

BETWEEN:

1912
 {
 Sept. 19.

THE IMPERIAL SUPPLY COMPANY, } PLAINTIFF.
 LIMITED. }

AND

GRAND TRUNK RAILWAY COM- } DEFENDANT.
 PANY }

Patents for invention—Feed lubricators for railways—Infringement—Validity of patents—License—Estoppel.

In an action for infringement of certain patents for invention, the defendant pleaded *inter alia* that the patents were invalid. By counter-claim the defendant alleged that the plaintiff was a trustee for the defendant in respect of the said patents, and sought a declaration of its right as trustee by the Court.

Held, that while the evidence did not support the counter-claim of the defendant, in any event the defendant could not, on the one hand, deny the validity of the patents, and, on the other, assert a right depending upon the patents being treated as valid and effective.

2. The patentees of the invention in question were employees of the defendant railway company, and had used the premises, machinery and tools, and had the benefit of the advice and assistance of the servants of the defendant, in perfecting their invention. After letters-patent for the invention had been obtained the defendant with the consent and acquiescence of the patentees used the said invention for the purposes of its railway. The patentees thereafter assigned the patents to the plaintiff.

Held, that while the facts disclosed that the patentees had given the defendant an irrevocable license to use the invention for its own railway, such license did not enable the defendant to manufacture the invention, or cause it to be manufactured, for use on other railways.

THIS was an action for damages for the infringement of Canadian Letters-Patent Nos. 98,330 and 129,053 for improvements in lubricators for the cylinders of steam-engines.

The case was before the Court on the question of the validity of a license from the patentees to the defendant

company, and judgment was given thereon on the 14th February, 1912. [Reported 13 Ex. C. R. 507.]

The question of infringement was tried on May 1st, 1912.

T. C. Casgrain, K.C., and *G. S. Stairs* for the plaintiff:

E. Lafleur, K.C., and *A. E. Beckett* for the defendant.

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Counsel for the plaintiff contended that the invention was wholly the result of the joint work and mental effort of Dalrymple and Burnside. The assistance that they got from the servants of the defendant company was slight, and not appreciable in the development of the essential features of the patented invention. The facts establish beyond all doubt that Dalrymple and Burnside were entitled to the patents under the provisions of section 7 of *The Patent Act* (R. S. C., 1906, c. 69). They cited *The Queen v. La Force* (1); *Dol-lond's Patent* (2); *Cornish v. Keen* (3); *Plimpton v. Malcolmson* (4); *Ex p. Henry* (5); *Nicolas on Patents* (6).

As to the question of disclosure of the invention before obtaining the patents, the evidence is that beside the first one tested on an engine, six others were manufactured for trial on engines during the winter season. Under the circumstances, this was not a dedication of the invention to the public, but only a reasonable experimental use of it for the purpose of testing the merits of the invention.

As to the right of the defendant to assert the invalidity of the patents, apart from the question of whether the defendant was bound by the written license executed by the inventors, the whole use by the defendant of the invention is referable to the leave and

(1) 4 Ex. C. R. 14.

(2) 1 Webs. P. C. 43.

(3) 1 Webs. P. C. 508.

(4) L. R. 3 Ch. D. at p. 556.

(5) L. R. 8 Ch. 167.

(6) P. 27.

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license of the patentees. The defendant knew that Dalrymple and Burnside were taking out a patent, and there is positive evidence that it acquiesced in their action for that purpose. Moreover, it negotiated for larger privileges than the patentees were disposed to grant, but not obtaining them was content to go on and manufacture the invention for itself with the assent of the patentees. If the defendant had intended to contest the validity of the patent for any reason these negotiations would not have been carried on. It would have rested simply on its rights, and not have entered into any pourparlers with the patentees as to obtaining a license, either for the Grand Trunk or its allied lines.

The defence that the relation of master and servant subsisting between the defendant and the patentees rendered the patents invalid as regards the defendant cannot prevail. Such a relationship does not entitle the master to patent the invention. They cited *Frost on Patents* (1); *Wallace and Williamson on Patents* (2); *Heald's Patent* (3); *Saxby v. Gloucester Waggon Co.* (4); *In re Marshall and Naylor's Patent* (5).

Such cases as *Worthington Pumping Engine Co. v. Moore* (6), and *Bonathan v. Bowmanville Furniture Mfg. Co.* (7), are distinguishable on the facts from this case. The same is to be said as to the American cases of *Solomons v. United States* (8).

Counsel for the defendant contended that neither Dalrymple nor Burnside could be regarded as inventors of either of the patents in dispute. The evidence shewed that they merely seized upon suggestions

(1) 3rd ed. p. 14.

(2) P. 27.

(3) 8 R. P. C. 430.

(4) 50 L. J. Q. B. 577.

(5) 17 R. P. C. 553.

(6) 20 R. P. C. 41.

(7) 31 U. C. Q. B. 413.

(8) 137 U. S. 342.

thrown out by Hudson and Lees, two of their fellow-workmen.

The evidence also shews that both patents were obtained by misrepresentation, inasmuch as neither patent was the joint invention of Dalrymple and Burnside. This would be a ground for avoiding both patents.

There is no controversy as to the circumstances under which the new lubricator was ordered to be made. Mr. Robb and Mr. Maver had a conversation in the spring of 1905 as to the unsatisfactory character of the old type then in use, and they decided to endeavor to get up a lubricator of their own. Maver then gave instructions to Dalrymple and Burnside and the shop generally to get up an improved lubricator. The finished model was made in the Grand Trunk shops by its men, was tested, and placed on an engine. Six more were made and applied to other engines and used all winter. The modification subsequently introduced by substituting three tubes instead of one leading from the condenser was also made in the Grand Trunk shops by its men.

The question in this case upon the above state of facts is not whether the invention could be patented by the employer, or by its servants, but whether such servants, or any one of them who could be considered the true inventor, can hold a patent and enforce it against the employer for whose benefit they undertook to do that very work. They cited *Cyclopedia of Law and Procedure* (1); *Gill v. United States* (2); *Keyes v. Eureka Consolidated Mining Co.* (3); *Lane v. Locke* (4); *Solomons v. United States* (5); *Hapwood v. Hewitt* (6);

(1) Vol. 30, p. 880.
 (2) 160 U. S. 426.
 (3) 158 U. S. 150.

(4) 150 U. S. 193.
 (5) 137 U. S. 342.
 (6) 119 U. S. 226.

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Blawell v. Interior Conduit &c. Co. (1); *Whiting v. Graves* (2); *Bonathan v. Bowmanville Furniture Mfg Co.* (3); *Worthington Pumping Engine Co. v. Moore* (4).

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CASSELS, J. now (September 19, 1912) delivered judgment:

This case was tried before me in Montreal on the 1st May last. The evidence was heard, and at the request of counsel written arguments were subsequently handed in. I have since the trial perused and re-perused the evidence, and considered the various authorities cited by the different counsel in their able arguments.

On the previous trial on the 22nd May, 1911, the issue was whether the paper purporting to be a license and dated the 2nd June, 1906, was binding on the Grand Trunk Railway Company. I set out in detail in my reasons for judgment (5) dated the 14th February, 1912, the conclusion I arrived then at, holding that the document in question was not agreed to by the Grand Trunk Railway Company.

Had my opinion been the other way the case would have ended, as according to my view the Grand Trunk Railway Company would have been estopped from disputing the validity of the patents in question. I fully explained my view on the question of estoppel. I was dealing only with the question of estoppel based on the alleged license of 2nd June, 1906.

I did not consider, nor had I the evidence then before me to deal with, the question of estoppel by conduct or otherwise.

(1) 80 Fed. R. 906.

(3) 31 U. C. Q. B. 413.

(2) 29 Fed. Cas. No. 17,577.

(4) 19 T. L. R. 87.

(5) EDITOR'S NOTE.—Reported, 13 Ex. C. R. 507.

The case is a difficult one and open to conflicting views.

I have come to the conclusion, from the reasons which follow, that the Grand Trunk Railway Company are estopped from impeaching the validity of the patents.

I have also come to the conclusion that if the defendants were at liberty to attack the validity of the patents, the evidence adduced before me is insufficient to support their defence. At the trial all the evidence as to whether or not the patentees Thomas Aikin Dalrymple and Robert Burnside, Jr., were the inventors and entitled to the patents was adduced, so that if the defence is open to the Grand Trunk Railway Company there has been a full trial on this question.

I think the patents as between the parties are valid.

I find, however, that the Grand Trunk Railway Company has an irrevocable license to make and use for themselves the patented inventions. This point is I think practically conceded by the plaintiffs.

I do not think the Grand Trunk Railway Company has any right to make and sell to others. I will deal with this question later on.

In a patent action pleadings and particulars have an important bearing on the questions at issue. Both by the rules of the Exchequer Court and the English practice the plaintiff is entitled to proceed to trial with full knowledge of the issues he is called upon to meet.

It becomes important therefore to consider the issues raised by the defence.

The first patent, No. 98330, was dated 3rd April, 1906, and the second, No. 129053, 1st November, 1910.

Since April, 1906, no claim has been put forward by the Grand Trunk Railway Company for avoiding the

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patents or that the plaintiff's assignors were trustees of the patents until the question was raised by their counterclaim. They were aware of the intended application for the patents to the patentees and assented to the issue to them.

The statement of claim was filed on the 25th November, 1910.

The plaintiffs are assignees through various assignments of the title of the patentees.

The first statement of defence is dated the 12th January, 1911 (filed on the 13th January, 1911). The fourth paragraph of this defence is as follows:

“ The defendants further say that prior to and at
 “ the time of the issue to the said Thomas Akin
 “ Dalrymple and Robert Burnside, Junior, of the said
 “ Canadian Letters-Patent, the said Dalrymple and
 “ Burnside were in the service of the defendants; that
 “ at that time the defendants were with the full
 “ knowledge of the said Dalrymple and Burnside
 “ lawfully manufacturing, using and dealing with a
 “ device for lubricating the cylinders of steam engines;
 “ that while so in the service of the defendants, and
 “ at the suggestion and request of the defendants, the
 “ said Dalrymple and Burnside devoted a considerable
 “ portion of their time in an endeavour to perfect the
 “ said device so being used and the improvements in
 “ lubricators mentioned in the Statement of Claim
 “ and said to be covered by the said Canadian Letters-
 “ Patent, and for the time so spent were paid by the
 “ defendants; that for such purpose and in developing
 “ and perfecting such improvements said Dalrymple
 “ and Burnside were permitted to use and did use the
 “ premises, appliances, tools and materials of the defen-
 “ dants, and acted under the direction of, consulted
 “ with, and had the benefit of the advice and assist-

“ance of officials of the defendants, competent to
 “give and render such, in consideration of all of which
 “it was understood and agreed that notwithstanding
 “the issue to the said Dalrymple and Burnside of the
 “said Letters-Patent, application for which was then
 “made, the defendants should have the right to
 “manufacture, use and dispose of, as they saw fit, the
 “improvements and alleged inventions covered by the
 “said applications and Letters-Patent; that in view of
 “the circumstances stated, the defendants submit that
 “notwithstanding the said Letters-Patent or any-
 “thing contained therein, or of any of the provisions
 “of the said document of June 2nd, 1906, they had and
 “have the full and absolute right to manufacture, use
 “and deal with the said improvements and inventions
 “mentioned in the Statement of Claim to the extent
 “which they have, and of which the plaintiffs complain
 “in this action; that the plaintiffs acquired their
 “alleged interest in the said Letters-Patent with the
 “full knowledge of the facts herein set forth, and of
 “and subject to the rights and privileges of the
 “defendants in, to, and in respect of the said device,
 “articles, appliances, improvements and alleged in-
 “ventions and by reason thereof are not entitled to
 “maintain this action against the defendants.”

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This defence sets up a specific contract between the patentees and the Grand Trunk Railway Company, whereby for the consideration mentioned the Grand Trunk Railway Company was, notwithstanding the issue of the patents, to have certain rights set out in this paragraph of defence.

The Grand Trunk Railway Company has failed to prove any such specific contract as alleged.

The defence impliedly concedes that as between Dalrymple and Burnside and the other employees of

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the Grand Trunk Railway Company, Dalrymple and Burnside were the inventors, having had the benefit of the advice and assistance of the officials of the Grand Trunk Railway Company.

The amended statement of defence was filed on the 5th June, 1911. This defence was filed after the first trial of the 22nd May, 1911.

Paragraph 4 of this defence, referring to patent 98330, is practically identical with paragraph 4 of the original defence.

Paragraph 5 of the amended defence is similar to paragraph 4 of the original defence quoted, except that it has reference to the later patent, 129053.

For the first time the claim that the patentees were trustees for the Grand Trunk Railway Company is set up in the counterclaim dated 5th June, 1911.

I confess I share with Buckley, J. the difficulty in understanding how a patentee can be a trustee for another of a patent which is void. The counterclaim is inconsistent with the defence that the patents are invalid. It savours of approbating and reprobating.

See *Richmond & Co., Ltd., v. Wrightson*, (1) where the learned judge finds that Wrightson was not the true and first inventor, but adopts the method of Mr. Justice Byrne of getting over the difficulty as reported in *Worthington Pumping Engine Co. v. Moore* (2).

On the 12th June, 1911, an order for particulars was granted requiring the defendants among other matters to give particulars of the 4th and 5th paragraphs of the amended statement of defence:—

“Particulars of the time, place and circumstances
 “of the alleged agreement by and under which the
 “defendants should have the rights claimed.”

(1) 22 R. P. C. at p. 33.

(2) 20 R. P. C. 41.

Particulars were furnished and the date of the alleged specific agreement is given as of the month of March, 1905.

These particulars were served on the 29th February, 1912, and repeated in further particulars of the 13th June, 1912.

As far back as June 1906 the defendants were aware that the patentees were negotiating a sale of the patents. See letter of Maver to Robb 4th June, 1906; also letters of 7th June, 1906, Robb to Maver; 12th June, 1906, Maver to Dalrymple; and 18th July, 1906, Dalrymple to Maver.

Then there is the claim for a license containing certain limited rights which the patentees declined to agree to.

Considering all the facts and circumstances referred to and the laches, even if the Grand Trunk Railway Company had a right to claim an assignment of the patents there would be, in my opinion, great difficulty in their way of obtaining a judgment declaring that the patentees were trustees of the patents for them.

I am of the opinion, however, that on the facts of this case, the relationship of trustee and *cestui que trust* did not exist.

The law concerning the rights of the master to patents obtained by the employee is intricate, and each case has to be decided upon the facts of the particular case.

In considering this case it has to be borne in mind that neither Robb nor Maver had any idea of how to obviate the defects in the lubricator then in use.

It is not the case of an employer suggesting the idea and employing a skilled mechanic to work out his idea. In this latter case it may be that a sale in advance would be implied and enforced on the issue of the

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patent, although the patent should probably issue to the employee (1).

The law as laid down in Heald's application by the Solicitor-General on an appeal from the Comptroller-General seems to be accepted as a correct statement of the law.

In this case an application was made by Heald for a grant of a patent. The grant was opposed on the ground that the applicant had obtained the inventions from Keeler while in the company's employment. The Solicitor-General (Clarke) is reported in 8 R.P.C., at p. 430 as stating:—

“ I look to the earlier matters in the month of May, 1889, when Mr. Heald was in the employment of the company, and in a book which was a book of the company and kept upon their premises was recording work that he did for that company. In that book he records not merely on the 20th May, but on other days certain incidents connected with the production of an improved lamp which was clearly required because the old lamp had certain defects or shortcomings which several persons in the employment of the company were trying to remedy, and there is no doubt in my mind from that diary that it was *as the servant of the company and in the desire to serve the interests of that company* that Mr. Heald made the improvements so far as he made them, in question.”

The Solicitor-General then proceeds:—

“ But then I have to deal with the proposition that an improvement made by a servant is the property of his employer so as to entitle the employer to take out a patent for it or to prevent the servant from taking out a patent for it. I am not aware of any

1 See Thornton on Patents (1910) pp. 59-60.

“ authority which lays down that the invention of a
 “ servant even made in the employer’s time and with
 “ the use of the employer’s material and at the expense
 “ of the employer thereof becomes the property of the
 “ employer so as to prevent the person employed from
 “ taking out a patent for it.”

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The statement at the end of the judgment (p. 431) as to the rights of Mr. Heald from the date of the issue of the patent is *obiter*, and not in accordance with what I consider the right of the Grand Trunk Railway Company to be under the circumstances of this case.

In the matter of *Marshall and Naylor’s Patent*, Farwell, J. is reported as follows (1):—

“ It is laid down in Mr. Frost’s book: ‘ In the
 “ absence of a special contract the invention of a
 “ servant, even though made in the employer’s time
 “ and with the use of the employer’s materials and at
 “ the expense of the employer, does not become the
 “ property of the employer so as to justify him in
 “ opposing the grant of a patent for the invention to
 “ the servant who is the proper patentee.’ (2)

In the case of *Worthington Pumping Engine Co. v. Moore*, a decision of Byrne, J. (3), the facts were different. The case turned upon the peculiar relationship which existed between the agent and his employers. At p. 47, it is stated that the patents had been taken out without communication of his intention to do so to the plaintiff corporation. At p. 49, the learned judge states his reasons for granting relief. It is on the ground that the act of the patentee was a breach of his obligation under his contract.

(1) 17 R. P. C. p. 555.

ents, 3rd ed. (1905) pp. 24 and 119; Ni-

(2) See also *Cyclopedia of Law & Procedure*, v. 30, p. 881; *Fulton on Pat-*

cholas on Patents (ed. 1904) pp. 26-27-41.

(3) 20 R. P. C. 41.

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In *Solomons v. United States* (1) Mr. Justice Brewer states the law as follows:—

“ If one is employed to devise or perfect an instru-
 “ ment or a means for accomplishing a prescribed
 “ result he cannot after successfully accomplishing the
 “ work for which he was employed plead title thereto
 “ as against his employer. That which he has been
 “ employed and paid to accomplish becomes, when
 “ accomplished, the property of the employer. So also
 “ where one is in the employ of another in a certain
 “ line of work and devises an improved method or
 “ instrument for doing that work, and uses the property
 “ of his employer and the services of other employees
 “ to develop and put in practicable form his invention,
 “ and explicitly assents to the use by his employer of
 “ such invention, a jury or a judge trying the facts
 “ is warranted in finding that he has so far recognized
 “ the obligations of service flowing from his employ-
 “ ment, and the benefits resulting from his use of the
 “ property and the assistance of the co-employees of
 “ his employer, as to have given to such employer an
 “ irrevocable license to use such invention.”

This case was approved in *Gill v. United States* (2).

In *Bonathan v. Bowmanville Furniture Manufacturing Co.* (3) the judgment of Wilson, J. is instructive.

When this case was decided the statute in force was 32 and 33 Vic., cap. 11. Section 6 provided that the invention should not be in public use with the assent of the inventor *at the time of his application* for a patent.

The statute in force when the first patent was applied for was the R.S.C., 1886, chapter 61, sec. 7, which provides that the invention shall not be in public use for more than one year prior to the application for a patent. Chapter 69, sec. 7, of R.S., 1906, is similar.

(1) 137 U.S. 342. (2) 160 U. S. 426. (3) 31 U. C., Q. B. p. 413.

In the *Bonathan* case the patent would have been void as it was in public use prior to the application for a patent.

In the case before me the patentees explicitly assented to the use by the Grand Trunk Railway Company of the invention, and I find that they gave to the Grand Trunk Railway Company an irrevocable license to use the invention.

The contention of the counsel for the Grand Trunk Railway Company is that the license extends not merely to the use, but that the Grand Trunk Railway Company has also the right to manufacture, or procure to be manufactured, the invention for others.

I do not agree with this contention. It is no part of the business of the Grand Trunk Railway Company to manufacture and sell lubricators.

In *Hapgood v. Hewitt*, (1) it is stated that whatever right the employer had from the contract of employment was a naked license to make and sell the patented improvement as a part of its business. The court was dealing with the case of a company whose business it was to make and sell ploughs. These ploughs contained the improvements patented.

I think, having regard to all the facts of this case, and in view of the Grand Trunk Railway Company having continuously used the inventions under the irrevocable license referred to above, they are estopped from disputing the validity of the patents.

As I have stated the evidence as to whether or not the patentees were entitled to the patents is before me, and I proceed to deal with this question.

The defendants, as to the first patent, aver that one Hudson, an employee of the Grand Trunk Railway Company, was the first inventor, having conceived

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(1) 119 U. S. 227.

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the idea in the fall of 1904. He alleges he had made a sketch which he shewed to one Jehu. I think this evidence too vague. It is improbable that Hudson would have kept this information to himself and not given the Grand Trunk Railway Company the benefit of his invention. At most according to Jehu, it was a rough sketch without any details. The time is left very indefinite. Jehu says he spoke to his father within a week of the interview. The father is living and could have been called but was not. Hudson's mother is still living and was present according to the witnesses at the interview with Jehu—she was not called.

According to Hudson, Burnside told him he had evolved some idea, but he (Hudson) said nothing of his invention. Clendenning, a pattern maker, got instructions from Ellis to prepare patterns. He states Burnside came to him first. He states that Burnside told him they were getting up a new lubricator and to work to the instructions of Hudson. Burnside was Hudson's foreman. Hudson had sworn that he got instructions from Robb to go ahead and build a lubricator according to the model he shewed him. Maver who was with Robb says he gave instructions to Dalrymple and Burnside. I accept the evidence of Dalrymple and Burnside. It would be unsafe to destroy a patent especially after such a length of time on evidence of the character adduced.

Then it is important in considering this evidence to bear in mind the allegation in the defence of the Grand Trunk Railway Company, set out in paragraph 4.

After the evidence of Hudson and others had been adduced, when application was made to amend the particulars by setting up that Lees was the inventor

of the invention set out in the latter patent of 1st November, 1910, the able counsel for the Grand Trunk Railway Company puts their case as follows:—

“ We have had evidence already as to that modification (referring to the 2nd patent) and I simply wanted to show that Mr. Lees is the man who suggested that modification. My position is that these employees were all working with one common object. They were all giving their suggestions and ideas to devise a lubricator for the Grand Trunk Railway. The bulk of these suggestions appear to have been made by Hudson, Ellis and Lees.”

This is hardly a claim that Hudson was a prior inventor.

I also think the evidence of Lees as to the second patent is insufficient to destroy the patent.

As to the conversation with Burnside referred to by Lees when recalled Pratt who was said to be present was not recalled.

In the argument a further claim was put forward to the effect that the second patent of 1910 was void by reason of the invention not being the joint invention of Dalrymple and Burnside, but the invention of Burnside only. In the particulars delivered no such claim is made. The only claim is that the invention was that of Lees. The original invention was the joint invention. It was not working as well as contemplated, and Burnside states he conceived the invention and consulted Dalrymple. They then perfected the invention and applied for and obtained the patent. The objection is a technical one. The later invention could not be used by the Grand Trunk Railway Company except in connection with the lubricator patented by the earlier patent of 1906. I do not think the objection should be given effect to,

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even if it were open to the Grand Trunk Railway Company to question the validity of the patent.

The plaintiffs are entitled to judgment for the usual injunction restraining the Grand Trunk Railway Company from making or selling to others the inventions in question.

The title of the plaintiffs was acquired on the 1st October, 1910.

I find no assignment to them of any damages prior to that date. The damages must be confined to the period subsequent to this date. A statement of lubricators sent to the Grand Trunk Pacific has been given but no dates. I should think the parties could agree as to the damages. If not there must be a reference to the Registrar.

The plaintiffs are entitled to the general costs of the action except as to the trial of the issue as to the validity of the agreement of 2nd June, 1906. The costs of this trial I think the defendants are entitled to. As the evidence given on this trial was used on the second trial, I fix the costs of the defendants at \$200 to be set off *pro tanto* against the costs of the plaintiffs to be taxed in the usual way.

Judgment accordingly.

Solicitors for the defendants: *A. E. Beckett.*

Solicitors for the plaintiff: *Casgrain, Mitchell,
 McDougall and Creelman.*