

Copyright and the Statute of Westminster

[Published in 24 Modern Law Review (1961) 355.]

In an article in Volume 23 of this Review,¹ Professor Hamish R. Gray submits that the controversy over the effect of section 4 of the Statute of Westminster, 1931, has been settled by a recent decision of the High Court of Australia. Section 4 provides that "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." The controversy turns on whether this provision merely lays down a rule of construction which, like any other rule of construction, can be displaced by words in a subsequent Act clearly indicating a contrary intention, or whether it goes further and has the effect of a permanent limitation on the sovereignty of the United Kingdom Parliament.² It is plain that this controversy, if it is not taken to be already settled by the well-known words of Viscount Sankey L.C. in British Coal Corporation v. The King,³ could only be settled by the decision of a case arising under an Act of the United Kingdom Parliament which clearly purported to alter the law of a self-governing dominion without embodying the declaration required by section 4. Professor Gray believes that Copyright Owners Reproduction Society, Ltd. v. E.M.I. (Australia) Pty., Ltd.,⁴ is such a case, but it is respectfully submitted that this view is mistaken.

The United Kingdom Act in question is the Copyright Act, 1956, and it is clear that, with one exception, its provisions operate initially as part of the law of the United Kingdom only. That this is so is shown by section 31, which gives power to extend any provisions of the Act by Order in Council so that they form part of the law of the Isle Kingdom might have lost its protection in Gibraltar because the 1911 Act no longer extended to the United Kingdom. For this reason there was included in the Seventh Schedule to the 1956 Act, which contained transitional provisions, the paragraph relied on by Professor Gray:

"41. In so far as the Act of 1911 or any Order in Council made thereunder forms part of the law of any country⁶ other than the United Kingdom, at a time after that Act has been wholly or partly repealed in the law of the United Kingdom, it shall, so long as it forms part of the law of that country, be construed and have effect as if that Act had not been so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."

The 1911 Act was repealed as part of the law of the United Kingdom on June 1, 1957,⁷ but the 1956 Act was not extended to Gibraltar until June 1, 1960.⁸ During the intervening three years the book first published in the United Kingdom continued to be protected in the law of Gibraltar because paragraph 41 provided that the 1911 Act was to be construed in Gibraltar as if it had not been repealed in the United Kingdom. In other words the Imperial copyright area remained intact as far as the law of Gibraltar was concerned.⁹ Thus paragraph 41 is seen as the corollary to section 31, its purpose being to bridge the gap between the replacement of the 1911 Act in the law of the United Kingdom and its replacement in the law of a colony or other dependent territory. Since the 1956 Act contains no machinery for the replacement of the 1911 Act in the law of a self-governing dominion, it follows that paragraph 41 is not intended to apply to such a dominion. This conclusion is reached without recourse to section 4 of the Statute of Westminster, but, if any doubt is thought to remain, the provisions of that section, even if taken at their lowest as laying down a mere rule of construction, are surely conclusive. Parliament must be taken always to have them in mind in enacting legislation, and an intention to override them could not be imputed unless expressed in terms admitting of no ambiguity. Such terms are not found in the 1956 Act and, as Menzies J. observed in the E.M.I. (Australia) case,¹⁰ "to treat it as altering the law in Australia would be to attribute an impossible

intention to the Imperial Parliament."

It was not suggested by any of the judges that because paragraph 41 refers to "any country other than the United Kingdom" and Australia is such a country the paragraph was therefore intended to apply to Australia. Apart from doing violence to the scheme of the Act, as explained above, such a suggestion would show a misunderstanding of the way statutes are drafted, which is within the context of existing law (including rules of construction) and constitutional conventions. Just as the draftsman writes "he" in the knowledge that this will not be taken to override the provisions of the Interpretation Act, 1889, which requires words of masculine gender to be construed as including the feminine and words in the singular as including the plural; just as he writes "any person" without fearing that this will be taken to include a Russian in Russia (or even an Australian in Australia), so he writes "any country" without wondering if someone will assume that Parliament is thereby intending to commit a grave breach of constitutional convention and to override what is at the very least a categorical rule of construction, a rule which existed even before the Statute of Westminster was passed. As Dixon C.J. remarked¹¹ of a suggestion that an Act passed in 1928 was intended to apply to Australia without the concurrence of that dominion: "Every presumption of construction was against such an intention." McTiernan J. also refers to this "rule of construction."¹²

Nevertheless Professor Gray commits himself to the statement¹³ that paragraph 41 "was clearly intended to apply to Australia, but, in the absence of the recital required by section 4 of the Statute of Westminster, it was a mere nullity." The E.M.I. (Australia) case is the sole authority given for this proposition but in none of the judgments, not even in the dissenting judgment of Menzies J., is there any suggestion that the British Parliament intended by paragraph 41 to alter the law of Australia in disregard of section 4 of the Statute of Westminster. In fact the judges paid little attention to the point. Dixon C.J., in what may with respect be described as something of an understatement, said in passing: "It may be remarked that perhaps in view of section 4 of the Statute of Westminster this provision [sc. paragraph 41] does not operate in point of law in Australia," while the view of Menzies J. has been mentioned above. The other two judges did not think it necessary to mention the point.¹⁴ Furthermore it is beyond question that none of the judges intended to pronounce upon the controversy over the meaning of section 4 of the Statute of Westminster. Far from discussing the two possible views and adopting one or other of them, the two judges who mentioned the matter treated the meaning of section 4 as not in dispute.

It is submitted that the case is simply an illustration of the fact that the wording of section 4, even treating it as a rule of construction only, is so strong that legislation of the United Kingdom Parliament which does not embody the declaration mentioned in section 4 could never be taken as intended to apply to a self-governing dominion unless no other construction were possible. If paragraph 41 had referred to "any country (including any self-governing dominion)..." or if Professor Gray had been right in his statement that the paragraph was "a mere nullity" if it did not apply to the self-governing dominions, then the matter would have been very different and the decision in the E.M.I. (Australia) case would have indeed been a constitutional landmark.

If the foregoing treatment is accepted as correct it follows that, except for the first, Professor Gray's five points¹⁵ are not, as he claims, established by the E.M.I. (Australia) case and must wait for verification until the unlikely event of legislation being passed by the United Kingdom Parliament which expressly alters the law of Australia or some other self-governing dominion without including the declaration required by section 4 of the Statute of Westminster.

Meanwhile a concluding word might be said about the copyright law of Australia. Although the 1956 Act did not alter this law, it clearly altered the effect of it. It did this by removing the United Kingdom and various dependent territories from the Imperial copyright area. If, as appears to be the case,¹⁶ no Australian law equivalent to paragraph 41 has been passed it would seem that works previously protected in Australia by reason of first publication in the United Kingdom, or in a dependent territory to which the 1956 Act has been extended, have lost that protection. The same also appears to be true of similar works previously protected in the Union of South Africa.

¹ "The Sovereignty of the Imperial Parliament," 23 M.L.R. 647.

² This differs slightly from Professor Gray's statement of the controversy (at p.647), which assumes that if s.4 is not a surrender of sovereignty it has no effect at all. This misunderstanding is the clue to much of what follows.

³ "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s.4 of the Statute. But that is theory and has no relation to realities." [1935] A.C. 500, 520.

⁴ (1958) 32 A.L.J.R. 306.

⁵ Copyright Act, 1911, s.1.

⁶ "Country" is defined by s.48 (1) of the Act to include "Any territory."

⁷ The Copyright Act, 1956 (Commencement) Order, 1957 (S.I. 1957, No.863).

⁸ The Copyright (Gibraltar) Order, 1960 (S.I. 1960, No. 847).

⁹ The diligent reader may ask: what about the protection given in another colony for a work first published in Gibraltar if the 1911 Act remained in force in the other colony after it has been repealed in Gibraltar? The answer is that para. 41 has been extended to meet this case: see the Copyright Act, 1956 (Transitional Extension) Order, 1959 (S.I. 1959, No. 103).

¹⁰ At p. 315.

¹¹ At p. 309.

¹² p. 310.

¹³ At p. 651 of his article.

¹⁴ The true effect of paragraph 41 does not seem to have been brought out in argument, and indeed it has been widely misunderstood. Menzies J. appears to treat it (at p. 315) as a saving which prevents the 1911 Act from being repealed in a country outside the United Kingdom. In this view he is joined by Professor Gray (at p. 650) and the editor of the latest edition of Copinger on Copyright (9th ed., p. 426). The latter work has some strange views on the effect of para. 41. On p. 371 it is stated that it applies to the self-governing dominions, while on p. 428 it is stated to operate in New Zealand, where the 1911 Act was never in force.

¹⁵ pp. 650-652.

¹⁶ I am writing from Ghana and relying on Copyright laws and Treaties of the World.