

field" was not a necessary part of the description of the manufactured article there in question, and there was evidence that the defendants' works were set up at Glenfield for the purpose of passing off their goods as those of the plaintiff. But have the respondents used the word "Caledonia" in such a manner as to pass off their water as coming from the springs of the appellants? Or have they taken adequate care to distinguish their goods from those of the appellants? In considering this question their Lordships do not forget the answer given by the respondent Lyall in his evidence when he accepted the suggestion of the plaintiffs' counsel that his object in taking this water from these wells was to sell it as Caledonia Water. They do not, however, attach so much importance to this piece of evidence as the learned Chancellor. From the way in which the suggestion was made and accepted, they think that Lyall may not have meant more than that he desired to sell it as water from Caledonia in competition with the plaintiffs. The respondents are not proved to have ever themselves sold their water under the description of "Caledonia Water," or "Water from Caledonia Springs," but what is said is that the use by them of the word "Caledonia" in any form enables the water to be sold by the retailer as "Caledonia Water," and is therefore calculated to deceive the ultimate purchaser. Their Lordships agree with what has been frequently said in these cases, that even a description of goods which is literally true may be so framed as to mislead, and they bear in mind the cases of which *Johnston v. Orr-Ewing* (1882, 7 App. Cas. 219) is an example, where a trade name or mark which would not mislead the dealer has been held an infringement because it was calculated to mislead the retail purchaser. The respondents (other than J. Tune and Son) sell their goods under the description of "Natural Saline Water from the New" (or "from New Springs at Caledonia," and as "Beaver Brand," and they have a picture of a beaver on their labels as a trade-mark. It appears to their Lordships that the expressions "the new springs" or "new springs" at once distinguishes their water from the water coming from what the appellants call on one of their labels "the original springs," and no person reading the label could possibly believe he was buying water from the original springs. It is not like the case of manufactured goods where the trade name attaches to the make of a particular manufacturer, and the purchaser might then suppose he was buying a new make of the same manufacturer. In the present case the name is not personal but local, and attaches only to the particular springs. The learned Chancellor criticises the use of the word "springs" as descriptive of the source from which the respondents derive their water, but this seems hypercritical. The source is none the less a spring because it finds its way to the surface by an artificial cavity instead of a natural fissure in the soil. The learned Chancellor also criticises

the use of the words "at Caledonia." He says there is no place called Caledonia simply. It is true that "Caledonia Springs" would have been more accurate, but also, probably, in the view of the plaintiffs, more objectionable. But whether the words are to be taken as referring to the township or the particular place, their Lordships agree with Maclennan, J., that the words "at Caledonia" are not inaccurate, and it was pointed out that the expression is used in the sheet called "Life at the Springs," which is described as published every Saturday "at Caledonia." It is possible that the common use of the word "Caledonia" in any form may lead to some dishonesty on the part of the retail seller. But their Lordships think that in the peculiar circumstances of this case the respondents cannot be made responsible for such a consequence. The plaintiffs sold their water as "Caledonia Water" at a time when they had no competitors in the sale of natural mineral waters from the place called Caledonia Springs, but in giving it that name they ran the risk of other persons discovering other springs in the same locality, and being entitled to sell other water as water coming from springs in that locality. Their Lordships hold that the respondents are entitled to indicate the local source of the waters sold by them, and, so holding, they think that the burden cast upon the respondents of distinguishing their goods from those of the appellants has been discharged. "New Springs" seems at least as distinctive as Crystal Springs, which the respondents originally thought of, or "Beaver Spring," which was suggested by the counsel for the appellants. They will therefore humbly advise His Majesty that the appeal should be dismissed, and the appellants will pay the costs of it.

Judgment appealed against affirmed.

Counsel for the Plaintiffs and Appellants—Arnoldi, K.C. Agents—Gadsden & Treherne.

Counsel for the Defendants and Respondents—Scrutton, K.C.—R. C. Smith, K.C. Agents—Poole & Robinson.

## HOUSE OF LORDS.

Friday, November 13.

(Before the Lord Chancellor (Halsbury), Lords Shand, Davey, and Robertson.)

LAWRENCE, BULLEN, & COMPANY v. AFLALO.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Copyright—Author and Publisher—Articles Contributed to *Encyclopaedia*—Copyright Act 1842 (5 and 6 Vict. c. 45), sec. 18.

A contract concerning copyright under section 18 of the Copyright Act

1842 may be inferred from facts and circumstances, and does not require to be constituted by writing or express words.

Where a publisher produced an encyclopædia made up of articles which on his employment were contributed by various authors for the purpose of being used in the encyclopædia, and were paid for by him—

*Held* that it was to be inferred that the articles were contributed on the footing that on payment the copyright should become the property of the publisher.

Section 2 of the Copyright Act 1842 enacts that the word "book" shall be construed to mean and include "every volume, part or division of a volume, pamphlet," &c., "separately published."

Section 13 enacts that when the proprietor of any encyclopædia, review, magazine, periodical, work, or work published in a series of books, shall employ persons to compose the same or any parts of the same on the terms that the copyright shall belong to the proprietor and be paid for by him, the copyright of such work shall be the property of the proprietor, "who shall enjoy the same rights as if he were the actual author thereof."

In 1896 Mr Aflalo submitted to Lawrence & Bullen, Limited, a firm of London publishers, a scheme for the completion and publication of a work to be called "The Encyclopædia of Sport," to be issued in parts under the editorship of Mr Aflalo, and to consist of articles by various writers on sporting subjects.

By written agreement dated 10th July 1896 Lawrence & Bullen agreed to publish the work and bear the cost of publication, and to pay Mr Aflalo a fee of £500 for his work as editor, while Mr Aflalo agreed to contribute without further fee special articles amounting to 7000 words, and all unsigned articles that might be required. At the request of the publishers Mr Aflalo engaged Mr Cook (a well-known writer on sport under the pseudonym of "John Bickerdyke") to contribute an article of 5000 words on "Angling," and separate articles of 5000 words each on "Trout" and "Pike" at the rate of £2 per 1000 words. In neither of the agreements was there any express stipulation as to copyright.

In 1899 the encyclopædia was published as arranged, Lawrence & Bullen being the publishers, Mr Aflalo being the editor, and contributing a signed article on "Sea Fishing," and a number of unsigned articles, and Mr Cook contributing three articles on "Coarse Fish," "Trout," and "Pike," all signed with his pseudonym. Messrs Aflalo and Cook were paid the sums stipulated.

In 1900 Lawrence & Bullen published a book called "The Young Sportsman," containing reprints of the articles contributed to the Encyclopædia by Messrs Aflalo and Cook.

Thereupon Messrs Aflalo and Cook registered themselves as proprietors of the

copyright of their respective articles, and brought an action against Lawrence & Bullen for infringement of copyright.

JOYCE, J., granted an injunction, holding that the copyright of the articles belonged to the plaintiffs and not to the defendants. On appeal the Court of Appeal (ROMER and STIRLING, L.JJ., VAUGHAN WILLIAMS, L.J., *diss*) affirmed this decision.

The defendants appealed.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—If I had not come to the conclusion that the case is covered by authority I should have desired further time to consider the mode in which I should express the views which I entertain. I think it absolutely impossible, after the decision arrived at just about half a century ago upon this very point in *Sweet v. Benning*, 16 C.B. 459, confirmed as it is by a decision of the Court of Appeal in *Lamb v. Evans* [1893], 1 Ch. 218, to render it doubtful what the decision on this appeal ought to be. I do not deny that there may be—there probably is—a distinction between the inference that would be drawn from the fact that a person had employed another to create something for him if it was a mere material subject and the rule which would apply to literary composition. Although there is a distinction in that respect which ought to be insisted upon, on the other hand literary compositions are subjects of barter and sale. When a person is employed to create some literary composition, and that involves somebody else spending money for its publication and incurring the responsibilities and great risk that may attend the publication, it is impossible not to recognise the fact that some of the inferences at all events could have been drawn from those facts of employment and payment which would naturally attach to the payment for something for which another person was employed. It is not a question of law, it is a question of fact, to be derived from all the circumstances of the case, what is the nature of the contract entered into between the parties. I must say that I thought that we had arrived at some sort of concurrence by the learned counsel themselves in the course of the argument, that in the construction of the 18th section, at all events, there were two propositions that could not be disputed. The first was that the bargain between the parties involving this question of copyright need not be in writing. Secondly, that no express words were necessary in order to constitute the contract, such as it is, contemplated by the statute. I must say that I can entertain no doubt that this is one of those inferences which you are entitled to draw, but one for which you can lay down no abstract rule. That which may be implied in a contract must depend very much on what the contract is—the nature of the contract—and whether or not the written contract displaces every other term whatsoever; because in the infinite variety of dealings among mankind there are some things which no one would think of expressing in terms, although undoubtedly

they would form part of any contract made on such a subject. Now, as I have said, this case I think is concluded by authority, and therefore I do not want to reargue the matter; but I rather concur with what fell from Lord Davey, that if this question had not been raised and decided half a century ago it would have been open to consideration whether or not the 18th section did not imply some express contract, at all events, one way or the other; but where a state of law has been recognised now for half a century and confirmed by the Court of Appeal, it would be, I think, a startling novelty for your Lordships to treat that as *res integra* which we should determine for ourselves without reference to previous decisions. In one sense those decisions are open to review by your Lordships' House, but I should feel great difficulty in differing from a Court constituted of some of the greatest lawyers who had ever sat on the English Bench—Jervis, C.J., and Maule, Cresswell, and Crowder, J.J.—especially when that decision has been approved by the Court of Appeal—Lindley, Bowen, and Kay, L.J.J.—in *Lamb v. Evans*. I think, after the very careful review of those cases that have been brought before your Lordships by the learned counsel, who very ably and candidly argued this question on the part of the plaintiffs, it is unnecessary to go through the whole of these authorities beyond this. If one looks at that case in the Common Pleas, one sees it was decided upon a special case, and the learned judges were unanimous in their decision that you could infer a transfer of the copyright from the facts, and then when you look and see what the facts are to which they refer as being those from which a reasonable man would infer it, it is manifest that the question which is raised here about the possibility of competition formed no factor in the problem which the learned judges decided. It is said—"Here is a person who is for the purpose of profit selling to a person who is to adventure and risk his money in the concern, and unless you come to the conclusion as a matter of reasonable inference that the copyright in the thing so purchased was to belong to him, the result would be that he would get nothing for his money." That is a general observation which I think may very properly be made in the abstract. People do not spend money except upon the hypothesis that they get something for it, and unless you give to the bargain the effect which the language itself seems to import, that the person who is the projector, the publisher, and is called "the proprietor," is to stand in the shoes of the actual author, and if you are to treat it as it has been treated at the bar here, the truth is the projector, the publisher and so forth, would get nothing for his money, because the whole object of his publication might be defeated the very next day, either by the same person to whom he had paid the money or by any stranger who might obtain the result of it. It seems to me, therefore, that it would be a very unreasonable inference to draw from such a transaction as this, that the

person who paid the money was not to have the right which would, as a matter of business in the case of a publisher where he is buying literary compositions, naturally be the thing for which he pays. He is the publisher, not the author; he goes to the author and buys from him what the author composes. Under these circumstances it seems to me that it would be a most unreasonable inference for one to draw from the facts in proof in this case, if I were to suppose that the person who paid that money and incurred the risk was not to have the complete right such as the original author would have had if it were not published in this way, to publish it himself. Therefore I think the appeal ought to be allowed and the judgment ought to be reversed. As I have already intimated, another question has been raised (I mean the words "separately published") upon which I propose to give no opinion at all. I therefore propose to leave that question, because it is not necessary to decide it for the purposes of the present case.

LORD SHAND—As your Lordships have resolved that there shall be no decision given on the question which has been raised under section 2 of the statute as to the effect of the words "separately published," there used in regard to the publication of the different articles, with others in an encyclopædia or magazine, I shall say no more than that I am certainly not prepared from the arguments which we have heard to agree with Williams, L.J., in what he alone has said on that subject. With reference to the case otherwise, I entirely agree with what has fallen from the Lord Chancellor. The question really here to be decided is whether the copyrights have been transferred by the publication from the authors to the publisher. The case is one in which the publisher's right depends on its being shown that the articles were contributed "on the terms" that the copyright in them should belong to him. Upon that question I think that we have important facts to consider. In dealing with it, it has not been disputed that although the agreement is contained in writing it is not necessary that the terms as to copyright shall be expressly stated; and where, as here, there are not express terms, it is enough to create a transfer of the right if that right be implied from the nature and whole circumstances of the publication and the arrangement and transaction between the parties. As bearing upon that matter, I think in the first place a very important point is that the publisher conceives the creation of the magazine which he publishes as his undertaking for his profit; that it is for the purpose of his magazine that the articles are contributed. Again, the articles as so contributed for the purpose of being used in his magazine are given on his employment and on his payment undertaken and made. Regarding those circumstances together, it appears to me that the articles are contributed on the footing that on payment under such employment they

shall become his property. The statute declares that if transferred on terms having this effect they shall be the property of the proprietor or publisher, who shall enjoy the same rights as if he were the "actual author thereof." It appears to me that it would be inconsistent with the notion that they were to become his property as if he were the author and with all the full rights of the author, that there should be still left in the author after payment made to him a property which would enable him to use the same articles in other magazines. This would clearly follow if the appellants' contention were sound. It would give the publisher little if any benefit for the payment which he had made, and I think that circumstance so inconsistent with the result of the payment made in the circumstances as of itself sufficiently to show that the practical result of what happened between the parties, having regard also to the clause in the statute, is that the terms to be inferred are that the copyright should belong to the proprietor or publisher; and that is to my thinking, therefore, the inference to be drawn from the contract between the parties. On these grounds, and concurring with all that his Lordship has said upon the authority of the cases in the past, I am of the opinion that the decision of the Court of Appeal should be reversed.

LORD DAVEY—I am of the same opinion. If this matter could be regarded as *res integra* I think that there would be a great deal to be said for a construction of the 18th section such as that which was contended for by the learned counsel in the case of *Lamb v. Evans*, viz., that it was for the publisher or proprietor to prove an agreement that the composer or author was employed upon the terms that the copyright should belong to the publisher. But any such proposition as that would be inconsistent with the law as laid down in the cases of *Sweet v. Benning* and *Lamb v. Evans*. The law which I understand to be laid down in *Sweet v. Benning* is that it is not necessary, according to the true construction of the 18th section of the Copyright Act, that you should find an actual agreement that the copyright should belong to the proprietor; nor indeed is it even necessary to find special circumstances which lead to that conclusion. I say so because I find that in the case of *Sweet v. Benning*, the special case upon which the opinion of the Common Pleas was delivered, contained a statement that nothing was said between the parties affecting copyright. I can find no special circumstances stated in the special case, and the decision seems to me to have been founded only upon the nature of the employment, the nature of the publication and the relation of the parties. Joyce, J., tells us in his judgment—"I decide this case upon the short ground that I see no special circumstance either in the nature of the work or in the terms or in the nature of the employment from which I can infer, or must infer, that which is not expressed—namely, that the

copyright is to belong to the proprietor." That being so, he says in another passage that the consequence would not be different from what it would be in an ordinary case. I do not think that that decision was consistent with *Sweet v. Benning* or *Lamb v. Evans*. I think that what the Court has to do is to look at all the circumstances of the case and to say as a jury, What is the inference which you would draw? Or as Bowen, L.J., puts it in his judgment in *Lamb v. Evans*,—What is the way in which business men would look at the question? Of course what the inference should be is a matter of fact, and for my own guidance I adopt the rule laid down by Kay, L.J., in *Lamb v. Evans*, as correctly stating what I understand to be the law, and therefore I ask myself, What is the inference which I am to draw from these circumstances? The circumstances are that the publisher is minded for his own profit to publish an Encyclopædia of Sport; he is prepared to spend, and he does spend, a very large sum of money, amounting to some thousands of pounds, upon the enterprise in which he is engaged; he employs a gentleman to act as editor and also to write some of the articles at a given salary, and through the editor he employs another gentleman, Mr Cook, to write articles for a given remuneration. Those are all the material facts of the case; and I have to ask myself what is the inference that I draw from those facts. That, I repeat, is a matter of fact and not a matter of law. No doubt one may gain some assistance from the way in which a similar set of facts have been regarded in other cases; but, after all, where it is a question of fact each case must stand upon its own merits. If I were to express my opinion as a jurymen upon the facts which I have mentioned, I should say that it was one of the terms on which these gentlemen were employed to write articles for the Encyclopædia that the copyright should belong to the proprietor, and I say so for this reason. The Encyclopædia was to be his property, it was to be his book, he was to derive the benefit and profit to be derived from its publication; and therefore I should assume that in buying the articles written by these gentlemen the inference is that both parties intended that the proprietor should have the right that was necessary for him to protect the property which he had purchased, and adequately to protect the enterprise for the purpose of which these articles were intended to be used. In my judgment he could not adequately protect the articles which he had purchased, or his property in the book for the purpose of which the articles were written and purchased, without having the right to prevent an invasion—I hardly like to say of the copyright, but I must say of the copyright in those articles. Therefore the inference which I should draw would be the same as was drawn in the cases of *Sweet v. Benning* and *Lamb v. Evans*; and for my part I am perfectly prepared to adopt every word of the judgments of

Bowen and Kay, L.J.J., as well as the judgments in the earlier cases. If I might choose one passage which I think expresses my meaning in better terms than I could use myself, I ask leave to read this passage from the judgment of Kay, L.J. ([1893] 1 Ch. 233)—“What is the fair inference from the facts of the case? Surely the inference is that the man who is to go to the expense of printing and publishing this book will, as between him and the agents he may have employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw; and I think in this case it is sufficiently clear, in the absence of evidence to the contrary, that the terms of employment of those several agents involved this, that the copyright in the portions of this book which they composed should belong to the owner of the book.”

LORD ROBERTSON—In my opinion this case ought to have been decided on the authority of *Sweet v. Benning* and *Lamb v. Evans*, as furnishing a rule of inference applicable to the facts of the present case. I do not think that the conclusion which I support is accurately described as inferring one of three statutory requirements from the existence of two. Whether that inference be legitimate or not must depend on the nature and on the other conditions of the employment; and the cases to which I refer do nothing to take the question out of the region of fact. But it is obvious that the facts of employment and of payment stand in a different category from the terms on which employment and payment take place, those terms being necessarily an element or ingredient in the employment and not a separate or independent fact. Accordingly, the view of the two Lords Justices about the three conditions, all requiring by the structure of the section to be proved, really means than an express agreement about the copyright must be proved or the writer retains the copyright. Unable as I am to accept this view, which is opposed to the decision in *Sweet v. Benning*, and, indeed, was not supported by Mr Scrutton, I am free to consider what is *prima facie* the proper inference, and I prefer on its merits, and also from its authority, the inference of *Sweet v. Benning*. I desire to say that I do not proceed at all on the argument on the words “separately published,” which was raised at a later stage in the Court of Appeal, and was apparently adopted by Williams, L.J.

Judgment appealed against reversed.

Counsel for the Plaintiffs and Respondents—Hughes, K.C.—Scrutton K.C.—Parker. Agent—Field, Roscoe, & Company.

Counsel for the Defendants and Appellants—Haldane, K.C.—Younger, K.C.—Gilmour. Agents—Elkin & Henriques.

## PRIVY COUNCIL.

Wednesday, December 2.

(Before Lord Macnaghten, Lord Davey, Lord Lindley, Sir Arthur Wilson, and Sir John Bonser.)

NATAL LAND AND COLONISATION COMPANY, LIMITED v. PAULINE COLLIERY SYNDICATE, LIMITED.

(ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.)

*Contract—Construction of Contract—Rights of Company—Contract Made on behalf of Company before Incorporation.*

A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract.

Circumstances in which held that no such facts had been proved.

The Pauline Colliery Syndicate, Limited, raised in the Supreme Court of Natal an action against the Natal Land and Colonisation Company, Limited, concluding for specific performance of an agreement of lease and for execution of a proper deed of lease.

The Supreme Court of Natal decided in favour of the plaintiffs and decreed specific performance of the agreement.

The defendants appealed.

The facts are fully set forth in the judgment of the Court, which was delivered by

LORD DAVEY—The appellants are an incorporated joint stock company, having their head office in London. Prior to and in December 1897 a Mr Rycroft was their general manager in Natal under a power of attorney dated the 26th October 1888, by the terms of which he was empowered to sell and lease the company's lands in the colony and to make contracts for these purposes. On the 9th December 1897 Rycroft, on behalf of the appellants, made a contract with a Mrs de Carrey respecting the coal mining rights in 3000 odd acres of land belonging to the appellants, and known as the Coal Company's Lots. The terms of this agreement are contained in seven letters extending from the 30th November to the 9th December 1897 between Rycroft and Messrs Shepstone, Wylie, & Binns, then acting as solicitors for Mrs de Carrey. The material terms are as follows:—(1) Mrs de Carrey was to have an option, *i.e.*, a right of prospecting for coal for six months from the 20th December 1897, with power to extend the option for a further period of three months; (2) the option was not assignable; (3) that Mrs de Carrey should have a right during the continuance of the option to call for a lease of the coal