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Musical Copyrights—Infringement Through Failure of Memory to Detect Source of Melody—No Actual Damage—Minimum Recovery

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U. S. GOVERNMENT NOT REQUIRED TO REISSUE OR PAY LOST WAR SAVING STAMP CERTIFICATES UNLESS PREVIOUSLY REGISTERED.

Mandelbaum v. United States, 298 Fed. 295.

The appellant, owner of certain unregistered war saving stamps, brought this action for reissue and payment thereof, offering to give satisfactory indemnity. Court had no jurisdiction over order to reissue stamps.

Question of the right to general relief was brought to this court on appeal. The rights of the parties lay in the interpretation of the contract on the backs of the stamps which was as follows:

" * * * This certificate may be registered at any post office of the first, second, or third class, subject to such regulations as the Postmaster General may prescribe. Unless registered, the United States will not be liable if payment be made to a person not the owner.

"Upon payment thereof, this certificate must be surrendered and the receipt printed hereon must be signed by the owner in the presence of the official to whom surrender be made. * * * Upon furnishing evidence of the loss of a registered certificate, the owner shall be entitled to receive payment of the amount for which it shall have been registered."

The appellant contended that the provision was merely for added protection to the government in case they paid the holder of the certificate.

The Court decided according to the contention of appellee that the provision expressly stated that the certificate would be paid only on being presented and surrendered by the owner. This, the Court held, showed a clear intent that no lost, destroyed, or stolen certificate should be paid unless registered.

MUSICAL COPYRIGHTS—INFRINGEMENT THROUGH FAILURE OF MEMORY TO DETECT SOURCE OF MELODY—NO ACTUAL DAMAGES—MINIMUM RECOVERY.

Fischer, Inc., v. Dillingham, 298 Fed. 245.

The infringement claimed appeared in a number of a light opera. The part in question, a series of notes called an ostinato, appeared as an accompaniment in the song "Dardenella." After "Dardenella" had faded from popularity, the same series appeared in a light opera.

The Court decided that the series was an original, as there was no proof of an ostinato appearing in any of the old masters.

The law is well settled that plagiarism of any part of a musical copyright, either in melody or accompaniment is proper subject for a suit. It is also clear that two people independently arriving at the same original, both may acquire a copyright. An original work may also be copyrighted although an identical text has appeared before.

In such cases as stated it must be evident that the text is an original. In the case in question the defendant was acquainted with the song "Dardanella," and it was probable that he had kept the notes in his mind.

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The Court decided that there was an infringement. The fact that one's memory has failed is no defence. Therefore there was an absolute right in the plaintiff to recover, although there was no evidence of bad faith on the part of the defendant.

Since there was no evidence of damages having been sustained on account of the infringement, the Court allowed the plaintiff minimum damages.

INTERNAL REVENUE—ADVANTAGEOUS PAYMENT OF A DEBT IN GERMAN MARKS AT A PREVIOUSLY LOWER RATE OF EXCHANGE, DOES NOT CONSTITUTE TAXABLE INCOME.

Kerbaugh-Empire Co. v. Bowers, 300 Fed. 938.

This action is brought by the plaintiff to recover an amount paid under protest as first and second quarterly installments of a corporation income tax for the year 1921. The defendant at all times material, was collector of internal revenue, second district, New York.

The plaintiff borrowed money for certain construction work, from a German bank, in marks, at the then prevailing rate of exchange, in 1913. A settlement of both principal and interest was reached and payment to the Alien Property Custodian made in 1921. The result of the transaction was that, by reason of the fall in the value of the mark the difference between the principal amount borrowed and the amount paid in settlement was $684,456.18. The income tax paid on this amount is now sought to be recovered.

Held that this difference is not taxable as income under Constitutional Amendment 16, nor Revenue Act of November 23, 1921, since it was not derived from employment of capital, labor or both, or from sale or conversion of capital assets resulting in profit.

SALES—FLUCTUATION IN PRICE OF GOODS HELD NOT TO RENDER PERFORMANCE OF CONTRACT "COMMERCIALLY IMPRACTICABLE" — DUTY TO MINIMIZE DAMAGES — BREACH OF CONTRACT.

Edgar & Son v. Grocers' Wholesale Co., 298 Fed. 878.

Held, that under a contract for sale of sugar to a wholesale grocery company, made at a time when the price was abnormally high and subject to wide fluctuations, a provision that the contract was "subject to strikes, fires, transportation and business conditions, and other extraordinary causes which render performance commercially impracticable" did not justify the buyer in refusing to accept shipment because of a drop in the market price of three cents a pound, where it continued to buy sugar from others and sell in the ordinary course of its business. On absolute repudiation of a contract by the buyer before performance, it is the duty of the seller to minimize his damages from the breach, and where the sale is of a commodity, such as sugar, which is as readily obtainable at shipping point as at the destination, he is not justified in making shipment and incurring large expense of transportation and storage, and is not entitled to recover such unnecessary expense as part of his damages.

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