposes of this provision the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works."

11. The works in regard to which copyright is claimed by the plaintiffs in the suit fall within Sub-section 1 (a) above extracted.

12. The territorial extent of the application of this enactment is to be gathered from Sections 25 to 28 of the Act. Section 25(1) enacted:

"This Act except such of the provisions thereof as are expressly restricted to the United Kingdom shall extend throughout His Majesty's dominions; provided that it shall not extend to a self-governing dominion, unless declared by Legislature of that dominion to be in force therein either without any modifications or additions or with such modifications and additions relating exclusively to procedure and remedies or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature."

Section 25(2) dealt with cases where a "self-governing dominion" passed legislation relating to copyright, a matter not relevant to the present context. As under Section 25, the Copyright Act did not extend proprio vigore to a self-governing dominion but only as a result of Dominion enactment or adaptation, Section 26(1) specifically empowered the Legislatures of the self-governing dominions to enact legislation relating to copyright, Section 26(1) and (2) ran :

(1) "The Legislature of any self-governing dominion may at any time repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion; provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal and that, on this Act or any part thereof being so repealed by the Legislature or a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends."

(2) In any self-governing dominion to which this Act does not extend the enactments repealed by this Act shall so far as they are operative in that dominion continue in force until repealed by the Legislature of that dominion."

13. Section 27 is a provision which is of immediate relevance in the present context as it dealt with territories other than self-governing dominions:

"The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but except

so far as such in modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession and to works first published in the possession."

Section 28 dealt with the applicability of the Act to Protectorates which is not relevant and I am, therefore, omitting it from consideration. The word "self-governing dominion" which was used in Sections 25, 20, etc, was defined in Section 35(1) thus :

" "Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and New Foundland."

Section 37(2) dealt with the date when the Act was to come into operation and its material clauses were "This Act shall come into operation --

(a) in the United Kingdom, on the first day of July 1912, or such earlier date as may be fixed by Order in Council;

(b) in a self-governing dominion to which this Act extends, or such date as may be fixed by the Legislature of that Dominion;

(d) in any other British possession to which this Act extends on the proclamation thereof within the possession by the Governor."

As India was in 1911 "a British possession", the commencement of the operation of the Act was governed by Section 37 (2) (d) and in accordance therewith there was "a proclamation" by the Governor-General in 1912 published in the Gazette of India bringing the provisions of the Act into operation in India as and from 30-10-1912.

14. The net result of these provisions I shall now summarise. The enactment extended to India as part of His Majesty's dominions other than a self-governing dominion (Section 25 (1)) and was brought into force by a proclamation of October 1912 under Section 37 (2) (d). The Indian Legislature, however, had a very limited power of modification and addition, conferred upon it by Section 27 limited to procedure and remedies, save in relation to the works of authors who were residents of India and in regard to their works first published in India.

15. In this state of things the Indian Legislature passed Act III of 1914. and on its enactment the proclamation stood repealed so that thenceforth the law of copyright in India was to be found in the Imperial Copyright Act of 1911 as modified by the Indian Copyright Act, III of 1914. In passing this enactment the Indian Legislature was exercising the power and the jurisdiction conferred upon it by Section 27 of the Imperial Act. The preamble to Act III of 1914, set out "Whereas it is expedient to modify and add to the provisions of the Copyright Act, 1911, in its application to British India" Section 3 enacted :

"In the application to British India of the Copyright Act (a copy of which Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, is set out in the first schedule) the following modifications shall be made."

and then follow the modifications which are set out in five sub-sections none of which is relevant to the present context. There are also other modifications as regards procedure, which also are immaterial for the purposes of the present case.

16. There is now no dispute that this state of the law continued till India attained independence on 15-8-1947. The enactment by Parliament of the Government of India Act, 1935, had made no change in the situation for by its Section 292, "All the laws in force in British India (including laws enacted by the British Parliament and extending to India) immediately before the commencement of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority."

It is, however, the legal consequences of the provisions of the Indian Independence Act of 1947 and the attainment of Republican status on 28-1-1950 that have formed the subject of debate in this case. It is, therefore, necessary to refer to the relevant provisions of these enactments and to a few others.

17. The Indian Independence Act (10 and 11) Geo. 6 Ch. 30) set up India into an independent dominion as and from 15-8-1947. Section 6 conferred on the Legislature of the newly created Dominion full power to make laws for it including laws having extra-territorial operation. Sub-section 2 reversed, as it were, the provision of Section 2 of the Colonial Laws Validity Act, 1865, which ran "Any Colonial law which is repugnant to any Act of Parliament extending to the colony to which law relates is void to the extent of the repugnancy", and enacted :

Section 18(2); "No law and no provision of any law made by the legislature of either, of the Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any other rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion."

The effect of this, of course, was that legislation by the Indian Parliament altering, amending or repealing any Parliamentary legislation applicable to India, would be intra vires and this would include such a law as the Imperial Copyright Act of 1911 in so far as it applied to India as a part of His Majesty's Dominions. Section 6(4) of the Independence Act enacted, "No Act of Parliament of the United Kingdom passed on or after the appointed day (15-8-1947) shall extend or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion"

this being in line with Section 4 of the Statute of Westminster, 1931. Section 6(5) dealt with orders, rule or other instrument of the United Kingdom passed after the appointed day and enacted that "these shall not extend to the new Dominions", as part of the law of that Dominion." The provisions I have extracted touched it would be seen, the future and not therefore of any crucial importance. In regard to Laws passed previously and which still continued to operate, and therefore, would be "the existing law" the relevant provision was Section 18 and this in the context of the present point is therefore of vital significance. I shall set out in extenso the subsections on which reliance was placed by the learned counsel in this case. They are ;

"18(1) In so far as any Act of Parliament, order in Council, order, rule, regulation or other instrument passed or made before the appointed day operates otherwise than as part of the law of British India or the new Dominion, references therein to India or British India, however worded and whether byname or not shall, in so far as the context permits and except so far as Parliament may hereafter otherwise provide, be construed as or as including references to the new Dominions taken together or taken separately, according as the circumstances and subject-matter require;

Provided that nothing in this sub-section shall be construed as continuing in operation any provision in so far as the continuance thereof as adapted by this sub-section is inconsistent with any of the provisions of this Act other than this section."

Section 18(3): "Save as otherwise expressly provided in this Act the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions & the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other legislature or other authority having power in that behalf."

The next matter that requires reference is the Constitution of India which came into force on 26-1-1950. Its legal basis is not the sanction of the U. K. Parliament, but, as the preamble sets out it was a Constitution which the people of India gave to themselves, There was thus a radical departure from the past so far as the origin of the Constitution was concerned. This, however did not mean that the laws which existed in India prior to the Constitution, notwithstanding that they traced their origin to either Indian legislatures constituted under British enactments or enactments of the British Parliament which either extended of their own force or were made applicable by ancillary Indian legislation, stood automatically wiped out. Article 372 of the Constitution provided the continuance in force of "existing laws" in these terms :

"(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force until altered or repealed or amended by a competent

legislature or other competent authority.

(2) For the purposes of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law whether by way of repeal or amendment as may be necessary or expedient, and provide that the law shall as from such date as may be specified in the order have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

Article 366 (10) defined "existing law" thus :

" 'Existing law' means any law, ordinance, order, by-law, rule or regulation passed OF made before the-commencement of this Constitution by any legislature, authority or person having power to make such a law, Ordinance, order, by-law, rule or regulation "

18. In passing I will only mention that the reference to the law-making bodies in the definition is wide enough to include an outside body like the Parliament of the United Kingdom.

19. I shall now set out certain pieces of post-Constitution legislation which appear tacitly to have proceeded on the basis that the Copyright Act, 1911, continued in force after January 1950. Acting in pursuance of the powers conferred by Article 372 (2) the Copyright Act of 1914 was "adapted" though this was confined to that portion which emanated from the Indian legislature, that is the first portion of the enactment and did not extend to the schedule which contained the text of the Copyright Act, 1911. The next occasion when the Indian Legislature dealt with the Copyright Act was in the Part B States Laws Act, 1951 (Act III of 1951). This enactment extended the territorial operation of the Copyright Act so as to cover Part B States other than the State of Jammu and Kashmir and finally by the Central Act XII of 1956 the Act was extended to the State of Jammu and Kashmir as well.

20. The question to be determined ultimately is whether the Imperial Copyright Act, 1911 either as operating proprio vigore or as applied by the Indian Copyright Act, 1914, was "a law in force in the territory of India immediately before the commencement of the Constitution", for if this is answered in the affirmative, it would be continued in force by virtue of Article 372(1) and the preliminary objection would have to be overruled.

21. It will now be convenient to set out the argument of Mr. Venkatasubramania Iyer in support of his contention that the Imperial Copyright Act, 1911, scheduled to the Indian Copyright Act III of 1914, lapsed and ceased to apply in India on this country attaining Independence. This was rested on two grounds : (1) that under the terms of Section 25 of the Copyright Act, 1911, itself its provisions were inapplicable to self-governing dominions and when India attained the status of a self-governing dominion by reason of the Indian Independence Act, the Copyright Act of 1911, ceased to apply in India and (2) a general contention that all Parliamentary enactments which

therefore applied to British India should be held to be inoperative in India after it attained independence on a proper construction of Section 18 (3) of the Indian Independence Act.

I shall deal with these two submissions in that order. The first contention was rested practically on the reasoning to be found in the judgment of the Irish Supreme Court in the Performing Right Society v. Bray Urban District Council, 1928 Ir R 506. The main question debated before that Court was whether the plaintiffs had copyright in two musical works "Venus on Earth" and "Lilac Time" which were both composed and published on the European continent. The plaintiffs claimed title to the copy-right by assignments dated 1923 and 1925 from the composers and they alleged that in breach of their copyright, there had been a band performance in public in that Irish Free State for which the defendants should be held responsible and brought the action for injunction and damages.

Apart from the merits, the defence raised was that the plaintiffs could claim rights only by virtue of the Imperial Copyright Act of 1911, but that that enactment ceased to apply in the Irish Free State, after the Treaty of 1921 between England and that State which led to the enactment of the Irish Free State Act of 1922, under which Ireland became a self-governing dominion, The trial Judge, Johnston J. repelled this contention and decreed the suit. On appeal his judgment was reversed and Fitz Gibbon J. who delivered the judgment in appeal held that immediately Ireland attained the Status of a self-governing dominion, as expressly recited in the Irish Free State Act of 1922, the Copyright Act of 1911 ceased to apply to Ireland on the very terms of Section 25 (1) which enacted that "the Act would not extend to a self-governing dominion unless declared by the legislature of that dominion to be in force therein."

The Irish Free State Act of 1922 contained a provision (Section 73) identical in language with Article 372 of our Constitution, which continued the operation of "the laws then in force until repealed or amended by the Free State." Fitz Gibbon J. held that there was no scope for the operation of this provision because on the language of Section 25 (1) of the Copyright Act, it ceased to be "a law in force" in the Irish Free State. The learned Judge got over the statutory definition of a "self-governing dominion" in Section 35 (1) of the Imperial Copyright Act by the theory, that on the Irish Free State attaining the status of "a self-governing dominion", it became automatically added to those enumerated there. Mr. Venkatasubramania Iyer urged that this was a reasonable construction of the provisions of the Imperial Copyright Act, which I should accept as governing the instant case.

22. I am wholly unable to accede to this argument. This decision of the Irish Supreme Court was taken in appeal to the Privy Council and this construction of Sections 25 and 35 (1) of the Copyright Act was expressly dissented from by Lord Sankey who delivered the judgment of the Board in Performing Right Society v. Bray Urban District Council, 1930 AC 377. Dealing with the reasoning of Fitz Gibbon J., Lord Sankey stated :

"Their Lordships are of opinion that this reasoning is not correct. It might be sound if there was no definition of the phrase 'self-governing dominion' in the Act, for then any part of the Empire which became a self-governing dominion subsequent to the passing of the Act might enjoy the advantages conferred by the Act upon such

territories. Unfortunately, however, for the argument as above pointed out, by Section 35 'self-governing dominion' is specifically defined and restricted, and the definition does not include Ireland. The proper way to interpret the Act would be wherever the words 'self-governing dominion' occur to read in the definition, and it would then be immediately seen that the words would be 'Canada, Australia, New Zealand, South Africa and New Foundland.' It is only by reading into Section 35 of the Copyright Act, 1911 words that it does not contain that the Supreme Court arrived at their conclusion."

23. Mr. Venkatasubramania Iyer urged upon me that the decision of the Privy Council was as such, no longer binding on this Court and that therefore I was free to overlook or disregard it and reach an opposite conclusion. This may technically be so but I find myself in entire agreement with the manner in which Lord Sankey has construed the provisions. I would also add that the approach to this question by Johnston J. the trial Judge appeals to me as sound and as based upon the application of the correct and well accepted canons of statutory construction as well as the practical needs of the situation. The learned Judge dealing with the argument that the attainment by Ireland of the new status resulted in the sweeping sway of the private rights of the plaintiffs said :

"It is now argued that this valuable property which the plaintiffs or their assignees enjoyed previously to the recent Governmental changes, was sweet clean out of existence by some malign magic in the Treaty or the Constitution. If this great constitutional change, which hitherto has been supposed to have affected public rights and national status only, is to be regarded as having interfered with private rights of property, whether real or personal, whether based on the common or the statute law, and whether owned by persons residing inside or outside this area the matter becomes one of serious import, affecting not only the persons primarily concerned, but also citizens of the Free State itself who may have acquired sub interests in the property in question by way of mortgage, lien, assignment, or trust.

It was more or less assumed during the course of the argument that the onus lay upon the plaintiffs to show that their rights had been preserved by one or other clause of the Constitution, It seems to me, on the contrary, that the onus is on the defendants to show that the plaintiffs' copyright in these musical nieces has been confiscated or extinguished, expressly or by necessary implication as a result of these political changes. I have not been referred to and I have myself failed to find any article of the Treaty or the Constitution which brought about any such result. I cannot believe that this great constitutional change brought with it or was intended to bring with it, a juristic vacuum in any department of national activity. On the contrary it is plain beyond controversy that the Constitution is based upon the assumption of the existence in the Free State of a fully developed body of law, regulating all rights and duties within that territory."

24. This is just in line with the accepted view in international law that the emergence of a new state or a change of sovereignty within a State, does not bring about any change in the private rights of its

citizens or the law governing such rights. This principle is pithily stated in Hyde in his "International law" at page 397.

"Law once established continues until changed by some competent legislative power.. It is not changed merely by change of sovereignty." Quoting Beale, the learned author says in a footnote :

"There can be no break or interregnum in law Once created, it persists until a change takes place, and when changed it continues in such changed condition until the next change, and so on for ever. Conquest or colonisation is impotent to bring law to an end; in spite of change of constitution the law continues unchanged until the new sovereign by a legislative act creates a change."

25. It is the same principle which underlies the following passages from the judgments of the learned Judges of the Court of Appeal in Ireland in *Armstrong v. Wickland*, 1924-2 IR 139. Dealing with Article 73 of the Irish Free State Act (corresponding to our Article 372) Pin J. said:

"They were adopted to provide for the interregnum which must elapse between the establishment of the Free State and the putting into active operation of the powers thereby taken and granted. They were passed so that the business of the State could be carried on smoothly and without a hitch, The essential object was to prevent any change in law or jurisdiction until the Irish legislature should have considered the changes necessary to be made and should have enacted them."

If Section 25 of the Copyright Act read in conjunction with Section 35 (1) of the Act is incapable of rendering that Act inapplicable merely by reason of India becoming a self-governing dominion, the first argument advanced by learned counsel must be rejected. In passing mention might be made of the provisions contained in the Ceylon Independence Act, 1947 (II Geo. 6 Ch. 7) when that country also attained the same status as India. Section 4 (1) enacted :

"As from the appointed day, the Acts and Regulations referred to in the second schedule to this Act shall have effect subject to the amendments made by that schedule & His Majesty may by order in Council make such further adaptations in any Act of the Parliament of the United Kingdom of an earlier session than this Act, or in any instrument having effect under any such Act, as appear to him necessary in consequence of section one of this Act; provided that this sub-section shall not extend to Ceylon as part of the law thereof."

and the schedule included the following in relation to Copyright :

"10. If the Parliament of Ceylon repeals or amends the Copyright Act, 1911 as it forms part of the law of Ceylon, then --

(a) except by virtue of sub-paragraph (b) of this paragraph that Act shall no longer apply in relation to Ceylon as a part of His Majesty's dominions to which the Act extends, so however, that this provision shall not prejudicially affect any legal rights existing at the time of the repeal or amendment;

(b) Ceylon shall be included in the expression 'self-governing dominion' for the purposes of Sub-section (2) of Section 25 and Sub-section (3) of Section 26 of that Act (which relate to reciprocity with self-governing dominions having their own copyright law) and the said Sub-section (2) shall have effect in relation to Ceylon as if that Act so far as it remains part of the law of Ceylon, had been passed by the Parliament thereof."

26. It would be seen that an alteration in the content of Section 35 (1) was made by express legislation and secondly that this was made subject to the preservation of existing rights.

27. The second head of Mr. Venkatasubramania Iyer's argument was rested on the language of Section 18 (3) of the Indian Independence Act. His contention was that the pre-existing law of British India was to be continued as the law of the new Dominion only with the necessary adaptations and that in this context the adaptation which was "necessary" included not merely in the phraseology necessitated by the emergence of India as a dominion, but also amendments or adaptations which became necessary by reason of the status which India attained.

He further urged that the continuance of the applicability of the Imperial Copyright Act to India was repugnant to the concept of its independence and that consequently it should be held that the Copyright Act ceased to apply in this country, this being held to be a "necessary adaptation" within Section 18 (3), of the Indian Independence Act. The "adaptations" referred to in this section he urged were not formal adaptations effected by an external authority but adaptations which Courts make when interpreting or enforcing any law when the same comes up for application before them and that I should make this adaptation now in applying the law.

28. Whatever be the width of the power of adaptation conferred by Section 18 (3) of the Indian Independence Act, I cannot agree that it extends to enable a repeal to be effected to an existing law particularly one governing rights in property, recognised all the world over. India was and continues to be a member of the Copyright Union and in that sense the conception of copyright is not repugnant to her ideas. If so, I do not see any principle underlying the suggestion that the Court should so adapt the Copyright Act, 1914 as to eliminate the provisions in the enactment scheduled to it merely because the scheduled enactment operates by virtue of legislation of the United Kingdom. On the other hand it would be in consonance with sound principles to hold that the Copyright Act, 1911 continues with the modifications effected by Act III, 1914, until the Indian Legislature chooses to legislate on the subject. I consider the following passage in Copinger on Copyright as describing the position correctly:

"The effect of Section 18 of the Indian Independence Act, 1947 appears to be that until some further provision is made, copyright protection both in India and with

respect to works originating there remains unaltered."

Coming next to the legal effect of India attaining Republican status on the continuance in force of the Copyright Act, 1911, learned counsel strongly relied on the decision of the Supreme Court in *State of Madras v. C. G. Menon*, as supporting the theory that on India becoming a sovereign Republic all laws enacted by the Parliament of the United Kingdom automatically lapsed and ceased to be operative. In that case, the Supreme Court had to consider the continued applicability of the Fugitive Offenders Act, 1881, which was applicable to India as a British possession prior to Independence. Section 12 of the Fugitive Offenders Act, 1881, enacted :

"This part of this Act shall apply only to those groups of British possessions to which by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same. It shall be lawful for Her Majesty from time to time by order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the order, and by the same or any subsequent order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions and qualifications as may be deemed expedient."

By orders in Council under this enactment, British India as a British possession was grouped along with Ceylon, Hongkong, the Straits Settlements, the Federated Malaya States, Johore, Kedah and Perils, Ke-lentan, Trengannu, Brunei, North Borneo and Sarawak. Within this group special provision was made for the backing of warrants for the arrest of offenders. The question which was considered by the Supreme Court was whether a warrant issued by a Magistrate in Malaya could be executed without any enquiry on an endorsement of a Magistrate in Madras. Their Lordships answered the question in the negative. The reason was stated by Mahajan C. J. who delivered the judgment of the Court in these terms :

"It is plain from the above provisions of the Act as well as from the order in Council that British possessions which were contiguous to one another and between whom there was frequent intercommunication were treated for purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a prima facie case was made against him was dispensed with The situation completely changed when India became a Sovereign Democratic Republic.

After the achievement of Independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British possession and it could not be grouped by an Order-in-Council amongst those possessions. Truly speaking it became a foreign territory so far as other British possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British possessions could only be dealt with by an

arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation Article 372 of the Constitution cannot save this law because the grouping is repugnant to the conception of a Sovereign democratic Republic."

29. Before proceeding to consider the applicability or scope of this decision, I might digress to draw attention to another decision concerning the legal effect of India becoming a Republic on the continued applicability of the Fugitive Offenders Act as between the United Kingdom and India. This was the point considered in *Re Government of India and Mubarak Ali*, 1952-1 All ER 1060. It was a motion for the issue of a writ of Habeas Corpus by a Pakistani National. The applicant had been charged with having committed forgery in India and while the trial was proceeding in Bombay he broke his bail and fled to Pakistan and thence went to England. At the instance of the Government of India the Metropolitan Magistrate at Bows Street arrested the applicant under the provisions of the Fugitive Offenders Act, 1881 and the motion for the writ was grounded on the contention that the Fugitive Offenders Act 1881, ceased to govern the relations between India and the United Kingdom when the former became a Republic though continuing as a member of the Commonwealth.

This contention was rejected and the application refused by a Divisional Court the judgment being delivered by Goddard C. J. The learned Chief Justice referred to the Order-in-Council of 1904 issued under Section 12 of the Fugitive Offenders Act, applying the Act to India when it was then a part of the Sovereign's Dominions and to the changed status of India as a Republic and added that the Act continued to operate by virtue of Section 1(1) of the India (Consequential Provisions) Act, 1949, which provided for the continuance of all existing laws, -- until provision to the contrary was made by the authority having power to alter that law -- to have the same operation in relation to India and to persons and things in any way belonging to or connected with India, as it would have if India had not become a Republic." He, therefore, held that the Magistrate had jurisdiction to effect the arrest.

30. I am making a reference to this decision merely for the purpose of showing that it would not be correct to regard that the Fugitive Offenders Act, 1881, had ceased to operate for all purposes as far as India is concerned. Menon's case, , was concerned with the political ties brought into being between disparate units of the British Empire by legislation of the Imperial Parliament and with the question as to how far these ties bound a unit whose status had undergone radical alterations. Mubarak Ali's case proceeded on the same lines and but for the parliamentary enactment of 1949 possibly the same result might have been reached. I do not, however, pause to consider as to what the position in India would be vis a vis the United Kingdom because of the absence of Indian legislation corresponding to the United Kingdom Act.

31. I am unable to see how the decision in Menon's case, or I would add Mubarak Ali's case, 1952-1 All ER 1060 helps learned counsel in the contention that the Copyright Act has ceased to be a law in force on the date of the Constitution. Notwithstanding that in its origin the Copyright Act 1911 was a legislation of Parliament, it was nevertheless part of the private law of this country and governed the rights and obligations between its inhabitants in regard to one type of property. In my judgment the case before the Supreme Court was not concerned with a law governing property rights of

individuals within the country. The Fugitive Offenders Act is really part of the public law of the State, a matter which would have been the subject of extradition treaties if the units had been independent countries and it stands to reason that such a law might undergo alterations by treason of radical changes in the status of the concerned parties.

The objection that was upheld by the Supreme Court was that the grouping of India with other British Possession could no longer be valid after India ceased to be a British Possession. Those principles of public law however, have no application for the determination of private rights and it would be subversive of all principles of international law to hold that the inter se rights of individuals concerning their property were affected by political changes. Possibly there might be cases where there might be some inappropriateness in applying the provisions of an enactment to new situations arising it might be, by reason of political changes, though I find it difficult to formulate this with any precision.

But such exceptional instances apart, I am unable to find any basis for the argument that the only laws in force at the date of the Constitution and which survived the emergence of India as a Dominion or as a Sovereign Republic were those laws which were enacted by the Indian Legislature and that British Parliamentary legislation theretofore applicable to India automatically ceased to operate on 15-8-1947, or on 26-1-1950. If the argument of learned counsel were pushed to its full length, it would follow that as the British Indian legislatures were themselves the creatures of British Parliament the laws passed by them would have to suffer a similar eclipse with the resultant position that there would be a complete vacuum created so far as statutory law in India was concerned. This logical result is sufficient to show that the argument is unsound and must be rejected.

32. It would be seen that in the above discussion I have not always kept distinct the two dates 15-8-1947 and 26-1-1950, and would therefore add just a word about it. The argument regarding the earlier date was with reference to (1) the effect of Section 25 (1) of the Copyright Act, 1911, and (2) the adaptation under Section 18 (3) of the Independence Act, 1947, and as regards the latter that the status of India as a republic rendered all previous parliament-tary enactments, therefore, applying in India inoperative -- relying on the decisions of the Supreme Court in Menon's case, and I have dealt with both these aspects of the question.

33. The learned Advocate General sought some assistance from the fact that the Imperial Copyright Act was modified and incorporated into the text of the Indian Copyright Act, III of 1914, and that, therefore, it must be taken that the enactment scheduled to the Indian Copyright Act must be treated on the same footing as an Indian enactment.

34. I am unable to agree with his contention because the modification was by virtue of the provisions of Section 27, of the Imperial Act and the legal basis upon which the Imperial Act applied in India was not by virtue of its incorporation in the schedule but by reason of its being a Parliamentary enactment applicable to India. Nor is there much point gained by reason of the Copyright Act of 1914 having been adapted by the Adaptation Order of 1950 or by its amendment by Central Act III of 1951 or 62 of 1956 because that adaptation or amendment had reference only to Act III of 1914 though undoubtedly they proceeded on the basis that the Copyright Act, 1911

scheduled to the Copyright Act of 1914 continued still to be part of the law of the country.

35. I, therefore, hold that the rights of the parties are governed by the Imperial Act of 1911, as modified by Act III of 1914. The preliminary objection is overruled and the issue is answered in favour of the plaintiffs.

36. The next point is in relation to the "Return of the Native" not having been first published within His Majesty's dominions. Section 1 (1) of the Copyright Act, 1911, which confers a statutory right named "copyright" is in these terms :

"Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends (a) for the term hereinafter mentioned in every original (b) literary (c) work, if

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid.

(b) but in no other works."

"Within His Majesty's dominions" is defined in Section 35(3) in these terms :

"For the purposes of this Act a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public "

The basis for defendants' case that the "Return of the Native" by Thomas Hardy was first published in America without being published in England is a passage in "A Biographical Study of Thomas Hardy in Richard Little Purdy" a book published in 1954. Referring to the first edition of Thomas Hardy's work, "Return of the Native" the learned biographer says ;

"The Return of the Native was first printed serially in Belgravia from January to December 1878The books are here entitled but provided with brief arguments, not printed The novel was also published serially in America in Harper's New Monthly Magazine from February 1878 to January 1879 x x x x ."

We have no evidence as to when it was commenced or finished but the first 7 chapters were written by 28-8-1877 and the first two books by 28 November and publication was begun in Chatto and Windus's Belgravia in January of 1878. "The Return of the Native" was published at 3s. 6d. in an edition of 1000 copies on 4-11-1878 The novel was published in America by Henry Holt and Co, in their "Leisure Hour Series" in December ;1878. To this the author adds a footnote :

"This edition has sometimes been described as the true first edition of the novel No accession records or deposit copies remain at the Library of the Congress nor has any evidence survived at the publishers', but the absurdity of the idea (which rests solely on the evidence of advertising end-papers in one or two copies variously dated 18 September and 28 October 1878) is apparent from the fact that Holt's 'priority claim' was not published until 2nd December nor was the novel advertised as ready before 14th December. The plate for the map, it may be observed was not in existence by 18th September." The plaintiffs have filed a photo-stat copy of the title page of the London Magazine, Belgravia which shows that the "Return of the Native" was first published in January 1878, Ex. P. 5.

37. The entire case of the defendants is based upon the correctness of Holt's 'Priority claim' which is discredited by Mr. Richard Little Purdy. Mr. Purdy's book also records that the Return of the Native was first published as a novel in England on 4-11-1878 whereas the first advertisement in America was only in December 1878. I feel unable to uphold the defence claim that Thomas Hardy's book "Return of the Native" was first published in America. I have omitted to mention the reference made by the defendants to Carl Webber's work "Hardy in America" where also the priority claim of Holt is mentioned but is discounted for the same reasons as have been adduced by Mr. R. L. Purdy. This point is, therefore, decided in favour of the plaintiffs,

38. The next question for consideration is as to whether the plaintiffs have established their title to the copyright claim. Thomas Hardy wrote his work "Return of the Native" in 1877 and the book was published in 1878. Under Section 5 of the Copyright Act, 1911, as also under the earlier law in force at the date of the publication of the work, Thomas Hardy as the author of the book was the first owner of the Copyright in the work. Section 3 of the Copyright Act, 1911, enacted that the term for which the copyright existed shall be the life of the author and a period of 50 years after his death. There is a proviso to this section which is not relevant to the present context.

Thomas Hardy died on 11-1-1928, and therefore subject to the provisions of this Act the copyright subsisted in Thomas Hardy or his representatives till 10-1-1978. Thomas Hardy, however, entered into an agreement with Messrs. Macmillan and Co. Ltd., on 2-4-1902, assigning his rights in the work to the firm by which the assignment was to subsist "during the legal term of the Copyright", Section 24 of the Copyright Act, 1911 dealt with copyright in the works which existed before the commencement of the Act and it was by virtue of this provision that the rights conferred by the Act became attached to the work published before its commencement Section 24(1) of the Act enacted :

Where any person is immediately before the commencement of this Act 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 substantial 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 provided that

(a) 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 at the commencement of this Act 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 and any interest therein created before the commencement of this Act and then subsisting shall determine"

The previous law governing copyright was the Literary Copyright Act. of 1842, and the term of the Copyright was contained in its Section 3 and it extended "till the life of the author and seven years thereafter or forty two years from the date of its first publication whichever period was longer." In the case of the book, "Return of the Native" the right of the author would have terminated seven years after his death, that is, by, 10-1-1935, this being the longer period and under Section 24 of the Copyright Act, 1911, the copyright in the work would on that date have reverted to the Thomas Hardy's representatives. There could therefore be no claim now under the assignment of 1904.

39. The plaintiff company are therefore now claiming under an assignment from the legal representatives of Mr. Thomas Hardy. Thomas Hardy had left a Will D/- 24-8-1922 which was probated in England. The probate is dated 22-2-1928 and is marked as Ex. P. 7 and the Will annexed to it forms part of the probate. Lloyds Bank Ltd. were appointed to-be Trustees and Executors of the Will. After providing for specific legacies the author bequeathed the residue of his real and personal estate to his children, if any, and to his wife, brother and sister.

Thomas Hardy left no children so that the residuary legatees under his Will were three, viz. his wife, brother and sister. The brother and the sister who had under the will, each a third of the residuary estate executed a gift deed dated 19-10-28 marked as Ex. P. 8 conveying their shares to Florence Emily Hardy the widow of Thomas Hardy. Emily Hardy thus became the owner of the entirety of the residuary estate and therefore the sole legal representative of Thomas Hardy in relation to the copyright in his works.

40. Emily Hardy herself died on 17-10-1937 leaving a will D/-10-5-1937, which has been probated, the probate being marked as Ex. P. 9. Emily Hardy in her turn also appointed Lloyds Bank Ltd., and in addition one Irene Cooper Wills as joint executors of her will. After some pecuniary and specific legacies the testatrix bequeathed the residue of her estate which included the copyright of which she became possessed under the Will of her late husband, to her sister Eva Anne Dugdale absolutely.

41. On 30-8-1944 a tripartite agreement was entered into between Lloyds Bank Ltd., Irene Cooper Wills, the joint executors of Emily Hardy's will of the first part, Eva Anne Dugdale sister of Emily Hardy to whom the copyright was bequeathed under Emily Hardy's will as part of the residuary estate of the second and Messrs. Macmillan and Co., Ltd., of the third part. Under this agreement Macmillan and Co. Ltd. paid to the executors (as the legal representatives of Emily Hardy), and to Anne Dugdale as the beneficial owner, a sum of . 40,000, in consideration of which the parties of the first and the second parts conveyed to Messrs. Macmillan and Co. Ltd. "the sole right to print and publish in any form in any part of the world the whole or any part of all or any of the literary works

specified in the first schedule. One of the works so included in the schedule was the "The Return of the Native." If the plaintiffs are able to establish their title so far there could be no dispute that they would have the right to maintain the suit.

42. The contentions raised by the defendants on this part of the case were two-fold.

43. They objected to the reception in evidence of Ex. P. 7 to P. 10 as not properly proved according to law and contended next that even assuming that these documents were held proved the plaintiffs were precluded from asserting any rights in the copyright, because they could do so only as the representatives of Thomas Hardy and Emily Hardy and as the wills of these two individuals had not been probated in India, Section 213 of the Indian Succession Act was a bar to the enforcement of such rights.

44. First in regard to the formal proof of the documents; this may be considered under two heads: (1) the two probates which have been marked as Exs. P. 7 and P. 9 and the other two documents inter vivos Exs. P. 8 and P. 10- As regards the first two documents, viz, the two probates I have no hesitation in holding that they are being certified copies of the probates granted by the Probate Division of the High Court of England are admissible in evidence under Section 82 of the Evidence Act, I do not consider it necessary to extract any portion of that section. I hold that Exs. P. 7 and P. 9 are sufficiently proved by the production of the certified copies of the two probates and therefore, they will be admitted in evidence.

45. In regard to Ex. P. 10, the tripartite agreement between the executors of Emily Hardy, the beneficiary under Emily Hardy's Will, and Messrs. Macmillan and Co. Ltd, there is formal proof before the court in the shape of the evidence of an employee of Messrs. Macmillan and Co., Ltd., who has identified the signature of Morris Macmillan in the tripartite agreement. I, therefore, hold that Ex. P. 10 has been formally proved and is accordingly admitted in evidence. The only difficulty is about Ex. P. 8, which is dated 19-10-1928. It is not a document, over, thirty years old, to attract the provisions of Section 90 of the Evidence Act, and, therefore, if formal proof were insisted on there has to be proof of the signatures" of the parties to the document.

No such proof was adduced. Learned counsel for the plaintiffs submitted that what was produced before the court was the original of the agreement, that there could be no dispute about the genuineness of the document and that if formal proof of the signatures was insisted on, he would make a request for an adjournment to enable a commission to be issued to witnesses in England to comply with this formality. I could not properly refuse this request and when I expressed myself, so, learned counsel for the defendants did not persist in his attitude and therefore the document has been permitted to be marked as proved.

46. The other question that arises on this part of the case is as regards the effect of Section 213 of the Indian Succession Act, on the claim of the plaintiffs. This section enacts :

1. "No right as executor, or legatee can be established in any court of justice, unless a court of competent jurisdiction in India has granted probate of the will under which

the right is claimed or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

2. This section shall not apply in the case of Wills made by Muhammadans, and shall only apply in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the (classes) specified in clauses (a) and (b) of Section 57."

47. Neither the Will of Thomas Hardy nor his wife is covered by Sub-section 2 and hence it is Sub-section (1) that applies to the present case. One point urged by Mr. Nambiar, learned counsel for the plaintiffs was that Lloyds Bank Ltd., in the case of Thomas Hardy's will and Lloyds Bank Ltd., and Irene Cooper Wills in the case of Emily Hardy's will were not functioning as executors but as trustees under the will and that therefore this section did not bar the assertion of rights by the plaintiffs.

There is no substance in this contention because in the will the executorship is in reference to their function to carry out the dispositions and they are referred to as trustees for the legatees in regard to such property as remained in their hands for the latter's benefit. The designation of the executors as trustees does not, therefore, affect the applicability of Section 213 of the Succession Act.

48. If the executors were precluded by Section 219 from asserting their rights to the copyright, Messrs. Macmillan and Co., as assignees from these executors, would stand in no better position.

49. Mr. Nambiar referred me to Section 41 of the Indian Evidence Act which enacted that an order of a competent court in the exercise of probate jurisdiction so rendered is relevant when the existence of the legal character or the title of any such person is relevant and urged that the probate granted by the High Court of England clothed the executors with title to the copyright of the deceased which should be recognised by Indian Courts and that this would enable the plaintiffs to maintain the suit without the production of a probate granted in India.

50. This argument is also without substance and it proceeds on a misapprehension of the relative scope of Section 41 of the Evidence Act and Section 213 of the Indian Succession Act. Section 213 of the Succession Act enacts a rule of evidence and constitutes the procedural requirement of the *lex fori*. In considering this it is necessary to advert to Section 228 of the Succession Act :

"When a will has been proved and deposited in a court of competent jurisdiction situated beyond the limits of (State) whether within or beyond the limits (India) and a properly authenticated copy of the will is produced letters of administration may be granted with a copy of such copy annexed."

The title which the will and the probate confer on the executor which is rendered relevant evidence under Section 41 is given effect to by the provision in Section 228 of the Indian Succession Act and on the production of the English Probate, what might be termed an ancillary probate is directed to be granted with the will annexed to enable such executors to assert their rights to the estate of the deceased to India.

51. Section 213 of the Succession Act, however, would certainly not apply to a case where under the provisions of the Indian Succession Act, a person who asserts his rights as a legatee or as an executor is disabled by law from obtaining a probate from any court in India. This section is primarily concerned with wills of Indian Nationals and those executed in India. Section 228 of the Succession Act is an extension of the rule and enables the granting of an ancillary probate in the case of foreigners.

It stands to reason that Section 213 of the Succession Act cannot be construed as insisting on the production of a probate which no court in India is competent to grant in regard to a will for which probate has been granted by a foreign court of competent jurisdiction. If this were the proper construction of Section 213 of the Succession Act, and I do not entertain any doubt as to the correctness of this position, the foreign probate would be sufficient proof of title of the legatee or the executor and admissible in evidence under Section 41 of the Evidence Act in proof of that right. The question, therefore, comes back to this. Could any competent Court in India have granted an ancillary probate of these two wills under Section 228 of the Succession Act?

52. In this context the relevant provision is Section 270 of the Succession Act which enacts :

"Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of this Court if it appears by a petition verified as hereinafter provided of the person applying for the same that the testator or intestate as the case may be at the time of his decease had a fixed place of abode or any property moveable or immoveable within the jurisdiction of the Judge."

Section 270 merely copies the principle of the English ecclesiastical law which was enforced in the county probate that it was the presence of the personal property of the deceased that was the foundation of jurisdiction to grant probate. It is not necessary to cite many of the English decisions because the point is too well settled for controversy. I will only refer to *Evans v. Burrell*, 1859-4 Sw and Tr 185, where Sir C. Gresswell stated :

"It does not appear from the affidavits that the deceased left any property in this country. Unless he did so there is nothing upon which the grant asked for would operate and I should have no jurisdiction to decree letters of administration to be granted."

and the observations of Sir J. P. Wilde in *The Goods of H Tucker*, 1864-3 Sw and Tr 585:

"The foundation of the jurisdiction of this Court is that there is personal property of the deceased to be distributed within its jurisdiction. In this case the deceased had no property within this country and the Court has therefore no jurisdiction."

No doubt the legislature has intervened in England and has enacted the Administration of Justice Act, 1932, under which the court is vested with power to grant probate even when there was no property within its jurisdiction. But neither this enactment nor the decisions on its construction are

of much relevance to the question now under consideration.

53. The first question therefore is whether the copyright which is the subject matter of this suit could be deemed to be an item of the personal property of the deceased situated within this country, In the case of tangible moveable property the problem is quite simple and such property will be deemed to be situated where it is found but when we pass from the region of tangible to the other class of choses in action or other species of intangible property the question ceases to be simple.

54. Dicey in his "Conflict of laws" (VIth Edn.) expresses himself thus :

"In most instances the situation of property i.e., whether it is or is not situated in England does not admit of doubt; but it sometimes happens that there is a real difficulty in affixing to property especially where it consists of debts or other choses in action, its due local position....."

Of the latter it was formerly said *mobilia sequuntur personam* that they had no locality. But this view is not generally accepted in English law. In the determination of the locality property assignable to the different kinds of personalty which have been owned by a testator or intestate, the High Court is in the main guided by maxims derived from the practice of the ecclesiastical tribunals. These maxims as modified by statutory enactments are based on two considerations; the first is that property so far as it consists of tangible things must in general be held situate at the place where at a given moment it actually lies; the second is that property may in some instances and especially where it consists of debts or choses in action, be held to be situate at the place where it can be effectively dealt with.....and so goods lying in a warehouse in England are to be held situate in England and debts due from debtors resident in England such as deposits in banks are also to be held there situate; *Commissioner of Stamps v. Hope*, 1891 AC 476 at p. 481. *Royal Trust v. Attorney General of Alberta*, 1930 AC 144 at p. 150. (*Vide English and Scottish and Australian Bank Ltd, v. Inland Revenue Commrs.* 1932 AC 238. But where a simple contract debt may be held in law to be situate in more than one place, the Court will consider in which place it is more properly payable under English law though a foreign Court might take a different view.

If the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding. A cause of action in contract or tort is situate where action may be brought upon it. Patents and trade marks are situate where they can be transferred on the same principle as shares in companies.....The inference, however, must not be drawn that because no personal property of the deceased would be liable to the payment of probate duty if such duty still existed, therefore, there is nothing belonging to the deceased so situate in England as to give the Court jurisdiction to make a grant; and this for two reasons (1) probate duty was chargeable only on property situate in England at the time of the deceased's death; (2) the character of the thing or the property on the situation whereof the jurisdiction of ecclesiastical Courts depended and the jurisdiction of the High Court mainly depends, The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, e.g. a debt owing to the deceased. The jurisdiction of the Court depended on there being in England something -- if the word "thing" be used in a very wide sense --for the dealing with which the representative of the deceased required a grant. These

two things may, but they may not, coincide.....Further, revenue cases are not always safe guides as to the situs of property from the point of view of jurisdiction because it is natural for revenue purposes for instance to take debts as situated where the creditor is." It might be noted here, that Dicey in his treatise has not specifically dealt with the situation of such an intangible asset as copyright.

55. Cheshire in his "Private International law" animadverts upon the habit of classifying moveables into tangible and intangible things and prefers to draw a distinction between choses in possession and choses in action. Dealing with the situation of choses in action, with reference to the question of the jurisdiction to grant administration -- testamentary or intestate -- the learned jurist says "Except in the case of tangible moveables there may be some difficulty in establishing the situation of property especially in the case of choses in action such as debts and shares. For the purposes of jurisdiction to make a grant of probate or administration, however, it has long been settled with respect to choses in action and title to property that judgment debts are assets where the judgment is recorded.... and simple contract debts, where the debtor resides at the time of the testator's death.....A share of stock, transferable only by registration is situated noli in the place where the certificate happens to be, but in the country where the shares effectively be dealt with as between the shareholder and the company, i.e., in the country where registration must be effected."

Again I have to mention that Prof. Cheshire either does not express any opinion as to the situs of the right to copyright.

56. The question, therefore, as regards the jurisdiction to grant probate -- whether a local Indian situation could be attributed to the right to copyright such as it sought to be enforced in these suits, has to be determined on principle without the assistance of any decision or even the opinions of authorities on Private International law.

57. Prima facie three matters appear to me to be relevant in this connection: (1) the fact emerging from the right in question originating from Indian Legislation in the shape of the Copyright Act, III of 1914; (2) the general principle which fixes "situs" with reference to the jurisdiction where the right could be enforced, and (3) lastly the analogy furnished by comparable intangible rights such as patents and trade marks (as to patents see 1932 AC 238 at p. 249 and p. 256).

58. If the intangible right whose situs has to be determined is a statutory right and owes its existence to a statute enacted by a particular country it appears to me to be consistent with principle to attribute to it a situs within the country which conferred that right. Normally the territory of a State enacting the law conferring that right would be the limit within which that law and that right could operate. No doubt that right might be recognised elsewhere, for instance, by reciprocal treaties or by reason of membership of International Conventions but still the fountain of authority for recognition outside the territorial area of the State conferring the right would be the sovereign act of the other state.

If, therefore, the copyright sued on in the present case could be held to originate in an Act of the Indian legislature, I feel no doubt whatsoever that that right should be deemed to be situate in India for the purpose of enabling an ancillary probate to be granted under Section 228 of the Indian

Succession Act. The position, however, in this regard is complicated by the fact that the right to copyright is traceable to the United Kingdom Copyright Act of 1911. which proprio vigore extended to the entirety of His Majesty's Dominions and possessions including India.

However, some little power was reserved to the Legislatures of these possessions. No doubt under Section 27 of the Act, the legislatures of British possessions were enabled to modify or add to any of the provisions of the "Act" in its application to the possession but with the rider, however, but except so far as such modifications and additions related to procedure and remedies they should apply only "to works the authors whereof were at the time of the making of the work, resident in the possession, and to works first published in the possession." The copyright involved in the present case was therefore not (until 1947) subject to any modification by the Indian legislation except as to procedure and remedies.

59. Does then the fact that the Indian legislature by its Act III of 1914 appended the Copyright Act of 1911 to its enactment by itself make any difference in the position. This question can be answered only in the negative, because of the basic assumption underlying Act III of 1914. The preamble to the Indian enactment runs "Whereas it is expedient to modify and add to the provisions of the Copyright Act, 1911 in its application to (provinces of India)." Again the opening words of Section 3 ran : "In the application to (the provinces) of the Copyright Act (a copy of which Act.....is set out in the First Schedule) the following modifications shall be made." Words to a similar effect are to be found in the opening portions of Sections 4 and 5. The entire foundation of the Act III of 1914, therefore, was that the United Kingdom Copyright Act, 1911, operated in India of its own force and the Indian enactment was merely designed to modify its application to this country in regard (o a few details.

Whatever might be the position in those cases where the right sought to be enforced is one which has been modified by the Indian Act I do not consider that in cases where there is no such modification it could be predicted that the right was under an Indian enactment. There is, therefore, no point gained to the solution of the present problem by reference to Act HI of 1914 and if the situs of a statutory right has to be determined by reference to the situs of the legislature, which granted or created the right, it should be deemed to be a United Kingdom right and therefore, not in any sense an Indian right.

60. I shall now take up for consideration the second of the matters I have set out above, namely, whether a local situation could be attributed to that jurisdiction where the right could be enforced. It would seem that one of the tests, if not the main, formulated for determining the locus of the choses in action -- which stems from practical considerations, is to find out the place or the country in which the right to the chose could be effectively enforced. For instance in the case of simple debts the residence of the debtor is treated as the situs of the debt because it could be recovered by an action in that jurisdiction. A similar rule based on a similar principle is applied to determine the situs of shares in companies.

Applying this principle to the type of right now under consideration the position would appear to be somewhat as follows: The right having originated under a statute of the United Kingdom and

particularly by the publication in the United Kingdom of the work by an author resident in England the right of copyright undoubtedly had its locality in the United Kingdom as the place which gave its birth but with the United Kingdom, so to speak, as its focal point, it extended beyond that territory and covered territories not subject to the jurisdiction of the courts of the United Kingdom.

Any infraction of the right, committed outside the United Kingdom could be enforced only in those courts which had jurisdiction over the area where there was an injury to that right. In such a situation is there any inappropriateness in attributing to such a right, a situs in each area to which the right extended? Though in the absence of assistance in the shape either of direct authority or even dicta covering the point, I naturally hesitate to venture any answer with certainty, I should consider on the principle flowing from the rule of effective enforcement, that the question must be answered in the affirmative.

Just by way of illustration let me take a case where there is a simple debt jointly payable by several debtors each of whom resides in different jurisdiction at the time of the death of the deceased. The application of the accented principles ought to lead one to attribute a multiple situs to the chose in action, and to deny any simple local situation to such a debt. This, therefore, points to the correctness of the conclusion which I am inclined to draw, in the case of rights such as we have in the present case, extending in more than one country.

61. Again let us take a case where there is a threat to the right to copyright or a denial of that right in India. Undoubtedly a suit for injunction or for a declaration of the right could be filed against the person who threatens or denies the right and I am unable to conceive of the possibility of such a course without attributing a local situation to that right.

62. Earlier I have set out instances of intangible rights like patents and trade marks as affording an analogy for reaching a decision in relation to copyright. The basis of the rule in those cases is to be found in the two principles which I have set out, i.e., the right being traceable to the legislation of a particular country and the principle of effective enforcement of rights to which I have referred. The third matter is really an application of the other two which I have already discussed. The analogy, therefore, supports the approach that I have made to the question now under consideration.

63. The result of this discussion, therefore, leads me to attribute a local situation in this country to the right which is sought to be enforced In this suit. If the right had such a local situation it would undoubtedly be property within jurisdiction in regard to which an ancillary probate could have been obtained under Section 228 of the Indian Succession Act

64. Upto now I have proceeded on the basis that jurisdiction in the matter of granting ancillary probate or as it is termed in England the resealing of probate granted by a foreign court is exactly identical with that, in relation to the grant of the primary probate of a will of the deceased. This however, does not appear to be the correct position, the jurisdiction to reseal being apparently wider than in the other case. What I have in my mind is the decision in the goods of Sanders, 1900 P. D. 292 by the eminent probate Judge, Corell Barnes J. The judgment consists merely in a note that resealing was ordered. The facts of the case are as follows: One Frederick Sanders bequeathed to his

brother a sum of . 250 and in a stated contingency provided that the legacy was to be paid to the "personal representative" of his brother. The brother was domiciled in Victoria, Australia and died there. The Supreme Court of the Colony of Victoria granted letters of administration to the widow of the deceased, Jane Sanders.

The brother left no estate in England. A probate was granted by the courts in England in regard to the will left by Frederick Sanders the testator. When the widow of the brother who had obtained letters of administration in Victoria applied for the payment of the sum of .. 250 as the "personal representative" of the deceased, the executors of Frederick Sanders required that they should have a proper discharge for the payment, and for this purpose an application was made for the resealing of the colonial grant obtained by the widow. The objection to the grant was that the intestate brother left no estate in England and that consequently English courts would have no jurisdiction to reseal the colonial grant. The court, however, allowed this to be done.

65. I am, therefore, satisfied that the plaintiffs should have obtained an ancillary probate under Section 228 of the Succession Act and consequently their failure to produce such a probate is a bar to the enforcement of their right in the suit under Section 213 of the Succession Act. The suit in relation to the claim for infringement of the copyright in Thomas Hardy's "Return of the Native" must therefore fail.

66. I shall however proceed to record my findings on the other matters in controversy in relation to the plaintiff's claim. First as to whether the defendant's Guide constitutes an infringement of the copyright in Thomas Hardy's work. Section 2(1) of the Copyright Act of 1911 enacts "copyright" in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by the Act conferred on the owner of the copyright. "I shall consider the provisos which follow this provision and their applicability a little later. Section 1(2) constitutes the provision where "the sole right" which is referred to in Section 2(1) is contained. This provision reads : "Copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever." The rest of the provision is not relevant and I, therefore, omit it.

67. In the light of these provisions the question for consideration is whether the defendants' work, "the Guide" constitutes a reproduction of the plaintiffs' publication or any substantial part thereof.

Bearing in mind that what is concerned in the present case is the right to literary copyright I might make a few observations as regards the scope of copyright protection in regard to such works. As this is well settled by authority and is not really in controversy before me, I shall merely extract a passage from Copinger on Copyright (p. 118) dealing with the matter.

"What is protected is not original thought or information but the expression of thought or information in some concrete form. Consequently it is only an infringement if the defendant has made unlawful use of the form in which the thought or information is expressed. The defendant must, to be liable have made substantial use of this form; he is not liable if he has taken from the work the

essential idea, however original, and expressed the idea in his own form or used the idea for his own purpose."

68. The next question is as regards what constitutes a substantial part of the work the reproduction of which constitutes an infringement of the sole right conferred on the owner of the copyright. The question is one of fact to be determined with reference to each case, but there is no controversy as regards the principles to be applied for determining what is "substantial". Copinger puts the matter thus:

"It is unusual for infringement to consist of an exact reproduction of the whole of the Plaintiff's work. Consequently difficult questions arise as to the amount or copying and the degree of resemblance necessary to constitute infringement. First as to the amount of copying, the Act of 1911 uses the expression "substantial part" in defining the sole right to reproduce The expression "substantial" is not, however, defined and some guidance as to its meaning may be obtained from the pre-1911 decisions It was decided that the quality of the piracy was frequently more important than the proportion which the borrowed passages bore to the whole work." Morton J. stated in *Johnstone v. Bernard Jones Publications Ltd.* Beauchamp, 1938-1-Ch. 599. "Of course it is clear that the word substantial does not denote the bulk or the length of the extracts." Lord Cottenham in *Bramwell v. Hallcomb*, 1836-3-My. and Cr. 737-738 said :

"When it comes to a question of quantity it must be very vague. One writer might take all the vital part or another's book though, it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity." The test ultimately seems to be "Is there an appropriation or more appropriately 'misappropriation' of the labour of another in the matter of expression? Before passing from this topic it is only necessary to add that an infringement of copyright is in the nature of an invasion of a right to property and therefore the intention of the infringer is immaterial provided there is infringement.

69. In the written statement two matters were set out in answer to the complaint that the defendants' guide constituted an infringement of the plaintiffs' copyright work. The first was that there was no "substantial" reproduction and the second that the defendant's work constituted "fair dealing" and was therefore protected by the proviso to Section 2(1) of the 1911 Act.

70. I shall first deal with the question as to whether the work constitutes an infringement in the sense of its being a substantial reproduction of the plaintiffs' copyright work because it is only when there is such a substantial reproduction that there is need to invoke the proviso, for the proviso, proceeds on the assumption that but for it, the infringement would have been established.

71. The questions to be considered are: (1) is there a reproduction of a substantial part of the copyright work" quantitatively and (2) what is the quality of the work abstracted and does it

constitute a valuable portion of the copyright work. First as to quantity: "The Return of the Native" as published by the plaintiffs occupies 480 pages of print and the defendants' Guide which is intended for enabling the Students appearing for the University Examination to understand Thomas Hardy and his work and be in a position to answer questions in relation to the work "covers 218 pages and consists of five portions -- Introduction, Chapter summaries, topical essays, character sketches and critical and general essays.

There is no complaint, however, of any infringement of any portion of the copyright work except with regard to what is termed "Chapter summaries". This occupies pages 7 to 126 in the defendants' Guide. These chapters are divided into six portions just as in the original and each chapter is headed almost similarly as in Hardy's original work. Though learned counsel for the plaintiffs laid some emphasis on the headings of these chapters I do not consider them as of much importance.

72. Learned counsel for the defendants has made a rough calculation of the words contained in the two works. The original work was stated to contain 1,64,000 words while the defendants' guide 42,000 words. Learned counsel stated that out of the 42,000 words only 4,000 words had been alleged to have been copied from the original. I might here mention that I suggested to the learned counsel for the plaintiffs that he might mark these portions of the original which were stated to have been copied in the defendants' work, number them serially and indicate the passages with the corresponding numbers in the defendant's work and it was as a result of the calculation made on the basis of this marking that the learned counsel for the defendant! submitted to me the above computation.

Learned counsel for the defendants also pointed out that there were several pages of the copyright work particularly those after page 182 where there was very little copying. I have examined the marked portions in the two works Exs. P. 1 and P. 1(a) very closely and I have reached the conclusion that a substantial part of the work had been "reproduced" so as to constitute an infringement. I consider that the test affording by comparing the number of words copied from the original with the total number of words in the original work is, somewhat misleading in the present case.

What the person who prepared the guide apparently did was to eliminate all those passages from Hardy's work which contained colourful descriptions either of the countryside or touching the characters in the novel, and copied only those portions which were essential for the narration of the story. The method adopted appears to have been to incorporate the language of the original to narrate the story, leaving out those portions which constituted what might be termed "purple patches" in the work. This seems almost to fall within the description of the type of abridgment referred to by Lord Atkinson in *Macmillan and Co Ltd. v. K & J. Cooper* 40 Mad LJ 637: (AIR 1924 PC 751 "the text of which consists of a number of detached passages selected from the author's work often not contiguous but separated from those which precede and follow them by considerable bodies of print knit together by a few words so as to give these passages when reprinted, the appearance as far as possible of a continuous narrative". I shall endeavour to make my meaning clear by reference to a few passages selected at random and which I shall set out in parallel columns: (After reproducing the passages in parallel columns his Lordship concluded) :

73. I consider that both by reason of the quantity as well as the nature of the matter extracted, the defendants' guide contains a substantial reproduction of the plaintiffs' work so as to constitute it an infringement under Section 2 (1) of the Act.

74. Learned counsel for the defendants urged that one at least of the prime tests as to whether the reproduction is substantial would be to consider whether the defendants' work was intended to or did compete with the sale of the plaintiffs' copy-right work and that in the present case there could have been no such competition. This was based upon the fact elicited in the evidence of the witness for the defendants in C. S. No. 215 of 1954 which though not strictly evidence, in this suit was treated by both sides as proof of the general practice in such matters, that the college authorities insist on the students studying the original and not be content with getting up the matter in the several guides which were published as aids to students preparing for the examinations.

I have no doubt that both in High Schools and Colleges lecturers and professors do insist upon their students studying the prescribed text books and not merely cram guides or notes, but this, however, in my opinion does not assist the defendants very much in this case. In the first place the effect of the defendants' publication as a competitor with the plaintiffs' copyright work is only one of the factors to be taken into account for ascertaining whether the reproduction is substantial. In the present case I cannot ignore the fact that Thomas Hardy's work has been prescribed for non-detailed study and in that sense the students would be expected to acquaint themselves with the broad details of the story as well as of the several incidents which are related.

If the defendants' work consisted of a string of passages from the plaintiffs' work, copied mostly in the author's own words but knit together by a few sentences omitting colourful descriptions, I am unable to hold that this did not constitute an infringement of the copyright. There might not be any intention to compete with the sale of the plaintiffs' publication but the intention of the defendants in such matters is nearly irrelevant. I can not, therefore, overrule the possibility of compe-

tition and that is all that is necessary for determining infringement of copyright.

75. I shall deal with the defence regarding fair dealing based on the first proviso to Section 2 (1) of the Copyright Act, 1911 after considering the plaintiffs' complaint regarding infringement of copyright in relation to "Stories from Tagore" -- since this defence is common to both the works concerned in this suit.

76. The other work in regard to which relief is claimed in this suit is a publication entitled "Stories from Tagore". The plaintiffs, Messrs Macmillans and Co., Ltd., entered into an agreement on 12-5-1919 with Sir Rabindranath Tagore (marked as Ex. P. 18) by which in consideration of the payment of a royalty, Sir Rabindranath Tagore assigned to them "the exclusive right of producing and publishing the work during the legal term of unrestricted copyright." In the case of this work, therefore, the technical objection based on Section 213 of the Succession Act which I have been constrained to uphold in the case of Thomas Hardy's work. "The Return of the Native" does not apply.

77. The question, however, has been raised as to whether Sir Rabindranath Tagore himself had copyright in these works for if he had not he could not clothe the plaintiffs with any such right. The challenge to the right of Tagore to the copyright in this work was set out in paragraph 15 of the defendant's written statement in these terms:

"The defendant states that these stories first appeared in Bengali and no translation thereof into English was published within ten years of their first appearance and therefore the sole right to publish the translation expired at the end of ten years from the date of the publication of the respective stories. The said period had elapsed according to the information of the -defendant before the publication of "The Stories from Tagore" in 1918. There is no copyright in the said translation according to the provisions of Section 4 of the Indian Copyright Act, III of 1914."

78. In order to understand this objection it is necessary to set out a few facts. The work entitled "Stories from Tagore" in which the plaintiffs claim copyright is a collection of ten stories all of which were written by Tagore in Bengali. Of these ten stories, stories entitled "Child's Return" and "Postmaster" were first published in Bengali in 1891, two other stories "Kabulivalah" and "Home Coming" in 1892. A further two "Once there was a King" and "Subah" in 1893; "Cast Away" and "Babus of Nayanjure" appeared in 1895, "Master Mashi" in 1897 and "Son of Rashainani" in 1911, The translations of these stories were published in two series along with other stories which are not included in the present collection. That published in 1916 was entitled "Hungry Stones and other Stories" while the publication in 1918 was styled "Mashi and other stories." It would thus be seen that the English translation of stories other than "Son of Rashamani" were published beyond ten years from the date of their publication in Bengali. I shall now turn to Section 4 of the Copy Right Act, 1914 on the basis of which the contention in paragraph 15 of the written statement of the defendant is raised. The relevant portion of Section 4 consists in its first sub-section which runs:

"4 (1). In the case of works first published in (India) Copyright shall be subject to this limitation that the sole right to produce, reproduce perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work;

Provided that if within the said period the author or any person to whom he has granted permission so to do publishes a translation of any work in any language copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section."

Based on this provision the argument was that unless a translation was published within ten years from the date of the first publication of a work there was no copyright in the translation. I am unable to agree with this construction of the provisions of Section 4 of the Act. The object of the provisions of Section 4 (1) was to confer on the author the sole right of translation for a period of ten years. That sole right might be exercised or omitted to be exercised.

If it was omitted to be exercised the result would be that at the end of the ten year period the statutory right to copy-right would not include the sole right of translation. In other words any person could thereafter translate the work and the author of the original could not complain that his right to copyright was infringed by reason of a translation of his work. But this does not, however, mean that there was no copyright in the translation. The right to copyright in the translation is not dependent on the terms of Section 4 but it springs from the very terms of Section 1 of the Copyright Act, 1911, because the translation itself would be "an original literary work" (Vide *Byrne v. Statist Coy*, 1914-1 KB 622).

In the present case, therefore, in regard to the translation of the stories written by Rabindranath Tagore other than "Son of Rashamani" there would be copyright in the translations as "an original literary work" and if the complaint is that that copyright is infringed it is no answer to point to the work being a translation.

79. I have so far dealt with a case where beyond the period of ten years everyone was free to translate the author's work but this would be subject to the proviso which deals with a case where the author had availed himself of the sole right to translate his works conferred upon him by the first part of Section 4 (1). Where the author either himself or with the assistance of others makes a translation of his work within the period of ten years, the proviso confers upon him a further right in the shape of forbidding others from translating his original work into the same language as that chosen by the author.

Taking the instant case of "Son of Rashamani", the original story in Bengali appeared in 1911. This had been translated within the ten year period into English and published in 1918. The result of this would be that for the term of copyright in the original Bengali the right would include the sole right to translate into English -- the language in which the translation took place, and though in the case of other stories no one was precluded from translating them into English, in the case of this particular story such a translation could be injunct-ed as an infringement of the copyright. I would only add that this right is quite distinct from the right to copyright in the translation as an original literary work.

80. The claim in the present case is based upon the copyright inhering in the translation as an original literary work and hence Section 4 is no bar to the assertion of such a right. The contention of the defendant is, therefore, overruled.

81. There is one other matter which was referred to in this connection and that was that it had not been established that Sir Rabindranath Tagore had copyright in the translation by reason either of his having translated the stories or having them translated at his instance. For this purpose reliance was placed on the statements to be found in the plaintiffs' own books regarding the persons who translated these stories from Bengali into English. For instance in Ex. P. 2 the plaintiffs' publication of stories from Tagore (1954 Edn.) it is stated at page 169 thus: 'Cabulivalah' is one of the Poet's short stories which has been translated. The present translation is by the late sister Nivedita."

Similarly in the collection of stories "Hungry stones and other stories" and "Mashi and other stories" originally published in 1916 and 1918 respectively (the latest editions of which were those of 1950 and 1952 and which were filed as Ex. D. 3 and D. 3 (a)), it was stated in the title page that the stories were translated from the original Bengali "by various writers". In the preface to "Hungry stones and other stories" some details are given in these words: "The stories contained in this volume were translated by several hands. The version of the 'Victory' is the author's own work. The seven which follow it were translated by Mr. C. F. Andrews with the author's help."

82. "Victory" is not included in the collection of stories entitled "Stories from Tagore" with which the present action is concerned. The following, however, included in the collection of "Stories from Tagore" are among these seven. "Once there was a King"; "Home coming" and "Babus of Nayanjore". Based on this passage learned counsel for the defendant urged that there was no proof if this did not constitute proof contra, that Rabindranath Tagore was the author of the translations and therefore the owner of the Copyright in the translated collection, learned counsel urged that there was no evidence in the case that either sister Nivedita or Rev. C. F. Andrews translated the stories at the instance of Rabindranath Tagore.

In my opinion this lack of evidence is of little consequence. We have in Ex. P. 18 a categorical statement by Sir Rabindranath Tagore that the copyright in this work vested in him and in the face of this assertion I am not inclined to attach any significance to the paucity of evidence in this respect. I am prepared to infer therefore that the translations must have been done by friends of Sir Tagore at his instance and in this connection I attach some importance also to the absence of any claim by the translators to copyright in their translation.

I hold therefore that the copyright in the translation vested in Rabindranath Tagore and that by the assignment of that right in 1919 it became validly transferred to the plaintiffs.

83. I shall now take up for consideration the issue as to whether the defendant's Guide constitutes an infringement of the plaintiffs' copyright work, "Stories from Tagore". As I have already discussed the law on the point as to what constitutes infringement when dealing with the infringement of copyright in relation to Thomas Hardy's work, "The Return of the Native" it is unnecessary to go into it again. The plaintiffs' publication, "Stories from Tagore" occupies 160 pages each page containing about 34 lines.

As stated earlier, it is a collection of ten stories. The defendants' guide to "Stories from Tagore" contains, roughly about 70 pages each page containing about 39 lines. As in the case of Thomas Hardy's work learned counsel for the plaintiffs, has marked both in the copyright work as well as in the alleged infringing copy, Ex. P. 2 and P. 2 (a) passages which are stated to have been taken from the plaintiffs' work.

Learned counsel for the defendant gave the following quantitative analysis of the amount of copying. The total number of words in the original work as calculated by him is 42264 and the total number of words in the guide is about 32,600. The offending words are said to be 6543. If this totalling were correct it would mean that the offending words constitute about fifteen per cent., of the original and

a little over thirty per cent, of the defendants' work. Learned counsel also told me that 727 lines out of 4580 lines in the plaintiffs' work were alleged to have been copied and if the number of lines in the defendant's work were taken into account it would mean 727 out of 2730.

As I have stated in relation to Hardy's work this method of determining whether the copying is substantial or not is at the best a rough one and I would add a not an entirely satisfactory one. I have, therefore, proceeded to compute the quantum of the offending passages with reference to each story.

(After comparing the two books his Lordship came to the conclusion that the defendants' copying constituted an infringement of copyright as regards quality and quantity.)

84. I shall now take up for consideration the defence of fair dealing which is common to both the Guides which form the subject-matter of the suit. This is based on the first proviso to Section 2 (1) of the Copyright Act, 1911, which runs;

"Provided that the following _ acts shall not constitute an infringement of copyright:
(i) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary."

It was the contention of the learned counsel for the defendants that even if the defendants' guides constituted an infringement in the sense that they reproduced substantial parts of the copyright works still the defendants would be protected by this proviso. It is neither necessary nor useful to refer to the law before the Copyright Act of 1911. In determining the applicability of this proviso two matters have to be borne in mind.

The first is with reference to "the purpose" for which a substantial part of the copyright work is reproduced, the second with regard to manner of use pertaining to that purpose; in order to receive protection it must be fair dealing. If the purpose of the reproduction is not one of those enumerated in the statute the question of "fair dealing" would not arise. The enumerated purposes are: private study, research, criticism, review, or newspaper summary.

The proviso employs the punctuation of a comma after each of these separate purposes so that prima facie it would appear as if each one of them were an independent head or purpose and not qualified by the others. I am saying this in view of an observation of Lord Hanworth M. R. in *Hawkes and Son (London) Ltd. v. Paramount Film Service Ltd.*, 1934-1 Ch 593, the particular passage is at page 604, where the learned Judge said:

"It was suggested by Mr. Macgillivray that in a sense a news film was a newspaper but the collocation of the words 'criticism, review, or newspaper summary' clearly points to the review or to notices of books which appear in newspapers and not to anything of the nature that was done in the present case."

It is unnecessary for the purpose of the present case, to decide whether "criticism" or "review" which was published otherwise than in a newspaper was entitled to the protection of the first proviso to Section 2. I shall proceed on the basis that a criticism or review appearing in other than a newspaper was also a "purpose" within the proviso. Learned counsel for the defendants sought to bring the defendants' guides under the heads of "private study", research and criticism.

I am clearly of the opinion that this submission should be rejected. A dealing with a work for private study is such a dealing that does not involve any publication. As stated by Copinger "Private study only covers the case of a student copying out a book for his own use, but not the circulation of copies among other students". Vide *University of London Press Ltd. v. University Tutorial Press Ltd.*, 1916-2 Ch 601. I find it not possible to hold that the defendants' guide could be said to be works of research.

There is no definition of the word "research" in the Act, and, therefore its meaning has to be ascertained from ordinary English usage. In Funk and Wagnalls English dictionary "research" is said to mean, I am extracting that meaning which appears to be most relevant to the present context, "Diligent protracted investigation especially for the purpose of adding to human knowledge, studious enquiry."

In "The Shorter Oxford Dictionary" the meaning attributed is "An investigation directed to the discovery of some fact by careful study of a subject; investigation, inquiry into things." Understood in the light of these meanings the defendants' guides -- Chapter summaries, which constituted an infringement cannot obviously be said to comprise quotations for the purposes of "research"; nor is there any substance in the contention that the guides constitute "criticism" of the copyright works. They were nothing more than summaries and a summary which extracts and reproduces substantial parts of the copyright work for the purpose of narrating the story is not "criticism". The purpose, therefore, predicted by the first proviso to Section 2 (1) is not satisfied.

85. In this view the question whether the use to which the copyright work is put is "fair dealing" or not would not arise for consideration but as the matter has been argued I shall express my views on it. Two points have been urged in connection with the meaning of the expression "fair" in "Fair dealing" (1) that in order to constitute unfairness there must be an intention to compete and to derive profit from such competition and (2) that unless the motive of the infringer were unfair in the sense of being improper or oblique the dealing would be fair.

Learned counsel, particularly, Mr. Thyagarajan appearing for the defendants in C. S. No. 215 of 1954 invited my attention to passages in Text Books dealing with American Law of Copyright particularly to "Literary property in the United States" by Ralph R. Shaw and Nicholson's "A Manual of American Copyright Practice" as throwing light upon what constituted "fair dealing". I am, however, unable to derive much assistance from these two works because the law of copyright in America is based upon the provisions of an Act of Congress the Copyright Act, 1909 which does not contain any statutory provision like the proviso to Section 2(1) of the Copyright Act, 1911, and these two authors proceed to define the scope of fair dealing or fair use on the basis of certain decisions of the American courts.

I might however point out that in the Chapter on "Quotations" (Permissible) in Mr. Nicholson's work the learned author discusses as to how much could be quoted without the specific permission of the copyright owner, and points out how uncertain the law on the point is in America. The author says "How much can be quoted without the specific permission of the copyright owner? Probably no other question besets publishers -- and the copyright office -- so frequently. In a form letter the Copyright Office says cautiously but not very helpfully, One must use his own best judgment' --which is exactly what the quoting author and publisher want to avoid. The Copyright Act is silent, the Copyright Office is non-committal, and for the most part the courts have been evasive in defining just what "reasonable quotation is". The author then proceeds to treat of "fair use" is one of the heads of permissible quotations. This shows that not much is gained by reference to American Law or to American decision or test books.

86. To resume the discussion of the two points urged I shall first take up the question as to the | motive to compete being necessary in order to constitute a dealing unfair. I agree that if there were such a motive it would render the dealing "unfair" but I am unable to agree that if the works were not intended to compete, this would set at rest all questions concerning "fair dealing". Here again it appears to me that one has to have regard to the substantiality of the quantity and the quality of the matter reproduced. If there were an abstraction of something of value to an appreciable degree it appears to me to be immaterial whether the copying is or is not likely to compete with the copyright work. Most probably it will and I have already expressed myself on this topic, but even if it did not, I consider that such an amount of copying would negative "fairness". The analogy of "fair comment" or "qualified privilege" in the case of defamation strikes me as affording some parallel to the question raised regarding the concept of "fair dealing". For instance there might be excessive publication which deprives the defendants of the qualified privilege and excessive user would analogically deprive the defendants of the plea of fair dealing. In a case where the court recorded a finding that a substantial part of the work had been reproduced to constitute infringement and dealing with the first proviso of Section 2(1) with which we are now concerned Slessor L. J. said :

"I agree with my Lord that this reproduction is clearly a substantial part of 'Colonel Bogey', looked at from any point of view whether it be quantity, quality or occasion.....

That being so, it is clear to my mind that a fair use has not been made of it; that is to say, there has been appropriated and published in a form which will or may materially injure the copyright, that in which the plaintiffs have a proprietary right. As is pointed out by Sir W. Page Wood V. 6 in Scott v. Stanford. (1867) 3 Eq. 718, 723 : 'If in effect, the great bulk of the plaintiff's publication--a large and vital portion of his work and labour-- has been appropriated and published in a form which will materially injure his copyright mere honest intention on the part of the appropriator will not suffice, as the court can only look at the result and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects.' So far, therefore, it is clear that a substantial part has been appropriated; or to use the language before the Act of 1911 I should have held in accordance with the authorities that there had not been a fair use

made of the matter."

87. The second point does not need any elaborate refutation. If substantial and vital parts of the works are reproduced the intention to appropriate to the infringer the labour of others for his own profit is made out and there need not be proof of any independent oblique motive.

88. There was one other defence raised to which it is necessary to advert. It was that a custom or usage had grown up in the publishing trade in this country and particularly in this City according to which whenever the University or other educational authorities prescribed as a text book any classical work or an original literary work, publishers prepared guide books in relation to such text books for enabling the students to master the prescribed texts. It was further urged that such guide books are intended to and do in fact contain a summary of the prescribed text and as part of the summary also included considerable portions from the prescribed works and that this practice or usage was countenanced or at least was not objected to by the publishers of the original text books which were prescribed.

The point was also urged in the slightly different form, that the publishers of original text books who persuade the university or other educational authorities to prescribe any particular publication of theirs as texts for examinations in effect, invited the publishers of guides and commentaries to prepare and publish such guides with the result that the publishers of original text books were estopped from complaining of any infringement of copyright if the guides contain considerable number of passages copied from the original. In proof of this practice or usage the defendants filed Ex. D.2 a guide book published by the Minerva Publishing House in 1938 when Thomas Hardy's 'Return of the Native' was prescribed as a text for the University examination; Ex. D.4 a guide published in relation to "Ivanhoe" and stories from Tagore and Ex. D.5(a) a guide published by the Minerva Publishing House in regard to "Under the Greenwood Tree" by Thomas Hardy,

89. I am unable to uphold the defence based on the alleged "custom or usage. In the first place the evidence offered is much too slender for inferring any usage much less custom. I might also point out that no analysis has been made either quantitative or according to quality in regard to the amount of copying that there was in those guides as to constitute them reproductions of substantial parts of the copyright work. In the absence of such analysis the mere fact that certain guides were published furnished no proof that though the latter constituted an infringement, custom or usage in the publishing trade afforded sanction for such infringement.

90. I have, upto now proceeded on the basis that usage might afford a defence for infringement. In the case of rights created by statute which prescribes the scope of the right and defines the purposes for which substantial parts of copyright works might be reproduced, any usage of the sort pleaded would in my judgment be inadmissible as being in contravention of the statute. The decision of North J. in *Walter v. Steinkopff* 1892-3 Ch. 489, and relied on by Mr. Nambiar, learned counsel for the plaintiffs fully supports this position. It is sufficient to refer to one portion of the headnote for indicating the point decided; "A practice by newspapers to copy from other newspapers is no defence to the copyright action."

91. I do not consider that there is any basis for the contentions that the plaintiffs were estopped from suing for infringement. As if to serve as a foundation for this contention a question was put to the only witness for the plaintiffs whether Messrs. Macmillan and Co. had not approached the educational authorities to have their publications prescribed as text books for the University or S.S. L. C. examinations and the witness answered this in the affirmative. It does not however follow that by reason thereof the plaintiffs must be taken to have licenced or aulhorised infringement of the copyright in their works. The point appears to me too clear to require any elaboration.

92. The result of the foregoing discussion is that if I had found in relation to the bar of Section 213 of the Succession Act in favour of the plaintiffs I would have decreed the plaintiffs' suit in regard to Thomas Hardy's work, "The Return of the Native". In view however, of my finding on that point the claim of the plaintiffs in relation to that work must fail, the suit is to that extent accordingly dismissed.

93. In regard to stories from Tagore, however, Section 213 of the Succession Act, constitutes no bar and on my finding that there has been a reproduction of a substantial part of the copyright work and that the defendants' work cannot claim the protection of "fair dealing" under the proviso to Section 3 (1) the suit succeeds in regard to that work.

94. The plaintiffs are, therefore, entitled to the appropriate reliefs, namely, (1) permanent injunction as prayed for in the suit, (2) an enquiry into the profits made by the defendants by the publication of the guide and (3) delivery over to the plaintiffs of the remaining copies of the offending work. The claim in regard to damages which is really alternate to the claim to enquiry into profits, which I have granted is dismissed.

95. I intimated to the counsel at the time of the hearing that evidence in relation to damages or profits might be led after my decision on the point regarding the infringement and hence no evidence has been adduced on this topic up till now.

96. The suit will be referred to the Official Referee for a finding as to whether any profits were made by the defendants and if so, how much by their infringing publication -- taking into account the fact that the defendants' guide consists also of matter -- pages 1 to 8 and from 80 to end in regard to which there is no claim by the plaintiffs. Both parties will be at liberty to adduce evidence before him. Time for the submission of the finding three months. The suit will be placed for further hearing after the receipt of the finding from the Official Referee. In view of the plaintiffs having failed in regard to their claim in relation to Thomas Hardy's work there will be no order as to costs, (The rest of the judgment is not material for reporting).