

BETWEEN:

UNDERWRITERS' SURVEY BUREAU }
LIMITED ET AL. } PLAINTIFFS;

AND

MASSIE & RENWICK LIMITED.....DEFENDANT.

1937
June 7-11;
14-18; 21-25.
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1938
Feb 25.
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Copyright—Action for infringement of copyright and conversion of infringing copies—Infringement by authorization—Copyright in fire insurance plans and rating schedules—Ownership of copyright—Property in copyright passes to executor by general bequest of all my “property real and personal of every nature and kind whatsoever in the Dominion of Canada” in will of owner of the copyright though not specifically mentioned in the will—Copyright Act, R.S.C., 1927, c. 32, s. 2, ss. (c) and (n); secs. 3 and 17; s. 20, ss. 3; secs. 21 and 24; s. 42, ss. 5—Combines Investigation Act, R.S.C., 1927, c. 26—Criminal Code, R.S.C., 1927, c. 36, s. 498—Period of limitation established by Copyright Act not a bar to relief where infringement is accomplished by fraudulent acts of defendant.

The action is one for infringement of copyright, and conversion of infringing copies, in fire insurance plans and rating schedules. The Underwriters' Survey Bureau Limited, a Canadian corporation, was incorporated in 1917. Its business is that of making fire insurance plans for the Canadian Fire Underwriters' Association, an unincorporated body in existence since 1883, of which all the other plaintiffs are members. The latter are incorporated bodies licensed to carry on in Canada the business of fire insurance. All assets and property, including copyright, vested in the name of the Canadian Fire Underwriters' Association, or in its custody, belong to the Members of the Association who support and maintain it, and whose affairs are administered by officers elected annually by the Members. The capital stock of the Bureau is held in trust for the Association and its

1938

UNDER-
WRITERS'
BUREAU
ET AL.

v.
MASSIE
& RENWICK
LTD.

Maclean J.

Members. Prior to the incorporation of the Bureau there was an organization known as the Plan Department of the Association. After incorporation of the Bureau it became the Plan Department of the Association, and as such it is referred to at the present time. The rating schedules were prepared by the Rating Department of the Association in collaboration with the Plan Department, now the Bureau.

These plans and rating schedules were not sold or offered for sale to fire insurance companies who were not Members of the Association, and when copies of the same were put in the possession of agents or representatives of Members, they were loaned only, and on condition that the same would be returned to the Association when the agent ceased to represent a Member. None of these plans and rating schedules was ever published within the meaning of s. 3, ss. 2, of the Copyright Act, R.S.C., 1927, c. 32, by or under authority of the Canadian Fire Underwriters' Association.

In 1880, one, C. E. Goad, began the production in Canada of fire insurance plans, copyright in which was registered as required by the Copyright Act then in force, and continued to produce such plans to the time of his death in 1910. These plans were sold by him to fire insurance companies or their agents, whether Members of the Canadian Fire Underwriters' Association or not. C. E. Goad, by his will, devised and bequeathed all his "property real and personal of every nature and kind whatsoever in the Dominion of Canada" to the Toronto General Trusts Corporation in trust as his executor with power "to sell and convert into money."

In 1911 the business of C. E. Goad including the copyright in the plans, was sold by the executor to the three sons of C. E. Goad who continued the business as partners under the name of C. E. Goad Company. They produced some new plans and revisions and reprints of plans made by C. E. Goad, copyright therein usually being registered. For some time prior to 1911, the Plan Department of the Canadian Fire Underwriters' Association had been making, revising and issuing plans for the use of its Members, and in 1911 it entered into an agreement with the C. E. Goad Company whereby the latter undertook to make and revise plans for the Association exclusively. The agreement terminated on January 1, 1917, and was not extended. The Plan Department of the Association resumed the making and revising of its own plans, and after January, 1918, this work was done by the Bureau on behalf of the Members of the Association. In October, 1917, or early in 1918, the Bureau acquired from the C. E. Goad Company the right to revise and reprint the Goad plans, for the use of Members only, and in March, 1931, purchased all the assets of the C. E. Goad Company, including the copyright in any plans produced or owned by them, the same being assigned to the Bureau.

Plaintiffs alleged that defendant, not a Member of the Canadian Fire Underwriters' Association, authorized others to make copies or reproductions of the plans and rating schedules and converted such to its own use.

Defendant denied plaintiffs' title to copyright in the plans produced by C. E. Goad, and claimed by plaintiffs to have been acquired by assignment from the C. E. Goad Company in 1931. Defendant further pleaded that the acts of the plaintiffs in withholding from the defendant and others, copies of the works in question, constitute a combine

and conspiracy within the meaning of the Combines Investigation Act, R.S.C., 1927, c. 36, and the Criminal Code, R.S.C., 1927, c. 36, s. 498; that the plaintiffs acquiesced in the alleged infringement and conversion and are guilty of laches; that the period of limitation applicable to such actions is a bar to relief.

Held: That plaintiffs' plans and rating schedules are entitled to copyright protection and that copyright has been infringed and infringing copies have been converted by defendant.

- 2 That copyright being an incorporeal property, not dependent upon property in the paper or manuscript, the copyright in C. E. Goad's productions passed to the executor of his will, although the will made no specific mention of "copyrights."
3. That the effect of s. 42, ss 5, of the Copyright Act, R.S.C., 1927, c. 32, is to prolong the term of any copyright which the plaintiffs may have had in any plans, prior to the coming into force of the Copyright Act.
4. That the works in question never having been produced for sale, or for profit, or for issue to the public, or to compete in any way with others who might do the same thing, it cannot be said that the plaintiffs "combined," or "conspired," within the meaning of those words, as used in the Combines Investigation Act, R.S.C., 1927, c. 26, and in the Criminal Code, R.S.C., 1927, c. 36, s. 498, to effect a restraint upon trade, or a restraint upon competition in trade.
5. That the plaintiffs have a right to copyright in the works they have produced and may publish or refrain from publishing the same, as they see fit.
6. That the evidence does not establish acquiescence by the plaintiffs in the infringement of their works, or in the conversion of the infringing copies.
- 7 That the defendant having fraudulently, and by fraudulent concealment, infringed and converted the works in question, the period of limitation established by the Copyright Act is not a bar to the relief claimed by plaintiffs.

ACTION by plaintiffs alleging infringement of copyright and conversion of infringing copies by defendant in fire insurance plans and rating schedules, copyright in which plaintiffs claim to own.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa and Toronto.

J. A. Mann, K.C., W. D. Herridge, K.C., and H. G. Lafleur for plaintiffs.

O. M. Biggar, K.C., H. Cassels, K.C., and Christopher Robinson for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

1938

UNDER-
WRITERS'
BUREAU
ET AL.

v.

MASSIE
& RENWICK
LTD.

Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

THE PRESIDENT, now (February 25, 1938) delivered the following judgment:

This action is directed against infringement of copyright and conversion of infringing copies, in what is known as fire insurance plans, and in various related compilations of fire insurance rating schedules, the copyright in all of which the plaintiffs claim to own. The action involves not merely one alleged act of infringement of copyright, or the conversion of a single infringing copy, but actually many hundreds. The case is rather unusual, and many disputed questions of fact and law are involved. I understand that proceedings have been taken already against others, similarly situated as the defendant here, or such proceedings are imminent. Such an amount of oral and documentary evidence was presented at the trial that it will hardly be possible to examine the same, as directed to any particular point, in any great detail. In the very able and exhaustive arguments of counsel an unusual number of points were debated, but I hope I shall not overlook any that are vital to a disposition of the case.

The Underwriters' Survey Bureau Limited, the first named plaintiff, hereafter referred to as the "Bureau," is a Canadian corporation, incorporated in 1917. Its business is the making of fire insurance plans, which I shall presently describe, for the Canadian Fire Underwriters' Association. The other plaintiffs, hereafter referred to as "Members," are all corporate bodies, resident within Canada and there licensed to carry on the business of fire insurance, and all are members of the Canadian Fire Underwriters' Association, hereafter to be referred to as the "Association." The Association is an unincorporated body, existing since the year 1883, and all assets and property, including copyright, vested in the name of the Association, or in its custody, belong to the Members of the Association who support and maintain it; the affairs of the Association are administered by officers elected annually by the Members.

The defendant carries on the business of fire insurance in Canada, its principal places of business being Toronto and Montreal. It might be desirable to add just here, what is stated in the defendant's statement of defence, that since the formation of the Association there have been in

Canada two classes of fire insurance underwriters, known respectively as "Board" and "non-Board" companies, the former consisting of Members of the Association, who, though under different managements, agree to quote identical insurance rates, while the latter act individually, or in small groups, and determine independently the rates of insurance to be charged for different risks. It is into the latter class that the defendant falls, and accordingly it is not a Member of the Association.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD
 Maclean J.

With these introductory remarks it might be desirable to explain at once the nature of the works in which copyright is claimed by the plaintiffs. The plans consist of drawings, to scale, representing the boundaries of the individual plots into which the total area of a city, town or village, generally urban areas, is divided. By appropriate signs, symbols and references, information required by fire underwriters regarding any building located on any plot, at the date of the preparation of a plan, is made available. There is printed on each plan, or on the first sheet of a plan, what is called the "key of symbols," which explains the significance of the various signs or symbols impressed on the various plots of land shown on the plan. In general outline the plan would show the boundaries of the city or town, the subdivisions of the area, streets, buildings and the use to which they are devoted, water courses if any, railway tracks, etc. The symbols, which may be colours impressed on the different plots, would indicate such particulars as street widths, the character of the outside and inside construction of buildings, passages or driveways, probable fire cut-offs, fire walls, openings in walls, piled lumber, water mains, the character of the municipal fire protection service, fire hydrants, fire alarm boxes, and many other particulars. The work incident to the production of such plans involves such steps as field surveying, chaining, plotting from chain notes, drawings from the surveyor's sheets, lithographing, colouring, stenciling, printing, mounting and binding. It will be obvious how important and necessary these plans would be in the conduct of fire insurance underwriting. It will be obvious also that the production and revision of these plans would involve a considerable expenditure of money and it is claimed that nearly one and a half million dollars have been expended by the

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

Association and the Bureau, in acquiring, producing and revising plans, from March, 1917, to the end of 1934, and, I think, it was stated that altogether about ten million dollars had been expended in the production of plans and rating schedules, the latter of which I am about to explain.

The other works, rating schedules, in which copyright is claimed by the plaintiffs, are set forth in Schedule No. 2 attached to the statement of claim, and consist of printed rating schedules for specific classes of risks, such as manufacturing plants, mercantile risks, and residential institutions; rate cards for certain areas specifically rated, under what is called the "Rate Card System"; rate books for other areas specifically rated in the Provinces of Quebec and Ontario under what is called the "Rate Book and Slip System"; and underwriting rules, etc. These rating schedules were produced, and from time to time revised, by what is called the Rating Department of the Association, in collaboration with the Bureau, for the use of Members. The rating schedules are primarily founded on the information supplied by the plans, and on the experience of Members of the Association as underwriters, and are companion works to the plans. The rating schedules always bear the name of the Association and, I think, in some instances, specific words indicating the same to be the property of the Association.

Prior to the incorporation of the Bureau, the capital stock of which is held in trust for the Association and its Members, there was what was known as the Plan Department of the Association, and the Bureau, after its incorporation in 1917, became the Plan Department of the Association, and as such it is sometimes referred to to-day. The operations of the Plan Department of the Association, and of the Bureau after 1917, related to the preparation, revision and issuing of plans of cities, towns, villages, and districts, which were found convenient or necessary by Members in the business of fire insurance underwriting. As already stated the rating schedules, applicable to different classes of fire risks, were prepared by what is known as the Rating Department of the Association in collaboration with the Plan Department, now the Bureau. The plans and rating schedules were not sold or offered for sale to fire insurance companies who were not members

of the Association, it being intended that the only persons or concerns entitled to receive such plans and rating schedules were the Members of the Association and, in some cases, affiliated associations. In cases where copies of the same were put in the possession of agents or representatives of Members, they were loaned only, and on the condition that the same would be returned to the Association when the agent ceased to represent one of the Members. It is claimed, correctly I think, that none of the works in question was ever published, within the meaning of s. 3, ss. 2, of the Copyright Act, by or under the authority of the Association.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

At this stage it might be well to explain, as clearly as I can, the origin of the plaintiffs' claim to copyright in the plans in question, as distinguished from the rating schedules, because all the plans in question are not original works produced by the Bureau, or the Plan Department of the Association. As far back as 1880, and up to the time of his death in 1910, one Charles Edward Goad began to produce in Canada what came to be known as Goad's Plans, that is, fire insurance plans of the nature I have described, and copyright in these plans was registered at Ottawa, as required, in the case of published works, by the Copyright Act in force in that period. I think it is correct to say that Charles Edward Goad sold copies of such plans as he produced to fire insurance companies, or their agents, without any discrimination as between Members of the Association, and non-Board fire insurance companies. Charles Edward Goad by his last will and testament vested his plan business in the Toronto General Trusts Corporation, his executor, to be sold for the benefit of his estate, and in 1911 that business was sold, including, it is claimed, the copyright in the plans, by the Toronto General Trusts Corporation to three sons of the deceased Goad, and they continued the plan business of their father, as partners, under the firm name of C. E. Goad Company; they produced some new plans, and revisions and reprints of plans made by their father, and copyright therein was usually registered. For some time prior to 1911, the Plan Department of the Association had been making, revising and issuing plans for the use of its Members. In 1911 the C. E. Goad Company proposed that the Association aban-

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

don the making and revising of its own plans, and that they, the C. E. Goad Company, should make and revise such plans for the Association exclusively. The members of that partnership, the three sons of Goad, the deceased, were, it is said, then the owners of the copyright, either as authors or by assignment, in all, or practically all, the so-called Goad plans that had been produced up to that time. This proposal was accepted by the Association and accordingly an agreement was entered into embodying the proposal, for a term of six years. This agreement terminated on January 1, 1917, and was not extended. Upon the termination of this agreement the Plan Department of the Association resumed the making and revising of its own plans, and after January, 1918, this work was done by the Bureau on behalf of the Members of the Association. In October, 1917, or early in 1918, the Bureau acquired from the C. E. Goad Company the right to revise and reprint the Goad plans, for the use of Members only, in consideration of certain royalties to be paid to the C. E. Goad Company. About this time the C. E. Goad Company had concluded to cease producing any further plans, and to dispose of their stock of original plans, or copies of plans, and by the end of 1930 or early in 1931, this stock was about exhausted. In March, 1931, the Bureau purchased all the assets of the C. E. Goad Company, including their copyright in any plans produced or owned by them, and the same was duly assigned to the Bureau.

The plaintiffs claim to have copyright (1) in the plans which they themselves produced from original surveys and all revisions and reprints of the same (2), in the revisions and reprints of Goad plans made for the plaintiffs under contract of service by the C. E. Goad Company (3), in the revisions and reprints of Goad plans which the plaintiffs themselves produced under licence from the C. E. Goad Company; and finally (4), in the plans which they acquired by assignment in 1931 from the C. E. Goad Company. A complete list of the plans in which the plaintiffs claim copyright is to be found in Schedule No. 1 attached to the statement of claim. It is not to be inferred that the plaintiffs acquired title to copies of plans produced and issued to the public, by the Goads. Any copies of plans which were purchased from the Goads, became the prop-

erty of the purchaser and he was free to do with them what he wished, but that would not give him, or any one else, the right to make copies of the same, that is, if copyright, which means the sole right to make copies, were in the Goads. Claims to copyright in certain of the Goad plans, and mentioned in the schedules to the plaintiffs' statement of claim, were abandoned during the trial, the reasons for which I need not explain; a list of such abandoned claims, is, I think, to be found in an exhibit in the case.

In Schedule A to the statement of claim will be found a list of the plans made either by the Bureau, or the Plan Department of the Association, from original surveys, showing the dates when the plans were made, and the dates of revisions and reprints made by the Bureau. In Schedule B, will be found a list of Goad plans completely revised and reprinted by the plaintiffs, showing the dates of the original Goad plans, the date of any revision made by the Goads, the date of any revision and reprint made by the plaintiffs, and the particulars of any registration of copyright therein. In Schedule C, appears a list of the Goad plans revised and partially reprinted by the plaintiffs. This Schedule shows the dates of the Goad plans, the dates of any Goad revisions, the dates of the plaintiffs' revisions, and the particulars of any registration of copyright therein. In Schedule D, appears a list of the Goad plans, acquired by the plaintiffs by assignment from the C. E. Goad Company, showing the dates of the original plans, the dates of any Goad revision and the particulars of any registration of copyright therein; these plans were neither revised nor reprinted by the plaintiffs. I should not fail to compliment the solicitor of the plaintiffs upon the great care and industry shown in the preparation of the various schedules attached to the statement of claim, and which have been of such great assistance in appreciating the many complicated facts of the case. I should add here perhaps another word. It will readily occur to one, when once it is mentioned, that revisions and reprints of plans, or sheets of plans, would become necessary with the passing of the years, and particularly in the case of the plans of growing cities and towns. And this, I assume, would be true also of the rating schedules. The practical life of a plan is

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.

 Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 ———
 Maclean J.
 ———

reckoned to be about twenty years, though it might well be less in some cases. In the interval between the printing of a plan made from original surveys, and any revision and reprint of the same, resort is made to what is called "stickers," that is, miniature drawings, symbols, etc., adhesively applied to the original plan, which would convey to underwriting Members the necessary information regarding any changes affecting fire risks under consideration, occurring since the production of the original plan. In the course of time the original plan, or some of the sheets of a plan, would thus become overladen with this superimposed material, and a substantial or complete revision and reprint of the plan would thus become necessary, and in which copyright would subsist.

We may now consider whether copyright protection is given to works of the nature in question here, the plans and rating schedules. Sec. 2 (c) of the Copyright Act, defines "book" to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published," and s. 2 (n) defines "literary work" to include "maps, charts, plans, tables and compilations". The term "book" has been held, in English cases, to include such material as the prices of stocks compiled by a stock exchange, racing information, a catalogue when not a mere list of articles, a telegraph code, a stud book, a map of the island of St. Domingo, a book of lithographic sketches on monumental designs, a post office directory, the design of a Christmas card, compilations and selections from former works and partly original compositions, and improvements in existing works. Halsbury's Laws of England (1), in discussing subject-matter in copyright, states:

It may only consist in the improvement of an existing work as in bringing up to date a directory, or a road book, or in bringing out a new edition of an existing work, provided that work is so enlarged and improved as to constitute in reality a new work. The new edition if it fulfills that condition, becomes a separate subject of copyright.

It would seem hardly open to debate that the plans with which we are here concerned, are entitled to copyright protection. The rating schedules, such as I have explained, fall within the terms "compilations" and "books," and are also, in my opinion, works entitled to copyright pro-

tection. The word "book" as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his production. There is no distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or *en bloc*.

Upon a consideration of the evidence and the law, I am of the opinion that the plaintiffs have established their title to copyright in the plans, and in the revisions and reprints of plans, mentioned in their statement of claim, and more specifically enumerated and described in the schedules thereto, subject to any variations properly resulting from the evidence adduced at the trial, but which need not now be mentioned, and subject to a consideration of other grounds of attack against the plaintiffs' claim to copyright, and which are yet to be discussed. Mr. Mann, I might say, abandoned any claim to copyright in any of the Goad plans, registered prior to January 1, 1896, that is to say, copyright, which by the lapse of twenty-eight years, had expired on January 1, 1924, the date when the present Copyright Act came into force. I entertain no doubt as to the plaintiffs' title to the copyright claimed in the rating schedules in question. However, an attack was directed against the title of the plaintiffs to copyright in certain of the plans in question, and this must be referred to. This attack is directed against the plaintiffs' title to copyright in the plans produced by Goad the elder, and, as already stated, claimed to have been acquired by the plaintiffs by assignment from the Goad brothers in 1931.

The late Charles Edward Goad by his will devised and bequeathed all his "property real and personal of every nature and kind whatsoever in the Dominion of Canada" to the Toronto General Trusts Corporation in trust as his executor with power "to sell and convert into money" such of the said property as may not at the time of his death "consist of money or be in the nature of investments of a sound character." No specific mention of "copyrights" as part of the testator's personal property so devised in trust, is made in the will. In this respect the Goad will is different from the will of Charles Dickens,

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

to which I shall presently refer, and the question arises whether Goad's copyrights passed to the executor as part of the "property real and personal of every nature and kind whatsoever" expressly devised in trust to the executor. In *Jefferys v. Boosey* (1), Erle J. said:

The nature of the right of an author in his work is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying, after publication in print, which is the limited meaning of copyright.

Erle J.'s opinion as to the nature of copyright, and that of Lord Brougham in the same case, has been accepted by the courts as correct and authoritative. Lord Watson, in *Caird v. Sime* (2) approves Lord Brougham's opinion. In *Mansell v. Valley Printing Co.* (3), after referring to Lord Watson's judgment in *Caird v. Sime*, Cozens-Hardy M.R. said:

The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property in the paper or manuscript. It is an incorporeal property.

In the same case Farwell L.J., at p. 744, said:

Every invasion of a right of property gives a cause of action for damages to the owner against the invader, whether the invasion be intentional or not, and whether it is innocent or malicious. This applies to all rights of property, real and personal, corporeal or incorporeal . . .

In the *Dickens* case (4), it appears that after certain bequests, the testator, Charles Dickens, devised all his real and personal estate to Georgina Hogarth and John Foster "upon trust at their . . . discretion to proceed to an immediate sale or conversion into money of said real and personal estate (including my copyrights)" for the benefit of the residuary legatees. A comparison of these terms in the Dickens will with the terms of the Goad will above cited reveals a close similarity of language between the two wills, with the exception that Goad did not use the word "copyrights" as designating a part of his residuary estate, as Dickens did. But, on this point, it is important to refer to what Maugham J. said in the *Dickens* case at p. 188:

If the will had not mentioned copyrights at all they would have passed under the gift of residue.

(1) (1855) 24 L.J. Exch. 81 at 85

(2) (1888) 12 A.C. 326 at 344.

(3) (1908) 77 L.J. Ch.D. 742 at 744

(4) (1935) 51 T.L.R. 181.

I therefore see no reason for questioning the validity of the title of the Goad brothers in any copyright which their father had in any plans, at the time of his death.

Another point in the controversy here might be referred to at this stage, because it has a bearing upon the question of the plaintiffs' title to copyright in some of the plans in question. The plaintiffs, it is contended, had at common law, copyright, or a proprietary right or interest, in their unpublished plans, that is, plans, "copies" of which were not "issued" to the "public," prior to the coming into force of the Copyright Act of 1921, and with this I agree. Unpublished works, prior to January 1, 1924, were protected under the common law and not by virtue of any Copyright Act. The nature of this common law protection was fully discussed in the *Dickens* case, already referred to. The Copyright Act of 1921, however, abolished common law copyright and confers statutory copyright upon all works as from the date when the same are made.

Subsection 5 of s. 42 of the Copyright Act provides that copyright shall not subsist in any work made before the first day of January, one thousand nine hundred and twenty-four, otherwise than under, and in accordance with, the provisions of this section.

But if any person, before the date just mentioned, had copyright at common law in unpublished works, that is, the right of withholding publication or restraining others from publishing, then s. 42 grants that person a substituted right, which is set out in the First Schedule to the Act. The particular interest, as I understand it, that the plaintiffs have in respect of this point, is that s. 42 has the effect of prolonging the term during which copyright shall subsist in what was common law copyright, and that may be of importance to the plaintiffs. Under the earlier Copyright Acts the term for which copyright subsisted was twenty-eight years, whereas under the Copyright Act of 1921, the term is for the life of the author, and fifty years after his death. The substituted right in any work made prior to 1924, is specified in the second column of the First Schedule, and the existing right in the first column of that Schedule. The practical effect of sec. 42 of the Copyright Act is, therefore, to prolong the term of any copyright which the plaintiffs may have had in any plans. It is not now necessary for me to designate what particular plans are affected by this point.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL
 v
 MASSIE
 & RENWICK
 LTD.

 Maclean J.

I come now to consider another ground of defence to this action, one that has already been the subject of considerable debate. It is the contention of the defendant that the plaintiffs have unlawfully combined and conspired to withhold from the defendant and others, copies of the works in question here, and that the bringing of this action was the culminating act, in a series of acts, to make completely effective their unlawful object; that the realization of this object would be injurious to the defendant and other non-Board fire insurance companies, and detrimental to the public interest by limiting competition in the business of fire insurance; and that such acts constitute a combine, and a conspiracy, within the meaning of the Combines Investigation Act, hereafter called the Combines Act, and s. 498 of the Criminal Code. Before the trial of this action this ground of defence came before me, pursuant to Rule 150, as a question of law to be determined in advance of the trial, and I decided that the same was not, in point of law, a defence to the plaintiffs' action: *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.* (1). As a result of that decision the paragraphs of the statement of defence relative to that defence were ordered, later, to be struck out. Upon appeal taken to the Supreme Court of Canada, that Court directed (2) that the paragraphs of the defence so struck out be restored, but without deciding the point of law stated for decision. At the trial, Mr. Herridge objected very strenuously to the reception of any evidence directed to the defence of "combine" and "conspiracy," on the ground that the Supreme Court of Canada, not having passed upon the law point, was without jurisdiction to direct the restoration of the said paragraphs of the defence, the striking of them out being merely an interlocutory order following my decision on the point of law; and he argued that such paragraphs of the defence still stood deleted, and that therefore no evidence was admissible respecting such point of defence. However, I allowed evidence to be given in respect of this defence, subject to the objection of Mr. Herridge, and treated the relevant paragraphs of the defence as having been restored.

(1) (1937) Ex C.R. 15

(2) (1937) S.C.R. 265.

While my own view in respect of this defence remains unchanged, yet, in deference to Mr. Biggar, who with his usual ability argued so strongly in support of it, I feel I should more fully discuss the point than I did when the same was earlier argued before me as a preliminary point of law. Mr. Biggar referred to a line of cases which in effect decide that a person cannot enforce a right directly resulting from the crime of that person. Typical of such cases is *Cleaver v. Mutual Reserve Assurance Co.* (1). One Maybrick insured his life in favour of his wife, Florence Maybrick, who was later convicted of having murdered her husband, though she was not hanged. The executors of Maybrick, trustees of the wife, brought an action upon the insurance policy, and the insurance company defended the action on the ground that if the executors obtained the money they would hold it in trust for the benefit of the wife, and that she would consequently be reaping a benefit by virtue of her crime. It was held by the Court of Appeal that public policy prevented Florence Maybrick from asserting any title as *cestui que trust* of the fund created by the policy, and that brought into operation the resulting trust in favour of the estate of the insured, which enabled the executors to maintain an action as plaintiffs without any taint derived from the crime committed by Florence Maybrick. The principle urged by Mr. Biggar was concisely stated by Fry L.J. in the following words:

The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person.

Another case referred to was *Beresford v. Royal Insurance Co. Limited* (2). In that case one Beresford, who was heavily insured in the defendant company, committed suicide, and the administratrix of his estate brought action upon the policies of insurance. The Court of Appeal reversed the judgment of the court below, which was in favour of the plaintiff, holding that the fact that the assured feloniously committed suicide rendered it against public policy for the insurance company to pay under the policies, and that the plaintiff was not entitled to recover. Other cases referred to are much of the same character

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

(1) (1892) L.R. 1 Q.B.D. 147.

(2) (1936) 53 T.L.R. 583.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.

v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

and need not be mentioned. It is to be observed that in the two cases which I have mentioned, the felony alleged as a defence in each case was something positively established.

Pursuing his line of argument further Mr. Biggar then contended that the plaintiffs were guilty of an indictable offence, under s. 498 of the Criminal Code; and of entering into a combination in restraint of trade contrary to the provisions of the Combines Act, in restricting the distribution and use of the works in question to Members, in preventing the defendant from making or procuring copies of the same, in having restrained the Commercial Reproducing Company from reproducing the said works, and on other grounds. Being therefore guilty of such wrongs, and being before the court with unclean hands, Mr. Biggar argued that the plaintiffs were barred from enforcing any rights in the copyrights in question.

The Combines Investigation Act provides for an enquiry by the Registrar into the facts of any alleged combine, and if by that officer found or believed to exist, the offending persons may be proceeded against by the Attorney-General of any Province, or by the Solicitor-General of Canada. Sec. 498 of the Criminal Code has frequently been construed by the Courts and I was referred to such cases as *Weidman v. Schragge* (1); *Stinson-Reeb Builders Supply Co. v. The King* (2); and *Belyea v. The King* (3), all decisions of the Supreme Court of Canada. These cases decide, that in any enquiry as to whether there has been an infraction of s. 498 of the Criminal Code, the test is not whether the act or acts complained of were reasonably necessary for the protection of the interest of the parties concerned, but whether as a matter of fact, the Act being designed to restrain encroachments upon freedom of competition in the public interest, there is injury to the public by the hindering or suppressing of free competition. At common law the rule seems to be somewhat different, and it has been laid down in several cases, of which *Sorrell v. Smith* (4) is one, that if the real purpose of a combination is not to injure another, but to forward or defend the trade

(1) (1912) 46 S.C.R. 1.
 (2) (1929) S.C.R. 276.

(3) (1932) S.C.R. 279.
 (4) (1925) A.C. 700.

of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues.

I hope I have substantially stated Mr. Biggar's line of argument on this point, though, of course, it is not as completely stated as he put it. I do not think the contention of Mr. Biggar is a tenable one, for several reasons. In the first place, the relief claimed by the plaintiffs does not emerge from any crime, misdemeanor, combine, or conspiracy, but from a right to copyright in one's own works, given by the Copyright Act of 1921, and earlier Copyright Acts, and the plaintiffs claim that there has been infringement and conversion of such copyright, by the defendant. The *Maybrick* case, and the recent *Beresford* case, are not applicable here because the rights there sought to be enforced had their genesis in crime, and therefore the principle of law expressed by Fry L.J. in the *Maybrick* case, which principle is here relied on by Mr. Biggar, is not, in my opinion, applicable to the case under discussion. The general principle is that a criminal, or his representatives, shall not be allowed, by a judgment of the court, the fruits of his crime. The Master of the Rolls in the *Beresford* case truly stated that in these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would afford, he said, no moral justification for a court to apply the maxim on which the principle just stated is founded. The construction to be given to s. 498 of the Criminal Code, the doctrine of the common law in respect of combinations in restraint of trade, and the distinction, if any, between them, it seems to me are not of consequence here, and I do not think that offences against the Combines Act, and sec. 498 of the Criminal Code, are available as defences in this action. Even if the wrongs imputed against the plaintiffs were established in fact, I do not think that would deprive them of their right to protect their copyrights; their copyrights would not perish because they had offended against another statute.

Further, the plaintiffs have not been charged with, or convicted of, an offence against s. 498 of the Criminal Code, nor has their conduct, as owners of the copyright in the plans and rating schedules in question, been the subject of an enquiry under the Combines Act. This court, is not

1938

UNDER-
WRITERS'
BUREAU
ET AL.
v.

MASSIE
& RENWICK
LTD.

Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

authorized to conduct any enquiry contemplated by the Combines Act, and it is without jurisdiction to try the plaintiffs on any information or charge levelled against them for breach of any provisions of the Criminal Code, and moreover, it is quite clear that the works in question were not produced for sale, or for profit, and they are not "commodities" or articles of "trade and commerce" within the meaning of either of those statutes. The alleged combine and conspiracy apparently arises from the fact that the plaintiffs do not issue copies of their works to the public, and that, I think, is a matter quite apart from the making of fire insurance rates. It may be said, I think, that there is no evidence, in fact I do not think it was suggested, that the plaintiffs by doing that which the defendant accuses them of, did result in, or contribute to, the establishment of fire insurance rates that are against the public interests, or that the same resulted in lessening competition in fire insurance underwriting. The works in question never having been produced for sale, or for profit, or for issue to the public, or to compete in any way with others who might do the same thing, I cannot quite appreciate how it can be said that the plaintiffs "combined," or "conspired," in the sense in which those words are used in the Combines Act, and in the Criminal Code, to effect a restraint upon trade, or a restraint upon competition in trade. What the defendant says to the plaintiffs is virtually this: "We admit your plans and rating schedules are very desirable and almost necessary in the conduct of our fire insurance business, but as we cannot carry on our business very conveniently without resort to your plans and rating schedules we propose to have copies made of them, when and if we can, and thus partake of the fruits of your useful and informative works, and it is very wicked of you to try and prevent us doing that." That is just what I cannot quite appreciate. And after all that is an epitome of the whole controversy in this case. The legislature has enacted so as to say that the plaintiffs have a right to copyright in the works they have produced, that is, the sole right to reproduce the same; and they may publish or refrain from publishing the same, as they see fit. I am therefore of the opinion that this defence fails.

Before approaching the question of infringement and conversion it will be desirable to make reference to certain

provisions of the Copyright Act. Sec. 3 of the Act defines what is copyright. It states:

For the purposes of this Act "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . . ; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right . . . to authorize any such acts as aforesaid.

Therefore the sole right to "publish," to "produce" or to "reproduce," is in the owner of the copyright, and the owner of the copyright is the only person who can "authorize" others to do the thing or things which the Act gives to him the sole right to do. Sec. 3 (2) defines "publication" to mean "the issue of copies of the work to the public," and ss. 3 of the same section is to the effect that a work shall not be deemed to be published . . . if published . . . without the consent or acquiescence of the author, his executors, administrators or assigns. If any unauthorized person does the thing which the owner of the copyright has the sole right to do, then that person would infringe the copyright. That is made clear by s. 17 which in part reads:

Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright

Secs. 20 and 21 set up certain presumptions as to copyright, and ownership therein. Sec. 20, ss. 3, reads:—

In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or as the case may be, the title of the plaintiff, and where any such question is at issue, then (a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; (b) if no name is so printed or indicated, or, if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

I might here interpolate that, following the year 1917, the name of the Bureau appeared on all plans produced by it, and prior thereto the name of the Association, or the Plan Department of the Association, or Charles Edward

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

1938

UNDER-
WRITERS'
BUREAU
ET AL.
v.
MASSIE
& RENWICK
LTD.
Macleay J.

Goad, or the C. E. Goad Company, appeared on all plans that are here in issue. Sec. 21 provides that

All infringing copies of any work in which copyright subsists, or of any substantial part thereof, . . . shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

I come now to the questions of infringement and conversion. It is not claimed that the defendant has infringed by itself reproducing copies of the plaintiffs' plans and rating schedules. The offence charged is that of authorizing others to make copies or reproductions of the same. The word "authorize," in the last line of s. 3 (1) of the Copyright Act has been judicially construed to include any one who sanctions, approves, or countenances, and I need only refer to the judgment of Tomlin J. in the case of *Evans v. Hulton & Co. Ltd.* (1), and to the case of *Ash v. Hutchinson & Co.* (2). The sole right of making copies of any work in which copyright subsists is in the owner, and the owner is the sole person who may authorize others to make copies. To the statement of defence is attached an appendix containing an extensive list—since added to I think—of copies of plans and rating schedules which the defendant admits having purchased from the Commercial Reproducing Company Ltd., a company with offices at Toronto and Montreal at all times material here. The business of this company, as its name indicates, was chiefly concerned with the production of copies of such things as plans, documents, etc. It did not carry in stock copies of any of the works with which we are here concerned, but it would produce copies of the same, upon request, and on being provided with the original plan or rating schedule, of which copies were desired. And this they did for the defendant when requested, the defendant providing the original work. There is a vast amount of evidence directed to the point of infringement but it is not practical to review it in any detail. It has been established to my satisfaction that the defendant company, through its Toronto and Montreal offices, would in some way come into possession of original plans issued by the plaintiffs to their Members, and would have copies made of them by the Commercial Reproducing Company. To this the evidence

(1) (1924) 131 L.T.R. 534.

(2) (1936) 2 All E.R. 1496.

of the witnesses Cooper, Merry and Shillabeer was particularly directed, and those witnesses were all in the employ of the Commercial Reproducing Company, at one time or another. In producing such copies the name of the Association, or the Bureau, appearing on the original plans, would be eliminated from the copies, and also the Bureau's plan registration number. The Bureau, however, had other means of identifying these copies, as being copies of the plaintiffs' plans. It is quite evident that all the copies produced by the Commercial Reproducing Company and paid for by the defendant, were upon the authorization of the defendant, by its officers or managers. The evidence of the witnesses Lawson, Green, and Freeman, former employees of the defendant company, explains how the defendant would secure possession of the plans from which copies were to be made. Those three employees were regularly instructed and directed, weekly I think, by the defendant to borrow or procure for a brief space, from persons properly in possession of the desired plans of the Association, so that copies of the same might be made for the defendant by the Commercial Reproducing Company. It was described how copies would be made as hurriedly as possible, and the originals returned to the persons from whom they were procured, so as to minimize the possibility of detection of the improper loan of the plan by any of the inspecting officers, or Members, of the Association. And Lawson stated "we knew it was copyright." It is quite obvious that this procedure was deliberately planned and executed, and no doubt carried out on an extensive scale. There can be no doubt but that plans so procured were improperly obtained, and that the production of copies of the same was authorized by the defendant. The whole affair from beginning to end was carried out with more or less secrecy, and without any suggestion of authorization by the plaintiffs. What I have just said about the plans would apply to the rating schedules. I therefore hold that the defendant has infringed and converted the works of the plaintiffs here in issue.

It was contended that the plaintiffs had knowledge of, and acquiesced in, the infringements and conversion alleged against the defendant, and that they condoned the same and took no active steps to protect their copyright, and are

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 V.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

therefore guilty of laches. It was urged that knowledge of the reproduction of the works in question by the authorization of the defendant, and others, had been brought home to the plaintiffs at various times, and extending back for a considerable period, and particularly was it said that the plaintiffs were aware that the Commercial Reproducing Company was reproducing copies of the plans, for the defendant and others, and that the plaintiffs by their laches have become disentitled to any relief against the defendant.

There is some evidence to show that rumours of infringement did reach the Bureau or Association, on more than one occasion. In 1929, Cooper, then the manager of the Commercial Reproducing Company, went to the office of the Association in Montreal to inform them that he had in mind the reproduction of a certain number of copies of a manual concerning insurance rates, produced by the Association, and he was informed that the manual was "copyright." Cooper then said: "Well, we reproduce some of your plans," and it was stated that the person whom he was addressing then said: "Well, I do not know about plans." There is no evidence as to whom Cooper was addressing, whether a responsible officer of the Association, or some employee occupying a minor position. Long, the manager of the Bureau, testified that the first actual knowledge he had of reproduction of the plaintiffs' plans was when he saw a report of Clarkson, Gordon, Dilworth & Co., a firm of accountants, made after an examination of the books of the Commercial Reproducing Company, and this report, he states, revealed to him for the first time the fact that the defendant, and other fire insurance brokers, had been authorizing the production of copies of the plaintiffs' works, by the Commercial Reproducing Company. And he stated that the first photostatic copy of the plaintiffs' plans he ever saw was in the defendant's office at Toronto, just prior to the trial. Long also stated that he once went to the office of a non-Board insurance broker in Montreal, with a view of obtaining evidence of infringement, and he asked to be shown, and was shown, a particular volume of plans, but this he found to be a volume of plans properly in that broker's possession. And Long had once a similar experience in the defendant's office in Toronto. There is some evidence that at one time the

defendant company was suspected of reproducing a certain plan, and an officer of the Bureau or Association called on Col. Massie, then associated with the defendant company, to enquire about this rumour or suspicion. What transpired between those two persons is not of importance, but evidently suspicion was allayed, or the supposed infringement was satisfactorily explained. Then there is evidence that as a result of rumours of infringement the plaintiffs sought the opinion of their solicitor as to their legal position in respect of copyright in the plans, and on another occasion a committee, representative of the Association, was appointed to investigate a rumour that copies of a particular volume of plans were in use in a certain fire insurance office in Montreal. These incidents do not, in my opinion, establish acquiescence of the plaintiffs in the infringement, or in the conversion, nor does it show that the plaintiffs had been put in possession of such facts as would assure them of success if they commenced actions for infringement of copyright against the defendant, or anyone else. I think it is not unfair to say that all this evidence rather indicates that the plaintiffs always actively concerned themselves about any rumours of infringement which came to their attention, and it negatives any idea of acquiescence. I do not think any other conclusion could be fairly reached. It was not until proceedings were taken against the Commercial Reproducing Company by the plaintiffs that they came into possession of reliable evidence of the defendant's infringements. Moreover, the general conduct of the defendant in respect of the works in question quite satisfies me that its managers and officers never entertained the view that the plaintiffs had in any way abandoned their copyright, or acquiesced in any infringement or conversion of the same, or that they were unlikely to proceed against infringers if they obtained sufficient evidence to act upon. I do not think the defendant can now be heard to say: "You did not attempt to prevent us in authorizing copies of the plans to be made, and therefore you acquiesced in our doing so." That is what the defendant now attempts to say, but in my opinion, the facts do not support that contention. It would require some positive evidence to warrant one holding that the plaintiffs had acquiesced in the infringement of copyright,

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 ———
 Maclean J.
 ———

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD
 Maclean J.

or in the conversion of infringing copies, and evidence of that nature is not before me.

One other point remains for decision and that is whether or not, in respect of the claims of infringement and conversion, the period of limitation applicable to such actions is a bar to relief here, the plaintiffs contending that the defendant fraudulently, and by fraudulent concealment, infringed and converted the works in question, and that, in such a state of facts, the period of limitation cannot be set up as a bar. A discussion of this point might logically have appeared earlier than this, but its consideration at this stage will, after having disposed of the question of infringement and conversion, and the question of the acquiescence of the plaintiffs therein, avoid a repetition of many of the facts referred to in my discussion of those other questions. By s. 24 of the Copyright Act it is enacted that an action in respect of infringement shall not be commenced after the expiration of three years next after the infringement. Sec. 21 provides that

all infringing copies of any work in which copyright subsists, or of any substantial part thereof . . . shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof, or in respect of the conversion thereof.

At a previous stage in the history of the action, I held that the period of limitation prescribed by s. 24 applied not only to the claim for infringement but also to the claim for conversion, and on appeal this decision was affirmed by the Supreme Court of Canada. In this case, and in respect of the point immediately under discussion, we escape the possible complications which might arise if the infringement and conversion of any one of the plaintiffs' works occurred at different times, and was the act of different persons. Here, each infringement and conversion is charged against the same person, the defendant, and so far as I can see the conversion would, in the practical sense, be contemporaneous with the infringement, because, so far as I now recall, the conversion of the infringing copies was to the defendant's own use; and the infringing copies, the property of the plaintiffs, are still in the possession of the defendant.

In the case of *Bulli Coal Mining Company v. Osborne* (1) it was held that the Statute of Limitations was no

answer to a claim in respect of a concealed and fraudulent trespass in the working of a coal mine, so long as the party defrauded remained in ignorance without any fault or laches of his own. The fraudulent act there was the taking furtively, underground coal from a neighbour's pit. In delivering the judgment of the Judicial Committee of the Privy Council, Lord James of Hereford said:

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own. The contention on behalf of the appellants that the statute is a bar unless the wrong-doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity.

Other authorities on this point, and to which I was referred, are *Lynn v. Bamber* (1), *Betjemann v. Betjemann* (2), and *Oelkers v. Ellis* (3). Salmond on the Law of Torts (4), discussing the rule of concealed fraud states:

When the defendant has been guilty of fraud or other wilful wrong doing, the period of limitation does not begin to run until the existence of a cause of action has become known to the plaintiff. This is commonly spoken of as the rule of concealed fraud, but the term *fraud* is here used in its widest sense as meaning any act of wilful and conscious wrong doing—for example—a wilful underground trespass and abstraction of minerals. The term *concealed*, moreover does not imply any active suppression of the facts by the defendant, but means merely that the wrong is unknown to the person injured at the time of its commission. . . . The rule of concealed fraud does not apply when the plaintiff could by the exercise of care and diligence have discovered the fraud. In other words, the statute runs not from the time when the cause of action was discovered by the plaintiff, but from any earlier time at which it ought to have been discovered.

Upon a consideration of the evidence, and the course of conduct of the defendant's officers and servants, I cannot avoid the conclusion that the defendant wilfully and wrongfully concealed from the plaintiffs its procurement of original works of the plaintiffs, the plaintiffs' property, from persons unauthorized to part with them, and similarly concealed the fact that it had caused copies of the same to be made for its own use, and in furtherance of that it caused or countenanced the removal of the name or names of the owners of the copyright from the said copies. If secrecy and concealment were deemed necessary in the steps lead-

(1) (1930) L.R. 2 K.B.D. 72. (3) (1914) L.R. 2 K.B.D. 139.
 (2) (1895) L.R. 2 Ch. D. 474. (4) 9th Ed., pp. 180, 181

1938
 UNDER-
 WRITERS'
 BUREAU
 ET AL.
 v.
 MASSIE
 & RENWICK
 LTD.
 Maclean J.

ing to the production of the infringing copies, it is improbable that the defendant would cease to conceal from the plaintiffs the conversion of the infringing copies to its own use; and it is a fair inference that every possible means was taken to conceal this conversion in order to prevent the plaintiffs obtaining evidence of the infringement. I do not think there has been laches, or lack of reasonable diligence, on the part of the plaintiffs, to discover the infringement and conversion, and it was not their fault that they remained in ignorance of the same. The evidence points strongly to the conclusion that the officers and managers of the defendant company believed the plaintiffs had copyright in the works in question, and that would be a sufficient motive for concealing their wilful wrong doing. I can hardly believe that the officers of the defendant company would not be conscious of their wrong doing, and they would not openly adopt the attitude that they were entitled as of right to enjoy the fruits of the extensive and expensive labours of the plaintiffs, and this would furnish a motive for concealing their wrong doing. Upon the facts and the law I am therefore of the opinion that the plaintiffs' contention upon this point must prevail, and that the principle of law to which I have referred is applicable here. I do not propose now to embark upon the task of specifying the infringements and conversions of the works in question which become affected by my decision on this point; that will have to be determined on the settlement of the minutes of judgment.

My conclusion is therefore that there has been infringement of copyright and conversion of infringing copies, by the defendant, generally, as claimed by the plaintiffs; and that the plaintiffs are entitled to the relief claimed. I cannot pretend in this judgment to state precisely the specific works infringed or converted by the defendant, and probably that is not expected of me. The works in which copyright was originally claimed by the plaintiffs, and the infringements and conversions of infringing copies claimed in the statement of claim and the schedules thereto, are admittedly subject to revision; and the list of the works set forth in the appendix to the statement of defence, and which I find were produced on the authorization of the defendant by the Commercial Reproducing Company, is, I think, also subject to some revision as a result

of the evidence. I require that counsel for the plaintiffs give counsel for the defendant at least seven days' notice of their motion to settle the minutes of judgment, the same to be accompanied by a draft of the order for final judgment proposed to be submitted on behalf of the plaintiffs, which, I hope, will be suggestive of some clear and concise method of designating the works to be affected by the several terms of this judgment. There will be the usual order for an enquiry into damages, if requested by the plaintiffs. The matter of costs will be reserved until the settlement of the minutes of judgment, but only for the reason that several proceedings were heard in the cause before trial, in respect of which the matter of costs was left undetermined, and my recollection of some of them is not at the moment clear.

Judgment accordingly.

1938
UNDER-
WRITERS'
BUREAU
ET AL.
v.
MASSIE
& RENWICK
LTD.
Maclean J.