

AUSTIN v. COLUMBIA GRAPHOPHONE CO. – ALLEGED MUSICAL COPYRIGHT INFRINGEMENT.

The report below is taken from *The Stage*, 5th, 12th, 19th and 26th July 1923, with obvious mistakes tacitly corrected.

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In the Chancery Division, on Tuesday, before Mr. Justice Astbury, an action was heard in which Mr. Frederic Austin, the composer, proceeded against the Columbia Graphophone Co. to restrain an alleged infringement of his copyright in the music of the opera "Polly," and the passing off of defendant's gramophone records, entitled "Selections From 'Polly'" as being the records of the plaintiff's work. Damages were also claimed. The defendants denied infringement, and denied the passing off.

Mr. Luxmoore, K.C., and Mr. McGillivray were for the plaintiff; and Sir Duncan Kerly, K.C., and Mr. Henn Collins represented the defendants.

Mr. Luxmoore said under the Copyright Act, when gramophone records had once been made of plaintiff's music anyone else could make records, provided they had done from plaintiff's music, upon a royalty being paid; but if it was necessary to make a score for the reproduction, the making of the score was an infringement of the plaintiff's copyright. The most valuable right with regard to gramophone records that plaintiff had was his right to first production. The defendants did not obtain that: it was obtained by the gramophone company who made the records under the title of "His Master's Voice." In this case, the records complained of were put on the market about a week before those of the gramophone company, and if the plaintiff was correct in saying they were an infringement of his music damage had been done to him.

The case against defendants was that they had infringed the plaintiff's copyright in the music "by authorising to be made an orchestral score, by which plaintiff's music was reproduced, and by making therefrom two double-sided disc records, by means of which substantial parts of the plaintiff's music might be performed mechanically." It was also complained that defendants had advertised their records in various ways.

He understood (added counsel) that defendants admitted the making of the orchestral score containing certain of the airs and the making of the records, but they denied reproducing parts of the plaintiff's music. What they said was that they had taken the music of Mr. Gay and Gay's airs. Gay was the author of the words and lyrics, counsel explained, but he did not write any music.

His Lordship: Who wrote the original music?

Counsel: The airs are traditional airs. The original music was not written for Gay's works. We say the defendants have appropriated our own setting, which is different from Gay's.

Mr. Justice Astbury: Are you and Sir Duncan Kerly going to sing to us? (Laughter)

Mr Luxmore said he had not yet heard his colleague, Sir Duncan, but he had no doubt he was ambitious enough to try. (Laughter). He believed, too, Mr. Henn Collins might sing. (Laughter)

Sir Duncan Kerly replied that if Mr. Luxmoore would sing his version he would sing afterwards. (Laughter) His Lordship would then decide they were quite different. (Laughter)

His Lordship asked if the copyright of Gay was gone. Counsel said that Mr. Gay died many years ago. The book was published about 1729, and he did not think it likely that any copyright was left.

Mr. Luxmoore explained that "Polly" was originally written as a sequel to "The Beggar's Opera," and it was not performed in Gay's lifetime because the Lord Chamberlain forbade the production, probably for political reasons. The idea of the work was to "lash the reigning vices." The play was later rewritten, so as to change it into a sort of light comedy, with agreeable and artistic music, so that it would give a pleasant evening's entertainment and be a commercial success.

The original lyrics were replaced by comic lyrics. Plaintiff prepared a musical version to suit the altered version, and selected some of Gay's airs. The adaptation of the play was by Clifford Bax, and it was quite different from Gay's original opera. Counsel went on to suggest that defendants had infringed because they had not themselves got the first right of production, this being secured by the Gramophone Company.

In reply to the Court, Sir Duncan Kerly, K.C., said the defendants' case was that theirs was an independent production from Gay's airs.

Mr. Luxmoore, K.C.: They say they would have done this if they had not known of ours. We say the treatment of the airs is our treatment.

His Lordship: Is your orchestral score copied?

Mr. Luxmoore: There are similarities, and we say they have followed our work. Gay's is a serious opera; ours is a comic opera, different in style, and our style of production has been followed.

Mr. Justice Astbury: You cannot copyright ideas, can you?

Counsel: Certainly; the characterisation of music you can.

His Lordship: In a play and piece of music you can pirate an idea?

Counsel: Yes; [not one idea, but] a series of ideas.

Mr Luxmoore proceeded to compare certain pieces of music in order to show instances, as he alleged, of the copying of the plaintiffs' music by Mr. Ketelbey, and the selection of similar words and passages for inclusion in defendant's score.

Mr. Justice Astbury, comparing two versions of a piece of music, observed that they seemed to be similar, as the dots came in the same spaces. His Lordship added: When you only know two tunes, one of which is "God Save the King," that is the only way you can read music. (Laughter)

Mr. Luxmoore mentioned later that in one instance plaintiff had introduced "a bagpipe harmony." Mr. Ketelbey had got that, too.

Mr. Luxmoore was proceeding with further details when Mr. Justice Astbury suggested he would understand the matter better from the evidence. "I do not know much about this music," he said, "but I know a tune when I hear it."

Mr. Luxmoore: I, too, am innocent of knowledge, and cannot explain the musical point of view.

Mr. Justice Astbury: I am looking forward to the time when Sir Duncan and you will give your illustrations. (Laughter)

His Lordship added that if piracy was suggested, he thought he could tell from the records if one sounded like the other. Counsel thought it was not a question of comparing the gramophone records. The point was, the defendant's records were based on the plaintiff's score.

His Lordship: If you turn a dignified hymn tune into a fox-trot, and you have a gramophone record of the fox-trot, you could tell if that was the same as the record of the hymn.

Counsel: There may be similarity in the records; we say their basis is the same as ours. The position is that the airs are common all through; they are based on Gay's airs, and we have treated them in a particular way, and they have treated them in the same way.

His Lordship: Would not the records show that?

Counsel: I do not think so.

His Lordship suggested that the piano would be helpful in determining if defendant had treated the airs in the same way. Would it not be better for a committee of musicians to hear the tunes and determine the matter?

Counsel said he thought his Lordship might be assisted by an expert if he wished.

His Lordship: If you play the tune on the gramophone, I can tell if it is a waltz or a dirge. (Laughter)

Mr Luxmoore: All the characteristics of our vocal score are brought out in their orchestral score.

His Lordship: We will hear the evidence, and if there is divergence in the evidence about these alleged piracies, perhaps we may hear it on the record and the vocal score, and so determine it.

The plaintiff, Mr. Frederic Austin, deposed that he arranged the music in "The Beggar's Opera," now running at the Lyric, Hammersmith, and also in "Polly", which was being produced at the Savoy. He was the owner of the copyrights. The original words of "Polly" were written by John Gay; it was a prose drama interspersed with lyrics sung to airs. The airs were traditional tunes, and also taken from the works of contemporary composers. No orchestral score of the original opera existed. He added material of his own to the original airs, and his own musical setting was for the altered form of the piece by Mr. Bax. He had granted a licence to a syndicate in respect of dramatic performance, and in respect of publication to Boosey and Co.

He had applications from three of the principal gramophone companies for the right to produce, and he granted the right to the Gramophone Co. When he heard that the defendants were publishing records he wrote protesting, and he was told that it was too late to do so.

Mr. Austin interested everybody in court by singing from his place in the witness-box from music score before him to indicate the variations he made in some of the original ditties. He gave his illustrations in a pleasant baritone voice. The words "Cease your anguish and forget your grief" had been varied by him to "Drink, boys, deep, and the devil take tomorrow."

[His Lordship, as Mr. Austin gave his vocal performance, observed: "That is not the tone of anguish." (Laughter)]

The hearing was adjourned,

The Stage, Thursday 5th July 1923

The hearing was continued yesterday (Wednesday)

Mr. Austin continued, and relieved the detail of his evidence by occasionally singing a few bars. Calling attention to the similarity of the music composed for the defendants to that of his own, he mentioned that the bagpipe harmony he had introduced was given with the same harmonic effect in Mr. Ketelbey's score.

Mr Justine Astbury said he took it there were musical people who could hear a tune and then remember it.

Sir Duncan Kerly, K.C. (for the defendants): May I suggest that resemblances could be found anywhere?

Mr. Austin mentioned that with the assistance of Mr. Clifford Bax he altered one of Gay's lyrics of a sentimental nature into a rollicking sea song. Originally a duet for soprano and tenor, it was now a solo song sung in a deep bass. In his score Mr. Ketelbey had accentuated that identical robust characteristic.

Asked to speak generally about the treatment by Mr. Ketelbey, Mr. Austin said the general impression was that of a distorted version of his work, and the defendants' records might be regarded as representing his work. Mr. Ketelbey used methods and style and introduced passages which, supposing the records were thought to be the plaintiff's would be extremely prejudicial to his reputation. His complaint was that Mr. Ketelbey had taken his structural invention, which was the

most valuable part of a composer's work. Mr. Ketelbey had taken his structural idea, which meant taking more than the mere bare notes. A composer's structure was more valuable than the manner in which he decorated that structure, and by taking that structure he did more harm than by imitating some of his harmonies.

Replying to Sir Duncan Kerly, K.C. (for the defendants), plaintiff agreed that "The Beggar's Opera" was known as Gay's "Beggar's Opera." It was forgotten for a time before he (plaintiff) revived it. Sir F. Bridge lectured on it in 1913? - He may have done, but I do not attend his lectures. And he proposed its performance? - I am ignorant of that.

Plaintiff said that Gay provided a series of traditional and contemporary tunes for "The Beggar's Opera," as in the case of "Polly," and he (plaintiff) wrote the orchestral composition upon that. "I took the tunes," added the plaintiff, and "made them into an opera of my own.

Plaintiff agreed that the "Beggar's Opera" became popular, and "Polly" was the subject of discussion among musical people before his own version was performed. Before the "Beggar's Opera" was known to be a success he thought "Polly" was an interesting thing to do on his own account.

As a matter of fact, some other composer has gone to Gay, and there is a second "Polly" on the stage? - It was on the stage formerly.

Was that arranged by someone altering Gay's words to the appendix tunes? - Yes. And then orchestrating the music? - I suppose so.

Counsel said he referred to the version known as the Chelsea version, by Borth [=Bath] Was he able to orchestrate it independently of your version? - Quite.

Mr. Austin observed that the uninformed public were under the misconception that Gay left a coherent music score. That was a mistake. To refer to the opera as having with it music by Gay was a loose reference.

Sir D. Kerly said his suggestion would be that the whole idea of any copying in this case had arisen from the accident that Mr. Ketelbey and the defendants were at first concerned in trying to do something from plaintiff's work, and then, when that fell through, went back to the original and did it for themselves.

Asked to state what musical people would think of the records, Mr. Austin said they would "wonder what had happened to Austin."

Counsel suggested that not half a dozen successive notes in Mr. Ketelbey's score could be said to be taken from plaintiffs, except those attributed to Gay. - Plaintiff said it could not be put in this way. The important matter was the bearing of the notes.

Mr. Austin was still under cross-examination when the hearing was again adjourned.

The Stage, Thursday 12th July 1923

Last Thursday the plaintiff, further cross-examined by Sir Duncan Kerly, K.C., said he did complain that the characteristics of his work had been taken. Sir Duncan proceeded to go into details of various passages, and plaintiff took an objection to being given for the purposes of his evidence what he described as parallel editions and not originals. A document (he said) that he used the previous day he had been studying till 3 o'clock in the morning and found it had many inaccuracies.

Later, his Lordship observed to Sir Duncan when technical terms were introduced by plaintiff: You and I are up against an enormous fund of musical knowledge and it is difficult for us.

Sir Duncan: It is difficult; the witness is able to speak in an unknown language, and it is embarrassing.

In re-examination plaintiff said he went to see what was called the Chelsea version of "Polly." He went with a critical mind, but there was nothing he had reason to complain of and it did not resemble his work. The dress of Polly in the "Beggar's Opera" and "Polly" was designed by Lovat Fraser. There was a Hogarth picture of Polly in the Tate Gallery, but Mr. Fraser's design was not like that.

Mr. Ernest Newman, musical critic, said the result of Mr. Clifford Bax's reconstruction of Gay's opera "Polly" was that a rather bitter and satirical piece had been transformed into a good comedy. The styles of the characters were altered, and after the first act the whole thing had been recast. Mr. Austin, upon the reconstructed piece, wrote the music, and witness was of opinion that there was no doubt that defendant's score was a copy of the plaintiff's. In fact, he thought Mr. Ketelbey, who wrote that score, had a more intimate knowledge of the opera as it was performed at the theatre and Mr. Austin's music than he had of Gay and his opera.

On Friday Sir Hugh P. Allen, Director of the Royal College of Music, said he was familiar with Gay's text and the lyrics in "Polly" 1729 edition and the tunes. Gay's work was serious and cynical. He was familiar with Mr. Austin's version, which he had heard at the Savoy, and with Bax's words. Mr. Austin's version covered a very different ground and was not suited to Gay's words. Mr. Austin had clothed the tunes in his own language, harmonised, laid them out, and orchestrated them in his own way. There were many resemblances between the work of the plaintiff and Mr. Ketelbey (who prepared defendant's score), and his view would be that the defendant's records were based on the Savoy and Kingsway versions.

Mr. Luxmoore, K.C. (for the plaintiff): What chance do you think there is of two musicians making such arrangements as these in question resembling each other as they are said to do in this case? – I don't know anything about chances; I never bet.

In answer to Sir Duncan Kerly, K.C. (for the defendants), Sir Hugh said in his view it was fair to say that Mr. Ketelbey had harmonised the tunes in Gay's opera in Austin's manner.

Mr. Geoffrey Shaw, composer, said that Mr. Austin, as well as arranging the original airs, had added much music of his own; so that the opera became a work by Frederic Austin founded on airs in the original 1729 edition. It was (he thought) unlikely that two men working independently could have produced two works as alike as the plaintiff's and Mr. Ketelbey's.

Sir Duncan Kerly, K.C., opening the defence, submitted that the acceptance of the plaintiff's case would carry the doctrine of copyright far beyond that laid down by the authorities, and it would lead to many other actions of this type and involve the judges in the consideration of matter of mere taste and fancy. Counsel submitted that the defendants were entitled to publish a version of "Polly," notwithstanding that Mr. Austin with his music and Mr. Bax with his altered lyrics had made the thing popular.

Mr. Justice Astbury said that the case for the plaintiff was put in this way – that the opera as played at the Kingsway was not Gay's opera. It was founded on Gay, but it happened to be Mr. Austin's, and if the defendants chose to put out records in such a way that they were records of the Kingsway production and so advertised them, then defendants were putting out a record that was not a record of the opera published 200 years ago.

Sir Duncan said there was no infringement of copyright in taking somebody else's methods or effects. There was no monopoly in ideas. There had been a real effort by Mr. Ketelbey to get back to Gay and make an independent production. He was producing Gay's airs in the way he thought they should be produced.

Mr. Justice Astbury asked if he could not hear the rival gramophone records. Sir Duncan replied that a hearing of the records would increase the difficulty of deciding the case.

Counsel said that musicians whom he would call would say they traced nothing in the airs other than what might come from a competent musician setting out to harmonise Gay's airs in the modern manner.

Mr. Albert Wm. Ketelbey, composer, music editor, and publisher, said that he had had more than twenty-five years' experience – many of his works had attained great popularity. He had also written works that had not attained popularity, and which were better. (Laughter). When he was invited to make another version of Gay's music he went to the British Museum to look at the 1729 edition, and copied down certain airs, and he had Mr. Austin's vocal score with him. The selection was independent of those that Mr. Austin had taken for his pianoforte selections. He considered himself to be quite capable of making a perfectly independent musical arrangement from Gay, and it never entered his mind that any knowledge he might have of Mr. Austin's music would tend to make him copy Mr. Austin. In fact, in connection with the orchestration he made no use of Mr. Austin's work.

Witness referred to a passage of melody from Gay in which he said plaintiff had not followed Gay but he (Mr. Ketelbey) had done so. Witness gave a musical illustration of the difference. In cross-examination Mr. Ketelbey said he advised defendants as to music that should be recorded, and made it suitable for recording. In regard to "Polly" at the Kingsway he, in fact, reported unfavourably upon it in January last.

You went with the idea of seeing what were the tit-bits of Mr. Austin's music? – No, the tit-bits of Gay's melodies.

Witness said he only heard "Polly" once before he made his orchestral score – he used Mr. Austin's vocal score, but he had nothing specific in his mind in regard to Mr. Austin's treatment of the music. He had a knowledge of Gay's airs as a matter of ordinary musical history.

Until "Polly" was put on at the Kingsway do you say everyone knew there was an opera "Polly"? – Musical people would know.

Witness did not agree that Mr. Austin had composed an entirely new work. If a composer took an air and wrote a work round it, he did not regard that as an original work – an original work would depend on the amount of symphonic development.

Counsel: What is the difference between original work and original composition? – Original composition would have much less of Gay in it and much more of Austin. It would not be called an original work unless all Gay's work was left out? – Unless there was considerably less of Gay in it. I say the whole thing is derived from Gay. It is a new arrangement, not a new composition.

Asked if he thought, assuming he had never heard of Mr. Austin's version, he would get as near to it as he had, Mr. Ketelbey replied in the affirmative.

Mr. Luxmoore: Could you have made a good record from Gay's airs without any reference at all to Mr. Austin's? – Certainly I could, and I did.

Mr. Ketelbey was further cross-examined yesterday (Wednesday). He agreed in relation to a certain passage that he had succeeded in getting something that was more like Austin than Gay. "But it is non-copyright," he added.

Mr. Luxmoore, K.C.: That is a matter for the Court.

Witness denied adopting Mr. Austin's manner of treatment. He had used his own musical instinct, which had resulted in similar treatment, but different harmony.

It was put to witness that the musical effect of a certain bar in his work was the same as that in Mr. Austin's, with the same accents on the notes. "Doesn't it sound the same to your ears," asked Mr. Luxmoore.

"There is a difference to my ears, but I cannot answer for other people's ears" was the reply.

Mr. Luxmore asked Mr. Ketelbey to give a solo of the passage containing the words "I will have my humours." This he did with gusto, and then the Judge inquired, "Do you ever get tired?" "Never," replied Mr. Ketelbey.

Reference was made by Mr. Luxmoore to the bottle [=battle] song in the opera, and Mr. Ketelbey called it a mock [battle] song. He used that term because Gay's work was satirical, aimed at lampooning the vices of the period.

Counsel: Have you read Gay's original work? – Yes, I have read parts.

At the stage the evidence of Sir Frederick Bridge, the well-known organist, was interposed. He was formerly organist of Westminster Abbey and was Professor of Music at the London University.

Sir Duncan Kerly: You have had great experience as a musician? – Yes, seventy years.

His Lordship: Then if I were you I should sit down.

Sir Frederick preferred to stand, and he gave his evidence from the floor of the court because of deafness.

Sir Duncan: You have been particularly interested in the music attached to Gay's operas?

Sir Frederick said he had studied Gay's music, and he looked upon himself as the reviver of "The Beggar's Opera" because he lectured on it ten years ago and performed a great deal of the music. He had analysed Mr. Ketelbey's version of Gay's songs in comparison with those of Mr. Austin because he was given to understand that Mr. Ketelbey had been accused of stealing Mr. Austin's thunder. He asked for the two scores to be supplied, and he spent some unhappy hours in the cloisters of Westminster comparing the two. Discussing a particular song, Sir Frederick said that Mr. Ketelbey's version was distinctly different so far as harmony was concerned, and in some cases was a more correct melody. Mr. Ketelbey had only one melody note that was not in Gay, and Mr. Austin had altered Gay's melody in nine places. A greater part of the bass in Mr. Ketelbey's version was Gay's bass, and much better than Mr. Austin's. His (witness's) conclusion was that Mr. Ketelbey had done nothing save that which an honest man ought to do. There were likenesses and similarities between the two versions, but that would not be surprising, because two good musicians like Ketelbey and Austin, dealing with an old tune, would find that it could only be dealt effectively in one way. He thought Mr. Ketelbey had made an independent version, and one that he (witness) would not have been ashamed to make.

Sir Frederick added that he did not think the grave charge against Mr. Ketelbey could be proved as it ought to be proved.

Sir Frederick was cross-examined by Mr. Luxmoore in great detail, and while the two versions by Austin and Ketelbey were under discussion Sir Frederick used the phrase, "I must defend myself. I was asked to look at it from the musical side."

Mr. Luxmoore: You are not in the dock yet. (Laughter)

His Lordship: No, Sir Frederick, you are quite safe. (Laughter)

Counsel: Have you heard the two records played?

Witness: No, thank Heaven! (Laughter)

Sir Frederick said he had not heard "Polly" at the Kingsway or the Savoy. He took care to keep away. He was a good judge of "The Beggar's Opera," as he lectured on it ten years ago; in fact, [he] thought he ought to have brought it out himself, and he felt he had missed a chance. (Laughter). He did not

think that Austin and Ketelbey, whom he knew to be good musicians, would be such fools as to borrow from one another.

It was arranged that Sir Frederick should attend again on Friday. Sir Frederick mentioned that he had never before given evidence in a Court.

The hearing was again adjourned.

The Stage, Thursday 19th July 1923

On July 12 this action was again before Mr. Justice Astbury in the Chancery Division. The defendants denied any infringement.

Mr. Luxmoore, K.C. (plaintiff's counsel) resumed the cross-examination of Mr. A.W. Ketelbey who prepared the defendants' musical score, a cross-examination that had been interrupted the previous afternoon by the calling of Sir Frederick Bridge. In re-examination by Mr. Henn Collins, Mr. Ketelbey repeated that he did not copy Mr. Austin's work, he never intended to do so, and having now compared the results he was sure he had in no way copied.

Mr. Hubert Bath, musical director and composer, said he had arranged music for the version of "Polly" produced at Chelsea. His own work was undertaken before Mr. Austin's production, and until this case he had not seen Mr. Austin's score. He had now seen Mr. Austin's published vocal score and Mr. Ketelbey's harmonised version of the records, and he had compared them critically, and he found no suggestion in Mr. Ketelbey's score of any copying from Mr. Austin. In the course of Mr. Bath's detailed examination regarding the different scores many technical terms were introduced, and Mr. Justice Astbury made the comment: "Take no notice, please, of any expressions that I use; I haven't the slightest idea what any of them mean." When reference was made to a "drone bass," his Lordship asked what it meant. Mr. Bath said that literally a drone note was a note or two notes like the two notes of a bag-pipe kept on while the tune move about above it.

Mr. Bath in cross-examination was asked if it was his own opinion that his version was not like Mr. Austin's. He replied that Mr. Austin had said they were unlike one another, but from what he had now seen there were three examples like Mr. Austin's occurring in "Red House," "Virtue's Treasure," and "Despair Leads to Battle." He had not been to see "Polly," but he had examined the vocal score.

Witness agreed that out of twenty-five original Gay tunes that he used only three resembled Mr. Austin's, and out of Mr. Ketelbey's eighteen there were ten resembling Mr. Austin's.

Mr. Justice Astbury observed that he was beginning to think that in the musical world they could say and do anything.

Witness said he would have expected Mr. Ketelbey, having heard Mr. Austin's version, to have produced something more unlike Mr. Austin than his (Mr. Ketelbey's) first "orchestration." His Lordship: If there has been any copying he would have been more likely to copy if he had never heard Mr. Austin's music or seen the opera? – Yes.

On July 13 Sir Frederick Bridge (late organist of Westminster Abbey), who gave evidence for the defendants last week, was further cross-examined. He agreed, in reply to Mr. Luxmoore, K.C., that he had simply compared the music of Mr. Austin and Mr. Ketelbey; he had not compared Austin with Gay nor Ketelbey with Gay. Counsel suggested that it was necessary for a fair comparison to consult the common source as found in Gay, and Sir Frederick said he might have had Gay, but was merely concerned with Ketelbey and Austin. "The man who first asked me to have anything to do with this confounded thing," added Sir Frederick, "asked me to look at Ketelbey's music and see if he had copied Austin. (Laughter). I may have said 'send me Gay as well,' but I do not admit it." (Laughter)

Sir Frederick was being questioned about similarities of treatment in Mr. Ketelbey's and Mr. Austin's music when he said he would like to refer to his own score, which he had prepared in comparing the two. Sir Frederick contended that Mr. Ketelbey had done nothing that was not legitimate, and then exclaimed: "These two men (Ketelbey and Austin) are good musicians, and they have no business to be fighting over this game. It is not worth the trouble. You ask me all these trivial questions; it is rubbish. I am sick of 'Polly.'"

The witness subsequently remarked: "This is a serious matter. If we are to be prevented from copying old tunes and treating them in our own way because some other musician has already copied them and brought them out, then people like myself, who go in for musical research, will be afraid to go to the British Museum in case we are locked up."

Sir Frederic Cowen, composer and conductor, was next examined by Sir Duncan Kerly. He had seen Mr. Austin's score, and the work of Mr. Ketelbey, and he was acquainted with the nature of the complaint in this action, and he could see no substantial copying of Austin by Ketelbey. Asked to say if there was any copying of Austin at all by Ketelbey, Sir Frederic Cowen said that, from the musician's point of view, his opinion was much the same as that of Sir Frederick Bridge. Such coincidences and resemblances as there might be arose from the fact of both the works being musicianly adaptations of the music. The coincidences were unimportant.

The Judge: In what way?

Witness: I mean from the point of view of the statement of claim.

Sir Frederic, in cross-examination, mentioned when a selection of music was handed to him for perusal: "I have never passed a musical examination in my life."

Mr. Justice Astbury: Well, you are in the course of doing so now. (Laughter)

Witness stated that he and Mr Austin could both name hundreds of celebrated composers who had copied from each other. It was very often subconscious.

On Tuesday further evidence was given for the defendant company.

Mr. Hubert Bath, replying to Mr. Luxmoore (cross-examining), who asked if he noticed in the various tunes the plaintiff complained of, that the beginnings of Mr. Ketelbey's score were more or less the same as Mr. Austin's and different from Gay's, said they were different from Gay's, but he did not say they were not like Mr. Austin's.

Counsel asked in regard to the duet "Prince George" whether in the original it was a song of sentiment and Mr. Austin had treated it as a bass sea-song. Witness said: Yes

Mr. Ketelbey has treated it in the same sort of way? – No; I don't think he has.

He has treated it as a robust song? – Well, apparently on paper he has, but in sound he has not.

Mr. Bath added that he had heard the records and it was entirely different from Mr. Austin's. It sounded different, and it did not give the impression of a robust song at all.

Asked about his version of "Polly," Mr. Bath said the original numbers were his own composition. The airs of Gay he treated in his own way, as the arranger and adapter. His own harmony and general characteristics he introduced. He described the numbers as arranged by him and the harmony of these would be useless if dissociated from the tunes. The important part of the work was the tunes.

Did you do anything but harmonise the words in Gay? – That is practically what I did.

Mr. Austin has done more than harmonise; he has altered the structure of Gay altogether? – One can hardly say that, but there is no structure in the Gay appendix, they are more indications.

Then, if there is no structure in the Gay appendix it is a new structure by Mr. Austin? – No.

How long did your version run? – It was put up for a fortnight, and it ran three weeks.

I gather it was not a successful version of "Polly"? – I do not know about the financial side, but otherwise it was a success.

Did you not get any royalty? – No; there was no arrangement about royalty.

Counsel: I do not suggest it was not an excellent version, but how was it referred to by the public? – It was always called the Chelsea "Polly."

To distinguish it from the other "Polly"? – I presume that would be the reason.

Re-examined by Sir Duncan Kerly: What was the other called? – The Kingsway "Polly."

Sir Duncan Kerly then called Sir Dan Godfrey.

His Lordship asked how many more expert witnesses counsel proposed to call.

Sir D. Kerly said three.

His Lordship said he did not think he needed three more. Somebody would have to pay the costs of this case someday. He thought it was his duty to keep the case within some limits.

Sir Duncan Kerly said his Lordship had to decide a question of fact as to whether defendants' score was a copy of plaintiff's, and he had overwhelming evidence that it was not.

His Lordship thought it was an abuse of the rule to have 6 or 7 expert witnesses. He was not going to count heads, and he did not wish to be uncomplimentary, but the one thing that impressed him was that there were not two musicians who ever thought or talked alike. Mr. Bath had differed from everything Sir Frederic Cowen said, and the evidence on one side was equally opposed on the other. He was not going to stop counsel, but he thought the taxing-master would deal with the matter.

Sir D. Kerly said he would take that risk.

His Lordship said he thought when they came to tax the bill "despair will lead to battle."

Sir Dan Godfrey then gave evidence. He said he was musical conductor and general director for the Corporation of Bournemouth, and had had great experience as an arranger of music. He had considered Mr. Ketelbey's rough score, and Mr. Austin's vocal score.

As a conductor and arranger, have you considered with particular reference to the alleged resemblance in this case how far, if at all, Mr. Ketelbey's production resembles Mr. Austin's?
Witness: I found hardly a bar in which I could say there is resemblance from a harmonic point of view.

Mr. Hamilton Harty, composer and conductor of the Halle orchestra in Manchester, said he paid special attention to the suggested resemblance between the two scores, and he came to the conclusion that there was no substantial similarity.

Mr. George Herbert Clutsam, composer and adapter and arranger of music, who arranged the music of "Lilac Time," said he had heard the evidence in this case.

His Lordship: And you are still alive? (Laughter)

Having made a comparison of the scores of Mr. Ketelbey and Mr. Austin, witness said he had formed a very decided opinion that the former was an absolutely independent work. The points of resemblance were very trivial.

Mr. Chas. Bassett, who prepared the posters of the defendant's records, stated that he studied the original work of Gay at the British Museum to get the right atmosphere for his work. He had not seen "The Beggar's Opera," or "Polly," according to his knowledge of the costume of the period.

This close the evidence, and the hearing was adjourned.

Yesterday (Wednesday) was the tenth day of the hearing.

Sir Duncan Kerly, K.C. (with whom was Mr. Henn Collins), on behalf of the defendants, said there had never been any concealment or any attempt or desire to conceal the fact that Mr. Ketelbey was thoroughly well acquainted with Mr. Austin's work. He was honestly endeavouring, however, to make an independent version. He provided an orchestration of Gay's airs according to modern ideas, and made a harmonious noise to go with the airs for the purpose of his gramophone records. The Court might find that there were a number of resemblances between Mr. Ketelbey's score and Mr. Austin's, and probably more than would have been arrived at by mere coincidences. His Lordship might take the view that, acting with perfect honesty, Mr. Ketelbey being as he was quite familiar with Mr. Austin's work, followed Mr. Austin's line in some cases. He followed his line either deliberately or sub-consciously. If he followed it deliberately, he was not an honest man, in view of the evidence he had given in the case that he did not follow it deliberately. But counsel submitted that no such finding would be justified. A sub-conscious following was entirely consistent with all the evidence in the case, and there were what a number of musicians regarded as coincidences. The most striking effect developed from the evidence for the defendants was that all these things were not new, original, strikingly distinctive or characteristic inventions of Mr. Austin. They were things which might very well be done by any musician.

Sir Duncan said he had received a letter from Sir Frederick Bridge which he would adopt as his argument. It was as follows: -

"The result of this case will be of importance to English music. Among recent developments in English music there has been an increasing interest shown in the music of those past periods when England was prominent, if not pre-eminent, in Europe. Music which has been forgotten for centuries has been rediscovered by research, arranged by the researchers for modern requirements, and performed. The fewer the obstacles placed in the way of free use and adaptation of this music, the more readily will it be assimilated by present-day musicians, and be available to build up an English music on the foundations of the great periods of the past. The arrangement of an old air must obviously be more difficult to copyright than a piece of entirely original music, for the old air itself is common property, and without the air there could be no arrangement. The question which now appears to have arisen for decision is how far can the arrangement be protected without establishing a copyright in the air itself. In the sensitive ears of the majority of musicians of the same period an air, apart from the melody, naturally suggests certain ideas of treatment and devices. These ideas and devices are, if it may be said, practically part of the air; they are not original, but commonplaces drawn from the common musical stock.

"It is of use of commonplaces of this kind that complaint is made in this case. If judgment is given for the plaintiffs it would seem dangerous for a composer to arrange an air which has been arranged before, and suicidal if he has seen or heard the previous arrangement. The need is for a guiding rule. The principle that there is only copyright in a sequence of notes is a rough-and-ready rule, which may not be perfect in its application to all cases, but it is intelligible and clear. Any other principles will certainly be very difficult for the musician to apply and almost impossible for a lawyer himself, probably inexpert, to interpret."

Mr. Henn Collins also argued the defendants' case, and in course of his argument referred to "God Save the King," because, as he said, it was one of the tunes with which his Lordship was familiar. His Lordship: I am not sure that I am now (Laughter)

His Lordship further observed that the evidence given on one side was diametrically opposed to that on the other. He had never known a case in which apparently thoroughly respectable and reliable people differed so much in their opinions. It was amazing. Mr. Collins said the ultimate question his Lordship had to decide was whether Mr. Austin's work had been infringed by the defendants reproducing a substantial part of the work. There were seven coincidences in his (counsel's) analysis

concerning six airs and at most two or three bars apiece, and his lordship was invited to say that in a work which in the printed piano score extended to 134 pages and at least 1,000 bars, these seven coincidences, concerning about 20 bars, formed a substantial part of the plaintiff's work. He thought his Lordship would say nothing of the kind.

The hearing was adjourned.

The Stage, Thursday 26th July 1923

The closing speech in the "Polly" copyright case was made last Thursday by Mr. Luxmoore, K.C., counsel for the plaintiff, Mr. Frederick Austin. The hearing by Mr. Justice Astbury in the Chancery Division had already occupied ten days.

Mr. Luxmoore said the two questions for the Court, which were very closely interwoven, were: (1) Had the plaintiff's copyright been infringed, and (2) had the defendants passed off their records as being records of Mr. Austin's work? When Gay wrote the opera in 1727 he wrote no music for it. But he selected, or had selected for him, a number of traditional airs, which were appropriated and set out in the appendix to the 1729 edition. The opera was never produced in Gay's lifetime. It was produced on two or three occasions after his death, and on each occasion it was a complete failure. No music of these productions was surviving; at any rate, no one in this case had been able to find any of the music. When, therefore, Mr. Austin started on his work he had absolutely free and open field, and all that he used were the airs that were found in the appendix and round them he wrote his opera. The opera as Gay wrote it was wholly unsuited for performance on the stage to-day, and it had to be entirely reconstituted and altered, and the only thing that was really kept was the skeleton of Gay. Some of the expert evidence given, said counsel, was in his experience astounding. They behaved as advocates, and forgot they were witnesses.

His Lordship: Facts seemed too prosaic and commonplace for musicians to bother about.

Mr. Luxmoore said that might apply to the defendants' but to the plaintiff's witnesses. The object of the defendants was to see how near they could get to Mr. Austin without committing a legal wrong. He did not claim copyright in the airs of Gay. They were open to anyone, and anyone could use them properly and independently, but they could not use the plaintiff's setting of them.

His Lordship: The defendants say they have not taken any of Mr. Austin's original work. All they have done is to approximate to method and ideas that are commonplace.

Mr. Luxmoore referred to Sir Frederick Bridge's letter, and said he agreed with him that the case would be important to English music. The importance, added counsel, was to protect those people who were anxious and willing to make research in regard to English music and deal with it. Sir Frederick seemed to think that if the plaintiff succeeded there would be some terrible calamity, and that no one would be able to examine non-copyright airs, especially if anyone had done them before. That was based wholly on a fallacy because the whole point and object of the Copyright Acts was to stimulate people to do independent work and to protect those who did it. The plaintiff's work was the method of treatment of the air and texture of the music. The whole fabric was founded on the air, but it was not only the air, it was the air in many cases adapted to quite a different purpose from that suggested in Gay. Gay suggested an adaptation of it in a particular manner, but Mr. Austin used it quite differently. That was his invention, and that was the thing which was protected, and which the defendants had infringed. Mr. Austin had said the character of the fabric was the thing that determined the character of the air. The defendants had made their musical work like the plaintiff's, and they did it for the purpose of making it as like as they could.

His Lordship gave judgment on Tuesday

JUDGEMENT

His Lordship said the action was for infringement of musical copyright and passing off. It was admitted in the defence that the plaintiff was the author and owner of the copyright in the music of the Kingsway "Polly." In that music Mr. Austin selected 50 airs out of the 71 airs made use of by John Gay. The original opera written by Gay was first published in 1729. It consisted of the text of the play written in ordinary prose form, with a certain number of lyrics, for which simple airs with an aid bass by a contemporary were printed in the appendix. No music was composed by Gay.

The work of Gay in which it appeared in the publication of 1729 was not technically performed on the stage, and until the opera was adapted by Mr. Austin and produced at the Kingsway the plaintiff's music of the opera "Polly" was practically unknown to the theatre-going public in this country. The opera produced at the Kingsway was, as regarded the book lyrics and music, a new and original work, and had achieved a great success; and in this country at the present time "Polly" meant to the theatre-going public that Kingsway production as performed with the plaintiff's music. The plaintiff alleged that the defendants had infringed his copyright in the music by making or authorising to be made, a manuscript or musical score and band parts, wherein a substantial part of the plaintiff's music was reproduced, and by making therefrom records, by means of which substantial parts of the music might be mechanically performed. The defendants had widely advertised their records for sale by means of a coloured poster with a drawing of a female figure representing Polly dressed in a costume that was a colourable imitation of the costume scene{???? [=seen] in the Kingsway production. At the date when the records were published, there was no orchestral music of "Polly" other than the plaintiff's music, and it was alleged that the defendants had passed off the records as and for authorised records containing selections from plaintiff's music.

The great success of the plaintiff's opera and the fact that it was the only successful version of "Polly" ever produced in this country, and that Gay's work in itself was wholly unsuited to the English stage were matters of importance in this action. The records that the defendant company desired to produce were wanted particularly for the portion of the public who had come to know the plaintiff's music. It was worthy of note that in the first edition of the plaintiff's vocal score a mistake was made in the description of one of Gay's airs that had been adapted by Mr. Austin. That air was known as "The Buff Coat," and in the plaintiff's first vocal score it was misprinted and appeared as "The Buss Coat." In the defendants' trade advertisement of their records the same mistake occurred.

After referring to the visit of Mr. Ketelbey to the British Museum to study Gay's work, his Lordship said that, with the exception of two omitted airs, Mr. Ketelbey chose on his visit 18 of the original airs which he had decided to publish at a time when it was thought that Mr. Austin's permission would be obtained, and three of the 18 were not copied the British Museum at all, but a reference made to Mr. Austin's score. The defendants said that when they could not get Mr. Austin's permission to make the first publication records they then decided to produce records of an independent work, to be made by themselves. The question naturally arose if they did desire to produce records of their own independent work, why did they employ Mr. Ketelbey, who had seen and heard the Kingsway production, and had carefully studied Mr. Austin's music, and who had orchestrated these twenty tunes that they desired to reproduce on the gramophone, to make a new score. The answer seemed to his Lordship to be perfectly obvious. After hearing the evidence in the case, and drawing the irresistible inferences that resulted, no stranger to the plaintiff's opera and music could possibly have supplied what the defendants desired, and what the public, with its taste whetted by Mr. Austin's music, would buy, and he was satisfied that the defendants desired to get as near to the plaintiff's work in the selected tunes as they hoped that they could safely go.

Reviewing the evidence, his Lordship said Mr. Austin was a careful, honest, and reliable witness, and he accepted his evidence in its entirety. The defendants' evidence was really directed to explaining that the various musical devices used by the plaintiff were in themselves devices commonly known in the art. Whereas the plaintiff's case, and the real one as his Lordship conceived it, was that the plaintiff had made and was the author of a new and original work, in which the combination and selection of Gay's airs with the many musical methods and devices that he had selected and worked

up into a new and original whole, became his property, which no one else, without his consent, could reproduce in the whole and in any substantial part.

His Lordship analysed and compared the scores of the plaintiff and the defendants, and gave instances in which he said Mr. Ketelbey had the misfortune to be more like Mr. Austin than Gay. There were between thirty-five and forty cases, at least, in which the defendants had borrowed from the plaintiff, and where they could not be explained, taken as a whole, as musical coincidences.

His Lordship dealt individually with the witnesses for the defence, and in regard to Sir Frederick Bridge, he said that he had written a letter to counsel for the defendants. Anything that this distinguished gentleman said or wrote was so interesting that, having regard to his evidence in Court, he allowed counsel (Sir Duncan Kerly) to read it as part of his argument. The letter was written after the writer had been in the witness-box, and there was a posthumous judgment, as it were, on the case. His Lordship said he agreed with the writer, subject to the qualification that if musicians doing original work in the direction spoken of by Sir Frederick were sufficiently protected by law, there was nothing to complain of in his statement.

Then came Sir Frederic Cowen, also a gentleman of high qualification. He was less hilarious than Sir Frederick Bridge, and he had not given any judgment after leaving the box (Laughter). In regard to Mr. Hamilton Harty, he expressed such extreme views that it was difficult to explain their effect on his lordship's mind, sitting, as he did, as a jury, ignorant of the mysteries of melody and harmonisation. The witness seemed to be in a sort of musical dreamland, where facts and realities and the like were considered so prosaic and commonplace as hardly to merit attention. His Lordship was sure, however, that the witness gave his evidence in perfect good faith.

Passing to the law on the subject of copyright, his Lordship said he had not doubt that there was copyright in the selection of common ordinary well-known musical materials. All the authorities which his Lordship cited and quoted applied to the present case, and in his opinion the defendants had taken a very substantial portion of the plaintiff's work. The primary object of the defendants was to make records which the public would accept as the best bits of the Kingsway "Polly," and their work was largely arrived at, in his opinion, by imitation and appropriation.

For these reasons he was of the opinion that the defendants had infringed plaintiff's copyright in his music by making or authorising to be made an orchestral score and band parts, wherein substantial parts of the plaintiff's music were reproduced, and by making therefrom and publishing gramophone records by means of which substantial parts of the plaintiff's music might be, and had been, mechanically performed. There must be judgment for the plaintiff for the relief claimed, an injunction and an inquiry as to damages and delivering up infringing records, and the defendants must pay the costs of the action, the costs of the inquiry being reserved.

On the application of Sir Duncan Kerly, his Lordship granted a stay of delivering up and of the inquiry on notice of appeal being given within twenty-one days.

In the same issue of *The Stage*: THE MUSIC BOX, by JAMES M. GLOVER.

... Now that the "Polly" case is over, one wonders at the object of the expensive litigation, because the advantage of one set of records getting a bulge on the other set is not very great. In mechanical music law, once the music is recorded a firm can start issuing their own records of the work, of course on payment of the usual royalty. There is naturally something in the idea of the "authorised and official" version of a West-End success and of the various specialist productions, but from my own experience the ordinary provincial gramophonist does not care who does the record so long as he has the goods delivered.

Comments by Tom McCanna

This case highlights the rivalry between the two major record companies of the time, Columbia and HMV. The witnesses were similarly polarised, Columbia artists v. HMV artists, Royal College people v. Trinity College, London v. Provinces, highbrow v. lowbrow.

I happened to meet Austin's grandson, Martin Lee-Browne, who provided his own account of the trial in the biography of his grandfather, *Nothing So Charming As Music*. He said that the day after the trial, Columbia sent a van round to HMV and left all their unsold copies of *Polly* on to the pavement outside.

The judgement has had implications to this day. For instance, the song *Bitter Sweet Symphony* credits the Rolling Stones' song *The Last Time* for a structural similarity, though melodically there is no apparent resemblance.

Here are my own tables of resemblances between the two versions. Click on the blue numbers to hear recordings. My list of songs does not include the *Buff Coat* mentioned in the trial, so my analysis might be incomplete.

Ketelbey Selection Side 1, [3249 A](#)

Time	Title	Gay's air	Austin vocal score	Austin recording	Comparison
0.01	Laugh, boys	69	p.85	04334	
0.28	I will have my humours	9	p.20	04334	uses Gay's repeats, but Austin's dialogue in 3rd strain; also oboe melody at start
1.11	Virtue's treasure	47	p.81		middle section replaced by original Ketelbey
2.05	Despair leads to battle	46	p.31		repeat follows Austin's pattern, also diminuend at end
2.32	The world is always jarring	34	p.56	02986	

Ketelbey Selection Side 2, [3249 B](#)

Time	Title	Gay's air	Austin vocal score	Austin recording	Comparison
0.01	Sleep o sleep	13	p.91		Ketelbey's counterpoint more complex
1.03	Though woman be a pretty craft	62	p.46	04332	Austin turns soprano duet into bass solo, with a pause; Ketelbey copies this
1.28	Honour calls me	43	p.63		little resemblance
1.50	As sits the sad turtle	57	p.110	02987	Ketelbey's bass line closer to original
2.35	A woman when battle presses	37	p.33	04331	Ketelbey copies Austin's mood

Ketelbey Selection Side 3, [3250 A](#)

Time	Title	Gay's air	Austin vocal score	Austin recording	Comparison
0.01	By bolder steps	52	p.59	02986	both follow Gay's bass line, Ketelbey more closely
0.43	The crow or daw	13	p.17	04331	Ketelbey follows Gay's trills
1.34	For all his pains	66	p.104		Ketelbey follows Gay's melody more closely, but at Austin's lower pitch
2.14	Wait until you spy	29	p.97	04333	Ketelbey follows and extends Austin's short double pedal

Ketelbey Selection Side 4, [3250 B](#)

Time	Title	Gay's air	Austin vocal score	Austin recording	Comparison
0.01	Brave boys prepare (from Handel's <i>Scipio</i>)	17	p.72		Ketelbey follows Gay's melody and phrasing; he had recorded this melody twice before
0.51	With sad emotion	22	p.118		
1.54	By women won	25	p.48	02987	Ketelbey's mood differs from Austin's
2.13	A pirate either must sink	10	p.42	04333	both follow Gay's use of octave passages; Ketelbey copies Austin's use of chorus for 2 chords, and in adding coda based on 2 nd half