[HIGH COURT OF AUSTRALIA.]

COPYRIGHT OWNERS REPRODUCTION SOCIETY LIMITED . . . . . Appellant;
Plaintiff,

AND

E.M.I. (AUSTRALIA) PROPRIETARY LIMITED . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1958.

Sydney, *Aug.* 22, 25, 26; *Dec.* 12.

Dixon C.J., McTiernan, Taylor and Menzies JJ.

Copyright—Musical works—Contrivances for mechanical performance—Royalties—Calculation—Rate—Public inquiry in United Kingdom—United Kingdom statute increasing rate—Effect in Australia—Copyright Act 1911 (*Imp.*), *ss.* 1 (2) (*d*), 19 (2), (3), (7), 25 (1), 27, 37 (2)—*Copyright Act* 1912-1950 (*Cth.*), *ss.* 8, 9, *sched.—Copyright Order Confirmation* (*Mechanical Instruments: Royalties*) *Act* 1928 (*Imp.*)—*Copyright Act* 1956 (*Imp.*), *ss.* 50, 51 (2), *seventh sched. cl.* 41, *ninth sched.—Interpretation Act* 1889 (*Imp.*), *s.* 38 (2)—*Statute of Westminster* 1931 (*Imp.*), *s.* 4.

By s. 19 (3) of the *Copyright Act* 1911 (Imp.) the rate for the calculation of royalties payable in respect of the reproduction of musical works by "records, discs and other contrivances" was fixed at five per cent of the retail selling price. By a proviso to that section, the Board of Trade was given power, after holding a public inquiry, to make an order decreasing or increasing that rate and it was further provided that such an order should have no effect unless and until confirmed by Parliament.

Section 25 of the Imperial Act of 1911 provided that that Act should not extend to a self-governing dominion unless the legislature of that dominion declared such legislation to be in force. By s. 8 of the *Copyright Act* 1912-1950 (Cth.) the Imperial Act is deemed to have been in force in Australia since 1st July 1912.

Pursuant to an order of the Board of Trade in the United Kingdom which followed upon an inquiry by a committee instituted by that board, an Act of Parliament was passed by which the rate of royalties was increased to six and one-quarter per cent: the *Copyright Order Confirmation* (*Mechanical Instruments: Royalties*) *Act* 1928. The public notification of the appointment of the committee and the opportunity to interested parties to appear was confined to the United Kingdom and the Act was not passed as a public general Act and is printed among Local and Private Acts.

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

In 1956 the Imperial Act of 1911 was repealed by the United Kingdom legislature (*Copyright Act* 1956 (Imp.)) but there was no declaration in this Act of the Australian legislature's consent to the repeal. In a suit for a declaration that the rate prescribed by the *Copyright Act* 1911 (Imp.) was the rate of six and one-quarter per cent:

Held that,

(1) because of s. 4 of the *Statute of Westminster* 1931 (Imp.) (adopted by Act No. 56 of 1942 (Cth.)), the *Copyright Act* 1956 (Imp.) does not extend to the Commonwealth:

So *held* by *Dixon* C.J., *Taylor* and *Menzies* JJ., *McTiernan* J. expressing no opinion.

(2) the order of the Board of Trade and the consequential Act of Parliament had no legislative operation in Australia (despite the fact that it was passed before the *Statute of Westminster* 1931 (Imp.)), and consequentially:

(3) the rate applicable in Australia was still five per cent as fixed by the original Act of 1911 (Imp.).

So *held* by *Dixon* C.J., *McTiernan* and *Taylor* JJ., *Menzies* J. dissenting.

Decision of the Supreme Court of New South Wales (*McLelland* J.) on other grounds affirmed.

APPEAL from the Supreme Court of New South Wales.

On 9th April 1957 Copyright Owners Reproduction Society Ltd. instituted a suit in the Supreme Court of New South Wales in its equitable jurisdiction against E.M.I. (Australia) Pty. Ltd. by which it sought *inter alia* a declaration that the rate prescribed by the *Copyright Act* 1911 (Imp.) as the rate at which royalties are to be calculated in respect of records, discs and other contrivances by means of which musical works may be mechanically performed is the rate of six and one-quarter per cent of the ordinary retail selling price of such records, discs and other contrivances.

The suit was heard by *McLelland* J., who dismissed it.

From this decision the plaintiff by special leave appealed to the High Court.

The material facts and relevant statutory provisions, both Imperial and Commonwealth, appear fully in the judgments of the Court hereunder.

Sir *Garfield Barwick* Q.C. (with him *H. H. Glass*), for the appellant. The appellant failed below because the judge of first instance decided that the inquiry held in London in 1928 by the Board of Trade was not a "public inquiry" within the proviso to s. 19 (3) of the *Copyright Act* 1911 (Imp.) and that the *Copyright Order Confirmation (Mechanical Instruments: Royalties) Act* 1928 (Imp.) which

purported to confirm the order of the board made as a consequence of the inquiry was of no effect as a confirmation of the new rate in Australia. The nature of the inquiry was not open to examination. The board's function was neither judicial nor strictly administrative but was part and parcel of a legislative process, which during the course of the inquiry was not subject to review by the courts by means of the prerogative writs and is not now open to review. [He referred to *Reg.* v. *Wright; Ex parte Waterside Workers' Federation of Australia* (1); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2) and *In re Gosling* (3)]. Again the prescription that the board should hold a public inquiry is in the circumstances no more than directory. If no public inquiry were held, the subsequent statute confirming an order made by the board would nevertheless be effective. Finally, the inquiry held was public within the meaning of the proviso; it was public in the sense that it was not held *in camera* and that the public was free to put matters before the board.

N. H. Bowen Q.C. (with him *R. Else-Mitchell* Q.C. and *R. J. Ellicott*), for the respondent. The history underlying s. 19 of the *Copyright Act* 1911 (Imp.) is set out in *Copinger and Skone James* on *Copyright*, 9th ed. (1958), pp. 272-274, 648, 649. The power of the Board of Trade to hold the inquiry under s. 19 (3) is given on certain conditions and if any condition be absent the power is not exercisable. There are four possible ways of regarding the function of the board under the proviso to s. 19 (3):—The board had power to hold an inquiry and make an order with regard to rate (1) for the whole or any part or parts of Her Majesty's Dominions to which the Act extended or had extended for not less than seven years; (2) for the United Kingdom alone after the Act had been in operation there for not less than seven years; (3) for the United Kingdom after the Act had been in operation there for not less than seven years and such order would then apply throughout Her Majesty's Dominions to which the Act extended; and (4) for the whole area to which the Act extended, after not less than seven years had elapsed either from the time the Act had been in force in that area or from the time the Act had first begun to operate anywhere. The first is the one here contended for, giving as it does to the board a distributive power of inquiring and of making provisional orders. *Albert* v. *S. Hoffnung & Co. Ltd.* (4) illustrates

(1) (1955) 93 C.L.R. 528, at pp. 541, 542.
(2) (1924) 34 C.L.R. 482, at pp. 508, 515.
(3) (1943) 43 S.R. (N.S.W.) 312, at pp. 318, 319; 60 W.N. 204, at pp. 207, 208.
(4) (1921) 22 S.R. (N.S.W.) 75, at pp. 78-80; 39 W.N. 5, at pp. 6, 7.

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

the way in which s. 19 operates in practice in different areas. The rate in question is one in every way related to the conditions of the particular area and there are a number of pointers to the distributive operation of the function being the correct one. First, the general nature of the copyright law shows the significance of the different areas. Secondly, the reference to the date of commencement aids the interpretation contended for. " Commencement " means the date when the Act comes into operation : *Interpretation Act* 1889 (Imp.), s. 36. Section 37 of the *Copyright Act* 1911 supplies the answer to what is meant in that Act by the date on which it comes into operation. Section 19 (3) does not speak of the commencement of the Act in the United Kingdom and the reason for it not doing so lies in the fact that the Act is an Imperial Act. The board's power arises, therefore, seven years after the Act has come into operation in any area. The power to hold a public inquiry and make such order as is just in the circumstances must refer to the circumstances in the relevant area of operation of the order. If one takes the view that the order will operate throughout the Imperial area, including Australia, then the board must take into account whether it would be just the whole of that area. " Public inquiry " in the proviso to s. 19 (3) does not mean merely an inquiry held in public, but an inquiry addressed to and available to the relevant public, i.e. the public in the area in which the rate is to operate, and the inquiry is directed to the relevant circumstances in that area. [He referred to *Berglund* v. *Graham* (1) and *Tatem Steam Navigation Co. Ltd.* v. *Inland Revenue Commissioners* (2).] If the Board of Trade has power to make an inquiry into the whole area or any part, then what was in fact done here was to inquire into part only and to fix a rate for that part and have a local confirmatory Act passed. It did not go nor seek to go beyond that. It properly exercised its power and what it did was valid. If, however, it be that the board intended to extend the order made over all the Dominions, then it has misconceived the type of inquiry required to be held and its order is invalid. There is a third alternative, that the board had power to fix a rate for the United Kingdom and that it has done. The *Copyright Order Confirmation (Mechanical Instruments : Royalties) Act* 1928 (Imp.) was not intended to operate and had no operation as an Imperial Act. Support may be found for this view in the nature of its classification, which was as a private and local and not as a public and general Act. Nor was it an Act to which the Commonwealth of Australia consented or which it requested. At the time of its passage an

(1) (1937) V.L.R. 162.

(2) (1941) 2 K.B. 194, at p. 203.

Imperial Act would not have extended to Australia unless it expressly so stated or by necessary intendment it was to be gathered from the Act that it did so extend. The Balfour Declaration of 1926 was a further factor in the situation. [He referred to *Latham, Australia and the British Commonwealth* (1929) p. 127.] The appellant has relied on the reference by *Knox* C.J. in *Gramophone Co. Ltd.* v. *Leo Feist Incorporated* (1) as one of the reasons for adopting the view that the *Copyright Act* 1911 is in force in Australia as an Imperial Act. That circumstance cannot give any particular colour to s. 19 (3) and if that sub-section is to be used in that way then the case was not correctly decided and ought to be reviewed. In the court below the respondent argued that if any declaration were to be made it should be confined to the period prior to 1st July 1957 because of the coming into operation of the *Copyright Act* 1956 (Imp.). That argument is pressed in this Court. The propositions relied upon in support of this argument are :—(a) The 1956 Act repeals the 1911 Act and the repeal operates in Australia ; (b) the repeal is not saved by cl. 41 of sched. 7 of the 1956 Act so far as Australia is concerned ; (c) even if the 1911 Act remains in force the *Confirmation Act* 1928 is repealed ; (d) the savings in s. 38 of the *Interpretation Act* 1889 (Imp.) and in cl. 6 of sched. 7 of the 1956 Act do not apply in Australia, and, even if they do, they have nothing to say to transactions after 1st July 1957.

Sir *Garfield Barwick* Q.C., in reply. Section 19 (3) is to be regarded not as imposing a rate but as merely definitive of what s. 19 (2) requires done in the way of payment. It is impossible to read sub-s. (3) which prescribes the rate as being susceptible of divisions so that the proviso is not part of the prescription or can be limited in its authority to a variation applicable only in the United Kingdom. The 1911 Act constituted one Act, not a series of Acts, and one the operation of which extended over expanding areas by dint of s. 25. When the Act extended into a new area it did not change its meaning but retained in the new area the same meaning as it had in the United Kingdom. Sections 25 and 27 evidence a desire for uniformity and it would be a strange construction to place on the proviso to say that it was limited to making a variation operative in the United Kingdom and not elsewhere. So viewed, there is no room for the first three constructions put by the respondent, and the fourth construction is the correct one. The respondent bases its argument for variable rates upon the expression " the

(1) (1928) 41 C.L.R., at p. 11.

H. C. OF A. 1958. COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

commencement of this Act" as affected by the *Interpretation Act* 1889, but those words refer to the first operation of the Act. It is right to think of the Act as extending its operation to new areas, but not as having a series of commencements, one in each new area to which it extended. Further, the fact that the confirmation of a new rate is in any event to be by the United Kingdom Parliament aids the view that there is to be one rate which may be varied by one body for all the areas to which the Act extends. On the function and status of the *Confirmation Act* 1928, see *Sir T. Erskine May's Parliamentary Practice*, 16th ed. (1957), pp. 864, 865, 1025 *et seq.* When the confirmation came before the House it exercised both a judicial and legislative function. The Act should be construed as authorising the order to operate in all places to which the 1911 Act extends, and it cannot be said that the Parliament intended to limit the extent of the operation of the order merely because by Parliamentary practice the bill is treated as a private bill. Upon the assumption that an order under the proviso to s. 19 (3) would not authorise an alteration in s. 19 (7) (*b*) the Parliament could confirm the order and independently validate an order which by its operation will make a change in s. 19 (7) (*b*). The combination of the two distinct acts will not taint the confirmation. The machinery of the Parliament and the division which it makes do not ultimately affect the quality of the act done by it in making the law. Section 19 (7) is intended to apply throughout the whole area to which the Act extends and when the Parliament alters the rate one finds from that very circumstance the necessary intention to make the change for the whole of the area to which the Act extends. There was no legal impediment to this being done, either in the Balfour Declaration or the antecedent convention. On the question of public inquiry, the *Copyright Act* 1911 by adopting the procedure of an inquiry by the Board of Trade and the making by it of an order of a provisional nature until confirmed has committed to the Parliament the resolution of the due performance of all preliminary matters to that body and the question is not examinable by a court. In any event, "public" here means no more than "not held *in camera*" and the inquiry in fact held satisfied the statutory requirement. The *Statute of Westminster* would preclude a repeal of the *Copyright Act* 1911 or the *Confirmation Act* 1928 from operating in Australia without a recital of the necessary request or consent. A repealing Act is an Act within the meaning of s. 4 of the *Statute of Westminster*. That the 1911 Act continues in force in the Dominions notwithstanding the repeals effected by s. 50 of the

Copyright Act 1956 fairly appears from cll. 40 and 41 of the seventh schedule to the latter Act. From the viewpoint of determining as a matter of construction the area of operation of the 1956 Act there is ample in these clauses to show that the Imperial Parliament had no intention of repealing the 1911 Act *qua* the Dominions. When the 1928 Act was passed, *qua* confirmation, it virtually exhausted the area; the confirmation could not be affected by a subsequent repeal. It had actually confirmed the order. Even if, contrary to the submission, the confirmation worked by the 1928 Act could be affected, the *Statute of Westminster* would prevent the repealing Act from operating in Australia without the necessary request or consent.

N. H. Bowen Q.C., by leave. In the 1956 Act the United Kingdom Parliament assumes that the 1928 Act is not an Imperial Act. It repeals both the 1911 Act and the 1928 Act, but as far as the 1928 Act is concerned it saves it, in cl. 6 of the seventh schedule, for the purposes of the United Kingdom, whereas the 1911 Act requires treatment as an Act having an Imperial operation in cll. 40 and 41 of that schedule. Treating the 1928 Act as a United Kingdom Act, the 1956 Act having repealed it, it is obliterated except to the extent to which its operation is saved. This is done by cl. 6, but the saving is very limited in its operation. For all relevant purposes in the suit the 1928 Act is repealed. The theory of repeal is that it is as if the Act had not been passed.

Cur. adv. vult.

Dec. 12

The following written judgments were delivered :—

DIXON C.J. This is an appeal by special leave from a decree of the Supreme Court of New South Wales in its equitable jurisdiction dismissing a suit for a declaration that six and one-quarter per cent of the retail selling price is the rate at which royalties must be calculated under s. 19 (3) of the *Copyright Act* 1911 (Imp.) upon records, discs and other contrivances for the mechanical performance of musical works. The *Copyright Act* 1911 (Imp.) forms the schedule of the *Copyright Act* 1912-1950 (Cth.). It was brought into force in Australia by s. 8 of the Commonwealth Act which provided that subject to any modifications provided in the latter Act the British Act, as the section calls it, should be in force in the Commonwealth and should be deemed to have been in force therein since 1st July 1912. The Imperial Act itself provided by s. 25 (1) that with the exception of such provisions as were expressly restricted to the United Kingdom it should extend throughout Her

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Dixon C.J.

Majesty's dominions. But there was a proviso that it should not extend to a self-governing dominion unless declared by the 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 the Act to the circumstances of the dominion as might be enacted by such legislature. Section 8 of the Commonwealth Act was enacted in fulfilment of the condition expressed in the proviso. The condition being thus fulfilled the Imperial Act thenceforward operated of its own force, that is, by virtue of the main part of s. 25 (1) of that Act and not as a law forming nothing but an exercise of Commonwealth legislative power. So at all events this Court decided: *Gramophone Co. Ltd.* v. *Leo Feist Incorporated* (1). To adapt the words of *Knox* C.J. (2), the express words of s. 8 show that the intention of the Commonwealth Parliament was to bring the Imperial Act into force in Australia, not to enact its provisions as a federal law. The *Copyright Act* 1956 (4 & 5 Eliz. 2 c. 74) of the United Kingdom, which came into operation on 1st June 1957 pursuant to s. 51 (2) and an order of the Board of Trade, repealed the *Copyright Act* 1911, with the exception of three sections none of which is presently material. The Act of 1956 contains no declaration that the Commonwealth of Australia has requested or consented to the enactment thereof. The repeal, therefore, of the Act of 1911 which is effected by the Act of 1956, does not, because of s. 4 of the *Statute of Westminster* 1931 (adopted by Act No. 56 of 1942), extend to Australia. For the reason no doubt, that it was felt that the construction and effect of the Act of 1911 in a dominion like Australia to which the repeal did not extend might otherwise be affected by the fact that it was no longer an Imperial enactment extending as a uniform law from the United Kingdom, an express provision to prevent this was made. Clause 41 of the seventh schedule of the Act of 1956 expressly provides that in so far as the Act of 1911 or any Order in Council made thereunder forms part of the law of any country, other than the United Kingdom, at a time after that Act has been wholly or partly repealed in the law of the United Kingdom, it shall, so long as it forms part of the law of that country, be construed and have effect as if that Act had not been so repealed. It may be remarked that perhaps in view of s. 4 of the *Statute of Westminster* this provision does not operate in point of law in Australia, and what its operation in the United Kingdom can be in point of fact it is difficult to see. But, however that may be, it is clear that the *Copyright Act* 1911 remains law in the Commonwealth of Australia.

(1) (1928) 41 C.L.R. 1. (2) (1928) 41 C.L.R. at p. 11.

The suit is, of course, based on that assumption. The plaintiff claims to be the " owner for the Commonwealth of Australia of the sole right to make a record disc or other contrivance by means of which a certain musical work known as ' Springtime in Victoria ' may be mechanically performed ", a claim that the defendant does not deny. The claim rests on s. 1 (2) (*d*) of the Act of 1911 which provides that copyright shall include the sole right " in the case of a . . . musical work to make any record . . . or other contrivance by means of which the work may be mechanically performed. . . .". But s. 19 (2) contains a provision that it shall not be an infringement of copyright in any musical work for any person to make within the parts of Her Majesty's dominions to which the Act extends records . . . or other contrivances by means of which the work may be mechanically performed if that person proves that two conditions have been fulfilled. The first condition is that such contrivances shall have previously been made by or with the consent, or acquiescence, of the owner of the copyright in the work. The second is that the person has given the prescribed notice of his intention to make the contrivance and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all contrivances sold by him calculated at the rate thereinafter mentioned. Sub-section (3) of s. 19 then states the rates at which the royalties are to be calculated. There is a rate specified for two years " after the commencement of this Act ", whatever that may mean in an Act commencing in different parts of the Queen's dominions at different dates: see s. 37 (2) of the Imperial Act and also s. 8 of the Commonwealth Act. But we are not concerned with that rate. The rate fixed for the calculation of royalties after that period is five per cent on the ordinary retail selling price of the contrivances calculated in the prescribed manner, subject to a minimum of a halfpenny for each separate musical work reproduced on the contrivance.

All the conditions stated in sub-s. (2) were fulfilled with respect to " Springtime in Victoria " and the defendant complied with all the foregoing requirements stated in sub-s. (3). As to the rate of five per cent the defendant made what, having regard to the regulations prescribing the manner of payment, may be described as equivalent to a tender of the appropriate sums calculated at that percentage. If five per cent is the correct rate the defendant company is not an infringer, actual or would be. But there is a proviso to sub-s. (3) concerned with a possible change or changes in the rate. It is the plaintiff's claim that in pursuance of the proviso the rate was long ago changed to six and one-quarter per cent of the

H. C. OF A. 1958. COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD. Dixon C.J.

ordinary retail selling price of the records or contrivances and that the change operated and still operates in Australia. This the defendant denied and it refused to pay more than five per cent. The purpose of the suit, which was instituted on 9th April 1957, was to obtain a decision upon the question which of the two rates, five per cent or six and one-quarter per cent, is the correct rate in Australia. The proviso is as follows :—" Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament ; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision."

The plaintiff's case may be said to consist of three steps. First, the plaintiff maintains that the proviso, upon its proper interpretation, armed the Board of Trade with authority, subject to confirmation by the Parliament of the United Kingdom, without more, to increase, or decrease, the rate payable in a self-governing dominion which like Australia had declared the Act of 1911 to be in force therein, that is to say, to increase or decrease the rate payable under sub-s. (2) of s. 19 in Australia in respect of the making of records or other contrivances in Australia. In the second place, the plaintiff says that the authority was regularly exercised and the exercise was confirmed by the Parliament of the United Kingdom in such a way as to put into operation in Australia a rate increased to six and one-quarter per cent. In the third place, the plaintiff contends that the repealing provisions of the *Copyright Act* 1956 (s. 50 and ninth schedule) did not result in the termination in Australia as well as elsewhere of the statutory confirmation of the order of the Board of Trade or of the order confirmed. The defendant contested the correctness of each of these three steps. But before dealing with any of the questions thus raised it is necessary to state what occurred in relation to the increase of the rate under the proviso.

It appears that on 17th February 1928 by a minute signed by the President of the Board of Trade three gentlemen were appointed to hold a public inquiry into the rate of royalty. The minute recited the material terms of the proviso to s. 19 (3) and recited that

it appeared to the Board of Trade, having regard to the representations made to it, that a public inquiry should be held into such rate of royalty. The appointment of the committee of three and the fact that they would meet in the conference room at the Board of Trade on 28th March 1928 was announced on 7th March 1928 to the press and to certain journals in the United Kingdom. The statement said that an application for an equitable increase in the rate of royalty had been made on behalf of a number of authors, composers and owners of musical copyright and the application was opposed on behalf of the mechanical music industry. It was added that representatives of any interests substantially affected who desired to be heard at the inquiry should communicate with the secretary who was named. It will be noticed that the proviso speaks of the Board of Trade holding a public inquiry, not of appointing a committee of persons to do so. Yet it was the latter that was done. The explanation lies in the existence of an Act called the *Board of Trade Arbitrations etc. Act* 1874 (37 & 38 Vict. c. 40) which provides that where an inquiry is held by the Board of Trade . . . in pursuance of any general or special Act . . . authorizing them to hold an inquiry the Board of Trade may hold such inquiry by any person or persons duly authorized in that behalf by an order of the Board of Trade and such inquiry if so held shall be deemed to be duly held (s. 2). The order may be made in writing under the hand of the president (s. 4). No doubt these provisions were availed of, though doubtless it was not supposed that of their own force they operated in or in relation to self-governing dominions like Australia. In their report the committee say that counsel appeared before them for the Musical Copyrights Defence Association which they describe as " the applicants " and for " the opponents, representing the Mechanical Music Industry ". The Incorporated Society of Authors, Playwrights and Composers was also represented during part of the hearing. The committee made a very full report upon all matters affecting the question of the appropriate rate, but there is nothing to suggest that they supposed they were dealing with anything that touched or might touch a self-governing dominion or intended to do so. In accordance with the report the Board of Trade, on 21st May 1928, made an order under its official seal and signed by the president. The order recited the terms of sub-s. (2) of s. 19 and of sub-s. (3) and the proviso. It also recited the terms of sub-s. (7) providing in effect that in the case of musical works published before the commencement of the 1911 Act the provision recited should have effect as if two and one-half per cent were substituted for five per cent. The committee had directed attention

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Dixon C.J.

to a doubt as to the operation of the proviso upon that sub-section. The recitals ended by a statement that the board had held a public inquiry into the matter and it appeared to them that such rate as aforesaid (*scil.* five per cent) was no longer equitable. The operative provisions of the order were three : The first ordered that the rate should be increased to six and one-quarter per cent and that the minimum of a halfpenny should be increased to three farthings. The second clause ordered that the rate of three and one-eighth per cent should be substituted for the rate of two and one-half per cent payable in pursuance of par. (*b*) of sub-s. (7) of s. 19. The third clause stated that the order might be cited and should apply to contrivances sold after a date specified or after three months from the confirmation of the order by Parliament, whichever be the later.

To confirm this order an Act was passed by the Parliament at Westminster. It was not passed as a general public Act and it is to be found printed among Local and Private Acts. That is because since 1868 statutes for the confirmation of provisional orders have been so treated. The reason is to be found stated in Ch. XXXI of *May's Parliamentary Practice*. It forms part of the system of legislation by provisional order. " Under various Acts of Parliament " says *May* (12th ed. p. 762), " most of the departments are now empowered to issue Provisional Orders (usually upon the application of parties interested) which in their scope and object are practically private bills or to make Provisional Orders (in many cases of their own initiative) for other purposes. The objects obtainable by Provisional Order are limited to those specified by the particular enabling Act. Such orders are scheduled to a bill, which is brought in by the government department and which declares the expediency of their confirmation ; and in this form they are submitted to Parliament for consideration." The Act which dealt with the order of 21st May 1928 was called the *Copyright Order Confirmation* (*Mechanical Instruments* : *Royalties*) *Act*, 18 and 19 Geo. V. c. lii. See *Halsbury Statutes*, 2nd ed. (1948), vol. 4, p. 812 ; *Copinger and Skone James*, *Law of Copyright*, 8th ed. (1948), p. 421, where, however, the chapter of the Act is erroneously given in Arabic numerals, i.e., 52 not lii. It recites the fact that the Board of Trade has made the provisional order set forth in the schedule under the provisions of the *Copyright Act* 1911 and that it is requisite that the order should be confirmed by Parliament. It is then enacted that the order set forth in the schedule shall be and the same is thereby confirmed and all the provisions thereof shall have full validity and force. It will be seen that this formula goes further than a mere approval of the order. It establishes its validity and

gives it force, that is force in the law according to its tenor. It would seem impossible in face of this enactment to treat the order of the Board of Trade as ineffective on the ground acted upon in the Supreme Court that there had not been an adequate compliance with the requirement of the proviso to s. 19 (3) that there should be public hearing. Such a ground could only be admissible where the *Copyright Order Confirmation (Mechanical Instruments: Royalties) Act* 1928 does not run, that is to say, has no legislative operation. If it has no legislative operation in Australia, surely it must follow that there has been no lawful increase in the rate payable here from five per cent to six and one-quarter per cent. There can be little doubt that those responsible for the measure were right in treating the confirmation provided for by the proviso to s. 19 (3) as amounting to more than an expression of parliamentary approval. It means an expression by statute of the parliamentary will that the order shall be operative. That is what the statute says and indeed no less would suffice to overcome the doubt about the place sub-s. (7) of s. 19 held under the proviso to sub-s. (3). The *Copyright Order Confirmation (Mechanical Instruments: Royalties) Act* 1928 having been assented to but the rates not having yet come into effect, the Gramophone Co. Ltd. (Australian Branch) wrote at once to the Attorney-General of the Commonwealth telling him of the information they had from their head office that the royalty had been increased, that the Royal assent had been given to the statute and that the rates would come into operation on 1st November 1928. The writer asked the Attorney-General to inform them whether the increased rates would apply in Australia automatically and if so, from what date. To this Sir Robert Garran, as Solicitor-General, replied saying decisively that the rates would not operate automatically in Australia. In London, a few days earlier, the Gramophone Co. Ltd. appears to have addressed a letter to the Board of Trade on the subject of the application to the self-governing dominions of the revised rates of royalty fixed by the *Copyright Order Confirmation (Mechanical Instruments: Royalties) Act* 1928. The Comptroller of the Industrial Property Department of the Board of Trade wrote in reply. He had been a member of the committee of three. His reply was that as at present advised the Board of Trade are of opinion that the new rates would not be applicable in the self-governing dominions unless adopted by the legislatures of those dominions. In effect the question which we are called upon to consider thirty years later is whether this opinion was right. The question is one of interpretation, but the opinion might prove right because of the meaning of the proviso or because of the

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

DIXON C.J.

meaning of what was done by the Board of Trade and Parliament in 1928.

The argument for the defendant began by denying that the proviso ever contemplated what the defendant maintains has occurred. The argument denies that it contemplates the fixing of a new rate necessarily uniform over all the self-governing dominions and possessions where the Act of 1911 had been brought into operation ; it denies that the proviso meant that this might be done by an inquiry, an order and an enactment exclusively concerned with the United Kingdom. The true interpretation of the proviso might well be, so that argument runs, that the Board of Trade and the United Kingdom legislature might seven years after the commencement of the Act in the United Kingdom increase or decrease the rate for the United Kingdom, leaving the self-governing dominions to deal with the rate by legislation under s. 27 to the extent allowed by that provision, or perhaps under s. 25 on the footing that it might be necessary to adapt the Act to the circumstances of the dominions and s. 25 is not exhausted. But if that were not the true interpretation of the proviso, then there were many indications that the rates for the different self-governing areas over which the Act operates, areas in many respects self-contained, must receive separate consideration. What is equitable in one dominion may not be equitable in another and what is equitable in the United Kingdom may not be equitable in a dominion. The money systems may not be the same in expression or in value. The regulations by which s. 19 is worked out may differ in the different areas. In aid of this argument *Albert* v. *S. Hoffnung & Co. Ltd.* (1) was cited as affording by analogy some illustration of the difficulty. Finally, reliance was placed upon the different times, widely separated, when the seven years mentioned in the proviso would expire in different dominions. If s. 19 (3) refers to the commencement in each place, this was relied upon as showing that the power could only arise as a separate power for every separate dominion or other law area to which the Act of 1911 extended.

Be all this as it may I think that it is clear enough that in 1928 neither the Parliament, the Board of Trade nor the committee of three appointed by the Board of Trade ever intended that the increase in the rate of royalty which the order made should take effect in Australia ; they never meant to alter the rate in Australia in virtue of the exercise by them of any paramount authority they may have possessed. If you commence with the Board of Trade it seems certain that they began by hearing representations to them

(1) (1921) 22 S.R. (N.S.W.) 75 ; 39 W.N. 5.

as to the effect of the rate from parties in the United Kingdom and that they set up in consequence the committee of three in pursuance of the authority to do so which the Board of Trade obtains from the application of the Act of 1874 to the proviso to s. 19 (3). The public notification of the appointment, of the time and place of meeting and of the opportunity to interested parties to appear was obviously confined to the United Kingdom. The times allowed are enough to show that: for we are not concerned with what can be done today but thirty years ago. The inquiry was conducted as a proceeding substantially between parties appearing before the committee and described respectively as applicants (*scil.* applicants for an increased rate) and as opponents. The report is an admirable exposition but in spite of the absence of any express geographical limitation it is quite clearly concerned entirely with the industry in Great Britain. The order made in consequence of the report goes forward for confirmation as an ordinary provisional order for confirmation by an Act of Parliament, doubtless public in the technical sense, but ranking with local and private legislation; not by a general public Act. Now it seems to me contrary to general conceptions and understanding of relations between the United Kingdom and the self-governing dominions to interpret such legislation, such a legislative proceeding, as an exercise of the residual legislative power of the Parliament at Westminster to impose its will upon a dominion. And yet, unless the *Copyright Order Confirmation (Mechanical Instruments: Royalties) Act* 1928, 18 & 19 Geo. V. c. lii, is to be interpreted as having what was then called an Imperial operation, I do not see how the confirmation or the order confirmed can affect Australia. An attempt was made to treat the confirmation not as a legislative act amounting to an exercise of sovereign legislative authority but as something like the signifying of some fact, event or occurrence forming a suspensory condition. This places the need for the confirmation of the provisional order by the Parliament of the United Kingdom in the category of conditions described by *Sheppard's Touchstone* as a kind of law or bridle annexed to one's act staying or suspending the same and making it uncertain whether it shall take effect or no. Such a view appears to me to misconceive the course of legislation by provisional order and parliamentary confirmation. The statute is no mere external event, it is a legislative act done in the exercise of parliament's legislative authority. It is so expressed and it operates as law: it is as an expression of the will of the Parliament of the United Kingdom as to what shall be the rate of royalty and what force the provisional order shall have in Australia, that Act must operate in Australia or not at all.

H. C. OF A. 1958. COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD. Dixon C.J.

Indeed it is enough to say that however it may be viewed it remains an Act of the Imperial Parliament and unless it operates as such for the purposes of the law of Australia the rate prescribed by law was not altered. It is true that in 1928 the *Statute of Westminster* had not yet been passed but the convention was strong and unbending which governed the exercise of the legislative power of the Parliament of the United Kingdom to affect the law in operation in a dominion. Every presumption of construction was against such an intention. Further, the concurrence of the dominion was treated as an indispensible condition. But even apart from that, on any assumption that may be made as to the extent of the authority reposed by s. 19 (3) in the Board of Trade subject to Parliamentary confirmation, it cannot be supposed that the Parliament of the United Kingdom by such a legislative procedure and by such an Act as 18 and 19 Geo. V, c. lii, intended to affect the law operating in Australia, the law fixing the rate for the calculation of the royalties payable in Australia in respect of records and contrivances made there.

On that ground I think that it was right that the plaintiff should fail in the suit. It is a ground which deprives the third step in the plaintiff's argument of any subject matter. I therefore do not deal with it.

In my opinion the appeal should be dismissed.

McTIERNAN J. I take the same view as the Chief Justice. The rates as determined by s. 19 (3) of the *Copyright Act* 1911 (Imp.) became binding in the Commonwealth of Australia because, pursuant to s. 25 of that Act, the Parliament of the Commonwealth enacted s. 8 of the *Copyright Act* 1912-1950 (Cth.), that is, subject to the modifications expressly made. It seems to me that, consistently with the policy which made the application of the Imperial Act dependent upon adoption by the Commonwealth, that is to say the policy expressed in s. 25, it would be expected that those rates would remain in force until altered in a corresponding manner with the sanction of the Commonwealth Parliament. The procedure contemplated by s. 19 (3) of the Imperial Act for altering the rates was followed in England but in a manner which indicated no intention of affecting the Commonwealth of Australia. There was, of course, at that time, nothing to impose any constitutional limitations upon the legislative power of the Parliament of the United Kingdom in relation to the Dominions, but a long course of constitutional practice and convention had an operation growing out of the acceptance of constitutional principles that did not depend

upon enacted law. The *Copyright Order Confirmation (Mechanical Instruments : Royalties) Act* 1928, whereby the recommendation of the Board of Trade was confirmed, owes none of its legal force to s. 19 (3) of the *Copyright Act* 1911 (Imp.). Its force, as law, depends simply upon its being an enactment of the Imperial Parliament. Constitutional practice governing the political relations between the United Kingdom and the Commonwealth, as at that time, could not but enter into the question whether the Act of 1928 was intended to operate in Australia. The rule of construction which found its source in the political and constitutional relations between the United Kingdom and the Commonwealth of Australia before the *Statute of Westminster* would raise a presumption that the Act of 1928 was not intended to operate of its own force in this country. Needless to say, it is a rule of construction which this Court would be expected to apply. The fact that the Parliament of the Commonwealth in adopting the *Copyright Act* 1911 (Imp.) made no special modifications in relation to s. 19 (3) does not seem to me to afford any reason for our departing from that rule of construction by holding that the Act of 1928 has force and effect in the Commonwealth. I think that it would be fanciful to say that although the latter Act does not apply in Australia as a piece of Imperial legislation, nevertheless, it may operate as no more than a fulfilment of the conditions prescribed by s. 19 (3) for altering the rates for the calculations of royalties. According to that theory any new rates would come into force by virtue of s. 19 (3) operating on an event or a factum, namely, the Board of Trade's report and the confirmation by the Act. The correct view, as it seems to me, is that under the legislation consisting of the *Copyright Act* 1912 (Cth.) adopting the Imperial Act of 1911 it would be expected that any alterations of the rates specified in s. 19, if the alteration were to operate in Australia, would be effected by or at best with the consent of the Parliament of the Commonwealth. It is not necessary to discuss any other question which was raised in this Court. In my opinion, the appeal should be dismissed.

TAYLOR J. In my opinion this appeal should be dismissed. I have reached this conclusion because in my view the rate at which royalties are payable in respect of the manufacture and sale within the Commonwealth of recordings of musical works is that prescribed by the *Copyright Act* 1911 (Imp.) in its original form.

My reasons for holding this view may be shortly stated. I agree with the other members of the Court that, notwithstanding the enactment of the *Copyright Act* 1956 (Imp.) the provisions of the

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Taylor J.

Act of 1911 remained in force in the Commonwealth with such modifications and additions as were made by the Commonwealth legislation in 1912. And, according to the decision of this Court in *Gramophone Co. Ltd.* v. *Leo Feist Incorporated* (1), they remained in force in the Commonwealth as the provisions of an Imperial statute which extended to the Commonwealth. That being so the " rate " at which royalties were payable within the Commonwealth was subject to alteration by an order of the Board of Trade made and confirmed pursuant to the terms of the proviso to sub-s. (3) of s. 19. This, of course, is the first step in the appellant's argument. But it is then asserted that in 1928 the form of procedure so prescribed was employed to increase the royalty rate payable under s. 19 (3) (*b*) from five per cent " on the ordinary selling price of the contrivance calculated in the prescribed manner " to six and one-quarter per cent. At first sight this may be thought to be the effect of what was done in 1928 but sound reasons appear for thinking otherwise when close attention is given to the terms of the order of the Board of Trade and to the provisions of s. 1 of the *Copyright Order Confirmation (Mechanical Instruments : Royalties)* Act 1928.

The authority expressly given to the Board of Trade by the terms of the proviso to s. 19 (3) was to make an order either decreasing or increasing the rate prescribed by that sub-section and it is apparent that the board, quite deliberately and not *per incuriam*, purported to do more than this. By cl. (2) of the order it purported also to vary the rate at which royalties were payable under sub-s. (7) of s. 19 and the difficulty in the way of this being done by provisional legislation of this character was brought to its attention by the report of the committee appointed to conduct the necessary preliminary public inquiry. Notwithstanding the opening words of sub-s. (7) doubt was felt concerning the authority of the board to vary the rate prescribed by sub-s. (7) (*c*). Then by cl. (3) it was provided that the order should apply to contrivances sold on or after the first day of November One thousand nine hundred and twenty-eight or after the expiration of three months from the date of its confirmation by Parliament whichever should be the later, i.e., in the events which happened, after 3rd November 1928. This meant that cl. (3) was designed to govern, to some extent, the operation of both cll. (1) and (2). But since there were doubts whether the increase to which cl. (2) was directed could properly be accomplished merely by the confirmation of a provisional order of the Board of Trade s. 1 of the Act of 1928 not only purported to confirm the order but also to go further and to enact that " all the

(1) (1928) 41 C.L.R. 1.

provisions thereof shall have full validity and force ". Even superficially these words may be thought to have accomplished, by incorporation, the enactment by the Imperial Parliament of the terms of the order so that the alterations to which it was directed depended for their future efficacy not upon a mere confirmation of the order as provisional legislation but upon a positive declaration that its provisions should have the force of law. That it was the intention of the Imperial Parliament to produce this result so far as the provisions of cl. (2) are concerned is, I should think, beyond dispute, and it seems difficult to deny the statute a like operation with respect to cl. (1). But when it is remembered that the provisions of cl. (3) to some extent govern the future operation of both cll. (1) and (2) this final proposition appears to be beyond question. Once it is conceded that, in order to give them the force of law, the provisions of cl. (2) were made the subject of positive legislative enactment it follows that it must have been intended that the provisions of cl. (3) should derive their authority in a like manner. In these circumstances it becomes impossible to deny that cl. (3), and indeed cl. (1), the operation of which, to some extent was governed by the former clause, achieved the force of law by a new exercise of legislative authority and this was expressed in the concluding words of s. 1 of the Act of 1928. It was, therefore, this Act which provided that the specified alterations should take effect and that the increased rates should apply to contrivances sold after 3rd November 1928 and this Act did not, in my opinion, extend to, or apply in respect of contrivances sold within, the Commonwealth. I agree with the Chief Justice that although the *Statute of Westminster* had not been passed at that time and although the Act of 1928 must be regarded as an Act which amended the *Copyright Act* 1911 (Imp.) it would be erroneous to attribute to the Imperial Parliament an intention that it should extend to the self-governing dominions. In these circumstances there may, in my opinion, be found clear evidence that in enacting the 1928 Act the Imperial Parliament did not purport to intend to alter the royalty rates payable in the Commonwealth. Indeed the legislative history of the Act would strongly incline one to think otherwise. Accordingly I am of opinion that the appeal should be dismissed.

MENZIES J. The appellant (plaintiff) is the owner in Australia of the copyright in a musical work called " Springtime in Victoria ". The respondent (defendant) is a manufacturer of gramophone records and in the early part of 1957 was minded to make a recording of " Springtime in Victoria ". Accordingly, as records of " Springtime

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Menzies J.

in Victoria" had already been made by some other manufacturer with the consent of the plaintiff, the defendant, taking advantage of the provisions of the *Copyright Act* 1911, 1 & 2 Geo. V, c. 46, s. 19 (2), gave notice of its intention to make the records and tendered to the plaintiff royalties at the rate of five per cent which it claimed to be the correct rate. The plaintiff asserted that it was entitled to royalties at the rate of six and one-quarter per cent and this action was commenced to determine whether the correct rate of royalty was five per cent or six and one-quarter per cent.

The differences between the plaintiff and the defendant went beyond the facts in issue in the suit and the object of the suit was to obtain determination of a question of great importance to both parties, namely, whether in cases to which s. 19 (2) and (3) of the *Copyright Act* 1911 applied the rate of royalty in Australia was five per cent or six and one-quarter per cent. Upon the hearing of this appeal it became apparent that there were differences between the parties arising out of the coming into operation on 1st June 1957 of the *Copyright Act* 1956, 4 & 5 Eliz. 2 c. 74, which had not emerged when the suit was commenced on 9th April 1957 and when the pleadings were delivered, and which were not fully explored at the hearing of the suit in October 1957, although argument was addressed to some aspects of these matters. This Court was invited by both parties to consider the whole controversy between them and it seems to me desirable to do so, subject to the reservation which Sir *Garfield Barwick* for the appellant urged that the parties should be given the opportunity of amending their pleadings to raise in proper form the issues not at present covered that were argued on the appeal and that, accordingly, the making of the formal order of this Court disposing of the appeal should be deferred until this is done. This course is, I think, the more desirable because it appears that this suit and the issues that it was intended to raise were the subject of prior agreement between the parties; the battleground was, and, I think, should remain the choice of both contestants. It is on this footing that I proceed to deal with the whole controversy.

The *Copyright Act* 1911 was adopted in Australia by the *Copyright Act* 1912 which by s. 8 provided as follows: "The British Copyright Act, a copy of which is set out in the Schedule to this Act, shall, subject to any modifications provided by this Act, be in force in the Commonwealth, and shall be deemed to have been in force therein as from the first day of July, One thousand nine hundred and twelve." The effect of this was the subject of decision by this Court in *Gramophone Co. Ltd.* v. *Leo Feist Incorporated* (1) where it

(1) (1928) 41 C.L.R. 1.

was decided that s. 8, read with s. 25 (1) of the *Copyright Act* 1911, brought that Act into force in Australia as an Imperial Act and that its authority in Australia did not depend upon the constitutional power of the Commonwealth Parliament stemming from s. 51 of the Constitution. This conception, as will appear later, is important in this case because it requires copyright in Australia to be regarded as Imperial copyright depending upon legislation of the Parliament at Westminster brought into force in Australia by the *Copyright Act* 1912 of the Parliament at Canberra. It denies that under the *Copyright Act* 1911 there is an Australian copyright distinct from Imperial copyright.

It is s. 19 of the *Copyright Act* 1911 that requires consideration here and it is sufficient to examine its terms without regard to the history which is set out in *Copinger's Law of Copyright* and is repeated in the report of the Committee of the Board of Trade to which I will refer later. What the section does is (i) to extend copyright in musical works to records and other contrivances by means of which sounds may be mechanically reproduced; (ii) to remove the making of records from the category of infringement of copyright if the maker proves (*a*) that the owner of the copyright has previously consented to or acquiesced in the making of records, and (*b*) that the maker has given the owner of the copyright notice of his intention to make records and has paid royalties calculated in the manner provided by the section; (iii) to provide for the calculation of royalties payable. This last is done by s. 19 (3) which is as follows: " (3) The rate at which such royalties as aforesaid are to be calculated shall—(*a*) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent; and (*b*) in the case of contrivances sold as aforesaid after the expiration of that period, five per cent on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing: Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Menzies J.

and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision." For the moment it is not necessary to state the effect of any of the other provisions of the section.

The royalty rate of five per cent set out in s. 19 (3) (*b*) was not changed until 1928 when it was changed in the following circumstances. On 17th February 1928 the President of the Board of Trade in a minute which, after referring to the proviso to s. 19 (3), and after reciting that " it appears to the Board of Trade, having regard to the representations made to it, that a public inquiry should now be held into such rate of royalty ", appointed a committee called " The Copyright Royalty (Mechanical Musical Instruments) Committee " to hold such a public inquiry. The appointment of this committee by the Board of Trade was authorised apparently by statute, viz. 37 & 38 Vict. c. 40. On 7th March 1928 it was announced by the Board of Trade that the committee would commence its inquiry in London at the Board of Trade on 28th March 1928, and representatives of any interests substantially affected who should desire to be heard at the inquiry were invited to communicate with the secretary not later than 21st March. It was admitted by the parties to this suit that sittings of the committee were not publicly advertised except by the announcement already referred to being circulated for publication to a number of United Kingdom agencies and instrumentalities and to journals and papers published in the United Kingdom. Meetings of the committee began on 28th March and terminated on 26th April 1928. On 19th May 1928 the committee reported to the Board of Trade and on 21st May the Board of Trade made an order to the effect that the rate at which royalties were to be calculated as provided by s. 19 (3) should be increased from five per cent to six and one-quarter per cent with provision for a minimum royalty of three farthings. This order was confirmed by the *Copyright Order Confirmation (Mechanical Instruments : Royalties) Act* 1928, 18 & 19 Geo. V, c. lii, which I will call the Act of 1928. Section 1 of this Act is as follows : " The Order set out in the Schedule hereto shall be and the same is hereby confirmed and all the provisions thereof shall have full validity and force." The Board of Trade order was the order set out in the schedule.

There are two features of the Act of 1928 that require comment. The first is that it was introduced as a private bill and is published as a private Act and not as a public general statute. This is simply because it was a statute for the confirmation of a provisional order.

The second is that s. 1 goes beyond confirming the Board of Trade order and enacts positively with regard to the order that " all the provisions thereof shall have full validity and force ". The explanation of this is to be found in the report of the Copyright Royalty (Mechanical Musical Instruments) Committee which called attention to a point of difficulty that had been encountered, namely, whether the machinery of s. 19 (3) of the Act for altering the rate of royalty applied to the rate of royalty payable in respect of musical works published before the passing of the *Copyright Act* 1911. As to this the committee said : " Section 19 (3) imposes the royalty of five per cent with a minimum of a halfpenny, and then by the proviso enacts that if it appears ' that such rate as aforesaid ' is no longer equitable it may be altered. Then sub-s. (7) provides ' In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions . . . (*b*) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated . . . ' It is to be noticed that sub-s. (7) (*b*) makes no mention of any minimum. The manufacturers have in fact paid the halfpenny minimum on such works as if it applied to them. We feel it our duty to call attention to the point and not to venture on any interpretation of the Act. If the matter rests with us, our opinion is that the three farthing minimum would apply also to the pre-1911 works and that the two per cent mentioned in sub-s. (7) should be raised to three and one-eighth per cent. Inasmuch as any alteration in the rate of royalty requires to be confirmed by an Act of Parliament, this point might perhaps be dealt with independently in that Act." Clause 2 of the order did substitute the rate of three and one-eighth per cent for two per cent and this is apparently the reason why the 1928 Act went further than simply confirming the order.

In the Supreme Court *McLelland* J. with some hesitation decided the suit in favour of the defendant on the grounds that the inquiry held by the committee was not a public inquiry within the meaning of the proviso to s. 19 (3) ; that the order of the Board of Trade was therefore a nullity and could not be confirmed ; that although the last part of s. 1 of the Act of 1928 could be regarded as giving all the provisions of the order operation in the United Kingdom notwithstanding that apart therefrom the order was a nullity, that part of the section did not apply in Australia ; and that by reason of the foregoing there was no change in the rate so far as Australia was concerned and the original five per cent royalty rate remained

H. C. OF A. 1958. COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD. Menzies J.

unaffected. The first question that arises upon this appeal is whether this decision is correct.

In my judgment it is not, because, apart from anything else, I am satisfied that the inquiry which the Board of Trade conducted was a public inquiry within the meaning of the proviso. I am ready to assume that the inquiry which was made was limited to the circumstances existing in the United Kingdom whereas in 1928 the *Copyright Act* 1911 extended not only to the United Kingdom but to three self-governing dominions, twenty-five other British possessions and eighteen protectorates. I do not, however, read the proviso to s. 19 (3) as requiring anything more than an inquiry to which the public can come and be heard and, in particular, I think there is no justification for reading into the proviso the requirement that any inquiry held thereunder must examine the circumstances existing in all the areas to which the *Copyright Act* 1911 extended at the time of the inquiry. I think it was left to the decision of the board what course such an inquiry should take and it is clear that the inquiry now under consideration was not only one that was announced publicly and was open to the public but was also one in the course of which representative interests submitted cases and appeared by counsel. On the point on which the defendant succeeded in the Supreme Court I have been convinced that it should have failed.

This makes it necessary for me to consider a number of other submissions made by Mr. *Bowen* for upholding the judgment in the defendant's favour, some of which were made to and rejected by the learned trial judge and some of which were not decided.

In the first place it was contended that either the proviso to the *Copyright Act* 1911, s. 19 (3), was limited in its application to the United Kingdom or that it required a number of separate inquiries into circumstances in the various areas where s. 19 (3) from time to time controlled royalty rates and a number of orders and confirmations each one confined to such an area. This argument, which started with the fact that an inquiry could take place only " after the expiration of seven years from the commencement of this Act ", proceeded by drawing from s. 37 of the *Copyright Act* 1911 and s. 36 of the *Interpretation Act* 1889 the conclusion that there must, or at least might, be as many " commencements of the Act " as there were areas to which it extended, and so reached alternative conclusions (1) that if only one initial inquiry was contemplated it would have to be an inquiry to be made at a time calculated from the time the Act came into operation in the United Kingdom and would be limited to United Kingdom circumstances and would operate only

in the United Kingdom or, (2) if this were not so and what was contemplated was a number of inquiries then each such inquiry would have to be confined to a particular area and must be held at a time calculated by reference to the date on which the Act came into operation in that area and each order must be confirmed separately. In neither event, so it was argued, could what was done in 1928 affect the rate of royalty in Australia. This is a point where it is significant that the *Copyright Act* is an Imperial Act and provides for Imperial copyright. I cannot regard the proviso as contemplating a number of inquiries in different places each resulting in a different revision of the royalty rate for a particular area. The royalty rate begins in s. 19 (3) as a uniform rate and it is probable that any revision made pursuant to the proviso thereto was intended to result in a uniform rate throughout the whole area to which the Act extended. To achieve the result which I think was intended, it is necessary to read the phrase " from the commencement of this Act " in the proviso as referring to the time at which the Act came into operation initially, i.e. 1st July 1912. It is true that this may give the phrase a meaning different from that which it would seem to bear in s. 24 and perhaps different from that which it bears in s. 19 (7) and (8). However this may be I regard the whole scheme that emerges from s. 19 (2) and (3) as requiring a uniform rate at all times and as providing for a Board of Trade order after public inquiry which when confirmed by Parliament would, without any amendment of s. 19 but in fulfilment of what is there provided, substitute a different rate for the original five per cent set out in s. 19 (3) (*b*). The fact that it is the Board of Trade that is to make an order and that it is Parliament that is to confirm the order affords assistance in reaching the conclusion both that any revision pursuant to the proviso should produce uniformity and that local inquiries are not within the contemplation of the section. It is true that the Commonwealth Parliament might have made a different provision applicable to Australia and it is not without significance that in s. 9 of the Commonwealth Act there is no modification of s. 19 (3) although there is a modification of s. 19 (4) and (6). My conclusion is therefore that in 1928 the procedure laid down by the proviso to s. 19 (3) was followed and that the rate of six and one-quarter per cent was substituted for the rate of five per cent, not only in the United Kingdom but in all the areas to which the *Copyright Act* 1911 extended, including Australia.

This conclusion is subject to consideration of a point which Mr. *Bowen* took with regard to the *Copyright Order Confirmation (Mechanical Instruments : Royalties) Act* 1928, viz. that this Act

H. C. OF A. 1958. COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD. Menzies J.

was not one which ever had any operation in Australia or in other words, that it was United Kingdom and not Imperial legislation and had no operation outside the United Kingdom and its dependencies. This contention was supported by reference to the private character of the Act and to the principles that prior to its passing had been stated in the report of the Inter-Imperial Relations Committee Imperial Conference 1926. I regard this as beside the point in relation to the Act of 1928. What s. 19 (3) of the *Copyright Act* 1911 did was to fix a royalty rate for the purposes of s. 19 (2) and make provision for the revision of that rate in accordance with the procedure laid down in the proviso to s. 19 (3). The making of such a revision would not involve any amendment of the *Copyright Act* 1911. Part of the machinery for that revision is the confirmation by Parliament of an order made by the Board of Trade. This procedure is laid down in an Imperial Act extending to Australia and what is done under that Imperial Act operates through the whole area to which the Act extends. I do not regard the convention recognised by the 1926 Imperial Conference as having any bearing upon the construction of the *Copyright Act* 1911 or as affording any ground for denying operation in Australia to a revision made as contemplated in s. 19 (3). Section 19 was adopted by the Commonwealth Parliament as it stood without any adaptation necessary to the circumstances of Australia (cf. s. 25). The adoption of the *Copyright Act* 1911 by the Commonwealth Act of 1912 introduced Imperial copyright into Australia including the provisions of s. 19 as to mechanical contrivances and by express enactment it was always open to the Commonwealth Parliament to repeal so far as Australia was concerned any enactments of the Imperial Parliament relating to copyright with the consequences set out in s. 26 which deals in terms with enactments passed by Parliament operative within a self-governing dominion.

It is, except in one respect, quite immaterial whether the 1928 Act is described as an Imperial Act or as a United Kingdom Act or whether it is a private Act or a public general Act; all that is required by the proviso to s. 19 (3) is that Parliament should by legislative act confirm a Board of Trade order. The exceptional respect to which I have just referred is with regard to that part of the Board of Trade order which is not in issue here, that is, cl. (ii) affecting the provisions of par. (*b*) of sub-s. (7) of s. 19. I do not find it necessary to reach any final conclusion upon this aspect of the matter because I have no doubt that if that part of the order was outside power, and if the final words of s. 1 of the 1928 Act had no

operation outside the United Kingdom, and if in Australia therefore the rate fixed by the *Copyright Act* 1911 s. 19 (7) still stands, this conclusion does not detract in any way from the effectiveness of the order and the confirming Act as bringing about a change of rate for the purposes of s. 19 (2) and (3). There is one other aspect of the 1928 Act to be mentioned. Section 1, as previously mentioned, both confirms the provisional order and enacts that " all the provisions thereof shall have full validity and force ". The additional words do not mean that the provisional order to the extent to which it was capable of confirmation was not confirmed ; to regard them so would be to deny effect to the earlier express confirmation of the order. The additional words were not intended to do more than give full force and effect to any part of the provisional order that was outside power of the Board of Trade. Clause 1, however, which relates to the change of rate, was clearly within power and for the purposes of this case it is not necessary to decide whether cl. 2 was outside power. It seems to me that to say the provisional order to the extent to which it was capable of confirmation was not confirmed would be to disregard the express language of Parliament.

Up to this stage I have paid no attention to the *Copyright Act* 1956 (Imp.) which came into operation on 1st July 1957, before the commencement of the hearing of this suit. Upon the hearing of this appeal it was relied upon by Mr. *Bowen* in two ways ; firstly, as repealing the Act of 1928 and so destroying as though it had never been the confirmation by Parliament of the Board of Trade order ; secondly, as repealing the *Copyright Act* 1911 so that it no longer operated in Australia. The first submission was argued at the hearing of the suit in support of the contention that the Australian royalty rate for the purposes of s. 19 (2) and (3) was five per cent and not six and one-quarter per cent but in the circumstances this matter was not decided ; the second argument, so far as I can see, was pressed for the first time in this Court.

The *Copyright Act* 1956, which is an Act to make new provisions in respect of copyright in substitution for the provisions of the *Copyright Act* 1911, operates of its own force in the United Kingdom including Northern Ireland and is capable of extension to the Isle of Man, the Channel Islands and the colonies and dependencies of the United Kingdom : see ss. 31 and 51. It repeals, subject to the transitional provisions contained in the seventh schedule, both the *Copyright Act* 1911 (except ss. 15, 34 and 37 ; and the saving of s. 37 may have significance here) and the *Copyright Order Confirmation (Mechanical Instruments : Royalties) Act* 1928 (s. 50 and the ninth

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Menzies J.

schedule). The relevant provisions of the seventh schedule are as follows:

"6 . . .

(2) The repeal by this Act of any provisions of section nineteen of the Act of 1911, or of the provisions of the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act, 1928, shall not affect the operation of those provisions, or of any regulations or order made thereunder, in relation to a record made before the repeal."

"41. In so far as the Act of 1911 or any Order in Council made thereunder forms part of the law of any country other than the United Kingdom, at a time after that Act has been wholly or partly repealed in the law of the United Kingdom, it shall, so long as it forms part of the law of that country, be construed and have effect as if that Act had not been so repealed."

"42. The mention of any particular matter in the preceding provisions of this Schedule with regard to the repeal of any of the provisions of the Act of 1911 shall not affect the general application to this Act of section thirty-eight of the Interpretation Act, 1889 (which relates to the effect of repeals), either in relation to the Act of 1911 or to any other enactment repealed by this Act."

The relevant part of s. 38 of the *Interpretation Act* 1889 is as follows: "(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or, (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; . . .".

I am not prepared to accept the argument that the repeal of the 1928 Act involves the consequence that the Board of Trade order must thereafter be treated as unconfirmed. It is true that there are general statements such as that of *Tindal* C.J. in *Kay* v. *Goodwin* (1), that "the effect of repealing a statute is to obliterate it as completely from the records of the parliament as if it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law" but they refer to the repealed statute as a source of rights and liabilities rather than to the consequences of the passing of the repealed statute as an element in a situation provided for by an existing statute. Moreover, to give the repeal of the 1928 Act the effect claimed for it would involve the resuscitation of the old five per cent royalty rate which went

(1) (1830) 6 Bing. 576, at p. 582 [130 E.R. 1403, at p. 1405].

out with the confirmation of the Board of Trade report. Such an effect would be to revive something not in force when the repeal of the 1928 Act took place and would be contrary to s. 38 of the *Interpretation Act*, cf. *Gwynne* v. *Drewitt* (1). There is a further aspect of the repeal of the 1928 Act that can be more conveniently dealt with after consideration of the contention that the 1956 Act repealed the *Copyright Act* 1911 as a statute operating in Australia.

This contention is far reaching because its acceptance would mean that since 1st July 1957 Australia has been without any copyright Act at all. It is, however, wrong, in my opinion, because in the first place I regard cl. 41 of the seventh schedule of the *Copyright Act* 1956 as an express provision preserving the operation of the *Copyright Act* 1911 in Australia. It is true that cl. 41 could, as it was argued, be regarded as merely an interpretation provision but the words " so long as it forms part of the law of any country other than the United Kingdom " and the words " shall . . . have effect " seem to me to point to more than matters of construction and reveal an intention that the repeal of the *Copyright Act* 1911, so far as the United Kingdom is concerned, should not affect its effect or operation in " any country other than the United Kingdom ". If the section were intended to do no more than relate to matters of construction on the footing that a repeal everywhere has been worked by s. 50 of the Act there would seem to me to be little object in distinguishing between the United Kingdom and other countries, and the words " so long as it forms part of the law of that country " would be most inappropriate. In any event, in face of s. 4 of the *Statute of Westminster* I would not be prepared to treat the *Copyright Act* 1956 as of its own force altering the law in Australia. That section is as follows : " No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." There is no such declaration in the *Copyright Act* 1956 and, to my mind, to treat it as altering the law in Australia would be to attribute an impossible intention to the Imperial Parliament. In my judgment, copyright law in Australia was not changed by the passing or the coming into operation of the *Copyright Act* 1956 (Imp.) and, in particular, the *Copyright Act* 1912-1935 (Cth.) and the *Copyright Act* 1911 as extended thereby remain in full force and effect.

This brings me back to a matter which I had deferred in dealing with the contention that the repeal of the Act of 1911 had the effect

(1) (1894) 2 Ch. 616, at p. 620.

H. C. OF A. 1958.

COPYRIGHT OWNERS REPRODUCTION SOCIETY LTD. v. E.M.I. (AUSTRALIA) PTY. LTD.

Menzies J.

of altering the royalty rate under s. 19 (2) and (3) in Australia. It was said that as the Act of 1928 was not an Imperial Act in the sense that the *Copyright Act* 1911 was an Imperial Act, and because cl. 41 of the seventh schedule to the *Copyright Act* 1956, although referring expressly to the *Copyright Act* 1911, does not refer to the Act of 1928, the 1928 Act should be regarded as repealed so far as Australia is concerned even if, because of the considerations referred to, the *Copyright Act* 1911 continues in operation in Australia. It was further said that the position of the plaintiff is not improved by cl. 6 (2) of the seventh schedule to the *Copyright Act* 1956 because that applies only in relation to records made before the repeal of the Act, that is, 1st July 1957, and it is apparent from the pleadings that the defendant had not made records of "Springtime in Victoria" before that date. I have already stated my reasons for thinking that the repeal of the 1928 Act while the *Copyright Act* 1911 remains in force anywhere did not destroy it as an actual confirmation of the 1928 Board of Trade order, but I now add that the reasons I have already given for holding that the *Copyright Act* 1956 did not repeal the *Copyright Act* 1911 so far as Australia is concerned lead me to the further conclusion that the same is true with regard to the Act of 1928 and its operation in Australia. That Act confirming the Board of Trade order affected the operation in Australia of the *Copyright Act* 1911 and it is the *Copyright Act* 1911 with the operation that it had on 1st July 1957 that forms part of the law of Australia for the purposes of cl. 41 of the seventh schedule to the *Copyright Act* 1956. Furthermore, if the *Copyright Act* 1956 were to be regarded as affecting the law of Australia at all, it would be to treat that Act as extending to Australia notwithstanding the *Statute of Westminster*, s. 4.

When the pleadings have been amended to define the issues that have arisen concerning the operation of the *Copyright Act* 1956 I would allow the appeal and make a declaration to the effect that notwithstanding the *Copyright Act* 1956 the rate at which royalties are, for the purposes of the *Copyright Act* 1911, s. 19 (2), to be calculated upon any records of "Springtime in Victoria" made by the defendant in Australia is six and one-quarter per cent of the ordinary selling price of the said records.

Appeal dismissed with costs.

Solicitors for the appellant, *Samuelson, Wilkinson & Marks.*
Solicitors for the respondent, *Sly & Russell.*

J. B.