1939
* Feb. 7, 8, 9, 10, 13, 14, 15 16, 17, 20.

1940
* Jan. 19.

MASSIE & RENWICK LIMITED, (DEFENDANT) ..... APPELLANT;

AND

UNDERWRITERS' SURVEY BUREAU, LIMITED, AND OTHERS (PLAINTIFFS) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Action for infringement of copyright and conversion of infringing copies—Copyright in fire insurance plans and rating schedules—Ownership of copyright—Period of limitation established by Copyright Act not a bar to relief where infringement is accomplished by fraudulent act of defendant—Criminal conspiracy—Disclosure of authorship of the works—Unpublished works—Author not identified—Copyright Act, R.S.C., 1927, c. 32.

The action is one for infringement of copyright, and conversion of infringing copies in fire insurance plans and rating schedules. In 1883, the Canadian Fire Underwriters' Association, an unincorporated body, was formed by the association of a number of fire insurance companies carrying on business in Ontario and Quebec, all the members of that Association at the date of the action being added as plaintiffs to the Underwriters' Survey Bureau Limited, a Canadian corporation incorporated in 1917. Prior to 1901, the fire insurance business in Canada was carried on under the minimum tariff system of rating. In 1900, or shortly afterwards, the Association decided to adopt the system of "rating schedules" for all buildings in protected areas, with the exception of residential risks, which remained subject to the minimum tariff system. In this system, formulæ known as rating schedules, which are applied to individual buildings, must be arrived at and expressed with precision. These specific rates are recorded on cards or books, which are issued to members and members' agents only. From the beginning, the Rates Committees of the Association had charge of all matters connected with rates. According to the constitution of the Association of 1914, it was provided, *inter alia,* that all then existing members of the Association and companies thereafter becoming members were binding themselves, by signing a copy of constitution and by-laws, to observe same; and that the member, who may withdraw, was bound to release, or "forfeit," "any right or claim to any portion of the property or assets of the Association" and return to it all card ratings and specific tariffs received from the Association, rating schedules and manuals not being placed in the hands of the agents but remaining in the hands of the officers of the Association. The affairs of the Association are administered by officers elected annually by the members, and the expenses are met by an annual assessment upon all the members proportioned in each case to the premium income of the member for the year. At the end of 1917, or the beginning of 1918, the Plans Department of the Association was taken over by the appellant, the Underwriters' Survey Bureau Ltd., a company incorporated for that purpose whose shares were held in trust for the members of the Association and its directors were officers of the Association.

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

The plan committee of the Association, constituted in 1917, was charged with the duty of transacting the common business in respect of plans and with conducting the business of the Bureau. Considerable sums of money derived from the contributions of the members of the Association to the common fund were spent in obtaining the necessary information for constituting the rating schedules and other material and in the actual production of the material itself, which material was intended for the exclusive use of the members of the Association. As to the plans, those produced by the plan committee prior to the incorporation of the Bureau and those made afterwards by the Association up to the 1st January, 1924, were delivered to the Bureau with the intention that they should be the property of the Bureau, i.e., the legal ownership should be vested in the Bureau. There were also two classes of plans other than that made by the Bureau after the 1st of January, 1924: first, plans, the copyright to which were registered in the name of Charles Edward Goad, who died in 1910; and, second, plans, the copyright to which was registered in the name of Charles E. Goad Company; and the respondents claim title to these plans under assignment by the Toronto General Trusts Corporation, executors and trustees of the will of Charles Edward Goad, through the members of the firm Charles E. Goad Company and under a further assignment in 1931 from the Charles E. Goad Company to the Bureau. A large number of the Goad plans were partially or completely revised and reprinted by the salaried employees of the Survey Bureau, some prior to the assignment of the Goad copyrights in 1931 and some subsequent to that. The respondents alleged that the appellant, 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. The appellant denied respondents' title to copyright to the plans produced by C. E. Goad and claimed by respondents to have been acquired by assignment from the C. E. Goad Company in 1931. The appellant further pleaded that the acts of the respondents in withholding from the appellant and others copies of the works in question constituted 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 respondents acquiesced in the alleged infringement and conversion and are guilty of laches, and that the period of limitation applicable to such actions is a bar to relief.

Held that the appeal should be allowed in respect of the rating material brought into existence after the first of January, 1924, and in other respects dismissed (1).

The "rating material," designating what were known as rating schedules or manuals and rate books, minimum tariffs and specific ratings but excluding the plans, was the property of the members of the Association at the date when the *Copyright Act* of 1921 came into force on the 1st of January, 1924. These members were the owners, not only of the material itself, but of the common law, incorporeal, exclusive right of reproduction and became, by force of the statute (section 42 in the schedule), the owners of copyright in that material.

(1) *Reporter's note.*—Petition for special leave to appeal to the Privy Council dismissed with costs on March 15th, 1940.

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Material of that character was subject-matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. As to such material produced after the statute came into force, the respondents have not adduced sufficient evidence to establish a title to copyright in it. The members of the Association are all incorporated companies and they or any one of them cannot be an author within the meaning of the *Copyright Act*. Any one or all of them, that is to say, all the members of the Association at any given time, could be the owner or joint owners of copyright, but they could acquire copyright only in one of two ways,—either by assignment by some person having a title to the copyright or by one of the ways mentioned in the proviso to section 12 of the Act. As to the ground that the present case comes within subsection (*b*), the respondents must, in order to succeed, show that the material in respect of which the question arises was made "in the course of his employment" by a person or persons "under a contract of service or apprenticeship" with the respondents or some of them. But from the evidence it must be inferred that this material was produced by employees in the course of their employment under a contract of service with the members of the Association for the time being. And there is no evidence as to the practice in relation to the contracts under which the employees of the Association were engaged or in relation to the terms of their engagement. It is not a mere abstract possibility, but a practical possibility, that for convenience some form of arrangement was resorted to by which there was no direct contractual bond between the members of the Association and the employees, or that in any case the work was done by persons who were independent contractors. As to plans: The plans copyrighted by Charles Edward Goad in his lifetime and those copyrighted by the Charles Edward Goad Company passed to the Underwriters Survey Bureau Ltd. by the deeds of transfer and assignment produced at the trial. As to nine plans made by the plan department of the Association in 1911 and 1917, copyright was vested by force of the *Copyright Act* of 1921, s. 42, in the members of the Association at the date when the Act came into force, i.e., on the first of January, 1924.—Copyright in the revisions of the Goad plans vested in the Bureau in virtue of the fact that these revisions were executed by the salaried employees of the Bureau in exercise of their functions as such. As to plans and revisions of plans made by the Bureau after the statute of 1921 came into force on the 1st of January, 1924, these having been made by the salaried employees of the Bureau, the title vested in the Bureau in virtue of section 12 (*b*)—As regards the copyright in the plans produced by the Bureau, including the revisions of the Goad plans, section 20 (3) (*b*) (ii) applies. *Prima facie* the legend "Made in Canada by the Underwriters' Survey Bureau Ltd." implies proprietorship and such legend is found on these plans: the *prima facie* case has not been met.

Held, also, as to companies which had ceased to be members of the Association and were not parties plaintiffs at the commencement of the action, their interest in the copyrights was a bare legal interest since, on ceasing to be members of the Association, they ceased to have any beneficial interest in such copyrights and the plaintiffs, as part owners, were entitled to protect their rights by suing for an

injunction and for damages. *Lauri* v. *Renad* ([1892] 3 Ch. 402); *Cescinski* v. *Routledge* ([1916] 2 K.B. 325) and *Dent* v. *Turpin* (2 J. & H. 139) ref.

Held, also, as to tangible chattels including infringing copies, companies on ceasing to be members ceased to have any joint or several right of possession in any of the common property and the plaintiffs were, therefore, entitled to maintain trover or detinue in respect of such chattels.

Held, also, as to the question of the Statute of Limitations, that that was ample evidence in support of the conclusion of the trial judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered. Therefore, the period of limitation established by the *Copyright Act* is not a bar to the relief claimed by the respondents.

Held, further, on the question of criminal conspiracy: if the plaintiffs in an action for the infringement of copyright are obliged, for the purpose of establishing the existence of, and their title to, the copyright to rely upon an agreement and that agreement constitutes a criminal conspiracy, and their title rests upon such agreement and upon acts which are criminal acts by reason of their connection with such an agreement, then it would be difficult, on general principles to understand how such an action could succeed; but, in the present case, the conclusion of the trial judge, negativing the existence in fact of a criminal conspiracy is right.

Held, further, as to the appellant's contention that the authorship of the work cannot in the case either of the plans or of the rating materials be ascertained, that, according to the provisions of section 20 (3) of the *Copyright Act,* the statute does not contemplate disclosure of authorship as a necessary condition of success in an action for infringement; but the provisions of that section do not go as far as creating a presumption that the name of the Association on the rating material should be regarded as the name of the publisher. As already stated, all the members of the Association being bodies corporate, none of them could be an author within the contemplation of the statute; and it cannot be found as a fact that the name Canadian Fire Underwriters' Association in these manuals, rate-books and other rating material is a name which answers the description of the statute, namely, that "a name purporting to be that of the * * * proprietor of the work is printed thereon in the usual manner."

Held, also, that, in the case of unpublished works (where the proprietor is shewn to have acquired a common law right prior to the *Copyright Act* of 1921 by evidence establishing facts requiring an inference that the work was done for the plaintiff and that the intention of all parties concerned in the production of the work was that the common law right should vest in him) the statute plainly contemplates the protection of that right; and the only possible protection is the recognition of the substituted copyright given by the statute. It would be then merely a matter of evidence: the ownership of the common law right must rest upon established facts

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and these facts can be proved by inference as well as by direct evidence.

Held, further, as to the duration of the copyright where that comes in question, that, if the owner of it cannot identify the author, the duration of it must be restricted to the period of fifty years from the date when the copyright or common law right, as the case may be, came into existence.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 103) varied.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), maintaining with costs an action for infringement of copyright by the appellant against the respondents in respect of certain works known as fire insurance rating material and fire insurance plans.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

W. N. Tilley K.C., O. M. Biggar K.C. and *Christopher Robinson* for the appellant.

J. A. Mann K.C., W. D. Herridge K.C. and *A. M. Boulton* for the respondents.

The judgment of the court was delivered by

THE CHIEF JUSTICE: In 1883 the Canadian Fire Underwriters' Association was formed by the association of a number of fire insurance companies carrying on business in Ontario and Quebec.

Prior to 1901, the fire insurance business in Canada was carried on under the minimum tariff system of rating. Territory in which the companies were carrying on business was divided into districts. For each district a minimum tariff of rates was drawn up in which the premiums for various defined classes of risks were quoted. These were placed in the hands of the agents and of the member companies.

In 1900, or shortly afterwards, the Association decided to adopt the system of "rating schedules" for all buildings in protected areas with the exception of residential risks, which remained subject to the minimum tariff system. In this system, formulae known as rating schedules,

(1) [1938] Ex. C.R. 103.

which are applied to individual buildings, must be arrived at and expressed with precision. Speaking generally, in large cities, and many lesser communities, a specific rate is separately worked out for each building and is tabulated in anticipation of applications for insurance in respect of that building.

These specific rates are recorded on cards, in the case of a large city, and in books in the case of smaller municipalities. The rate cards and books are issued to members and members' agents only. The specific rates are kept up to date by new cards or slips pasted in the rate books.

From the beginning, the Rates Committees of the Association had charge of all matters connected with rates.

The operation of the system of rating schedules is explained by the witness Dixon:

Q. Just explain to the court how towns, cities and villages became specifically rated?

A. We will take, say a town A.—it does not matter whether we call it a village, town or city. They put in some fire protection—it may be fire pumps and mains and hydrants, and provide a certain amount of hose—a fire station, and some firemen. It may be a gravity or pumping system. They notify us that they have carried out these improvements and that they now have some protection.

The first thing we do is send down our water works inspector. He visits the place and checks over all the protection that is provided. He also checks over street widths and congestion, and construction conditions generally. He comes back to the office and writes a very elaborate report of that, so that we can tell exactly what that municipality has.

That report is sent to the municipality, by the way, and it has in it recommendations for further improvements and how to expand the system that they have.

His report comes, or it did, from the C.F.U.A. to the rates committee again, and they went over it very carefully and would decide that in view of the protection provided there we would effect a certain basic rate or key rate for the beginning of our schedule rating in that municipality. They would also say to the plans committee, "We desire to specifically rate town A. Kindly see to it that a plan of town A is made and working sheets sent to the C.F.U.A. as soon as possible."

We could not start in to make the inspection until that plan was made, because our whole schedule rating system depends upon our plans. We have in that specific tariff our block numbers, and our numbers in the specific tariff must absolutely correspond to the numbers that the agent and the company have; otherwise they would not know what rate to apply. So that either Goad or ourselves or the Underwriters' Survey Bureau, as the case may be—depending upon the time that the work was done—would send their surveyors to the municipality and build up a plan.

And while they were collating that to send out to the company members they would send us what we call a working sheet. That has just a cheaper binding on it, so that our inspectors can roll it under their arm and fold it up and take it to the municipality with them. And

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they go into each one of those risks, in the municipality. They go down one street and up the next, and make a report of every risk of a mercantile nature in that place. That survey consists of all the details of construction, occupancy, exposure and private protection that the assured may have. He may have extinguishers, fire pumps and hose, and so on, for all of which he would be entitled to a credit off his rate.

They come back and they have a plan and spread it out in front of them, and they see on each one of these risks—each building is called a risk in the fire insurance business—they identify that survey with the marking on the plan. In other words, let us say it would be block 5, sheet 2, No. 62 Main Street, town A. And when a tariff goes out to the companies the agent writes in and says that

> my assured, Number so and so, 62 Main Street, block 5, sheet 2, of the town of A, desires so much insurance on his household furniture,

or his barber shop stock, or whatever it is he wants to insure; and the company simply goes to work and takes their tariff, and looks up block 5, 62 Main Street, and there it is. And they see it is a candy store, let us say, so they know the occupancy must have changed. Then they take it up with the agent. But if it is a barbershop when the inspection is made and is still a barbershop, they know the rate that is to apply. So that the plan and the rate identify one another.

His Lordship: But the rate is never put on the plan?

A. No, sir.

Q. That would be in the rate book?

A. Yes, sir.

Q. But there is a means of identifying all the particular properties on the plan?

A. Yes.

It will be convenient to use the term "rating material," which was employed on the argument, as designating what are known as rating schedules or manuals and rate books, minimum tariffs and specific ratings. Except in the case of minimum tariffs, plans are an essential part of the rating machinery but, for the purpose of convenient discussion, the term "rating material" will embrace the matters just mentioned and then only.

Before proceeding to consider the rights in controversy, it is convenient to explain the constitution of the Canadian Fire Underwriters' Association.

In the constitution of 1914 the names of the existing members of the Association are set out and it is prescribed, by one of its provisions, that all existing members of the Association and companies thereafter becoming members, shall sign a copy of the constitution and by-laws; and it is declared that by this signature a member binds itself to observe the constitution and by-laws.

The constitution also provides that a member may withdraw on giving notice to that effect but that such with-

drawal shall not take effect or release the member from his agreement to observe the constitution and the by-laws until the expiration of three months from the date of the notice.

Upon withdrawal, the withdrawing member releases, or "forfeits," as the word is, "any right or claim to any portion of the property or assets of the Association," and returns to the Association of all card ratings and specific tariffs received by it from the Association. Rating schedules and manuals are not placed in the hands of the agents. They remain in the hands of the officers of the Association. Plans, as we shall see, are dealt with as the property of the Underwriters' Survey Bureau, an incorporated company, which performs the functions of the plan department of the Association under the control and supervision of the Plan Committee.

The members of the Association meet annually, semi-annually and at special meetings called at the discretion of the president or the executive committee, or upon requisition by a specified proportion of members.

At annual meetings the members elect a president and two vice-presidents, one for each branch, Ontario and Quebec. They also name certain committees, including an executive committee, a plan committee and rates committees. The members of the executive committee are elected for two years and retire in rotation yearly.

This committee has a general authority to transact any business which the members of the Association can transact, excepting the amendment of the constitution and by-laws and the forfeiture of membership; and the constitution declares the intention that the committee shall dispose of all matters except those which the committee may consider it desirable to reserve for submission to the Association.

One of the secretaries is required to attend the meeting of the committee and keep the minutes which are printed and distributed to all the members of the Association.

The constitution formally declares that the members of the Association in general meeting are superior to all committees and constitute a final court of appeal.

The constitution also provides for the election by the members in general meeting of certain salaried officers,—

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a permanent chairman of the executive committee and two secretaries, one of whom has an office in Montreal and the other in Toronto, where the business of the respective branches (Quebec and Ontario) is transacted. One of these secretaries is named as treasurer.

The secretaries are "in their respective jurisdictions" the chief executive officers of the Association, have the general supervision of its work and of all its employees and are directly responsible for the management of their respective offices.

The current expenses of the Association are met by an annual assessment upon all the members proportioned in each case to the premium income of the member for the year. Interim assessments are made quarterly based upon the income of the previous year, an adjustment being made when the amount payable by each member has been accurately ascertained. Each member, in addition, pays for the revision of any rating material and for the revision of tariffs made for it at the cost of the labour involved.

The assessment is made under the authority of the members of the Association in general meeting by the treasurer and is paid to the treasurer who submits to the annual meeting a printed statement of the previous year's expenditure and its apportionment audited by a chartered accountant appointed by the Association. There is a bank account at each of the branches, Montreal and Toronto, and all monies received are deposited in that account and it is the duty of each of the secretaries to defray the expenses of his branch. It is the duty of the secretary, who is the treasurer, to transfer to the account of the other branch sufficient funds to enable this to be done. All payments are made by cheque on one of these accounts, signed by the president, or a vice-president, and the treasurer or the other secretary, according to the account upon which the cheque is drawn.

At the end of 1917, or the beginning of 1918, the Plans Department of the Association was taken over by a company incorporated for that purpose under the Dominion *Companies Act*, the Underwriters' Survey Bureau, Ltd., the shares being held in trust for the members of the Association. The plan committee of the Association, which was constituted in December, 1917, under an amendment to the constitution, was charged with the duty of

transacting the common business in respect of plans and with conducting the business of the Underwriters' Survey Bureau, Ltd. We shall have to discuss in greater detail the business of the Bureau later.

I put aside the consideration of the plans for a moment and discuss the rating material so-called.

Considerable sums of money derived from the contributions of the members of the Association to the common fund were spent in obtaining the necessary information for constituting the rating schedules and the other material mentioned and in the actual production of the material itself. This material was intended for the exclusive use of the members of the Association. There can be no doubt, I think, that, subject to the provisions of the constitution, the property in it was (as was all the common property) vested in such members for the time being. I think there can be no doubt that material of that character was subject matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. The principle laid down by Lord Brougham in *Jefferys* v. *Boosey* (1) applies.

The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. I do not think section 22 of the statute of 1875, which relates only to printing and publishing, supersedes the common law right to prohibit other dealings with unpublished documents.

As regards the particular material with which we are concerned, that produced for the Association prior to the date when the *Copyright Act* of 1921 came into force, it was, as has been said, produced for the exclusive use of the members of the Association who considered it of funda-

(1) (1854) 4 H.L.C., 815 at 962.

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mental importance that this right of exclusive user should be jealously guarded and, it must have been well understood that, not only the property in the material itself, but the ownership of the incorporeal right described by Lord Brougham should be vested exclusively in the members of the Association.

It is important to notice that at this moment we are considering only the common law right of the author, the author's employer and the author's assigns, to control the use of unpublished documents, the right so vividly described by Lord Brougham in the words just quoted.

It is the contention of the respondents that this right in respect of this rating material is vested, as to the legal property in it, in the members of the Association for the time being and it is said that, on the 1st of January, 1924, when the *Copyright Act* of 1921 came into force, the property, not only in the rating materials themselves as physical things was vested in the members of the Association at that moment, but also this incorporeal right in relation to these materials.

It is not necessary, I think, to go further back than the constitution of 1914 because, as we have seen, the members of the Association at that time contracted with one another in the terms of the constitution and by-laws, and the Association proceeded from that time on to work under that constitution and those by-laws as amended from time to time; the power to amend being vested by the constitution in the members of the Association in general meeting acting by a two-thirds majority.

Now, I think the only fair implication from the provisions of the constitution is that the legal title to the common property is vested in the members of the Association for the time being. The fluctuating body for which the name was a description in fact was not a entity known to the law and not capable of legal ownership of such property. There is no express provision for a board of trustees; and although the shares of the Survey Bureau are held by trustees for the Association, we have no information who these trustees are or how they are appointed.

The phrases used are " the property of the Association " and " the assets of the Association " and I think the reasonable meaning of these phrases is that which I have indicated.

The treasurer and the secretary who is not the treasurer, as well, perhaps, as the president and vice-president who are authorized to sign cheques with one of the secretaries have, no doubt, a special property in the funds of the Association and that may be so also with regard to the executive committee which possesses almost unlimited powers of administration. But the general property of the common assets is, I think, in the members for the time being, subject, of course, to the provisions of the contract under which they are associated together.

Primarily, the incorporeal right we are considering is the right of the author and, while I do not suppose a corporation could be an author in the sense of the rule, still these incorporated companies, who were the members of the Association during the period with which we are concerned, could acquire title to the incorporeal right by assignment from the author and I think also through the authorship of an agent or servant or of an independent contractor, employed to produce a work in respect of which, in ordinary circumstances, the author would be invested with the right.

It is clearly settled now, by the authority of *In re Dickens* (1) that the author, in transferring the property in his manuscript, does not thereby necessarily assign the incorporeal right.

But I think, having regard to the considerations just mentioned, it is a legitimate inference that it was well understood by everybody that this rating material was produced for the exclusive use of the members of the Association and, consequently, that in the members of the Association vested the sole and exclusive right of multiplying copies. The evidence does not disclose the practice of the Association in respect of the terms under which the persons, inspectors and others, were employed for the production of these materials. Under the constitution I have no doubt it was competent to the executive committee, if not to the secretaries, to authorize the employment of persons for such purposes under a contract which would be a contract of service between the members of the Association for the time being and an employee, or a contract of agency, or a contract under which the employee

(1) [1935] Ch. D. 267.

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would be an independent contractor. Whether the executive committee could pledge the personal credit of the members of the Association is really immaterial. In practice such a question could hardly arise and, at all events, it is of no importance here.

These materials were produced and the cost of their production was paid for out of the common fund and whether the persons, who, if they had produced them for themselves, would have been the authors, were employees under a contract of service with the members for the time being, or agents under a contract of agency for the members for the time being, or engaged as independent contractors under a contract with the members for the time being, or whether the practice of the Association was to contract through one or more of its permanent officials, the treasurer for example, in such a manner as not to give rise to contractual relations with the members themselves, is really of no importance because, whatever was done, was done for the members and paid for with their money.

The materials themselves when produced and in the possession of their officers were in the possession of the members and any rights acquired by any permanent official as the result of work done under contracts with third persons, the fruits of such contracts, would be acquired for the members and would be the rights of the members. I think this results from an application of the reasoning of Maule J. in *Sweet* v. *Benning* (1) in his judgment at page 484 and *arguendo* at pp. 468 and 475, as well as from the reasoning of Lord Halsbury in *Lawrence* v. *Aflalo* (2) and the judgment of Bowen L.J. in *Lamb* v. *Evans* (3). The immediate question under consideration in these cases was the application of section 18 of the *Copyright Act* of 1842, but the reasoning seems to me to be applicable to the common law right.

Mr. McGillivray, in his book published in 1902, on the Law of Copyright, at pp. 73 and 74, expresses the opinion where the author was a servant or agent the property in the work, as well as the copyright in it, under the statute of 1842, would vest in the employer *ab initio* independently of section 18 of that statute; and, in the case of an independent contractor, independently of the statute also,

(1) (1855) 16 C.B. Rep. 459. (2) [1904] A.C. 17, at 20, 21.
(3) [1893] 1 Ch. 218, at 227, 229.

the copyright would not vest *ab initio* in the contractor but would pass to the employer upon the delivery of the work with the intention of conveying the right. I have no doubt that the delivery of completed materials by an independent contractor to an official of the Association for the Association as such or the completion of the work by a servant or agent and delivery into the custody of the proper official of the Association with the intention, express or implied from the circumstances, of transferring the common law incorporeal right, would have the effect of vesting this in the members. The official acquiring the incorporeal right could only hold it as agent and if there were a trust, he would be a bare trustee for the members of the Association for the time being. The entire beneficial property in the incorporeal right would, I think, in respect of such right, come within the schedule of section 42 under the statute of 1921.

This discussion will, probably, appear to be superfluous; but in my view it has a direct bearing upon a question that is one of the cardinal questions on the appeal to which we shall come to presently. Before leaving the subject, however, I think it is convenient at this point to make this observation. We have, as I have said, no evidence as to the actual practice pursued in respect of contracts with the persons employed by the Association for the preparation of these materials. Now, it is a fact that must be taken into account in endeavouring to consider these questions in a practical way that this Association was a body of fluctuating membership which could not, as such, be a party to a contract of service or any other contract. Between 1914 and 1924, from seventy to eighty companies were added to the membership of the Association. The membership was more than doubled. It was, no doubt, open under the constitution, as already observed, to the executive committee to authorize the officials of the Association to enter into contracts with third persons to which the members of the Association for the time being would be contracting parties. This principle would be attended by the inconvenient necessity of having in the case of employees an assent to a change of parties whenever a change in membership of the Association took place. I do not think we are entitled to speculate upon the subject

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and I do not think on the evidence before us we can justly infer that this course was pursued in respect of contracts of employment, but, for the reasons just given, I think, as regards these incorporeal rights existing when the statute of 1921 came into force that is of no importance.

Such was the position when the statute of 1921 came into force on the 1st of January, 1924; the property in the rating material of the Association, as well as any incorporeal rights connected with it, were vested in the members of the Association at that time. It follows, by force of section 42 and the schedule thereto, that these members of the Association acquired copyright in this material under the statute.

After the Act came into force new rating material was produced by the Association and this material still remained unpublished. It was, I have no doubt, subject matter for copyright under the statute and one of the cardinal questions for determination is whether the plaintiffs, or some of them, acquired such copyright in this material in respect of the alleged infringement of which the action is brought.

The members of the Association are all incorporated companies and I am unable to convince myself that they or any one of them could be an author within the meaning of the *Copyright Act*. Any one or all of them, that is to say, all the members of the Association at any given time, could be the owner or joint owners of copyright, but they could acquire copyright, as far as I know, only in one of two ways,—either by assignment by some person having a title to the copyright or by one of the ways mentioned in the proviso to section 12 which is in these words:

> 12. Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein
>
> Provided that
>
> (*a*) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and
>
> (*b*) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright; but where the work is an article or other contribution to a newspaper, magazine, or similar

periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

It is argued that the present case comes within subsection (*b*). The respondents must, in order to succeed upon that ground, show that the material in respect of which the question arises was made "in the course of his employment" by a person or persons "under a contract of service or apprenticeship" with the respondents or some of them.

I have already in effect expressed my opinion upon this question. It has given me a good deal of concern but I do not think from the evidence before us I can infer that this material was produced by employees in the course of their employment under a contract of service with the members of the Association for the time being. As already observed, there is no evidence as to the practice in relation to the contracts under which the employees of the Association were engaged or in relation to the terms of their engagement. It is not a mere abstract possibility, but a practical possibility, that for convenience some form of arrangement was resorted to by which there was no direct contractual bond between the members of the Association and the employees, or that in any case the work was done by persons who were independent contractors.

I turn now to the point chiefly relied upon by counsel for the respondents in support of their claim to copyright in this material. It is based on section 20 (3) (*The Copyright Act*, 1921, R.S.C. 1927, ch. 32, as amended by Stats. of Can. 1931, ch. 8) which is in these terms:

(3) In an action for infringement of copyright in any work in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case:—

(*a*) The work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and (*b*) The author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;

Provided that where any such question is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act, then, in any such case:—

(i) 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;

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(ii) 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 purpose of proceedings in respect of the infringement of copyright therein.

This subsection establishes, first, the presumption that copyright subsists in this material. As to clause *b* (1) that seems obviously inapplicable for the reason already indicated, namely, that all the members of the Association being bodies corporate, none of them could be an author within the contemplation of the statute.

I come now to 3 (*b*) (ii). I am unable to find as a fact that the conditions of this enactment are fulfilled. The action is brought by a number of incorporated companies, including the Underwriters' Survey Bureau, Ltd. The Canadian Fire Underwriters' Association is not a party to the action and could not be so under its group name. The Association is not a partnership. Its name is not a trade name. It designates sufficiently for practical business purposes a group of companies bound together by an agreement embodied in a constitution and by-laws, the identity of which changes from time to time. The name of the Association, if read as denoting the members of the group, would have one denotation at the time of the trial and, in fact, another at the date of the commencement of the action, another at the date when the material said to be the subject of copyright came into existence and the copyright also was constituted; another, perhaps, when the first alleged infringement occurred and, it may be, another and different one at the date of each successive infringement. In these circumstances I cannot find as a fact that the name Canadian Fire Underwriters' Association on these manuals, rate books and other rating material is a name which answers the description of the statute, namely, that

a name purporting to be that of the * * * proprietor of the work is printed thereon in the usual manner.

I now turn to the plans.

In October, 1917, the Underwriters' Survey Bureau, Ltd., was incorporated. The shares were held entirely in trust for the Association, that is to say, for the members for the time being of the Association. The directors were officers of the Association.

On the 4th of December, 1917, an amendment of the constitution was adopted by the Executive Committee and duly passed which provided as follows:

Plan Committee.—This Committee shall have charge of all work in connection with the making or obtaining of plans, and shall have the control and direction of the Underwriters' Survey Bureau, Limited, and shall make all arrangements for supplying plans and revisions to Members and others, and for the prices to be charged for them, subject to the following general regulations:—

The clause further provided that:

All copies of plans in Agents' hands shall remain the property of the Underwriters' Survey Bureau, Limited.

By the by-laws,

all plans and revisions delivered to a member should be by way of loan only and be and remain the property of the Underwriters' Survey Bureau, Limited;

and in the event of a member ceasing to be such, all such plans and revisions should be returned to the Underwriters' Survey Bureau, Ltd.

Copies were put in evidence of receipts required from agents and of the labels pasted upon the plans which show that a plan is to be used solely for the business of the members of the Association and that it is to be returned to the Bureau on request. The receipt is in the following form:

Underwriters' Survey Bureau, Limited
Toronto and Montreal

..... 19

I hereby acknowledge having this day received from the Underwriters' Survey Bureau, Limited, copy of Plan of.....

I bind myself to use same solely for the business of the Canadian Fire Underwriters' Association, Companies, and to return it to the Bureau on demand.

Signature.....

and the label reads as follows:

Insurance Plan of

.....

Underwriters' Survey Bureau, Limited
and is loaned to

..... on the following conditions: That the Plan is to be kept in good order, that it is to be used only in connection with business of Companies, Members of the Canadian Fire Underwriters' Association, and to be returned on request to the

Underwriters' Survey Bureau, Limited,
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Some nine plans in all had been made by officers of the Association, seven in 1917, between March and December, and two in the year 1911. The rest of them were all made by the Bureau.

Although the Bureau was not incorporated until October, 1917, an office was opened in its name on the 1st of April, 1917, and some time later it opened an office in Montreal for the transaction of Quebec business. In the minutes of the first annual meeting of July, 1918, it is stated that new plans and revisions had been made and distributed to the Companies in certain places

during the fourteen months from the 1st of April, 1917, to the 31st of May, 1918, that the Bureau has been in operation.

The plans produced by the plan committee of the Association prior to the incorporation of the Bureau seem to have been treated as the property of the Bureau and this would appear to be in conformity with the provisions of the constitution and by-laws above mentioned by which all copies of plans in agents' hands were to remain the property of the Underwriters' Survey Bureau, Limited, and the provisions of the by-laws that all plans and revisions issued to a member should be by way of loan only and be and remain the property of the Underwriters' Survey Bureau, Ltd.

It seems probable that all the plans made by the Association were delivered to the Bureau and delivered, moreover, with the intention that they should be the property of the Bureau, that is to say, the legal ownership should be vested in the Bureau. There can be no doubt, at all events, that after the incorporation of the Bureau, plans made by the employees of the Bureau became the property of the Bureau and, I think, the only inference is that the exclusive right of reproduction and publication vested in the Bureau also. The Bureau was under the control and direction of the plan committee and the business of the Bureau was conducted by that department, but the form of the resolution of the Bureau, by which the management of its affairs was placed in the hands of the plan committee shows that the committee was acting as the agent of the Bureau and that, in engaging and dismissing and controlling employees, in entering into contracts for supplies and work, in renting premises and other-

wise acting in the conduct of the business, the committee was to act on behalf of and in the name of the Bureau. That this was the practice appears from the evidence of Long and Brown.

As regards plans then produced by the Bureau down to and including the 31st of December, 1923, after its incorporation, the proper conclusion appears to be that the exclusive common law right of reproducing and publishing these plans was vested in the Bureau, an incorporated company. As regards the nine plans produced prior to the incorporation of the Bureau, if they were not the property of the Bureau they were the property of the members of the Association and the rights of the members of the Association as of the 31st of December, 1923, in respect of them would be the same as their rights in respect of the rating material. It follows that, by force of section 42 and the schedule thereto, of the statute of 1921, the Bureau or the members of the Association acquired copyright in all these plans.

It does not appear to me to be strictly necessary to decide whether the Bureau was the agent of the members of the Association or held these plans and the rights in relation to them in trust for the members of the Association, or was merely a corporate body under the control of the Association by virtue of the ownership of its shares and the composition of its governing body. But I think the proper conclusion is that the Bureau was the agent of the Association and governed by the constitution.

We are concerned also with two other classes of plans before we come to the plans made by the Bureau after the 1st of January, 1924: first, plans, the copyright in which was registered in the name of Charles Edward Goad, who died in 1910; and, second, plans, the copyright in which was registered in the name of the Charles E. Goad Company. The respondents claim title to these plans under assignment by the Toronto General Trusts Corporation, Executors and Trustees of the will of Charles Edward Goad, through the members of the firm Charles E. Goad Company, and under a further assignment of March 3rd, 1931, from the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd. I think the transfer from the Toronto General Trusts Corporation to the persons

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who became members of the firm Charles E. Goad Company, which was a transfer of the business of Charles Edward Goad as a going concern, and a list of assets including (*inter alia*) good will and advances made to surveyors, by necessary implication had the effect of vesting in the transferees the title to the copyrights which had been acquired by Charles Edward Goad. The construction contended for on behalf of the appellants would really defeat the transaction as contemplated by all parties. The document may properly be construed with reference to the known circumstances in which it was made. In any case, a three-eighths interest in the plans was vested in the transferees under the will and passed to the Bureau by the transfer of 1931.

Certificates of registration have been produced for these plans which, under sections 36 (2) and 37 (6), constitute *prima facie* evidence that copyright subsists in the work and that the persons registered were the owners of such copyright. This *prima facie* case has not been met.

The property in all plans belonging to the Goads in possession of agents of the Association passed to the Underwriters' Survey Bureau, Ltd., for the consideration of $22,000 as the result of an agreement of the 21st of September, 1917. An agreement was made on December 27th, 1917, between the Charles E. Goad Company and the Survey Bureau that, for a certain price, when the Association or the Bureau

> desires to revise one of Goad's plans the plans or sheets needed are to be placed at the disposal of the Association or the Bureau and to be used as required in the preparation of the revision

and the right to revise copies in possession of the Association or member Companies, or their agents, was admitted.

A large number of the Goad plans were completely reprinted by the Survey Bureau; some prior to the assignment of the Goad copyrights in March, 1931, and some subsequent to that. There were also complete revisions by the Bureau of other plans of which, however, all the sheets were not necessarily reprinted.

I do not think it is doubtful that the intention of the members of the Association and of the Bureau and the plan committee was that the legal property in all the plans and revisions produced after the incorporation of the Bureau, and revisions of these plans acquired from the

Goads, should vest in the Bureau although no formal, explicit agreement to that effect is proved. The members of the Association conceived that the plan department of the Association was being incorporated. The business of the plan department was to be conducted by the plan committee but, as already observed, as agents for the incorporated Bureau. I see no reason why, as respects any of the revisions of Goad plans made prior to the 1st of January, 1924, for the Bureau, the exclusive right of reproduction should not be considered to be vested in the Bureau. And this, I think, would apply equally to complete reprints and to revisions effectuated by stickers where the sheet was not reprinted. These revisions were made for the exclusive use of the members of the Association and their agents and they had the authority of the Goad Company for making use of their original sheets for such purposes. Of the revisions, whether expressed in a complete reprint or by stickers, the salaried employees of the Bureau were the authors; and I can see no reason why, on the principles above explained, they had not the right to prevent anybody else publishing them or making copies of them, including the Goad Company.

On the 1st of January, 1924, then, the Bureau were the legal holders of the incorporeal, exclusive right of reproduction in all plans made by themselves as well as in the revisions of the Goad plans made by their salaried employees.

We arrive now at the important question which concerns the revisions of these plans after that date and the new plans made by the Bureau after that date.

First, as to the new plans. The method of plan making is explained by Mr. Long in his evidence very fully and, I think, it results from the evidence that all plans and revisions were made by the salaried employees of the Bureau, subject, of course, to instructions received from the plan committee (acting as agents and in the name of the Bureau) or emanating from a general meeting of the Association, or from the executive committee. These plans, of course, were only a part of the machinery for arriving at rates and were essential in the process of rate making. The plans constituted an essential part of the process, apparently, in every case except those cases in which the principle of "minimum" rates was applied.

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They were intended, as everybody understood, for the sole and exclusive use of the members of the Association and their agents acting in the course of their duties as such agents. They were really confidential documents in the sense that the information contained in them was not to be disclosed to rival insurance companies, or employed in the business of such companies. The information given by a plan, besides the general setting of streets and general conditions such as information with regard to hydrants and water supply generally, public buildings and so on, and dimensions of areas and buildings, is conveyed by symbols the meaning of which is given in every case in a key plan.

The foundation of the plan is a field sheet made by the surveyor in the field, which is uncoloured. The office staff, comprising surveyors, draughtsmen, colourists, by the use of the surveyor's field notes complete the plan, inserting such additional symbols as do not appear in the surveyor's field sheet. But the whole process from beginning to end differs very little to-day from the method perfected by Mr. Long when he became in March, 1917, the Manager of the Association's plan department. There can be no doubt that the plan committee, subject to directions by a general meeting of the members, or the executive committee, had full authority, acting as agents for and in the name of the Bureau, to prescribe the manner in which this work was to be carried on. The persons concerned in the actual production of a plan could not in the ordinary course be fairly described as independent contractors and there is, I think, sufficient evidence to support the inference that they were persons performing services under contracts of service. And that is, I think, the proper inference. (*Massine* v. *de Basil* (1); *Ware* v. *Anglo-Italian Commercial Agency* (2); *Drabble* v. *Hycolite* (3)).

Then, as to the revisions of the Goad plans, the salaried servants of the Bureau were the authors of these revisions, and, as the work produced constituted in each case a new

(1) (1938) 82 Sol. Jo. 173.
(2) (1922) McGillivray Cop. Cas. 1917-1921, p. 346.
(3) (1928) 44 T.L.R. 264.

work, I do not know why they are not proper subjects for copyright, or why such copyright did not vest in the Bureau.

As regards the nine plans produced by the plan department of the Association before the incorporation of the Underwriters' Survey Bureau, Ltd., in October, 1917, copyright in these plans would appear to have vested in the members of the Association at the date when the Act of 1921 came into force. This point would appear to be governed by the considerations above mentioned as affecting the rating material produced by the Association before the Act came into force.

To sum up—

The rating material, using the words in the sense indicated above as excluding the plans, was the property of the members of the Association at the date when the statute of 1921 came into force on the 1st of January, 1924. These members were the owners, not only of the material itself, but of the common law, incorporeal, exclusive right of reproduction and became, by force of the statute (section 42 and the schedule), the owners of copyright in that material. As to such material produced after the statute came into force, the respondents have not adduced sufficient evidence to establish a title to copyright in it.

As regards plans.—The first group of plans with which we are concerned consists of plans copyrighted by Charles Edward Goad in his life time. These copyrights passed to the Underwriters' Survey Bureau, Limited, by the transfer, first, from the Trustees and Executors of Charles Edward Goad to the sons of Charles Edward Goad, who afterwards carried on his business as partners under the firm name of Charles E. Goad Company, by a transfer dated the 21st of September, 1911, and by a transfer from the partners in the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd., dated the 3rd of March, 1931;

Second, the plans copyrighted by the Charles E. Goad Company. These copyrights passed from the Charles E. Goad Company to the Underwriters' Survey Bureau, Ltd., by the last-mentioned assignment;

Third, the nine plans made by the plan department of the Canadian Fire Underwriters' Association in 1911 and

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1917. With respect to these copyright was vested, by force of the Act of 1921, s. 42, in the members of the Association at the date when the Act came into force, the 1st of January, 1924.

Fourth, revisions of the Goad plans (plans of Charles Edward Goad and Charles E. Goad Company) effected by the Underwriters' Survey Bureau, Ltd. The copyright in the original plans passed under the agreements above mentioned to the Underwriters' Survey Bureau, Ltd., and the copyright in the revisions vested in the Bureau in virtue of the fact that these revisions were executed by the salaried employees of the Bureau in exercise of their functions as such;

Fifth, as to plans and revisions of plans made by the Underwriters' Survey Bureau, Ltd., after the statute of 1921 came into force on the 1st of January, 1924. These plans having been made by the salaried employees of the Bureau the title vested in the Bureau in virtue of section 12 (*b*);

Sixth, as regards the copyright in the plans produced by the Underwriters' Survey Bureau, Ltd., including the revisions of the Goad plans, although the question is doubtful, I have come to the conclusion that section 20 (3) (*b*) (ii) applies. *Prima facie* the legend "Made in Canada by the Underwriters' Survey Bureau, Ltd.," I am disposed to think, implies proprietorship and this legend is found on these plans. The *prima facie* case has not been met.

In this view of the case, the point that attracted considerable attention on the argument as to the rights of part owners can be briefly disposed of. The point has no application to the plans except the nine plans made by the Association before the incorporation of the Bureau. As regards the copyright in these plans, and in the rating material, owned by the members of the Association on the 1st of January, 1924, the copyright vested in these members when the Act came into force.

If any companies which were members on that date were not plaintiffs in the action because they are no longer members, there is no evidence to show that such companies are still in existence. Their right, in respect of the copyrights, if any, would be a bare legal right because, by

the terms of the constitution, they released all their rights and claims in the common property on ceasing to be members.

As to the personal chattels, the rating material itself and the plans, they abandoned possession of them on ceasing to be members and from this abandonment of possession, and the terms of the constitution which embodied their contract with the continuing members, it resulted, I think, that they never acquired either possession or right to possession in any of the personal chattels that became part of the common property of the members of the Association after their withdrawal.

As to the copyrights, the agreement embodied in the constitution was executed by them before the copyrights came into existence and I assume, therefore, that even after withdrawal they retained a bare legal title to some interest in the copyrights but I do not think that applies to personal chattels, even such personal chattels as the infringing copies. A company ceasing to be a member could, I think, thereafter have no joint or several right to possession in any of the common property and, therefore, would not be a proper party to an action in trover or detinue in respect of such property. Further, I cannot accept the proposition that one joint owner, or owner in common, of personal chattels is not entitled to maintain trover or detinue against a mere wrongdoer.

It is not, of course, disputed that the plaintiffs are entitled to protect their rights by suing for an injunction and for damages. (*Lauri* v. *Renad* (1); *Cescinsky* v. *Routledge* (2). As to their rights in respect of the infringing copies, attention may be called to *Dent* v. *Turpin* (3) in which it was held that one of several companies of a name used as a trade mark may, on infringement, sue alone for an injunction or delivery up of articles bearing the pirated trade mark, or for an account of the profits made by the infringers, and for payment of such part of the profits as the plaintiff may be entitled to.

There is a further point as regards the nine plans produced by the Association. All these plans were under the control of the plan committee. The reasonable inference

(1) [1892] 3 Ch. 402. (2) [1916] 2 K.B. 325.
(3) (1861) 2 J. & H. 139.

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from the facts appears to be that the plan committee treated them as in the same category as plans produced by the Bureau,—the property of the Bureau to be lent to the agents of members and to be returned on the retirement of a member. They bear the legend above mentioned. I am disposed to think it to be a legitimate inference that these plans, with the consent of the plan committee representing the members of the Association, became the property of the Underwriters' Survey Bureau, Ltd., together with the incorporeal right of reproduction, and that when the Act of 1921 came into force the Bureau was invested with the copyright in these plans.

There remains the question of the Statute of Limitations. The point which has concerned me most as to this feature of the appeal is whether, in view of the fact that the rights the respondents seek to enforce are the creature of the statute, you can go beyond the statute for the purpose of ascertaining the statutory limitation.

I have come to the conclusion, however, that the principle applied in *Bulli Coal Mining Co.* v. *Osborne* (1) cannot be limited to underground trespasses, that it covers this case and that there was ample evidence in support of the conclusion of the learned trial judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered.

I think the conclusion of the learned trial judge negativing the existence in fact of a criminal conspiracy is right and I think it unnecessary to discuss the subject further except to say this: If the plaintiffs in an action for the infringement of copyright are obliged, for the purpose of establishing the existence of, and their title to, the copyright to rely upon an agreement, and that agreement constitutes a criminal conspiracy, and their title rests upon such agreement and upon acts which are criminal acts by reason of their connection with such an agreement, then I have on general principles great difficulty in understanding how such an action could succeed.

(1) [1899] A.C. 351.

In what I have said, I have not adverted to some points raised by Mr. Tilley and Mr. Biggar which should be noticed. The first is the contention that the authorship of the work cannot in the case either of the plans or of the rating materials be ascertained. It is clear from section 20 (3) of the Act that the statute does not contemplate disclosure of authorship as a necessary condition of success in an action for infringement.

Then in the case of unpublished works (where the proprietor is shewn to have acquired a common law right prior to the statute of 1921 by evidence establishing facts requiring an inference that the work was done for the plaintiff and that the intention of all parties concerned in the production of the work was that the common law right should vest in him) the statute plainly contemplates the protection of that right; and the only possible protection is the recognition of the substituted copyright given by the statute. It appears to me to be merely a matter of evidence: the ownership of the common law right must rest upon established facts and these facts can be proved by inference as well as by direct evidence.

As to the duration of the copyright when that comes in question, if the owner of it cannot identify the author, the duration of it must be restricted to the period of fifty years from the date when the copyright or common law right, as the case may be, came into existence.

As to the point of *res judicata,* I can perceive no reason for disagreeing with the decision of the Court of Appeal in *Ash* v. *Hutchison* (1) which, it is quite freely conceded, is conclusive if rightly decided.

There is a further point, in respect of the presumption under section 20 (3). Mr. Mann argued that the name of the Association on the rating material should be regarded as the name of the publisher. I am afraid the considerations already explained are conclusive against him on this point. Publishers in the copyright sense they could not be because the respondents' case in effect involves the proposition that the material was in that sense unpublished. In any other sense the word would seem to imply proprietorship.

In the result, the appeal is allowed in respect of the rating material brought into existence after the 1st of

(1) [1936] 1 Ch. 489.

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January, 1924, and in other respects dismissed. The appellants should have two-fifths of the costs of the appeal. The respondents should have the general costs of the action and the appellants the costs exclusively attributable to the issue on which they have succeeded.

Appeal allowed in part and in other respects dismissed, appellant to have two-fifths of costs of appeal.

Solicitors for the appellant: *Cassels, Brock & Kelley.*

Solicitors for the respondents: *Mann, Lafleur & Brown.*