

ON APPEAL FROM THE COURT OF APPEAL OF
ONTARIO

BETWEEN

ASSOCIATED BROADCASTING COMPANY LIMITED,
H. REIBSTEIN, BEECHER DENNIS and
WESTMINSTER HOTEL LIMITED *Appellants*

AND

COMPOSERS, AUTHORS and PUBLISHERS
ASSOCIATION OF CANADA LIMITED *Respondent.*

RECORD OF PROCEEDINGS

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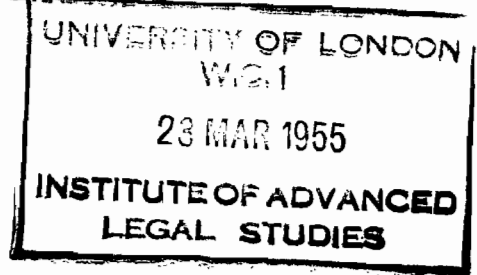
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No. 21 of 1953.

ON APPEAL FROM THE COURT OF APPEAL OF
ONTARIO



BETWEEN

ASSOCIATED BROADCASTING COMPANY LIMITED,
H. REIBSTEIN, BEECHER DENNIS and
WESTMINSTER HOTEL LIMITED *Appellants*

AND

COMPOSERS, AUTHORS AND PUBLISHERS
ASSOCIATION OF CANADA LIMITED *Respondent.*

38043

RECORD OF PROCEEDINGS

No. 1.
Statement of Claim.

In the
Supreme
Court of
Ontario.

IN THE SUPREME COURT OF ONTARIO.

(Writ issued the 14th day of April, 1949.)

No. 1.
Statement
of Claim,
14th April,
1949.

Between

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF
CANADA, LIMITED *Plaintiff*

and

ASSOCIATED BROADCASTING COMPANY LIMITED, H. REIBSTEIN,
10 BEECHER DENNIS and WESTMINSTER HOTEL LIMITED ... *Defendants.*

AMENDED STATEMENT OF CLAIM.

Amended at trial on the 11th day of January, 1951, pursuant to the Order
of The Honourable Mr. Justice Schroeder.

1.—The Plaintiff is a company incorporated by letters patent under
the Companies Act of the Dominion of Canada, having its head office at the
City of Toronto, in the Province of Ontario.

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Supreme
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Ontario.

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continued.

2.—The Defendant Associated Broadcasting Company, Limited, is a company incorporated by letters patent having an office or place of business at the said City of Toronto. The Defendants Reibstein and Dennis reside in the said City of Toronto. The Defendant Westminster Hotel, Limited, is a company incorporated by letters patent having its principal office in the said City of Toronto.

3.—The Defendant Associated Broadcasting Company, Limited, carries on the business of providing musical programmes to subscribers for valuable consideration for its service by means of sending electrical impulses originating in mechanical contrivances situate in a central studio controlled by the said Defendant to loudspeaker installations set up in premises of subscribers in which the sounds are made audible for the entertainment of the public visiting such establishments. 10

4.—The Defendant Reibstein is the licensee of and person responsible for the conduct of operations in a place of entertainment known as the Famous Door Tavern situate at 665 Yonge Street, in the said City of Toronto.

5.—The Defendant Dennis is the licensee of and person responsible for the conduct of operations in a place of entertainment known as the Brass Rail situate at 701 Yonge Street, in the said City of Toronto. 20

6.—The Defendant Westminster Hotel, Limited, is the licensee of and person responsible for the conduct of operations in a place of entertainment known as the Town and Country Room in the Westminster Hotel at 240 Jarvis Street, in the said City of Toronto.

7.—Pursuant to several contracts between the Defendant Associated Broadcasting Company, Limited, and the Defendants Reibstein, Dennis, and Westminster Hotel, Limited, particulars of which are not known to the Plaintiff, a loudspeaker system was at all material times installed and maintained by the Defendant Associated Broadcasting Company, Limited, in the Famous Door Tavern, the Brass Rail and the Town and Country Room in the Westminster Hotel with the approval and concurrence respectively of the Defendants Reibstein, Dennis and Westminster Hotel, Limited, in order that the public frequenting the said places of public entertainment might hear the public performance therein of musical compositions, which were simultaneously performed in a central studio operated by the Defendant Associated Broadcasting Company, Limited, and were transmitted to the said places of public entertainment by means of electrical impulses conducted by metallic wire controlled by the said Defendant and by the several Defendants in their respective premises aforesaid. 30 40

8.—The Plaintiff is and was at all times material to this action the owner of that part of the copyright in the musical works known as “MOON

GLOW," " SOPHISTICATED LADY," " APRIL SHOWERS," " OL' MAN RIVER," " MEG " and " MAKE BELIEVE " which consists in the sole right to perform the same or any substantial part thereof in public throughout the Dominion of Canada.

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Statement
of Claim,
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1949—
continued.

8A.—The Plaintiff duly filed with The Honourable The Secretary of State at the Copyright Office a statement of the fees, charges or royalties which it proposed to collect in compensation for the issue or grant by it of licences for the performance of its works in Canada in the year 1949 and the Plaintiff's tariff of such fees, charges or royalties was duly approved
10 by the Copyright Appeal Board.

9.—On the 8th day of April, 1948, the Defendants and each of them infringed the Plaintiff's said copyright by performing or causing to be performed in public by loudspeakers installed, maintained, actuated and supplied with music as set forth in paragraphs 3 and 7 hereof in the Famous Door Tavern, the Brass Rail and the Town and Country Room in the Westminster Hotel aforesaid, the musical works " MOON GLOW " " SOPHISTICATED LADY," " APRIL SHOWERS," " OL' MAN RIVER " and " WHO " or a substantial part thereof without the consent of the Plaintiff and by authorising the said performance without the consent of the Plaintiff.

20 10.—On the 9th day of April, 1949, the Defendants and each of them infringed the Plaintiff's said copyright by performing or causing to be performed in public by loudspeakers installed, maintained, actuated and supplied with music as set forth in paragraphs 3 and 7 hereof in the Famous Door Tavern, the Brass Rail and the Town and Country Room in the Westminster Hotel aforesaid, the aforesaid musical work " MAKE BELIEVE " or a substantial part thereof without the consent of the Plaintiff and by authorising the said performance without the consent of the Plaintiff.

30 11.—The said Defendants have infringed the Plaintiff's said copyright by performing or causing the said musical works or a substantial part thereof to be performed for the private profit of the Defendants and each of them without the consent of the Plaintiff.

12.—Unless restrained by this Honourable Court the Defendants intend to repeat the said infringements in respect of the said musical works " MOON GLOW," " SOPHISTICATED LADY," " APRIL SHOWERS," " OL' MAN RIVER," " WHO " and " MAKE BELIEVE."

13.—By reason of the wrongful acts of the Defendants aforesaid the Plaintiff has suffered damages.

14.—The Plaintiff proposes that this action be tried at Toronto.
The Plaintiff claims :—

In the
Supreme
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No. 1.
Statement
of Claim,
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1949—
continued.

- (i) A declaration that it is the owner of that part of the copyright in the said musical works "MOON GLOW," "SOPHISTICATED LADY," "APRIL SHOWERS," "OL' MAN RIVER," "WHO" and "MAKE BELIEVE" which consists of the sole right to perform the same in public throughout the Dominion of Canada.
- (ii) A declaration that the Defendants and each of them have infringed the Plaintiff's said copyright in the said musical works as hereinbefore set forth by the performance thereof or by authorising the performance thereof in public without the consent of the Plaintiff for the private profit of the said Defendants and each of them. 10
- (iii) An injunction restraining the said Defendants, their and each of their agents, servants and employees from infringing the Plaintiff's copyright in the said musical works "MOON GLOW," "SOPHISTICATED LADY," "APRIL SHOWERS," "OL' MAN RIVER," "WHO" and "MAKE BELIEVE" by the performance of the same or any substantial part thereof in public by means of the said device without the consent of the Plaintiff. 20
- (iv) The sum of \$500.00 damages.
- (v) Such part of the profits which the Defendants have severally made from such infringement as this Honourable Court may decide to be just and proper.
- (vi) That all necessary accounts be taken and enquiries had.
- (vii) The costs of this action.
- (viii) Such further and other relief as the nature of the case may require and as this Honourable Court may deem just.

Delivered this 14th day of April, 1949.

MANNING, MORTIMER & KENNEDY, 30
67 Yonge Street, Toronto 1.
Solicitors for the Plaintiff.

No. 2.
Order of
Urquhart,
J., 9th
June, 1949.

No. 2.
Order of Urquhart, J.

Thursday, 9th June, 1949.

UPON NOTICE made unto this Court on the 16th day of May, 1949, by counsel on behalf of the Plaintiff for an order restraining the Defendants and each of them from performing in public certain musical works and for

further and other relief, IN THE PRESENCE OF counsel for the Plaintiff and for the Defendants, UPON READING the affidavits of Charles Ross Matheson, Leonard Headley, George Langtry Evans, Martin Maxwell and William Edward Hodges filed, and UPON HEARING counsel aforesaid, this Court was pleased to direct the said motion to stand over for judgment and the same coming on this day for judgment,

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No. 2.
Order of
Urquhart,
J., 9th
June, 1949
- *continued.*

1.—THIS COURT DOTH ORDER THAT, upon the Defendants paying into Court to the credit of and to abide the result of this action within seven days from the date hereof the sum of \$1,000.00, the Plaintiff's motion be and
10 the same is hereby dismissed.

2.—AND THIS COURT DOTH FURTHER ORDER that the costs of this motion be costs in the cause.

“ROY CADWELL,”
Assistant Registrar, S.C.O.

No. 3.

Statement of Defence.

No. 3.
Statement
of Defence,
13th June,
1949.

FRESH STATEMENT OF DEFENCE.

Amended on the 8th day of January, 1951, pursuant to the Order of The Honourable Mr. Justice Schroeder at trial.

20 1.—Save as hereinafter expressly admitted the Defendants do not admit any of the allegations in the statement of claim contained and put the Plaintiff to the strict proof thereof. The Defendants plead that the statement of claim does not disclose any cause of action against them or any of them.

2.—The Defendants admit the allegations in paragraphs 1, 2, 4, 5 and 6 of the statement of claim contained. The Defendants have no knowledge of the allegations in paragraph 8 of the statement of claim contained. The Defendants expressly deny the allegations in paragraphs 9, 10, 11 and 13 of the statement of claim contained.

30 3.—The equipment owned or used by the Defendants in the acoustic reproduction of recorded sound vibrations is a gramophone within the meaning of subsection (6) (a) of Section 10 B of the Copyright Amendment, Act, 1931, being Chapter 8 of the Statutes of Canada, 1931, as amended and therefore there has been no infringement of copyright by the Defendants or any of them by reason of the public performance of musical works in

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No. 3.
Statement
of Defence,
13th June,
1949—
continued.

Canada by means of such equipment. The defendants plead Sections 10, 10 A and 10 B of the said Act.

4.—The Defendants therefore submit that this action should be dismissed with costs.

Delivered this 13th day of June, 1949, by Borden, Elliot, Kelley, Palmer & Sankey, 320 Bay Street, Toronto 1, Solicitors for the Defendants.

No. 4.
Joinder of
Issue,
15th June,
1949.

No. 4.
Joinder of Issue.

The Plaintiff joins issue herein.

Delivered this 15th day of June, 1949, by Manning, Mortimer & 10 Kennedy, 67, Yonge Street, Toronto 1, Solicitors for the Plaintiff.

Plaintiff's
Evidence.

No. 5.
Opening
Remarks of
Counsel for
Plaintiff.

EVIDENCE AT TRIAL.

No. 5.
Opening Remarks of Counsel for Plaintiff.

HIS LORDSHIP : Are you ready to proceed ?

Mr. MANNING : Yes, my Lord. I am for the Plaintiff, my Lord, with my friend Mr. D. W. Falconer, and, for the Defence, there is Mr. Sankey and Mr. Fox.

HIS LORDSHIP : I shall read the record first, Mr. Manning, before calling on you. 20

Mr. MANNING : Yes. If your Lordship prefers, I thought I might even have given a very explanatory statement.

HIS LORDSHIP : Very well.

Mr. MANNING : The action is a test action and it arises under the Copyright Act and, for your Lordship's convenience, I have brought a pamphlet copy of the Act. It is to determine whether the users of music

who use electrical transcriptions in central studios and transmit electrical impulses by telephone wire to permit those works to be reproduced in public in remote places, are under the necessity of taking out a licence from the Plaintiff for the right to perform.

Under the Copyright Act, Section 3, the owner of the copyright has certain exclusive rights and one of those rights is to perform the works in public throughout Canada and to authorise performances of the works in public. By virtue of assignments from the original composers, the Plaintiff has become through intermediate stages, the owner of the performing rights, as will be demonstrated by evidence. The Plaintiff carries on the business of licensing performing rights and is subject by the Act to control.

HIS LORDSHIP : Is it the Canadian Performing Rights Society ?

Mr. MANNING : Yes, my Lord, it is the Canadian Performing Rights Society, whose name was changed, but it has continued its existence and it is the same corporation as it was from the beginning. Bodies such as the Plaintiff are under regulatory authority of parts of Section 10 and the following Sections, 10A and 10B, are the basis of certain duties of filing lists of works and of obtaining approval of the fees, charges or royalties which they may collect.

HIS LORDSHIP : Well, there is a Board set up by the Government to fix those.

Mr. MANNING : Yes. It is set up by virtue of the sections to which I refer.

HIS LORDSHIP : And what section is that ?

Mr. MANNING : 10, 10A and 10B. They do not appear actually in the body of the text, my Lord, but are printed on page 21 of the pamphlet copy. I do not think for the purposes of my present observations it is necessary then just to more than draw attention to them but, for the moment I shall have to attempt to get rid of part of Section 10B before I get through. It is basic law that copyright may be subdivided and assigned in various parcels either for fixed or determinable periods of time and that the performing rights may be severed from the copyright generally and there will be no question, I imagine, of that between us. Under Section 17 of the Copyright Act, the copyright is infringed by any person who, without the permission of the owner, does what the owner alone has the right to do and evidence will be led to prove that, on the 8th and 9th days of April in 1949 there were public renditions at the "Famous Door," a tavern on Yonge Street, at the "Brass Rail," also a tavern on Yonge Street, and at the Westminster Hotel on Jarvis Street, in public, of two works, the Canadian Performing Rights in which are the property of the Plaintiff. I will not attempt at the moment to anticipate the evidence by saying how the performances took place, except to say this, that the sounds were produced in those three outlets by means of amplifying loudspeakers, which were activated by impulses received over Bell Telephone wires, which were

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Plaintiff's
Evidence.

No. 5
Opening
Remarks of
Counsel for
Plaintiff—
continued.

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Plaintiff's
Evidence.

No. 5.
Opening
Remarks of
Counsel for
Plaintiff—
continued.

connected with it, and those impulses originated in a studio which is owned by the first Defendant and operated by it, and there is a contractual relationship between the first Defendant and the other three Defendants by virtue of which the first Defendant provides musical programs through their loud-speakers, and these particular works were among those provided.

The Defendants say they do not dispute, I think, and I doubt if there will be any controversy at all as to whether the works were all in fact performed, but the Defendants say that as the result of sub-section 6 (a) of Section 10 B of the Act, they are not under the necessity of taking out a licence from the Plaintiff. Subsection 6 (a) of 10 B is a rather peculiar subsection. It does not appear in the group of subsections, in the proviso to Section 17, which is the only exemption section of the Act apart from 6 (a), but it does provide this, and perhaps I should read it and then we will know what it is we are talking about : 10

“ In respect of public performances by means of any radio, receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance, from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties ” to be paid by the provisions of this subsection in amounts fixed by the Copyright Appeal Board. 20

I do not think I need read the rest of that subsection, because it has nothing to do with this action.

The Defendants say the sounds were produced by a gramophone and that is denied by the Plaintiff, and that substantially is the issue between us. If the sounds were produced by gramophone, then the Plaintiff cannot succeed. In other words, if the sounds were not produced by a gramophone, then the Defendants cannot succeed, and with that, I think I have nothing further that I need say by way of explanation. Perhaps your Lordship would then care to read the pleadings. 30

HIS LORDSHIP : The Defendant alleges that this alleged music was reproduced by a gramophone.

Mr. MANNING : By gramophone. I purposely refrain from saying anything about the instrumentality by which the sounds were produced.

HIS LORDSHIP : And that is really the vital issue between the parties in this action. 40

Mr. MANNING : That is it. I think there is no issue of fact between us except that one, and it is mixed fact and law. On the other hand, there is a lot of formal evidence I will have to give.

HIS LORDSHIP : Under Section 10—that begins at page 21 of the re-enacted section, is it ?

Mr. MANNING : No, it was a new section enacted after the consolidation in 1927. At the time of the 1927 consolidation there was no legislation for controlling the fees which may be charged by the Performing Rights Societies, and then in the 1930's a series of statutes were passed designed to provide means for regulating the fees which may be charged by the Performing Rights Societies, and the version which is in that pamphlet copy is the latest version, my Lord, of that regulatory machinery.

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Plaintiff's
Evidence.

No. 5

Opening
Remarks of
Counsel for
Plaintiff—
continued.

HIS LORDSHIP : That is the one that appears on page 21 ?

10 Mr. MANNING : Yes. There was earlier legislation about which we do not need to trouble ourselves. It provided for intervention, I think, by the Governor-in-Council in respect of any fees proposed, which the user of the music complained of, but it is not present in our particular present action.

HIS LORDSHIP : Yes. Do you wish to add anything, Mr. Sankey ?

Mr. SANKEY : I don't think so, my Lord, except perhaps this, my Lord. For your benefit paragraph 4 of the Defence was perhaps misconceived and we are placing no reliance on it.

HIS LORDSHIP : On paragraph 4 ?

Mr. SANKEY : Yes, my Lord.

20 Mr. MANNING : Oh, yes. I see.

HIS LORDSHIP : So that is withdrawn or, at any rate, you are not paying any attention to it ?

Mr. SANKEY : We are not paying any attention to it, and we are asking your Lordship to pay no attention to it.

HIS LORDSHIP : Well, I am not really concerned about the question of the tariff or anything of that nature in this action. That is something that could be the subject of a reference, if need be.

30 Mr. MANNING : Oh, I suppose so, my Lord. The actual amounts that would be involved are nominal, so far as the present action is concerned.

HIS LORDSHIP : But it is actually, as you stated, a test action.

Mr. MANNING : Yes. Behind the result of this action, I may say, are a great many thousands of dollars in fees.

HIS LORDSHIP : Yes. Now, Mr. Sankey, I understand you withdraw paragraph 4 of the Statement of Defence.

Mr. SANKEY : If it is possible to be withdrawn from the pleadings, my Lord. I am content formally to move to strike it out and place no reliance on it.

Mr. MANNING : I suppose it could just as well be deleted.

40 Mr. SANKEY : Yes, it could just as well be deleted.

HIS LORDSHIP : Yes. Then an order will be made to allow the Defendant to delete paragraph 4 and renumbering paragraph 5 as 4. There

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Plaintiff's
Evidence.

No. 5
Opening
Remarks of
Counsel for
Plaintiff—
continued.

is nothing in the fixation of those charges to indicate that the Board had in mind such a reproduction as we are concerned with in this case ?

Mr. SANKEY : My Lord, I do not think we are concerned here with fees, charges and royalties. This is an action for damages for infringement and an injunction. It is a misconception.

HIS LORDSHIP : All right, Mr. Manning.

Mr. MANNING : I propose to call Mr. Matheson as my first witness.

No. 6.
C. R.
Matheson.
Examina-
tion.

No. 6.

Evidence of C. R. Matheson.

CHARLES R. MATHESON, sworn.

10

Examined by Mr. MANNING :

Q. What is your occupation, Mr. Matheson ?—A. I am manager of the Licence Department, Composers, Authors and Publishers Association.

Q. Did you have anything to do with attempting to get the Associated Broadcasting Company to take out a licence with the Association ?—

A. Yes, I did.

Q. And did it take out a licence with the Association in 1949 ?—

A. No, it did not.

Q. Did you have anything to do with trying to procure a Mr. Reibstein, to take out a licence, or the Westminster Hotel ?—A. No.

Q. Did you make an inspection at the " Famous Door " ?—A. Yes.

Q. Do you remember the date ?—A. April 8, 1949.

Q. Did you make a memorandum of what you observed on that inspection ?—A. Yes, sir.

Q. Well, this is a contemporary memorandum, is it ? Is it a memorandum made at the time ?—A. Yes made at the time.

Q. All right. Tell us what you did, in November, 1949, at the " Famous Door " ?

HIS LORDSHIP : Is that a place operated by the Defendant Reibstein ?

Mr. MANNING : I believe so my Lord. There is an admission as to that in the Defence. It is an allegation in the amended Statement of Defence. Yes.

Q. What did you observe ?—A. On April 8th at noon, I visited the " Famous Door " and heard a number of musical compositions performed, among those being, " Moon Glow." Later in the evening on the same date, I paid a second visit to the " Famous Door."

30

HIS LORDSHIP : What is this—a cocktail bar ?—*A.* Yes, my Lord.

Mr. MANNING : Yes. “ Moon Glow,” is that a musical work ?—*A.* Yes, it is.

Q. Well, we will have more about that presently. What else did you do ?—*A.* Later in the evening I paid a second visit to the same establishment and heard a performance of the musical composition “ Who.”

Q. “ Who ” ?—*A.* Yes.

Q. Anything else ?—*A.* At the same time I heard additional works performed which are on this list. Do you wish me to read them ?

10 *Q.* And was there any visible means by which the sounds that you heard were created ?—*A.* No, I could see nothing.

Q. You could see nothing ?

HIS LORDSHIP : Is there any point in your going through all the details and putting them on the record as to what musical compositions, or alleged musical compositions, were heard ?

Mr. MANNING : I think so, my Lord, because I must prove the copyrighted version of them, my Lord.

HIS LORDSHIP : I just wondered if counsel for the Defence were interested.

20 Mr. SANKEY : I know nothing of the titles in this case, my Lord.

HIS LORDSHIP : You do not even admit they are music, I suppose ?

Mr. SANKEY : No, my Lord.

Mr. MANNING : I think perhaps, my Lord, it might be convenient to file the cards of inspection so that we have the story before us.

HIS LORDSHIP : Yes.

Mr. MANNING : And that might be Exhibit No. 1, would it ?

HIS LORDSHIP : I am just wondering if they would be admissible evidence ; something made for the purpose of refreshing his memory.

Mr. SANKEY : Is this the card the witness made ?

30 Mr. MANNING : Yes, a contemporary report.

Mr. SANKEY : At the same time ?

Mr. MANNING : If you would rather not have it——

Mr. SANKEY : I have not objected. I just want to know what it is.

HIS LORDSHIP : Well, it is not evidence.

Mr. MANNING : No, it is not evidence.

Mr. SANKEY : No : it is something to refresh his memory. I don't want it.

Mr. MANNING : All right, then, we won't put it in.

Q. Then, I show you this sheet music, Mr. Matheson. What is that ?—

40 *A.* It is the sheet music for a musical composition entitled “ Moon Glow.”

Q. And is that the “ Moon Glow ” that you heard ?—*A.* Yes, it is.

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Plaintiff's
Evidence.

No. 6.
C. R.
Matheson.
Examina-
tion—
continued.

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tion—
continued.

EXHIBIT No. 1 : Sheet music for composition " Moon Glow."

Q. And the second document is what ?

Mr. SANKEY : Is my friend tendering that as an exhibit, because I think he should have the author, or the publisher, rather than this witness, give the evidence.

Mr. MANNING : If my friend will refer to the Copyright Act.

Mr. SANKEY : Does the witness read music ? I know your Lordship does, but I don't know whether he does.

HIS LORDSHIP : Do you read music ?

The WITNESS : I have been doing this kind of work for nearly 10 20 years, my Lord.

HIS LORDSHIP : Do you read music ?—A. No, I do not read music.

HIS LORDSHIP : I am just wondering whether that proves that this is the original composition with which we are concerned.

Mr. MANNING : My Lord, there are certain presumptions which arise under the Copyright Act itself as to certain pieces of music which are governed by the Copyright Act.

HIS LORDSHIP : Well, what section is that ?

Mr. MANNING : I think it is Section 20, subsection 3 :

" In any action for infringement of copyright in any work, 20
" 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 copyright or of an interest in the copyright, either
" by assignment or licence, has been registered under this 30
" Act, then, in any such case :—(1) 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."

And then the section below does not apply to this case. There is a name printed on each of these copies.

HIS LORDSHIP : What do you say to that, Mr. Sankey ?

Mr. SANKEY : My Lord, it does not prove that that is the work which 40 was performed.

HIS LORDSHIP : No, no, but that must be a matter for further evidence. As I take it, Mr. Manning now is only proving these compositions, and he is going to perhaps have an expert tell us whether—oh,

I suppose this witness might be asked certain questions to indicate how he knows this piece of music.

Mr. SANKEY : My Lord, in backwards, is it not, to call a witness who heard a certain piece of music, and now he is putting this in as apparent proof of what the music was.

HIS LORDSHIP : Well, the witness has not yet said what he heard reproduced was this particular piece of music. He said he heard something which he claimed was "Moonlight," or was it "Moonshine" ?

10 Mr. MANNING : "Moon Glow," yes. Will you look at that music now, Mr. Matheson ? Do you see any words there, on the printed copy, except one ?

The WITNESS : Yes. It prints both the music and the words.

Q. Did you hear both the music and the words ?—A. No, just the music.

Q. Just the music. I see. All right.

HIS LORDSHIP : You don't know whether what you heard is a reproduction of the things which were on Exhibit I, because you don't know one note from another ?—A. That is quite true, my Lord, but I am as familiar with that tune as "God Save the King," and it is on my piano at
20 home and my family play it.

Mr. MANNING : Now, I show you a second document here——

HIS LORDSHIP : I take it you are satisfied that, under the Act, that is admissible under subsection (b), Mr. Sankey ? It would appear to be so.

Mr. SANKEY : It would appear to be so, my Lord. I have not studied the Section as I would like to have done.

HIS LORDSHIP : Well, it does strike me that it is still open to you to show the contrary, but it does look as though that is proof of the fact. It is a presumption arising under the Statute that the work was composed by the author whose name is printed on it.

30 Mr. SANKEY : I must say, when the document was first presented, I thought it should be proved as a document either by the publisher or the author.

HIS LORDSHIP : Well, the Statute seems to extend the common law.

Mr. SANKEY : Well, I should like to reserve my objection.

Mr. MANNING : I do not think my friend has proved the contrary.

HIS LORDSHIP : Apart from this Statutory enactment, it would not be admissible.

Mr. MANNING : Oh, I quite agree with that, my Lord. Now, this document. What is that ?—A. It is a printed copy of a musical composition
40 by Jerome Kern.

Q. And published by ?—A. T. B. Harms Company.

Q. And is that the music of the work that you heard played ?—
A. Yes.

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EXHIBIT No. 2 : Sheet music of the song "Who."

Q. Those were the only works you heard then, Mr. Matheson, that are involved in this action?—A. Yes.

Q. Now, I produce to you a certificate of the Canadian Copyright, of the musical work "Moon Glow" issued by the Acting Commissioner of Patents, on the 12th of November, 1934, and that is issued to Mills Music, Incorporated, and an assignment of the Canadian performing right in that work from Mills Music, Incorporated, to the Plaintiff, dated the 20th of August, 1948, and effective until the 31st of December, 1949, and those two documents are part of the records of the Plaintiff?—A. Yes.

10

EXHIBIT No. 3 : Certificate of the Canadian Copyright of the musical work "Moon Glow" to Mills Music, Incorporated, and an assignment thereof from Mills Music, Incorporated, to the Plaintiff.

Q. And then I produce to you a certificate of Canadian Copyright, in the musical work "Who" dated the 10th day of September, 1941, and issued to T. B. Harms Company, and assigned by T. B. Harms Company to the Plaintiff, of the Canadian performing right therein, dated the 2nd of January, 1947, and effective until the 31st of December, 1949. That also is part of the record of the Plaintiff?—A. Yes.

Q. Now, there are several others and I think perhaps it will be 20 convenient to put them in in sequence, now, my Lord.

EXHIBIT No. 4 : Number of certificates and assignments.

Q. Then, Mr. Matheson, I produce to you and show to you a certificate of Canadian Copyright, dated the 11th day of January, 1947, covering the musical work, "April Showers," the copyright being issued in the name of Harms, Incorporated, of New York?—A. Yes.

Q. They are proved by the certificate of H. C. Donnelly. There is also, Mr. Matheson, here, a document of assignment of Canadian performing right, dated the 10th day of December, 1947, and effective until the 31st of December, 1947, from Harms, Incorporated, to the Plaintiff? 30 —A. Yes.

Q. And that also is part of the records of the Plaintiff?—A. Yes.

EXHIBIT No. 5 : Assignment dated 10th December, 1947, from Harms Incorporated to Canadian Performing Rights.

HIS LORDSHIP : "April Showers," is that the famous song that was sung by Al Jolson?—A. Yes.

Q. Was that copyrighted only in 1947?

Mr. MANNING : Well, that is the Canadian certificate of copyright. It does not necessarily mean any copyright originated then. They are merely certificates of the fact, if I may put it that way. It has been put 40 in a more concise form than otherwise it might be.

HIS LORDSHIP : That must be so, because I can recall, if I may say so, hearing that when I was very much younger than I am today.

Mr. MANNING : Oh, I think some of these works are quite old, my Lord.

Q. Then, Mr. Matheson, I show you here a certified copy of a certificate of copyright. In this case the original certificate of copyright seems to have been lost, and this certified copy of the certificate of copyright is dated the 22nd of May, 1941, and the certificate of copyright itself is dated the 31st of March, 1947, in respect of the musical work, " Ol' Man River " ?
—A. Yes.

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10 Q. And then, attached to that is—oh, by the way, that copyright was issued in the name of T. B. Harms Company, and then I show you an instrument of assignment of the Canadian performing right from the T. B. Harms Company to the Plaintiff, dated the 12th of December, 1947, and effective until the 31st of December, 1949 ?—A. Yes.

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Q. The same applies to this as to the other documents ?—A. Yes.

EXHIBIT No. 6 : Certified copyright in the name of T. B. Harms Company, and assignment of the Canadian performing rights dated 12th December, 1947.

20 Q. Then, we have another work, Mr. Matheson, " Make Believe," and there we have a certificate of the Canadian copyright—I beg pardon, a certified copy of the certificate of Canadian copyright, the certificate of the copy being dated the 22nd of May, 1941, and the original certificate of the copyright appearing to be dated the 31st of March, 1927, which covers the musical work, " Make Believe," and that is recorded in the name of T. B. Harms Company ?—A. Yes.

Q. And then we have an assignment, January dated, but carries an acknowledgement of the 12th of December, 1947, covering the Canadian performing right, signed on behalf of T. B. Harms in favour of the Plaintiff, and effective until the 31st of December, 1949. Is that part of the Plaintiff's documents ?—A. Yes.

30 EXHIBIT No. 7 : Certificate of copyright to Harms Company, and assignment Harms Company to the Canadian Performing Rights.

40 Q. Then, finally, we have, Mr. Matheson, a certificate of the Canadian copyright dated the 6th day of November, 1933, covering the musical work " Sophisticated Lady," and it is issued in the name of Gotham Music Service Inc., for " incorporated," and then there is an assignment of the Canadian performing right therein by the Gotham Music Service, Inc., dated the 20th August, 1948, in favour of the Plaintiff and effective until the 31st of December, 1949 ; do you identify that as a document from the Plaintiff's records ?—A. Yes.

EXHIBIT No. 8 : Assignment of Gotham Music Service to the Canadian Performing Rights of the work " Sophisticated Lady " dated 20th August, 1948.

Q. Now, have any of these works been withdrawn from the repertoire of the Plaintiff ?—A. No.

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Q. They were all, in 1949, effectively within the repertoire?—A. Yes.

Q. There were no cancellations, or anything?—A. No.

HIS LORDSHIP: Would "repertoire" be the proper word there?

Mr. MANNING: There, yes, my Lord. I don't know whether it would be correct or not.

HIS LORDSHIP: Well, I thought the proper word would be "impresario."

Mr. MANNING: Well, I think that would be a more accurate word, but we speak of it before copyright, and they use the word "repertoire." We have had some competitors there who have used it. 10

Q. Well, at any rate, there has been no withdrawal of the right to use those works?—A. No.

Q. Then did the Plaintiff cause numbers of those works to be listed with the Secretary of State, at the Patent Office?—A. Yes.

Q. Now, have you copies of the records that are at the Patent Office?—A. Yes.

HIS LORDSHIP: That would be with the Under Secretary of State.

Mr. MANNING: Well, under subsection 10 of Section 1 the phraseology is somewhat peculiar, if I recall it, but one is supposed to file with the Secretary of State at the Patent Office—I will soon see what the 20 language is—I never can remember it.

Mr. SANKEY: At the Copyright Office.

Mr. MANNING: With the Commissioner of Patents. And these cards here are the Plaintiff's counterparts of the lists that are filed with the Secretary of State?—A. Yes, they are.

Q. Just check them over to see if they cover all those works?—A. Yes; these are the cards for the works which were performed.

Q. So that the counterpart of those cards is on file in the Copyright Office? Is that it?—A. Yes. They were sent to the Copyright Office to be filed. 30

Q. At what dates?—A. The date appears on each card, the date of filing.

Q. The date appears on each card. Now, I don't know that I need do more than merely read off the dates that appear on these cards, my Lord.

HIS LORDSHIP: Yes.

Mr. MANNING: As to "Make Believe," the date of filing is March 27th 1933. I do not know that these are in the same sequence as the exhibits were put in. As to "Sophisticated Lady," the date is June 12th, 1933. As to "Moon Glow," the date is December 10th, 1934. As to "April Showers," the date is the 20th February, 1933. As to "Who," the date 40 is the 1st of May, 1933. As to "Ol' Man River," there are three dates. The first date is May 8th, 1944. Then there is—no, that cannot be on May 28th, 1941, May 8th, 1944, and September 8th, 1941. There seems to be three different versions of the work recorded.

HIS LORDSHIP : They were all the same work, were they ?

Mr. MANNING : Oh, yes ; three registrations on the same work, " Ol' Man River."

Mr. SANKEY : Will that be one Exhibit ?

HIS LORDSHIP : Yes, all one exhibit.

EXHIBIT No. 9 : Record of filings of " Make Believe " ;
" Sophisticated Lady " ; " Moon Glow " ; " April Showers " ;
and " Ol' Man River."

HIS LORDSHIP : Those are copies of the original ; duplicates ?

10 Mr. MANNING : Duplicate originals, and the other part was sent to the Patent Office.

Mr. SANKEY : Four works ?

HIS LORDSHIP : Six works.

Mr. MANNING : Yes, there are six works.

Q. Then, I think you indicated you did not know how the sound was created in the places you visited ?—A. There was no visible instrument.

Q. No visible instrument. I see.

HIS LORDSHIP : This was in a cocktail bar, was it ?—A. Yes.

20 Mr. MANNING : You might perhaps indicate to us what the accommodation in that place is ?—A. It is a cocktail bar and there was accommodation for I would say 200 people.

Q. Were there other people present when you heard this ?—A. Yes, many other people.

Q. Have you any idea approximately how many ?—A. I would say the place was about half full.

Q. You say, then—try and give us the number of people you thought were there ?—A. I think 100 people would be there.

30 Q. Now, you were there on two occasions, on April 8th. Does that apply to both times ?—A. No, it would not. At the late evening performance all seats were occupied.

Q. That is to say there were nearly 200 people there ; is that it ?—A. Yes.

Q. Did any person at the " Famous Door " indicate to you,—I mean the proprietor, Mr. Dennis—did you see Mr. Reibstein there ?—A. No, I did not.

Q. Well, that is all, I think.

HIS LORDSHIP : Cross-examination.

Cross-examined by Mr. SANKEY.

40 Q. Mr. Matheson, when you say that you heard the musical " Who " performed, you are going by your memory having heard sentences of those names in the past. Is that right ?—A. Yes, and the fact that I had made the record at the time of the performance.

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Q. And it is clear that you do not read music and you could not read the music on Exhibits 1 and 2 ?—A. That is correct.

Q. Now, these cards that have been filed as Exhibit No. 9 are filed pursuant to Section 10, subsection 1 of the Act—is that right ?—A. Yes.

Q. Did you fill in lists properly so-called, or just cards ?—A. Originally, when the Act was passed, we did fill in lists, but since 1933 we have filed index cards at the request of the Government.

Q. At the request of the Copyright Office ?—A. Yes.

Q. And do you know whether or not your cards are kept separate from others such as B.M.I. or any other organisation such as yours ?— 10

A. Do you mean the record at the Copyright Office ?

Q. Yes ?—A. I couldn't tell you.

Q. Can you tell me whether or not, when a work becomes obsolete, you have ever withdrawn a card ?—A. No

Q. When it is filed it stays ?—A. Yes.

HIS LORDSHIP : When does a work become obsolete ?

Mr. SANKEY : My Lord, the reason for the question was, the Act requires them to be removed from time to time.

HIS LORDSHIP : How often do they have to be filed ?

Mr. SANKEY : Well, for instance, Mr. Matheson, when your right 20 under that assignment expires, do you withdraw the card ?—A. No.

HIS LORDSHIP : For instance, your right in these cases extends to the 31st of December, 1949. Unless you have the assignment renewed, of course, you would not expect to collect any income according to the tariff, would you ?

Mr. MANNING : May I interject at this spot, my Lord. My reason for doing so is, it might becloud the issues in this action if we are to get involved in a discussion of other matters. I should put it this way. The primary claim on these works is derived by a more remote and circuitous route than the one that I have established here. It is derived by virtue 30 of the membership of the author and publisher,—we use the word more or less indiscriminately,—of the publisher who undertakes to print the work, and an affiliated society. Under their membership—I do not suppose for a minute there will be a correction here—the members undertake to execute assignments in favour of the nominee of a society to which they belong, and that society to which they belong has an arrangement with the Publishers and Authors Association by virtue of which it makes a blanket assignment of all the performing rights in Canadian works, to the Association and a reciprocal assignment everywhere for the United States. Now, that is a very common thing throughout a work. The Society represents many, 40 many societies throughout the world. Now, a particular document with respect to a particular work at any time is carried over from a limited time. They are habitually renewable and this particular administration, if I may put it, is only technically necessary by virtue of the provisions of sub-

section 5, Section 20 of the Act, and is offered in that way and for that purpose.

HIS LORDSHIP : Well, in any event, it is irrelevant to the issues here. You are claiming it was before December, 1949, that these works were brought out.

Mr. MANNING : Yes. We have given what was current and we had the right at the time and the Act permits it to have the right at the time and what would happen after is quite wide of the mark.

10 Mr. SANKEY : My Lord, I am quite sure we are all obliged to my friend for his explanation, but I do not wish to be taken as assenting. However, I have no more questions.

HIS LORDSHIP : Any re-examination ?

Mr. MANNING : There was one question I should have asked the witness.

Re-examined by Mr. MANNING.

Q. I was going to ask him merely to identify this in the Canada Gazette, prescribing the fees that he might collect.

20 HIS LORDSHIP : Doesn't it prove itself as it is ? Anything printed by the King's Printer, doesn't it indicate on its face that it is from the King's Printer ?

Mr. MANNING : Yes, my Lord.

HIS LORDSHIP : Then, I think it might be put in as an exhibit.

Mr. MANNING : The date is the 25th January, 1949, Extra No. 1 of the Gazette.

EXHIBIT No. 10 : Copy of Canada Gazette dated 25th January, 1949.

Mr. MANNING : There is no re-examination, my Lord.

HIS LORDSHIP : That is the tariff for the year 1949 ?

30 Mr. MANNING : It includes the tariffs which the Association might collect during the year 1949.

HIS LORDSHIP : Mr. Manning, I don't know whether any point is going to be made of it or not, but I was wondering if you have sufficiently proven by this witness that what he heard were productions of those two works, printed copies of which you have filed. I don't know whether counsel is making any point of that. If so, I would allow you to take those two exhibits out to-night and have this witness hear them performed.

Mr. MANNING : Yes. I was going to say I shall not be in any difficulty with that. If I wanted to—

40 Mr. SANKEY : Bring a piano and have them performed. I don't want to tell my friend how to prove his case. I merely want him to prove it.

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HIS LORDSHIP : Well, I merely mention that in case you want to prove it. It does not prove that this man heard what may be proved by music lovers. He does not understand music himself, but if you wish to have those copies, you may take them out and return them tomorrow morning. We will adjourn now until half past 10 tomorrow morning.

HIS LORDSHIP : Yes, Mr. Manning.

Mr. MANNING : My Lord, having in mind the problem that arose last night as to identification of the music, I thought it might be well to bring here a gramophone with the records of the music that was played in charge of a competent technician; and then it is suggested that the witness Matheson might be able to identify here what he heard. 10

HIS LORDSHIP : How are you going to get a musical reproduction on the record ?

Mr. MANNING : Well, I propose to have the record played here and the witness who will have charge of the instrument will identify the record which is played with the music in the exhibit, and I think that perhaps might cover any possible gap there might be in proving the identity.

HIS LORDSHIP : That is done for the benefit of the " jury " ?

Mr. MANNING : That is done for the benefit of your Lordship, acting as a jury. 20

HIS LORDSHIP : What do you say, Mr. Sankey ?

Mr. SANKEY : It is my friend's case. I have nothing to say.

HIS LORDSHIP : Well, have you any objection to it ?

Mr. SANKEY : I have no objection.

Mr. MANNING : There are several alternatives by which it could be done and perhaps I may read the alternatives off which occur to me, and then your Lordship will direct which should be followed, or my friend can say if he wants to check.

HIS LORDSHIP : Oh, well, Mr. Sankey says he has no objection to the course you propose. 30

Mr. MANNING : I can conceive, for instance, of it being suggested that the witness is being led in bringing in the evidence of a certain witness.

Mr. SANKEY : My Lord, my point is my friend can take any course he chooses.

Mr. MANNING : I understand that, but the point is I do not want to lead.

HIS LORDSHIP : Well, if Mr. Sankey does not consent to that course, I must rule whether it is strictly admissible or not, because I have final responsibility for this record.

Mr. MANNING : Oh, quite so, my Lord. Now, these are the methods 40 by which I contemplated it might be done ; first would be for the calling of a specific record of the work " Who " or " Moon Glow " and ask the

witness whether that is the work he heard played, that he described. In that particular form, I could conceive of no objection to that. It would be the shortest way to prove it, but it does not follow that it would be acceptable. Then I can suggest that the several works be played and that the witness be asked to identify the several works which are played. That I thought would be faultless.

HIS LORDSHIP : If the witness has a good ear.

Mr. SANKEY : It would be faultless if you pick the right one.

Mr. MANNING : Then I can conceive of another way, to ask counsel
 10 to designate in writing all the works he wants to be played and what sequence and what work he wants played here, and let the witness interrupt when he recognises the work in question and then, finally, he can ask the witness to select a record and identify that as what he heard. Any one of those four can achieve it, but some of them may be open to objection by my learned friend, and some of them your Lordship might think would put the witness upon his mettle, and I am quite content to follow any one of those courses.

HIS LORDSHIP : Yes. Of course the last one is a very unsafe course isn't it ?

Mr. MANNING : Well, my Lord, I don't know how you could find
 20 any flaw in it from an evidentiary point of view.

HIS LORDSHIP : Unless you had given your witness a musical education since the occurrence of these events.

Mr. MANNING : Well, I have not spoken to the witness, my Lord, and I am afraid that is one of the things we could get into, anyway. That would always be possible.

HIS LORDSHIP : Yes. Oh, I am going to allow you to use the first method.

Mr. MANNING : That is to say, have the work played and ask the
 30 witness if that is what he heard.

HIS LORDSHIP : Yes.

Mr. MANNING : It is the simplest, of course.

HIS LORDSHIP : A great deal may not turn on that anyway. You are more concerned, are you not, with the sounds emanating from the gramophone.

Mr. SANKEY : My Lord, I am very interested that Mr. Manning should prove his case.

HIS LORDSHIP : Oh, counsel is always interested in that, of course.

Mr. SANKEY : And I would like to know if he is going to tell the
 40 witness what the record is and then ask him to identify it, or going to put on some strange record and ask him to identify it.

Mr. MANNING : If you like, I will have all the records played and then to ask him to identify them in the sequence in which they are heard.

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Mr. SANKEY : I don't want to suggest anything to my friend as to what course he should proceed upon.

HIS LORDSHIP : Well, your first suggestion was that you should play several records.

Mr. MANNING : That was the first one, my Lord.

HIS LORDSHIP : Without suggesting to the witness what they were.

Mr. MANNING : Without suggesting to the witness what the records were.

HIS LORDSHIP : Yes. Well, I think that perhaps would be fair. 10

(The witness, Matheson, returns to the witness box.)

HIS LORDSHIP : I suppose the " jury " can use common knowledge.

Mr. MANNING : I have no objection, my Lord.

(Reporter's Note : A gramophone is attached to an electric plug in the Courtroom, the gramophone being operated by a lady operator.)

Mr. MANNING : I am going to ask the operator to play possibly eight or ten records and then I shall interrupt to ask the witness to say what the works are after playing a few bars of the work.

HIS LORDSHIP : Very well. 20

(Reporter's Note : After a few bars of the work had been played, Mr. Manning followed with the question.)

Mr. MANNING : What work is that?—A. That is " Sophisticated Lady."

HIS LORDSHIP : You cannot tell me from what great classical work that was taken ?

The WITNESS : No. It is the original work by Duke Ellington, my Lord.

Mr. MANNING : What work is that?—A. " April Showers."

HIS LORDSHIP : I would say that is rather leading. 30

Mr. MANNING : Yes, my Lord ; unfortunately the records have the words. All right.

HIS LORDSHIP : I suppose you recognised that one, witness?—A. Yes, sir.

(Another record partly played.)

Mr. MANNING : Can you identify that?—A. " Who."

Q. Now, is that the work which you heard performed in the Famous Door?—A. Yes, it is.

(Another record partly played.)

Mr. MANNING : Can you identify that?—A. " Ol' Man River." 40

HIS LORDSHIP : Did you recognise it from the introduction ?—
 A. No, sir.

(Another record partly played.)

Mr. MANNING : All right. What work is that ?—A. I would have
 to have it played past the introduction.

Mr. MANNING : Very well ?—A. That is “ Moon Glow.”

Q. Is that the one you heard in the Famous Door ?—A. Yes it is.

Q. Then, I have identified the two that this witness testified to.

HIS LORDSHIP : Yes, he testified to “ Moon Glow ” and “ Who.”

10 Mr. MANNING : And there were no words in either of them.

HIS LORDSHIP : That “ Who,” is that the song that is concerned
 with someone having stolen someone’s heart ?—A. That is correct.

Q. I did not recognise it from hearing it.

Mr. MANNING : Well, we did not get on to the words, my Lord.
 Would you play the last record, please ?

(Another record is partly played.)

The WITNESS : That is “ Make Believe.”

Mr. MANNING : That is all from this witness, then.

HIS LORDSHIP : Any cross-examination ?

20 Mr. SANKEY : No questions, my Lord.

HIS LORDSHIP : I don’t suppose anyone will raise the question as to
 whether there should be a charge for the performance in the Courtroom.

Mr. SANKEY : A performance in public, my Lord.

Mr. MANNING : Oh, yes : for your Lordship’s convenience there is
 the list, and the sequence in which they were played.

HIS LORDSHIP : Yes, I have it in my own notes, thank you.

Witness excused.

No. 7.

Evidence of P. A. Cutts.

30

PERCY A. CUTTS, sworn.

Examined by Mr. MANNING.

Q. What is your business, Mr. Cutts ?—A. I am a musician.

Q. What instrument do you perform on ?—A. String bass, bass violin.

Q. I see. Do you read music ?—A. Yes.

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Q. Did you make an inspection at the Brass Rail on the instructions of Mr. Matheson?—A. Yes I did.

Q. Do you remember the date?—A. April 8th, I believe.

Q. Of what year?—A. 1949.

Q. Did you make a memorandum at that time of what you heard?—
A. I did, yes.

Q. Would you look at this, then, and refresh your memory and tell me what works you heard performed at that time?—A. Do you wish me to read it?

Q. I don't want the whole list. I want the ones that are marked 10 there. You may tell us about those?—A. "Sophisticated Lady."

Q. At what time of the day did you hear that?—A. In the afternoon.

Q. Have you marked the time on your card there?—A. 3.51 is the time.

Q. 3.51 p.m. And I ask you, can you identify this document?

HIS LORDSHIP: You are handing the witness what exhibit?

Mr. MANNING: A new exhibit, my Lord.

Q. What is that?—A. That is the sheet music of "Sophisticated Lady."

Q. And is that the work that you heard?—A. Yes it is. 20

Q. Were there any words when you heard the music?—A. No. The type of music used in this establishment does not use words.

Q. They did not use words, but you did hear the musical set of it. Is that it?—A. Yes.

EXHIBIT No. 11: Sheet music of "Sophisticated Lady."

Q. Then, I think you have not any others marked on that occasion have you?—A. No.

Q. Did you make an inspection of any other places on Mr. Matheson's instructions?—A. I visited the Famous Door Tavern.

Q. And on what date did you visit the Famous Door?—A. I believe 30 it was the next day, April 9th.

Q. April 9th, 1949. Did you make a memorandum then?—A. Yes, I did.

Q. And filled it in at the time?—A. That is right.

Q. Now, will you tell us what music you heard on April 9th?—A. One of the selections I heard was the piece "Make Believe."

Q. That is written by whom?—A. I am not familiar with the author.

Q. Can you identify this?

HIS LORDSHIP: What time of day was it?—A. In the evening, 7.22. 40

Q. And that is a cocktail bar, too, is it?

Mr. MANNING: That is right.

Q. And would you tell me what that document is?—A. It is the sheet music for the selection, "Make Believe."

Q. By?—A. Jerome Kern.

Q. Did you hear the words?—A. No, none of the selections played had words.

In the Supreme Court of Ontario.

EXHIBIT No. 12 : Sheet music of " Make Believe."

Q. Now, how many people were there in the Brass Rail, when you were there?—A. Well, I couldn't say offhand how many. It wouldn't be too busy in the afternoon.

Plaintiff's Evidence.

Q. Would you care to give us an estimate?—A. Possibly 30 to 50 people.

No. 7. P. A. Cutts.

10 Q. And when you were in the Famous Door, how many people would be there?—A. I imagine around the same number.

Examination—
continued.

Q. You didn't make a specific count?—A. No, I did not.

Mr. SANKEY : He imagines around 60.

The WITNESS : Possibly. There is no point in my judging how many people would be in there at that time.

Mr. MANNING : I see. You did not observe that?—A. No.

HIS LORDSHIP : But were there some patrons there?—A. Yes, there were.

20 Mr. MANNING : Did you observe in either of these two places what was the instrumentality by which the sound was diffused?—A. Oh, there was nothing visible in music of this type, except possibly the positions where the speakers may be, I mean, in noticing specifically.

Q. Well, not possibly. I want to know what you observed?—A. I did not observe anything.

Q. Did you notice from what direction the sound came?—A. Not specifically, no.

Q. All right. That is all, thank you.

HIS LORDSHIP : Any cross-examination?

Mr. SANKEY : No questions, my Lord.

Witness excused.

Evidence of A. D. Bennett.

No. 8. A. D. Bennett. Examination.

ANTHONY D. BENNETT, sworn.

Examined by Mr. MANNING.

Q. Mr. Bennett, what is your business?—A. I am a musician.

Q. And do you read music?—A. Yes.

Q. Did you make any visits at the Famous Door on instructions of Mr. Matheson?—A. Yes, I did.

Q. When was that?—A. April 8th.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 8.
A. D.
Bennett.
Examina-
tion—
continued.

Q. And did you, when you were there, make a memorandum of what you heard?—A. Yes.

HIS LORDSHIP: This is April 8th, 1949?—A. Yes.

Mr. MANNING: Is this the memorandum?—A. Yes, it is.

Q. Now, what musical works did you hear performed there? I don't want the whole list. I want any one that is noted particularly?—A. I see. "April Showers."

Q. At what hour of the day was that played?—A. 5.20 p.m.

Q. In the afternoon?—A. Yes.

Q. Were there any other people there, in the room, when you were there?—A. Oh, yes, there would be 30 to 40 people, maybe.

Q. And I ask you if you can identify this document?—A. This is the sheet music for "April Showers."

Q. By Louis Silvers, and words by B. G. Da Silva. Now, did you hear the words sung?—A. No.

Q. But you did recognise the music. Is that it?—A. That is right.

EXHIBIT No. 13: Sheet music of "April Showers."

Q. And did you make any visit to the Westminster Hotel?—A. Yes, I did.

Q. And on what date did you make that visit?—A. That was on the 20 same day.

Q. April 8th, 1949?—A. That is correct.

Q. At what time?—A. It was earlier in the afternoon.

Q. Did you make a memorandum then of what you heard?—A. Yes, I did.

Q. Now, would you tell us whether that is the memorandum?—A. Yes, it is.

Q. And what part of the Westminster Hotel did you visit?—A. The room there known as the "Town and Country Room."

Q. What is it?—A. It is a cocktail lounge. 30

Q. Were there any other people there?—A. Yes.

HIS LORDSHIP: The "Town and Country Room." Is that what they call it?—A. Yes.

Mr. MANNING: It is a cocktail lounge?—A. Yes.

Q. And how many people were there?—A. Oh, not very many; maybe 15.

Q. Did you notice if any music was performed there?—A. Yes.

Q. And what particular music did you notice?—A. "Sophisticated Lady."

Q. And do you recognise this document, Exhibit 11?—A. Yes, this 40 is the music for "Sophisticated Lady."

Q. And that is Exhibit 11; and were any words sung with it?—A. No.

Q. You just heard the music itself?—A. That is correct.

Q. Now, in the Brass Rail, did you observe what were the means by which the sounds were produced?—A. You mean in the "Town and Country Room"?

Q. No, I was thinking of the earlier one, the Famous Door, I am sorry. I will ask you about the Brass Rail first. Did you see any means by which the sound was produced?—A. I did not see nothing, no. There was nothing evident.

In the
Supreme
Court of
Ontario.

Q. And in the “Town and Country Room” was there anything evident by which sound was produced?—A. No, there was not.

Plaintiff's
Evidence.

Q. I see. That is all, thank you.

HIS LORDSHIP: You were making the rounds only of the cocktail bars?—A. That is correct.

No. 8.
A. D.

10 Mr. MANNING: Oh, I didn't ask you at what hour you heard that work, Exhibit 11?—A. 3.53 p.m.

Bennett.
Examina-
tion--
continued.

Q. Yes. Your witness.

Cross-examined by Mr. SANKEY.

Cross-exam-
ination.

Q. How long did this vaudeville program last that afternoon?

HIS LORDSHIP: Are you referring to the music?

Mr. SANKEY: To the pub crawl, my Lord.

The WITNESS: About an hour in each case.

Q. That is all, thank you.

Witness excused.

20

No. 9.

Evidence of J. Houston.

No. 9.
J. Houston.
Examina-
tion.

JOHN HOUSTON, sworn.

Examined by Mr. MANNING.

Q. What is your business, Mr. Houston?—A. Bookkeeper.

Q. Are you familiar with music?—A. I can identify pieces played.

HIS LORDSHIP: You can read music?—A. No, my Lord.

Mr. MANNING: Did you visit the Famous Door at any time on instructions from Mr. Matheson?—A. Yes, I did.

Q. On what date?—A. On April 8th, 1949.

30 Q. At what hour?—A. Late in the afternoon.

Q. Did you make a memorandum at the time of what you heard?—
A. Yes, I did.

Q. Is this the memorandum?—A. That is it, yes.

Q. Now then, will you tell us what you heard as to a particular piece of music, on that occasion?—A. “Ol' Man River.”

Q. How often have you heard it?—A. Quite a few times.

Q. Have you any doubt about it?—A. No.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 9.
J. Houston.
Examina-
tion—
continued.

Q. I suppose I cannot ask this witness in view of the fact, my Lord, that he does not read music, to identify the music ?

HIS LORDSHIP : No, it would not serve any purpose.

Mr. MANNING : Would you recognise that work if you heard it again ?—*A.* I did. It was played to me this morning from that sheet music.

Q. Do you remember what number in the sequence of the works that were played it was, or did you make any note of that ?—*A.* Near the end.

Q. Well, perhaps we might have two or three selections heard and see if you can identify the ones you heard. 10

(Reporter's Note: Records are again played on the gramophone.)

Mr. SANKEY : I think, my Lord, to save time we will admit that he heard those ten—to save a little time.

Mr. MANNING : Well, all right then. That is all with this witness. Oh, did I ask what time it was played ?—*A.* 10.48 a.m.

Q. And were there other people in the room ?—*A.* Yes, sir, there were quite a few. There was about 100.

Cross-examination. Cross-examined by *Mr. SANKEY.*

Q. Just see this card my friend showed you. Is that in your handwriting ?—*A.* Yes, it is. 20

Q. And when did you make the handwriting on this card ?—*A.* At the time.

Q. At the time you heard the music ?—*A.* Yes.

Q. Thank you.

Mr. MANNING : Do you want to put it in ?

Mr. SANKEY : No, thank you.

Witness excused.

No. 10.
Miss G.
Jenson.
Examina-
tion.

No. 10.

Evidence of Miss G. Jenson.

30

Miss GEORGINA JENSON, sworn.

Examined by *Mr. MANNING.*

Q. I show you two documents here, Miss Jenson. Would you identify them for us ?—*A.* Yes, they are both copies of "Ol' Man River."

Q. What difference is there between them ?—*A.* One is the vocal and the other is just the piano arrangement.

Q. You read music, do you ?—*A.* Yes.

Q. What are your qualifications?—A. I have a teacher's degree in piano.

Q. And how long since you qualified?—A. Oh, I have not taught for about eight years, but I have been working for over four years.

Q. What is your present activity, by the way?—A. Record sales clerk.

HIS LORDSHIP: Which is the vocal?—A. The vocal is "A" and the instrumental "B."

HIS LORDSHIP: Then they will be 14A and 14B.

10

EXHIBIT No. 14 A: Sheet music of "Ol' Man River."

EXHIBIT No. 14 B: Instrumental sheet music of "Ol' Man River."

Mr. MANNING: And have you seen the sheet music of these various exhibits? May I take them now? I show you now Exhibit 1, Exhibit 11; I should have given you Exhibit 2. Then Exhibits 11, 12, 13, 14A and 14B. Look them over carefully. Will you tell me if it was the music, or what the music was that you performed on the instrument here?—A. Yes, they were all played.

Q. All those works were played on the instrument?—A. Yes.

20

Q. Were any other works played on the instrument?—A. No.

Q. And are there any other works in the catalogue of records which you have, which carry the names that those works carry?—A. No.

Q. What was the instrument on which the performance was done, over here?—A. A gramophone.

Q. Do you know by whom it was manufactured?—A. Yes, it is an English Victor machine.

Q. I think perhaps, my Lord, it might be worth while having this machine put in as an exhibit.

HIS LORDSHIP: What about the records?

30

Mr. MANNING: I will put the records in next, my Lord.

EXHIBIT No. 15: Gramophone on which the records were played.

Mr. MANNING: That is the instrument, then, on which you performed these works?—A. Yes.

Q. Then, would you just look these records over and see if those are the ones you did have performed?—A. These are the ones that were played this morning.

HIS LORDSHIP: How many are there?—A. Six.

Mr. MANNING: I suppose these may go in as one exhibit, my Lord.

40

They all carry labels on them.

HIS LORDSHIP: Yes. Those are the six records which were played on Exhibit 15 in the Courtroom, this morning?—A. Yes.

EXHIBIT No. 16: Six records played on Exhibit No. 15.

Mr. MANNING: That is all with this witness.

Mr. SANKEY: No questions, my Lord.

Witness excused.

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Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 10.
Miss G.
Jenson.

Examina-
tion—
continued.

In the
Supreme
Court of
Ontario.

No. 11.

Evidence of M. R. Raymond.

Plaintiff's
Evidence.

MURRAY R. RAYMOND, sworn.

No. 11.
M. R.
Raymond.
Examina-
tion.

Examined by Mr. MANNING.

Q. You are the vice-president of the Defendant, Associated Broadcasting Company, Mr. Raymond?—A. That is right.

Q. And I believe act as manager?—A. Yes.

Q. There were some documents that you were going to produce, or your counsel was good enough to say he would make them available.

Mr. SANKEY: What would you like?

10

Mr. MANNING: The contracts, please. (Produced.)

Q. I show you, Mr. Raymond, this document, and I would ask you to identify it?—A. This is the contract that we have with the "Famous Door," Yonge and Charles Street, Toronto.

Q. And when you say "we," you mean the Associated Broadcasting Company?—A. The Associated Broadcasting Company.

HIS LORDSHIP: What is the date of it?

Mr. MANNING: Oh, I am sorry, my Lord. January 30th, 1948.

EXHIBIT No. 17: Contract, Associated Broadcasting Company and the "Famous Door" dated January 30th, 1948.

20

Q. This document, Exhibit 17, Mr. Raymond, is signed by Mr. Reibstein, do you notice?—A. Yes.

Q. Harry Reibstein?—A. Yes.

Q. That is the Defendant, Harry Reibstein?—A. Yes.

Q. Do you know what his capacity is?—A. I believe he is a partner in the establishment known as the "Famous Door."

Q. Was that contract in force throughout 1949?—A. Yes.

Q. I don't know that I need do more than put it in at the present time, my Lord. Perhaps it might be convenient to summarise it. It is a contract by which the Defendant, the Associated Broadcasting Company, agrees to supply to Reibstein, the subscriber, what is called in quotations "Music by Muzak," program services only to the following locations, and there is typewritten in "opening until closing 8.00 a.m. till 3.00 a.m." and then as part of the Muzak services, the Associated will instal and keep in operating condition with the exception of:—

"6—8 inch P.M. Full Range Loud-speakers

"6—Line-to-voice Coil Transformers

"1—25 watt Heavy Duty Amplifier

"1 specially balanced Transmission Line from studio of "Associated" to above location, and

40

"1—Microphone."

Then the third clause calls for the subscriber to accept the " Music by Muzak " programs at such periods of time as may be fixed by Associated and as such programs may from time to time be constituted.

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Then the fourth paragraph, the subscriber will pay to Associated for the above Muzak service,

Plaintiff's Evidence.

" (a) an initial installation charge of nil

" (b) a service of forty dollars (\$40) per month, payable " monthly in advance."

No. 11. M. R.

Raymond.

Examina-

tion - -

continued.

10 Then there are some printed clauses and descriptions which are interesting, but which are not relevant here, and there is a typewritten clause marked Item 5. Item 5, the printed clause, seems to have been stricken out and typewritten in and this says :

" This arrangement shall remain in force for a period of two " years commencing on June 8th, 1948, and for successive yearly " periods but either party may terminate this arrangement at the " end of a yearly period (following the two year term), upon at " least sixty (60) days' prior notice in writing, sent by registered " mail."

20 HIS LORDSHIP : That is, service is payable at the rate of \$40 a month ?

Mr. MANNING : That is right, sir. Then, I show you a second document which I would ask you to identify ?—A. This is the contract that we, the Associated Broadcasting Company, have with the " Brass Rail," 701 Yonge Street, Toronto, to supply them with Muzak.

Q. And this document is dated August 27th, 1948, and there is a signature at the bottom there. That is—— ?—A. " B. Dennis."

Q. Do you know who Mr. Dennis is ?—A. He is proprietor of that establishment.

Q. And one of the Defendants here ?—A. Yes.

30 EXHIBIT NO. 18 : Contract between Associated Broadcasting Company and the Brass Rail, dated August 27th, 1948.

Mr. MANNING : This contract, my Lord, is on the same printed form and the first clause contemplates the supplying of the service to a cocktail lounge, dining-room, two private offices, between the hours of opening and closing. Then, the specification as to what is to be supplied reads as follows :

40 " 2. As part of the Muzak service, Associated will instal and " keep in operating condition, for the reception of the Muzak " programs at the above location, the following transmission line " and sound equipment :

" 11—12" P.M.R.D. loud-speakers.

" 2—8" P.M.R.D. loud-speakers.

" 13—speaker-line transformers.

" 11—Special Ceiling Baffles with Mounting Rings.

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Court of
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—
Plaintiff's
Evidence.

No. 11.
M. R.
Raymond.
Examina-
tion—
continued.

“ 2—Special Office Baffles.
“ 1—Transmission line direct from studio to 701 Yonge
“ Street.
“ All necessary Indiv. Vol. Cont.
“ 1—25 watt H.D. Amplifier.
“ 1—Paging Microphone.”

Q. Is that right?—A. That is right.

Q. And one paging microphone?—A. That is right.

Q. What is a paging microphone?—A. It is just a small microphone
for use in paging if they wish to reach anyone anywhere in the establishment 10
and they don't know just where he might be.

Q. If I understand it correctly, that is a microphone on the premises
which could be used over this transmission, through the loud-speaker?—
A. That is right, yes.

Q. And that agreement was in force, was it, throughout 1949?—A. Yes.

Q. Then, I show you two documents fastened together here—oh,
I am sorry. I did not read from this document the matter of construction.
No. 3 is the same, an undertaking to take “ Music by Muzak ” programs
at such periods of time as may be fixed by Associated and as such programs
may from time to time be constituted. 20

And then No. 4,

“ The subscriber will pay to Associated for the above Muzak
“ service,

“ (a) an initial installation charge of Eighty Dollars (\$80)
“ payable upon completion of the installation ;

“ (b) A service fee of Fifty-five Dollars (\$55) per month
“ payable monthly in advance.”

There was a cancellation clause but it is not inconsistent,—I mean it does
not appear to have been exercised, so it is not necessary to refer to it.

HIS LORDSHIP : Is “ Muzak ” the name of an instrument which is 30
used for transmission purposes ?

The WITNESS : No, that is simply the trade name for the music.

Mr. MANNING : I propose to ask some questions about it shortly,
my Lord, that will perhaps elucidate the matter. Then, Mr. Raymond,
I show you two further documents which are fastened together. Would
you identify them, please?—A. These are contracts covering services to
the Westminster Hotel, their dining room, and also to the “ Town and
Country Room ” operated by the same people.

Q. And when you say the Westminster Hotel, the contracting party
is the Westminster Hotel Limited?—A. Yes. 40

Q. And it operates the Westminster Hotel, does it?—A. Yes, that
is right.

Q. Yes, I see. Perhaps I might deal only with the “ Town and Country
Room,” my Lord, because it is the one where the evidence indicates the
performance took place. The contracts are both dated on the same date,

March 3rd, 1949, and the contract for services in the "Town and Country Room," at 240 Jarvis Street—that is where the Westminster Hotel is?—
 A. Yes, that is right.

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 Ontario.

EXHIBIT No. 19: Contract between Associated Broadcasting Company and the Westminster Hotel, dated March 3rd, 1949.

Plaintiff's
 Evidence.

Mr. MANNING: Clause 1 of Exhibit 19 calls for supplying to the subscriber, "Music by Muzak" service only to the following locations, the dining-room, between the hours of opening and closing, and the cocktail lounge between the hours of opening and closing; the "Town and Country Room" is a cocktail lounge, is it?—A. Yes, that is right.

No. 11.
 M. R.
 Raymond.
 Examination—
continued.

Q. Then, as part of the Muzak service Clause 2 provides that Associated will instal and keep in operating condition, for the reception of the Muzak programs at the above location, the following transmission line and sound equipment:—

- " 11—regular duty loud-speakers
- " 11—special acoustic baffles
- " 11—speaker transformers
- " 11—volume controls
- " 1—T.-pad
- " 1—heavy duty amplifier
- " 1—specially balanced transmission line."

Then there is the usual clause to accept, and Clause 4 provides that the subscriber will pay to the Associated for the above Muzak service an initial charge of \$68 and "(b) a service fee of Fifty Dollars (\$50) per month, "payable monthly in advance." Then Section 5:

- " This arrangement shall remain in force for successive two
- " yearly periods commencing on February 11th, 1949, but either
- " party may terminate this arrangement at the end of any two
- " yearly period on at least sixty (60) days' prior notice in writing,
- " sent by registered mail."

Was that arrangement in force throughout 1949?—A. Yes.

Q. Then there is a separate contract on the other part of the hotel, my Lord. Now, how did the immediate activating of the loud-speakers in the "Famous Door," the "Brass Rail" and the Westminster Hotel, "Town and Country Room," come about? I don't want you to give me any evidence at all as to what happened outside the premises of those particular places for the moment. What connection was there between the loud-speakers and the other apparatus which was installed pursuant to these contracts? It was installed, wasn't it?—A. You mean prior to these contracts being signed?

Q. No. Perhaps I have made my question too cumbersome. Were the installations that are called for on those several contracts made?—
 A. Were they made?

Q. Yes.?—A. Oh, yes, they were made.

In the
Supreme
Court of
Ontario.
—
Plaintiff's
Evidence.
—
No. 11.
M. R.
Raymond.
Examina-
tion—
continued.

Q. And at the premises of the Brass Rail and the Famous Door and the Westminster Hotel, and only within those premises, what else was there?—*A.* There is an amplifier.

Q. But we have got those called for in the agreement?—*A.* Well, there was nothing else other than—

Q. Well, to what were those connected?—*A.* They are connected to our studio.

Q. By what?—*A.* A wire.

Q. Whose wire is it?—*A.* Well, we happened to lease that from the Bell Telephone Company.

Q. The wire is the property of the Bell Telephone Company?—*A.* Yes, right. 10

Q. And you have an agreement with the Bell Telephone Company?—*A.* Yes.

Q. Would you let me have that, please? Well, before I use these, perhaps my friend would not mind informing me on something. Your Lordship will excuse me for a moment? Have you Mr. Raymond, got any contracts with the Bell Telephone Company which relate to connections with the "Brass Rail" and the "Famous Door" and the Westminster Hotel?—*A.* Have I the contracts? 20

Q. Yes, or has your company?—*A.* Oh, yes, we have contracts.

Q. Well, have you got them here?—*A.* I don't know whether they are here or not.

Q. Perhaps this need not go on the record, my Lord.

Mr. SANKEY: I sent my friend, in the course of the litigation, three typical contracts with the Bell Telephone Company in respect of one of the premises—I don't know which it was—and I wrote a letter explaining the necessity for having three contracts with the Bell Telephone Company. If my friend chooses to put in—I think the letter is accurate, and he has in his hand three typical samples of the type of contract that he has with the company, marked "a," "b" and "c." 30

HIS LORDSHIP: That would serve the purpose.

Mr. MANNING: I think it is sufficient, but it does not bind them, any of that detail, with the particular companies.

HIS LORDSHIP: No, but you can ask the witness that.

Mr. SANKEY: I don't know, but I think the witness will say that this contract is followed uniformly in each case.

HIS LORDSHIP: Well, he may be asked that.

Mr. MANNING: Then, Mr. Raymond, have you a standard form of contract with the Bell Telephone Company?—*A.* The Telephone Company have a standard form of contract. 40

Q. Well, you enter into a standard form of contract with them?—*A.* Yes, as a rule.

Q. And would it be a fair thing, then, to put in any of the contracts that appear for wire-line services with the Telephone Company as typical of all of them?—*A.* Yes, as long as it is within the city.

Q. As long as it is within the city?—*A.* Yes.

Q. Then, do I understand you have a separate contract for each place to which service is rendered?—A. No. I am just saying if it is Toronto. I don't know what other telephone companies have.

Q. No, but I mean for each hook-up you have in Toronto, have you a separate contract with the Telephone Company?—A. Yes, we have.

Q. And do the rates vary?—A. Yes, they vary.

Q. Have you the particulars of what the monthly rates are in the case of the "Famous Door" and the "Brass Rail" and the Westminster Hotel?—A. No, I don't have those on hand, but I could secure them.

10 Q. Well, nothing turns on it anyway. Then, perhaps we could put in as a typical contract this document, if you will agree that it is a proper one?—A. Well, this happens to be one from our studio to the Elgin Exchange, and there is an amplifier which is in addition to the ordinary contract.

Mr. SANKEY: The three apply to the one subscriber, "a," "b" and "c."

Mr. MANNING: Oh, they all apply to one subscriber.

Mr. SANKEY: Yes.

20 Mr. MANNING: Well, would this be a fair one to put in as typical of the contract which you have with the Bell Telephone Company to supply the three places named?—A. Yes, this is a typical contract.

Q. All right, that may be marked as an exhibit, my Lord?

HIS LORDSHIP: Yes, Exhibit No. 20.

EXHIBIT No. 20: Lease of facilities for program transmission between the Bell Telephone Company of Canada and the Associated Broadcasting Company, 1139 Bay Street, Toronto.

Mr. MANNING: I gather from your counsel, Mr. Raymond, it was not possible to find the specific contracts that relate to these three locations, and that is my only reason for using this one?—A. Oh, I see.

30 Q. This (Exhibit 20) is on a printed form of the Bell Telephone Company, my Lord. It is a short memorandum called, "Lease of facilities for program transmission," and proceeds in this wise:—

"Associated Broadcasting Company, 1139 Bay Street, Lessee,
requests the Bell Telephone Company of Canada, Lessor, to
furnish facilities for Program Transmission Service.

"It is agreed that service will be provided from Elgin Bridging
Arrangement (Basic) to Keyhole Tavern, 506 King Street West,
beginning on 12.4.49 and continuing on a monthly basis."

40 That, of course, would be different in the "Brass Rail" or the "Famous Door" or the Westminster Hotel, whatever it might be—for these contracts?—A. That is right.

Q. But the rest of it would be the same. It is provided from the Elgin Bridging Arrangement (Basic)?—A. No. In the case of the "Famous Door" and the "Brass Rail," the lines would go directly from our studio, rather than through the telephone exchange.

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Plaintiff's
Evidence.

—
No. 11.
M. R.
Raymond.
Examina-
tion—
continued.

In the
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Plaintiff's
Evidence.

No. 11.
M. R.
Raymond.
Examina-
tion—
continued.

Q. Oh, I see. The Elgin Bridging Arrangement refers to the Elgin Exchange?—*A.* Yes.

Q. Oh, I see. All right. Then in the beginning, in this case “on the 12th of April, 1949, and continuing on a monthly basis,” and then the printed form continues “that the Lessee will be bound by the terms and conditions endorsed on the reverse side hereof, and will pay to the Company the sum of Seven Dollars and Ten cents installation charge.” Then, “This request becomes a binding contract as soon as accepted by the Bell Telephone Company of Canada, as evidenced by the signature of its representative hereto. Its terms and conditions cannot be waived by any representation or promise unless the same be confirmed in writing and signed by the Manager on behalf of the Company.” Then “Details of mileage, equipment and rate,” and then there is below that a panel for showing the particular details. Can you interpret this:

“1 P.T.C. one mile.”

to me?—*A.* I don't know. I presume that is program transmission chiefly.

Q. Then, “one mile,” that is the distance to the——?—*A.* That is the distance to their line.

Q. And \$7 per month, and then it purports to be signed on behalf of the Bell Telephone Company by Mr. W. T. Nichols, and then there are printed conditions on the back, which do not concern us here, do they?—*A.* No.

Q. Well, then, as I understand it, you have a separate contract on that form in respect to each of the three installations that are in question in this action? Is that right?—*A.* That is right.

Q. And that whatever is done to provide programs in the “Brass Rail,” the “Famous Door” and the Westminster Hotel—I am not concerned with that at your end—is done by transmission of electrical impulses over those Bell Telephone lines with the apparatus in the several destinations?—*A.* Yes.

Q. In connection with the Muzak service, do you work according to a pre-arranged program?—*A.* Yes.

Q. And if my friend doesn't mind me leading here, those pre-arranged programs are prepared by the “Muzak” Corporation in New York?—*A.* That is right.

Q. And are supplied to you in monthly quotas, or something of that sort?—*A.* No, As a rule they come up in about four or five days lots.

Q. And there is available to you from the Muzak Corporation library all electrical transcriptions?—*A.* Yes.

Q. To match up with the program?—*A.* That is right.

Q. So that you can run through the program by getting from the Muzak Corporation the transcriptions that are required?—*A.* Yes.

Q. Now then, did you, in fact——

HIS LORDSHIP: That is, they make available the electrical transcriptions. Is that what you say?—*A.* The records, yes.

Mr. MANNING: But they are actually called transcriptions, are they not?—A. That is one name for them, yes.

Mr. SANKEY: But they are records.

Mr. MANNING: Do you always have transcriptions for the programs for a particular day?—A. Yes, as a rule we have them.

Q. Do you ever make substitutions?—A. We might occasionally. If, for example, one of our records were to be damaged and were to be sent back for replacement, it is possible that that exact number would be programmed the following day and we would not have it and then we would have to substitute.

Q. Yes. Then, will you identify this document, please?—A. That is our program for April 8th, 1949; our basic program.

Q. And substantially this is the program that was played. Is that it?—A. That is correct.

EXHIBIT No. 21: Program of music played on April 8th, 1949.

Q. Then, if you will look at Exhibit No. 21, Mr. Raymond, in the bracket there "12.45 to 1.00 p.m." you will notice that there is shown the title "Moon Glow"?—A. That is right.

20 Q. If you will look at the bracket at 3.45 p.m., you will see the work "Sophisticated Lady." There are generally four and sometimes five items in the interval, and then in the bracket from 4.30 to 4.45 p.m., you will see "April Showers" and then I do not see in the rest of the program any further works that appear to have been performed on that day. "Make Believe" and "Who." Do you know anything about the performance of them?—A. No, I do not know anything about those.

Q. Do you know of any other instrumentality in the "Famous Door" or the "Brass Rail" or the Westminster Town and Country Club for producing music, than the instrumentality provided by your company?—
30 A. Not to my knowledge there is anything.

Q. Now, have you the program, please, for the 9th of April?

Mr. SANKEY: I am sorry, we cannot find it.

Mr. MANNING: I show you—

Mr. SANKEY: That is industrial, I think.

Mr. MANNING: No, it is called "Basic Program." I show you a further document, Mr. Raymond. Perhaps you would identify it?—
A. That is the basic program for Saturday, April 9th, 1949.

EXHIBIT No. 22: Basic Program for Saturday, April 9th, 1949.

40 Q. Then, I draw your attention to this, Mr. Raymond, that in the brackets between 7.15 and 7.30 p.m. on April 9th, the work "Make Believe" appears as the second number?—A. That is right.

Q. Well, you don't question that this work was performed on that day?—A. No.

Q. And would it be proper to say that the Defendant, the Associated Broadcasting Company, transmitted to the several premises throughout

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April 8th and April 9th, the electrical impulses which produced the sounds in the "Brass Rail" and the "Famous Door" and the Westminster Town and Country Club?—*A.* Yes.

Q. I suppose you would not have any comment to make as to the works that did not appear on the program for April 8th, which appear to have been performed in the "Brass Rail" the "Famous Door" and the Westminster Hotel Town and Country Club?—*A.* Not other than they might have been a substitution, or it is possible that they were request numbers.

HIS LORDSHIP: You are referring to the three pieces that were 10 mentioned as having been played on April 8th that were not on the program?—*A.* Yes.

Q. That is "Make Believe" and "Who" and "Ol' Man River"?—*A.* Yes, that is right.

Mr. MANNING: May be request numbers?—*A.* It is possible, yes.

HIS LORDSHIP: And if one of these cocktail bars puts in a request for a number, I suppose the others have to have the same number?—*A.* Well, we do not, as a rule, provide request numbers, but occasionally if someone is having a celebration—

Q. If it is provided for one cocktail bar they all have to either enjoy 20 it or suffer it?—*A.* Yes, pretty well.

Mr. MANNING: Your witness.

Cross-exam-
ination. Cross-examined by Mr. Fox.

Q. Mr. Raymond, my friend asked you whether it was fair to say that your company, Associated Broadcasting Company, during the month of April, 1949, transmitted to the Brass Rail and various other places named by him, the electrical impulses which caused the performance of these particular pieces of music, and you answered, as I understood you, "Yes" to that question. Now, would you explain to his Lordship what was meant in your mind by transmitting the electrical impulses which caused these 30 performances? What were the instrumentalities that you used to transmit these electrical impulses?—*A.* In our studio we have what is in effect a phonograph.

Mr. MANNING: Well, may I object my Lord, at this stage? The witness was not called by me as an expert witness, and the witness is now being asked in effect to give evidence which, in a mild way, is at variance from the evidence which he gave on discovery, which is essentially evidence of an expert character, to put a name on an instrument. Now I, of course, do not want to interfere with the bringing out of any proper facts.

HIS LORDSHIP: Well, I suppose a layman could look at an 40 instrument and say it is—for instance, this Exhibit 15 that has been filed here is called a gramophone by the witness who put it in.

Mr. MANNING: That is true.

HIS LORDSHIP: And if there is any real, serious difference between the experts as to when a phonograph is not a phonograph, I suppose that is a matter that might be struggled with when it arises.

Mr. MANNING : Yes. The only thing I wanted to do with this, my Lord, was to keep the door open so that, in a sense, I have to go to an adverse camp to find a witness to prove certain facts.

HIS LORDSHIP : And Mr. Fox does not put this witness in as an expert. He is putting him in as a lay witness. At least, he was examined as a lay witness.

Mr. MANNING : Oh, it is quite right to cross-examine him. I am not challenging him on that. The only question I am getting at is the very crux of this case is what causes the sounds.

10 Mr. FOX : That is what I am trying to find out.

Mr. MANNING : Yes, and I am not trying to stop you, except I do say this : if there is a question of putting a label on the instrument which causes the sound, then I should be at liberty to cross-examine on that point, because I can show that the witness did not use the word " phonograph " at all in giving his evidence on discovery. He called it a different thing altogether. Now, I do not challenge, of course, the interest of the witness, or anything of that sort, but it is necessary for me to make very clearly what the instrumentality was, and my friend should not be permitted at this stage——

20 HIS LORDSHIP : Oh, you called him as your witness, and it is thrown wide open.

Mr. MANNING : Yes, but not as an expert witness.

HIS LORDSHIP : Oh, he is not purporting to be an expert witness, and he has not given any qualifications and, until he does, I must take his evidence as that of a lay witness.

Mr. MANNING : Yes, but as a lay witness, my suggestion is, or submission is, that any evidence the witness may give of this sort, if it differs from the evidence given on discovery, should be subject to further examination of a leading character, by myself.

30 HIS LORDSHIP : No, that would only be so if this witness were a hostile one. On what other basis would you suggest ?

Mr. MANNING : No other basis, my Lord, except this.

HIS LORDSHIP : Than that he is hostile.

Mr. MANNING : No, except this other basis. If the witness purports to give a label to an instrument which is not its usual label at all, then, he is purporting to be an expert, whether wittingly or otherwise ; that would be making my friend's witness——

40 HIS LORDSHIP : Well, I am not going to make any ruling in advance, Mr. Manning, and I suggest you let Mr. Fox complete his cross-examination and then any questions you put on re-examination I shall rule upon as they arise.

Mr. MANNING : Very well. I thought, my Lord, I should raise the question now.

HIS LORDSHIP : I think it is a very wise rule never to cross the bridge until you arrive at it.

Mr. MANNING : Yes, but I thought it should be brought up now.

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Mr. FOX: My Lord, perhaps I may be permitted to make this observation. I sat here quite silently while my learned friend tried to impeach his own witness. He puts him in, and I submit with respect I am entitled to cross-examine and I made no objection when my learned friend asked this witness to describe a certain piece of machinery which was put in here and I do not suggest the witness should be qualified as an expert to do something which is ordinary knowledge.

Q. Now, Mr. Raymond, will you please again describe to me the instrumentalities that your company employs in order to transmit the electrical impulses which cause the acoustic performances of a work to become audible in certain premises who are subscribers to your service?—

A. Well, the records are placed on a phonograph or a gramophone.

Q. Now, may I interrupt you just a moment. You say the records. These are the electrical transcriptions you spoke about to my friend?—

A. That is right.

Q. And they are circular discs of the usual thickness of gramophone records, are they?—A. Yes.

Q. Yes. Go on please?—A. They are placed on a revolving turn-table and the playing head is then placed on the disc or record. In this playing head is a needle. The music is cut into the discs, the vibrations rather, or sound waves, are transmitted.

Q. May I interrupt you, please, Mr. Raymond? What causes the vibrations or sound waves?

HIS LORDSHIP: Now, would you know that?—A. Well, I just don't understand that question.

HIS LORDSHIP: Wouldn't that be a question of physics.

Mr. FOX: No, respectfully, my Lord, I think your Lordship and I both know there could be no question of that. It is common knowledge.

Mr. MANNING: In my submission, we are getting right away to expert evidence, my Lord.

HIS LORDSHIP: Well, let us see how far it goes. Do you know how these sound waves are cut into the wax?—A. They are cut in by means of electrical impulses.

Mr. FOX: I am afraid perhaps I have not made myself clear in my question. I did not ask the witness how these grooves were cut in the record, my Lord. I asked what caused the vibrations or sound waves in the needle.

HIS LORDSHIP: In the needle? I see. Very well.

The WITNESS: It is the sound track or pattern that is cut into the record and the needle is travelling around there,—it is in contact with those.

Mr. FOX: The point of the needle is in contact with the grooves in the record?—A. The point of the needle is in contact with the grooves in the record.

Q. Which are in a sinuous track around the record?—A. That is right.

Q. And the record on the turn-table is turning in a circle perforce, and the motor. Is that correct?—A. That is right.

Q. All right. Now, you have a needle. As I understand, you used the expression "head." Now, what do you mean by the head of the instrument?—*A.* It is simply the playing head. What we term the playing head to hold the needle.

Q. And the mechanical impulses, or the vibrations, or sound track in the record are then transmitted through the playing head and they become electrical impulses. Is that right?—*A.* That is right.

Q. I see. In the playing head, then, you have certain instrumentalities that turn the mechanical vibrations into electrical impulses. Is that
10 correct?—*A.* That is right.

Q. What is that called in common parlance? What are the instrumentalities in the head that turn the mechanical vibrations into electrical impulses? Isn't that a magnetic coil?—*A.* Oh, yes, I beg pardon; a magnetic coil. That is true.

Mr. MANNING: He is your witness. Perhaps, my Lord, it might be noted that this is, in my submission, expert evidence, and my friend is making him his witness.

HIS LORDSHIP: Mr. Fox, of course, this man is general manager of your own company, and I think perhaps, as counsel, you should not
20 cross-examine him on a matter of this kind.

Mr. FOX: Very well, my Lord. All right, Mr. Raymond. We have you to the head and you told me that at that point the mechanical vibrations were transmitted into electrical impulses. What happens to those electrical impulses?—*A.* They are then sent over the wires and go through the amplifiers and then they go into the loud-speakers; they are changed back to mechanical impulses.

Q. At the loud-speaker you say they are changed back from electrical impulses to mechanical vibrations?—*A.* Yes.

Q. And so, as mechanical vibrations——?—*A.* —— become audible.
30 *Q.* In that they produce sound waves?—*A.* Yes.

Q. Now, taking a look at Exhibit No. 15, Mr. Raymond, which one of my friend's witnesses characterised as a gramophone. On Exhibit 15, are there any similar instrumentalities to those that you use in your premises?—*A.* Yes. There is a motor to drive this turntable. There is the turn-table itself. There is the head and the needle and this, I presume, is the loud-speaker chamber, or resonance chamber here. That would be similar to the loud-speaker in its action.

HIS LORDSHIP: Well, that takes the place of the amplifier, does it, or loud-speaker?—*A.* No, this would take the place of the loud-speaker?

Mr. FOX: Well, by "this" you are pointing to something underneath.
40 Would you mind describing it for the purposes of the record?—*A.* Well, it is a sound chamber. That would amplify the sound. I would imagine this is a mechanical phonograph, not an electrical one.

Q. Exhibit No. 15 is entirely mechanical. It has no electrical instrumentalities connected to it or contained in it?—*A.* No.

Q. But you find in it a motor? See if I state correctly what you tell us of the instrumentalities. You find in it a motor, a turn-table on which I presume the record is placed for playing?—*A.* That is right.

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Q. You find the needle ; you find the head. Do you find a suspension arm to carry the head ?—A. Yes.

Q. And you find a loud-speaker ?—A. Yes.

Q. Now, the difference between the instrumentalities contained in that box and those employed by you I presume have some relation to the fact that electricity is employed by you ?—A. Yes.

Q. Do you know of any instrumentalities of a nature broadly similar to the gramophone contained in the box, Exhibit No. 15, which do employ electricity to assist their instrumentalities ?—A. I would like to have that question again, Mr. Fox, please.

Q. Do you know——

Mr. MANNING : With the greatest respect, my Lord, I object.

HIS LORDSHIP : Well, I will have to hear the question.

Mr. MANNING : Yes, but I think the question has already been repeated. I don't want to interfere with any cross-examination if it is understood what it achieves, but I do submit on this cross-examination, this cross-examination refers only to expert evidence and not to any evidence led in chief, and I have no objection to my friend asking questions now, if it is understood now that the witness now becomes my friend's witness so that it is open to me to cross-examine, and I do submit that is the proper 20 view to take.

HIS LORDSHIP : Well, I don't know that, strictly speaking, he now becomes Mr. Fox's witness, but inasmuch as he is general manager of Mr. Fox's client, I think Mr. Fox should be careful not to cross-examine him, and I think Mr. Fox accepts that rule.

Mr. FOX : I do, my Lord, fully.

Mr. MANNING : I quite accept that, my Lord, and it is a difficult point to make without appearing to be captious in the matter. When he testifies as to instrumentalities, or creating a sound, he gets at once into technical knowledge, which is not available to the man on the street and, 30 take my friend's question which he is asking now.

HIS LORDSHIP : Of course Mr. Raymond is not the layman on the street. He is the general manager which deals in the transmission of these mechanical impulses which we call music.

Mr. MANNING : I won't even quarrel with that view. I am not willing to impeach the witness's qualifications, but I do submit this : when a witness is called and is then put in as a witness for an opinion on expert knowledge, he ceases to be an ordinary witness but, by cross-examination, he becomes in effect a witness for the person who wants to use his expert knowledge. 40

HIS LORDSHIP : Mr. Fox has so treated him and has accepted my ruling that he should not cross-examine on matters of this kind.

Mr. MANNING : May I even go a step further and I submit this with the greatest of deference, that once a witness is asked to give evidence of a

scientific nature, not having been asked evidence of a scientific nature prior thereto, he is in a different category and he must go on the theory, if you like, of an expert witness for the other side, and he is subject to cross-examination by the side which called him originally on facts. Now, that submission I make and I do not want to push it any further.

HIS LORDSHIP : Well, the necessity for a ruling on that has not yet arisen because you have not yet re-examined him.

Mr. MANNING : Well, I make the submission, my Lord.

HIS LORDSHIP : Well, it is a little premature, I would think,
10 Mr. Manning.

Mr. FOX : My Lord, using my own phrase, but I do not want to be captious either, I think my friend might have used a different word—not captious, but apprehensive. I recall to your Lordship's mind I think my friend is labouring under a misapprehension. There is no such thing as scientific evidence. There is no such thing as technical evidence. There is either evidence or non-evidence, and your Lordship will find that distinction clearly made in both the Ontario and the Canada Evidence Act. In all the works there is no such thing as scientific evidence.

HIS LORDSHIP : And you say this man is not giving opinion
20 evidence ?

Mr. FOX : I am not asking for opinions.

HIS LORDSHIP : You say he is stating as a fact things that are within his knowledge ?

Mr. FOX : That is all, my Lord, and in such a case I ask this witness a certain type of question. He becomes my witness by my friend's examination. I have never heard, in the law of evidence—my friend puts him in as a witness and then he becomes mine for cross-examination for all purposes, my Lord, unless he proves hostile and, with respect, my Lord, the fact that he happens to be vice-president and manager of my client
30 company, I suggest is completely beside the point. I bow to your Lordship's ruling. I am not cross-examining but, with respect, I think your Lordship is holding me down.

HIS LORDSHIP : You have the right, Mr. Fox, to cross-examine any witness but, in a case of this kind, the Court sometimes deems it more proper and it gives more weight to his evidence if it is elicited in free cross-examination, and that is why I put that suggestion to you ; not as a rule, necessarily.

Mr. FOX : I beg your Lordship's pardon. I have no quarrel with your Lordship's suggestion at all. I am grateful for it.

40 Q. Now we were in the middle of a rather involved question, Mr. Raymond, which I think I can shorten and perhaps satisfy my friend. Have you ever seen what might be called in common parlance, an electrical gramophone ?—A. Oh, yes.

Mr. MANNING : If I did take exception, it was because I thought I had the right to do so.

Mr. FOX : Well, of course you had.

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HIS LORDSHIP : I think even the Court has heard of an electrical gramophone.

Mr. FOX : You cannot pick up a newspaper without seeing them. You have heard of such a thing ?—*A.* Yes.

Q. All right. Now, if I go into the T. Eaton Store on College Street—let me interrupt myself. Disregard what I have said. Have you ever examined the inner workings of an electrical gramophone ?—*A.* Yes.

Q. You have taken them apart ?—*A.* Yes—I have seen them taken apart.

Q. All right, you have seen the innards of them ?—*A.* Yes. 10

Q. And are you capable of recognising the various parts constituting the innards of one of those instruments ?—*A.* I believe so.

Q. All right. If you went into Eaton's Store on College Street in Toronto and were to buy an electrical gramophone and you took it home with you and proceeded to dismantle it, would you be good enough to tell me, in sectioning the parts, if you would find what would cause sounds to emanate from it ? Explain to his Lordship how these things work and what they are made of.—*A.* In the first place, you would have an electric motor which drives a spindle on which revolves a turn-table.

HIS LORDSHIP : And that takes the place of the spring motor that you have in Exhibit No. 15 ?—*A.* That is exactly it, your Lordship, yes. On this turn-table is placed a record which you use and, when it is revolving the needle which is in the playing head, comes in contact with the grooves in the record and the vibrations which are transmitted up through the needle acts on the magnetic coil, which is in the playing head. 20

HIS LORDSHIP : The magnetic coil is in the playing coil ?—*A.* It is in the playing head, yes.

Q. Yes ?—*A.* The electric impulses so generated——

Q. Generated by the coil ?—*A.* By the coil.

Mr. FOX : May I interrupt you, Mr. Raymond. 30

Mr. MANNING : Well, my Lord——

Mr. FOX : Yes ?

HIS LORDSHIP : Well, let me hear the question first.

Mr. FOX : You say the electrical impulses generated by the coil. Is it fair to say to you that it is the mechanical vibrations from the contact between the needle and the grooves in the record creating the mechanical vibrations that then come up to the magnetic coil in the head and are transformed into electrical vibrations ?—*A.* Yes, that is correct.

Q. That is the point at which you get the transference from mechanical vibration to electrical ?—*A.* Yes. 40

Q. Yes. Then, continue.

HIS LORDSHIP : Then, the mechanical vibration becomes an electrical impulse ?

Mr. FOX : Yes, my Lord. Yes ?

The WITNESS : These are then carried along the wires on the playing arm.

Q. Would you describe a little more fully what you mean by the playing arm?—A. Well, the arm to support the playing head and the needle.

Q. Is that in any way similar?—A. It is very similar in every respect to the mechanical machine, Exhibit No. 15.

HIS LORDSHIP: It is suggested to you that that is sometimes called a suspension arm?—A. Yes; that would be another name for it, yes.

10 Q. Yes?—A. These impulses then go through the amplifying part of the machine.

Mr. FOX: What is the purpose of the amplifying part of the machine?—A. To change those impulses back to mechanical—electrical back to mechanical impulses, which drive the loud-speaker.

HIS LORDSHIP: Wait, now. Those impulses then go to the amplifying part of the machine to change the impulses back into what?—A. Mechanical vibrations and thus drive the loud-speaker, connected to the loud-speaker, so that the sound becomes audible to the ear.

Q. Well, the loud-speaker simply magnifies these mechanical vibrations to the point where they become audible?—A. Yes, that is right.

20 Q. Isn't that the function of it?—A. Yes, I would say that in simple layman's language.

Q. Well, that is all I am professing to be?—A. Yes.

Mr. FOX: So that after you pass out of the loud-speaker all the things that have been going on quietly inside now become audible—that you can hear?—A. That is right.

Q. And until that happened all these impulses and vibrations that were going on inside, you just did not hear?—A. No.

Q. You hear them after you turn on your volume control on this electrical gramophone?—A. That is right.

30 Q. And get the loud-speaker into operation to put the noise or whatever it may be out into the room, where you want it?—A. That is true.

HIS LORDSHIP: I take it that, to communicate these vibrations along a wire to the loud-speaker, you would have to have them turned into electrical impulses so that they could travel along the wire?—A. Yes.

Q. Is that the object of the coil?—A. That is the object.

Mr. FOX: Your Lordship will appreciate that what the witness has now described is not the instrumentalities.

40 HIS LORDSHIP: No, I know that. You are speaking of the ordinary electrical phonograph which you might find on any shelf in a store, but it has a loudspeaker which is placed at a short distance away from the arm and you have to have some means by which these vibrations can reach this loudspeaker so as to be magnified?—A. Yes.

Q. And a wire is used for that purpose?—A. A wire is used for that purpose.

Mr. FOX: The witness has so stated, the wires connecting these various instrumentalities that he speaks of.

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HIS LORDSHIP : And the coil turns the mechanical vibrations into electrical impulses so that they can be carried along this wire, however short it may be, to the loud speaker ?—*A.* Correct.

Q. Where those are changed—where the electrical impulses are converted into mechanical vibration, and that is magnified ?—*A.* Which becomes audible.

Q. Magnified and made audible ?—*A.* Yes.

Mr. FOX : That is right. Now, Mr. Raymond, do you have any other type of instrumentalities in the premises of the Defendant, the Associated Broadcasting Company, for the purpose of diffusing sound to other locations ?—*A.* No. 10

HIS LORDSHIP : Other than what ?

Mr. FOX : Other than that which he has already described. Do you have any radio equipment there ?—*A.* Oh, yes. I beg your pardon. We do have a radio receiving set ; a pick-up set.

Q. And what is that used for ?—*A.* That is used to pick up as a rule, sport broadcasts, such as the World Series, hockey games and championship fights.

Q. And all that, you say, is used for the purpose of picking up certain events on the radio and, by picking up, I presume you mean catching the electrical impulses out of the air and turning them into sound ?—*A.* That is right, yes. 20

Q. What do you do with the sound when you get it ? Just let it loose in your studio ?—*A.* No, that is provided to our subscribers over their loud-speakers. We do not have a loud-speaker for that purpose there.

Q. But tell me how. I understand then that you take the sound that you pick up by the radio receiving set and you also put that on your wires to your subscribers ?—*A.* That is right.

Q. Tell me how you do that, would you, and which instrumentalities you would employ ?—*A.* Well, it is substantially the same as when we are sending out the music. Simply switch the amplifier into that particular channel to pick up and send out the radio programme. 30

Q. What I would like to know, Mr. Raymond, if I can and I am not being obtuse, is, you have a radio receiving set and you want to transfer the sounds received to another location, whether it is the other side of the room or the next room, or another building. Now, you have your radio receiving set. What do you do ? Do you add to it, or where do you put it ? Do you plug in something, or what happens ?—*A.* We plug in the loud-speakers. The music, say in this particular case the sport broadcast would be transmitted by wire from the receiving set to the loud-speaker or loud-speakers. 40

Q. Now, I want to have this quite clear to his Lordship and to me, incidentally. Perhaps we can get it down to terms that we laymen will understand. Let us assume I have a radio receiving set sitting here on the table and plugged into a suitable source of electrical supply. Now, that is capable of receiving electrical impulses from the air and giving us music,

or a speech, or whatever happens to be going at the moment, isn't it?—
A. Yes.

Q. But for some reason or another, I want to take the sounds from that instrument and transfer them into his Lordship's private room next door. Now, what do I do?—*A.* You simply run a wire from the radio receiving set to the loud-speaker in his Lordship's room.

Q. Are there places in a normal radio receiving set that I will buy in a store, that I can put wires in to have another loud-speaker connected into another room, or another building?—*A.* Yes.

10 *Q.* Those are usually called what, in the trade?—*A.* Terminals

Q. So that if I go and buy a radio receiving set I will, let us say, quite often find on it a pair of terminals to which I can couple wires and a loud-speaker, and I can lead those wires into another room or I can lead them across the road into another building and have the acoustic performance at that place instead of here, on the table?—*A.* Quite, yes.

HIS LORDSHIP: Well, then, what you do is attach the wires which carry the ordinary transmission of these pre-arranged programs—you attach those wires to the terminals on your radio receiving set in your studio?—*A.* Yes, that is right.

20 *Q.* And, by that means, you carry those various electrical impulses to the various outlets, to your customers?—*A.* That is right.

Q. In other words, what the Defendant broadcasting company actually does with its radio receiving set is what I have suggested hypothetically might be done with a radio set sitting on this table and leading into his Lordship's room. Now, I noticed in response to that question you merely nodded your head.—*A.* Pardon, yes.

Q. Remember that the reporter is not looking at you. Please answer audibly.

30 HIS LORDSHIP: You see, there is an old saying, "Don't shake your head because there is nothing in it."

Mr. FOX: Now, Mr. Raymond, Exhibit No. 20 is a typical contract, as you explained yourself, between the Defendant Company and the Bell Telephone Company and on the back of it in its terms and conditions I notice the second sentence of paragraph 3 reading as follows:

"Under no circumstances shall the electrical potential
 " applied to such special circuits exceed one hundred and twenty
 " (120) volts, nor shall the current in said special circuits exceed
 " thirty-hundredths (.30) amperes for more than three (3) seconds
 " out of any twenty (20) seconds continuous use of said special
 " circuits."

40

Why is that condition included in that contract? Will you explain to me, please?—*A.* That is to prevent what is known as cross-talk in the telephone cables. I might explain that by outlining that, in a telephone cable, there are many wires or circuits to carry messages, voices, from one point to another and, if the current carrying those electrical impulses is of too great

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a degree, you will have a spill-over from one cable, or one wire to another. As a consequence you would have garbled messages or music in this particular case, leaking over into the other lines.

HIS LORDSHIP: What they call "getting your wires crossed" ?—

A. Well, just about.

Mr. FOX: Induction, my Lord, is the term, so I am informed by expert opinion. You get this feeding from one line to another.

Mr. MANNING: I am glad my friend is giving his expert opinion.

Mr. FOX: No. His Lordship's expression, "getting your wires crossed," is exactly what would happen, from what the witness tells us, and that is why you have the current reduced in those wires ?—A. That is right, yes. 10

Q. Mr. Raymond, would you tell me where you get this equipment you employ? Do you build it, or buy it, or how do you get it ?—A. We buy it from various suppliers of equipment in the States and Canada.

Q. Would you name them for me, please ?—A. The loud-speakers we obtain from the Jensen Manufacturing Company. The amplifiers we obtain them from the Stromberg Carlson, or the Northern Electric. The turn-tables, we are using one that was bought from the Presto Company.

Q. They are located where ?—A. The Presto, they have Canadian 20 representatives here in Montreal.

Q. Where did you get your pick-up ?—A. The pick-up comes from the Western Electric.

Q. Any other instrumentalities that you employ ?

HIS LORDSHIP: What is the pick-up ?—A. That is the pick-up head; the playing head.

Q. From Western Electric ?

Mr. FOX: Any other instrumentalities that you buy or make yourselves ?—A. Those would be the main parts. The wire, of course, the Canada Wire and Cable. 30

Q. Cabinets, racks, anything else ?—A. Oh, well, the cabinets—they can be obtained from the Hammond Company, or the Northern Electric.

Q. Do you make any of this equipment yourselves ?—A. No, we do not make any.

Q. You purchase it all ?—A. That is right.

Q. Is it made to order, or standard equipment ?—A. No, it is all standard equipment.

Q. Available at those places you have mentioned ?—A. That is right.

Q. Mr. Raymond, I notice on Exhibit No. 17, which is a copy of your contract with the "Famous Door," there is certain equipment set out. We spoke about the full-range loud-speakers. Those, I presume, are the loud-speakers in the premises of the "Famous Door" ?—A. That is right. 40

Q. Now then, there are six line-to-line coil transformers. What are those ?—A. They are employed to balance the speakers up.

HIS LORDSHIP: What are they called ?—A. Line-to-voice coils, I believe.

Mr. FOX : Voice coil transformers. The purpose of those, you say, is to balance up the loud-speakers ?—A. To equalise the amount of power going to each one.

Q. So that you will not have one loud-speaker operating at a higher volume than another ?—A. That is the idea.

Q. Then, there is a heavy duty transformer ?—A. That is right.

Q. What is the purpose of that ?—A. Well, that is to amplify the electrical impulses to the point where they can be transferred to a mechanical vibration.

10 Q. Now, this morning——

HIS LORDSHIP : I wanted to get that, Mr. Fox—to the point where they can be amplified to what ?—A. As a mechanical vibration or audible to the ear.

Mr. FOX : I think, my Lord—well, perhaps I can get this from the witness better than explaining it myself. It is then at some point subsequent to the amplifier that the electrical impulses are transformed into mechanical vibrations. Is that correct ?—A. Yes, that is right.

Q. The function of the amplifier is to raise the power of the electrical impulses ?—A. Yes.

20 Q. And it is at the loud-speaker point that the electrical impulses are transmuted into mechanical vibrations. Is that right ?—A. That is correct.

HIS LORDSHIP : The amplifier raises the power of the electrical impulses. Will there be expert evidence to show how that is done ?

Mr. FOX : Yes, my Lord.

Mr. MANNING : I propose to call a technical man, my Lord.

HIS LORDSHIP : And the loud-speaker transmutes these electrical impulses, which are increased in power, into mechanical vibrations ?—A. Mechanical vibrations, yes, that is right, sir.

30 Mr. FOX : Then turn to Exhibit 18, Mr. Raymond, which is a copy of your contract with the “ Brass Rail.” You similarly have loud-speakers, transformers, an amplifier—you also have special ceiling baffles and special office baffles. What are those baffles ?—A. Well, a baffle is simply a cabinet or box to contain the speaker.

Q. A box ?

HIS LORDSHIP : You are referring to the loud-speaker ?—A. Yes, the loud-speaker ; I am sorry.

Mr. FOX : And on your contract, Exhibit No. 19, with the Westminster Hotel, there is an item referring to volume control. What are those ?—

40 A. That is simply a control whereby the volume of the sound or the music can be lessened coming from the speakers.

Q. Similar to what you have on the ordinary domestic radio receiving set, or gramophone ?—A. Exactly the same.

Q. You have a knob usually connected with the volume control. You turn it to the left to reduce volume and turn it to the right to increase it ?—A. Yes.

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HIS LORDSHIP : Your clients can adjust it to suit their own individual taste ?—*A.* That is right, yes.

Mr. FOX : Approximately how many subscribers do you have taking this service, Mr. Raymond ?—*A.* We have approximately 190.

Q. Are you the only organisation that provides this type of service, or are there others provide similar services ?—*A.* Well, there is one other service in Toronto. How many there are in other cities, I could not say.

Q. They do substantially the same thing ?—*A.* Yes, exactly.

Q. Pardon me for a moment, my Lord. Your witness.

HIS LORDSHIP : Any re-examination ?

Mr. MANNING : Yes, my Lord.

10

Re-examination by Mr. MANNING.

Q. Mr. Raymond, you recall that, on examination for discovery you were asked if you could produce any of the invoices for the equipment which you got from the Presto Company and the Jensen Company ?—*A.* That is right.

Q. Have you been able to find them ?—*A.* The Presto invoices we have not. I believe we have some of the invoices covering the loud-speakers, though. Whether they are here in Court or not, I don't know.

Mr. MANNING : Are they here ?

Mr. SANKEY : I did not follow that up, I am sorry. We could to-night.

Mr. MANNING : Well, perhaps we might have them later.

Mr. SANKEY : I didn't know my friend was making a point of them.

Mr. MANNING : If it were possible, I would like the invoices on the other equipment.

Mr. SANKEY : On the studio equipment ?

Mr. MANNING : Yes.

Q. Those items of equipment are bought wholesale from the several sources of supply that you have named to my friend, Mr. Fox ?—*A.* Yes.

Q. And the ordinary man on the street could not buy them that way could he ?—*A.* Oh, he could buy them, certainly.

Q. I did not say he could not buy them. He might order them through a retail dealer, but he would not buy them that way. *A.* I imagine he would buy the turn-table equipment and amplifiers at the same prices that we buy them, because we don't buy them in any quantities.

Q. You buy them, I take it, from the makers ?—*A.* And the loud-speakers, we do buy large quantities.

Q. But you buy direct from the maker, don't you ?—*A.* Yes.

Q. And are you familiar with the retail trade ?—*A.* To a degree, yes.

Q. Have you ever engaged in it ?—*A.* Yes, I have.

Q. How long ago ?—*A.* Oh, it is many years ago now.

Q. Can you give us an approximation of the number of years ?—*A.* About 15.

Q. There has been a good deal of change in the last 15 years, hasn't there ?—*A.* I suppose so.

20

30

40

Q. So when you say they could not be bought, you are inferring from what you know about trade practices prior to your going into this business ?—A. Yes.

Q. More than 15 years ago. I see. Now, can the man on the street buy the transcriptions that you use ?—A. Yes, he could buy them if he wished to.

Q. From whom ?—A. From the Muzak Corporation.

Q. Well, do you know if the Muzak Corporation would sell them ?—A. If they would sell them ?

10 Q. Yes ?—A. Yes. I know in one instance where they have sold them to a firm—not an individual.

Q. To a firm. Were they engaged in a similar business to yours ?—A. No—well, yes, to a degree, yes, they were providing music to their employees.

Q. Can those transcriptions be performed on an instrument like this instrument here ?—A. Yes.

Q. Exhibit No. 15 ?—A. Now, I don't know what speed that revolves at, but if it revolves at $33\frac{1}{3}$ revolutions per minute, they can be used.

20 HIS LORDSHIP: Your turn-table revolves at that speed does it ?—A. Yes, that is right.

Q. It is adjustable, though, isn't it ?—A. Yes, they run at 78, $33\frac{1}{3}$ and 45, which is common practice.

Q. And provided the sets are run at agreed revolutions—A. Well, nearly all are. That is right.

Mr. MANNING: Have you ever tried to reproduce it on an ordinary record player ?—A. Yes, I have.

Q. It will work ?—A. It will work.

Q. Did it work ?—A. Oh, it did work, yes.

00 Q. All right, I ask the witness, my lord, to produce one of the recordings of the works that were performed here as just ordinary equipment. It is not here yet. Perhaps we may let the witness go until the time when they will be available. I am through with this witness, my Lord, for the time being, until we can ascertain these other things.

HIS LORDSHIP: Then, the witness is to stand down, but is to return for the purpose of giving further evidence when you have the equipment here.

Mr. MANNING: Yes, when we have one of the transcriptions, my Lord, and also on the subject of the invoices.

HIS LORDSHIP: Yes, Very well.

40 Mr. FOX: Subject to one thing, if I may suggest, my Lord. I don't know that the particular question of the record arises out of the cross-examination, and I therefore take it that anything my friend might ask relative to the record, might be the subject of cross-examination.

HIS LORDSHIP: It is confirmatory really of the Plaintiff's case, is it not ?

Mr. MANNING: I would submit, my Lord, it is an answer to some of the questions that have been brought out by my friend on cross-examination.

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Mr. FOX : That is the nature of this whole apparatus.

HIS LORDSHIP : You are saying that his evidence indicates in a general way that this is an ordinary gramophone ?

Mr. MANNING : Yes, my Lord.

HIS LORDSHIP : And he amplifies what he said on cross-examination by saying that these records could be reproduced on an ordinary gramophone.

Mr. MANNING : May I point it out this way, my Lord. In chief no evidence was led as to what was the nature of the installation inside the studio.

10

HIS LORDSHIP : Quite so.

Mr. MANNING : And then, my Lord, my friend examined at large on matters which respectfully, I submit, are in some part at least opinion evidence, and it seemed to develop the idea of identity between the instrument Exhibit 15 and the instruments in the Associated Broadcasting Studio. Now, this is by way of reply.

HIS LORDSHIP : Is that really re-examination ? Isn't that part of your reply generally in the case, rather than re-examination, Mr. Manning ?

Mr. MANNING : Well, I don't know, my Lord. I am being subject 20 to your Lordship's ruling on that.

HIS LORDSHIP : You see, this man is your witness and you are asking him to fortify his evidence as your witness by making a demonstration in Court with a view to impeaching him.

Mr. MANNING : Impeaching the evidence by his counsel.

HIS LORDSHIP : Yes. What is your authority for that ? You are entitled to call evidence to contradict your own witness, but are you entitled to do that through the same witness whom you wish to contradict ?

Mr. MANNING : Well, I don't know, my Lord. I have not tried to refresh myself on the authorities. I would have submitted though that, 30 in this particular case, and I am quite well aware of the course of my friend's argument, that it is only, let us say, evidence as to facts. My submission is that we have gone beyond fact, or perhaps it has become apparent that we have gone beyond facts to something I propose to prove.

HIS LORDSHIP : I do not think this would be the time to do it, unless you have authority to fortify it, Mr. Manning, but it would be my view that what you are seeking to do is to water down, if I may use the expression, or to weaken the evidence of a man whom you called as your own witness on a point which was elucidated in cross-examination, and it is very doubtful if you can do that by demonstration. He has made 40 a statement to you which, for the moment, is binding. He says these records which were supplied by the Muzak Corporation work on an ordinary set ; that they tried it and found they worked. Now then, you are saying,

“ I want you to demonstrate that, because I think you are wrong.” Aren’t you really cross-examining your own witness, without laying any basis such as having the Court declare him a hostile witness ? That is the way I am disposed to view it at the present time, subject to any authority you are able to give me on the point.

Mr. MANNING : Of course, a witness may be hostile although there is no reason to challenge his integrity.

Mr. FOX : Oh, no, no, no.

Mr. MANNING : Oh, I think so.

10 HIS LORDSHIP : I think you have got to show that he is.

Mr. SANKEY : Combative in giving his evidence.

HIS LORDSHIP : That he is giving evidence which is contrary to what you have been led to expect from him.

Mr. MANNING : I think I can show that very easily from the examination for discovery. There was an examination for discovery and from one end to the other, and I examined him and gave him the utmost liberty, and there is not a word of a gramophone ; not a word.

HIS LORDSHIP : Well, perhaps he was not asked.

20 Mr. MANNING : He was asked what it was that produced the sound and, in the course of the examination for discovery, one does not cross-examine.

HIS LORDSHIP : No, but what he did here was to describe the nature of the equipment and compare it, under cross-examination by Mr. Fox, with an ordinary gramophone and his evidence tends to the conclusion that it is similar equipment, except that it transmits these vibrations over a longer wire. That is the effect of his testimony. Oh, I should think you would be right, Mr. Manning, to call evidence contradictory of this last statement.

Mr. MANNING : Oh, I propose to do that.

30 HIS LORDSHIP : Well, then, your purpose is served. Let us not get on the record what is not correctly speaking, admissible evidence.

Mr. MANNING : Well, I am not going to labour it at this stage. We cannot do anything about it, anyway.

HIS LORDSHIP : Well, I will let you reserve it. I am not going to rule against you for the moment, because I want to hear any authority you have to offer, but you know my present disposition.

Mr. MANNING : Yes, my Lord, I understand.

HIS LORDSHIP : Nothing further arising out of this witness ? Then, you may stand down.

40 Witness excused.

Mr. FOX : Subject to what I have said, my Lord, when this record does get here and my friend starts to ask questions, I may ask to cross-examine on that material.

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HIS LORDSHIP : That is if it is admitted.

Mr. FOX : Of course, my Lord.

HIS LORDSHIP : You are not consenting ?

Mr. FOX : Oh, no, my Lord. I do not consent to anything, my Lord.

HIS LORDSHIP : We sometimes find, Mr. Fox, there are long discussions about the admissibility of evidence only to learn the other side does not object to it. I want to avoid that if possible.

Mr. FOX : Perhaps I had better make no remark about that at all.

No. 12.
W. T. C.
Dowding.
Examina-
tion

No. 12.
Evidence of W. T. C. Dowding.

10

WILLIAM T. CHARLES DOWDING, sworn.

Examined by Mr. MANNING.

Q. What is your professional occupation, Mr. Dowding ?—A. Recording Engineer.

Q. And in whose employ ?—A. R.C.A. Victor Company.

Q. What do the R.C.A. Victor Company do ?—A. The R.C.A. Victor Company, in this branch, make transcription recordings and ordinary recordings.

Q. How do you distinguish between transcription recordings and ordinary recordings ?—A. Mainly by two reasons : one, the speed of the turn-table, and the other, the size of the recorded groove or tract. 20

Q. Now, what is the purpose of the so-called transcription recording ?—A. You mean the use, or the use it is put to ?

Q. For what purpose is it made ?—A. It is made to reproduce sound on radio broadcasts, or of the nature of radio broadcasts only.

Q. Are those transcription recordings customarily sold to the retail buyer ?

HIS LORDSHIP : Just a moment. Did the witness say a transcription recording is made to reproduce sound on radio broadcasts only ?—A. As a rule, I would like to say. 30

Mr. MANNING : Are those recordings suitable for performance on the ordinary instrument that is installed in a private home ?—A. Suitable, no—possibly, yes.

Q. Why are they not suitable ?—A. By my first remarks, first, because of the turn-table speed ; secondly, by the size of the recorded groove or tract.

Q. Yes. Has the size of the disc itself anything to do with their suitability or otherwise ?—A. Yes.

Q. What size are transcription recordings, usually?—A. Usually 16 inches in diameter.

Q. And what is the diameter of the record used or sold in the retail trade for the ordinary domestic customer?—A. Oh, sizes 10 inches and 12 inches.

Q. Are the grooves in the standard form of record of the same character as the grooves in the transcription recording?—A. In size, no; in appearance, yes.

Q. Well, now——

10 HIS LORDSHIP: When you say "size," do you mean depth?—
A. Depth and width, my Lord.

Mr. MANNING: What is the characteristic of the recording method used in records that are sold to the retail trade? First, the technical description of the method of recording?—A. In the technical terminology, I would say that recording is used as a term to describe the recording of the ordinary records.

Q. Yes. Well, now, how is the impression made upon the disc? We have to use regular marks of some kind. How are the impressions made on the standard record that is sold to the public?—A. By cutting a groove in a
20 soft material, of a pre-set size.

Q. Of a pre-set size. And we have the standard record and we have the micro-groove recording of that type. We have two sizes, haven't we; the micro-groove and the standard recording?—A. That is right.

Q. And have you examined these under a microscope? Would you describe to us what those grooves look like? Is there a characteristic name for the method of recording?—A. Of recording in general?

Q. Well, recording for the ordinary retail trade, as I use the term "for the retail trade"?—A. As I used before, the term records.

Q. Well, when you see one of these under a microscope, do you see a
30 straight line, or grooves, or what do you see?—A. You see under microscope a series of white and black lines, not straight but curved, according to the sound impressions.

Q. And is there a special name for that kind of recording?—A. Yes, it is called disc recording.

Q. Well, now, have you examined any of the transcriptions that are used in the Muzak system?—A. Yes.

Q. Do they follow that method of recording the sound?—A. Yes.

Q. Do they use the same grooved lines?—A. Yes.

Q. And at what speed? are they geared to play?—A. The Muzak
40 speeds?

Q. Yes?—A. $33\frac{1}{3}$ revolutions per minute.

Q. Are they of the same character of record as the characteristic $33\frac{1}{3}$ records that are sold to the retail trade?—A. Up to a point, yes.

Q. Do I infer from that there is a difference between them?—A. Yes, the size of the groove.

Q. Is that where we get the word "micro-groove" as applied to the retail records?—A. Yes.

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continued.

Q. What is the significance of the word "Long-playing" as applied to the records that are sold at retail?—*A.* The significance is that in the recorded method used, the play back time is increased and still maintain the quality of sound on a smaller disc.

Q. And do they use the same material for the discs?—*A.* Yes.

Q. So that if you compare—

HIS LORDSHIP : So that if you have a six-inch record that plays as long as the ordinary ten-inch record, the six-inch record is known as a "Long-playing" record?—*A.* Yes, if it is cut under the conditions described. 10

Q. And it can be so cut as to give it the same playing length as a ten-inch record might have?—*A.* Yes, my Lord.

Mr. MANNING : Yes. And those long-playing records sold in the retail trade, then, are not the same as the records or transcriptions that are used in this Muzak system?—*A.* No.

Mr. FOX : Well, my friend is really leading.

Mr. MANNING : He has already said that.

HIS LORDSHIP : Well, he said that, compared with records used for domestic purposes that there is a difference in the size of the groove. He has already said that. 20

Mr. FOX : My Lord, with respect, what the witness said is the very same up to a point. Now, my friend is—

HIS LORDSHIP : No, he has said that farther back, but then he went on to elaborate that there was a difference in the size of the groove.

Mr. MANNING : He has already said that these transcriptions would not play on the ordinary machine, my Lord.

HIS LORDSHIP : No, he has not said that. That is one thing he did not say. He said it was possible—wait, now—he said "it is not suitable, but it is possible to use these records on instruments at home."

Mr. MANNING : I am sorry, my Lord. 30

Q. Have you any knowledge of the marking of these recordings, Mr. Dowding?—*A.* Which recordings?

Q. The recordings for the Muzak Company?—*A.* No.

Q. Now, will you tell us what was the historical origin of the word "gramophone"?—*A.* Historically I would have to go to a reference.

HIS LORDSHIP : Wouldn't we get it in the well-known case of Gresinger and the Victor Electric Company?

Mr. MANNING : I think not, my Lord.

HIS LORDSHIP : I should have thought that they covered that. They covered everything else. 40

Mr. FOX : My Lord, with my friend's permission, you do get it conveniently defined in an English gramophone case which I shall have occasion to refer to.

Mr. MANNING : Well, how long have you been familiar with these processes?—*A.* 1941.

Q. Have you had any occasion to see literature of any of the enterprise?—*A.* No.

HIS LORDSHIP : Of course, we could not cross-examine the authors of that literature, Mr. Manning.

Mr. MANNING : No, not very well.

Q. Well, can you tell us when it became common practice to replace mechanical by electrical means in the reproducing of sound from records ?—

A. I would say in the early 1930's.

Q. Do you know what the instrument used for that purpose was called ?—A. You mean speaking—

Q. In trade names ?—A. In trade names ?

10 Q. Yes ?—A. In trade names, phonographs. I might add, too, along with that, perhaps the term gramophone.

Q. Do you know ?—A. I do not know.

Q. No. Did you inspect the premises of the Associated Broadcasting Company ?—A. Yes.

Q. Toronto ?—A. Yes.

Q. Where are they ?—A. On Bay Street.

Q. Do you remember—

HIS LORDSHIP : Just before you go into that, Mr. Manning, have the witness look at Exhibit 15. It does not use the electrical method of
20 transcription does it ?

Mr. MANNING : Would you, Mr. Dowding, before you go on to the question I was just putting to you, look at that instrument and tell me what name it carries on it ?—A. On the inside cover it has, "His Master's Voice Gramophone Company, Limited, Hayes, Middlesex."

HIS LORDSHIP : That is the old-fashioned gramophone without the big visible horn. Isn't that what it is ?—A. Yes.

Mr. MANNING : Can you tell me whether that is an early or later development than the one with the visible horn ?—A. It is a later development.

30 Q. Do you know when the form of the sound box that appears in that gramophone came in ?—A. The date of this, at which this was brought out—

Q. When that form of sound reproduction by replacing the horn came in ?—A. I don't know.

Q. Well, I don't know if your Lordship wanted any more questions on that.

HIS LORDSHIP : No, thank you.

Mr. MANNING : Well then, you made an inspection at the premises of the Associated Broadcasting Company ?—A. Yes.

40 Q. And they are at Bay Street. What number on Bay Street, do you know ?—A. I have forgotten the exact number. It is below Bloor Street.

Q. And above Charles, is it ?—A. Right.

Q. And what did you observe in those premises ?—A. The room contained apparatus for the reproduction of sound from electrical transcriptions.

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Q. What was the apparatus that you observed there?—*A.* Four turn-tables in conjunction with pick-up arms and an associated amplifying equipment.

Q. Now, how large a room was it in which you observed those turn-tables?—*A.* Approximately ten by fifteen feet.

Q. And was there anything in that room, I suppose one may call it a studio—is that it?—*A.* Better a control room.

Q. Anything in that control room by which sound could be made audible?—*A.* Yes.

Q. Where was that?—*A.* I can't remember. I would, from memory, 10 say overhead.

HIS LORDSHIP : What was overhead?—*A.* The loud-speakers.

Mr. MANNING : How many loud-speakers were overhead?—*A.* That I cannot remember.

Q. How far away from the turn-tables were those loud-speaker installations?—*A.* Not more than 12 feet.

Q. And how were the loud-speaker installations connected with the turn-tables? By the way, did I ask you how many there were of those loud-speakers?—*A.* I don't remember.

HIS LORDSHIP : He could not say. 20

Mr. MANNING : How were they connected with the turn-tables?—*A.* By wires.

Q. Were they fixed wires or demountable?—*A.* I am guessing at this as I did not actually see the wires themselves.

HIS LORDSHIP : Well, don't guess please?—*A.* All right, then, I cannot answer.

HIS LORDSHIP : No. You are here to swear to those things which you know to be facts. You are not here to guess?—*A.* Yes, my Lord. I did not see the wires to the loud-speakers.

Q. Then, how can you say the turn-tables were connected to the 03 loud-speakers by wires, if you did not see the wires?—*A.* Assuming the practice.

Q. Oh, that is an assumption. Then you don't know. You didn't see any wires passing from the turntables to the loudspeakers?—*A.* No, my Lord.

Q. But you were assuming that if they were to be used, that would be the only manner by which they could be used?—*A.* To my knowledge, yes.

Q. All right.

Mr. MANNING : Were there any devices for changing the turn-table 40 which would be connected with a loud-speaker in that room?

Mr. FOX : Did you say for "changing the turn-table," meaning there were four turn-tables, and meaning the turn-tables were operated at any one time?

The WITNESS : One.

Mr. MANNING : Did you ask for or observe the operation of the turn-table?—*A.* You mean did I see it operating?

Q. Yes?—*A.* Yes.

Q. And how many did you see operating at the time you were there ?
 HIS LORDSHIP : He has already said he only saw one operating
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Mr. MANNING : What date was it you made your inspection ?—
 A. October 21st, 1949. Plaintiff's
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Q. Was anybody present with you when you made your inspection ?
 —A. Yes. No. 12.

Q. Who was present ?—A. Mr. Landry Evans. W. T. C.

10 Q. Now, did you observe by whom or by what manufacture the turn-
 tables were made ?—A. Yes. Dowding.

Q. By what ?—A. By Presto. Examination—

Q. And what are they ? What do Presto make ?—A. The Presto
 people manufacture recording apparatus and play-back apparatus. continued.

Q. What do you mean by "play-back apparatus" ?—A. That piece
 of apparatus required to transform sound from a recorded disc into audible
 sounds.

HIS LORDSHIP : Which I would call a phonograph or a gramophone.
 Is that right ?—A. Yes, my Lord.

Mr. MANNING : Well, perhaps, my Lord, that is the question you
 20 have to decide.

Mr. FOX : May I ask that the Reporter read that definition back.
 I would like to get it down, my Lord.

HIS LORDSHIP : Yes, please, Mr. Clitheroe, will you read that back ?

The REPORTER : "What do you mean by 'play-back' apparatus ?
 "—A. That piece of apparatus required to transform sound from a
 "recorded disc into audible sounds."

Mr. FOX : Thank you.

Mr. MANNING : Now, did you, while in that control room,
 Mr. Dowding, inspect the loud-speaker ?—A. No.

30 Q. Did you notice whose amplifier it was there ?—A. No.

HIS LORDSHIP : I asked the witness if a phonograph or a gramophone
 might conform to that definition, and your answer is what ? You have
 described the play-back apparatus. Now, would a gramophone come
 within your definition of a play-back apparatus that you have just given
 us ?—A. Yes.

Q. Would a phonograph come within that definition ?—A. Yes.

Q. Is there any other instrument would come within it ?—A. Yes.

Q. What ?—A. A tape-recorder.

Q. Anything else ?—A. A dictaphone.

40 Q. Yes ; anything else ?—A. I might generalise and say those machines
 that are manufactured to-day with apparatus—

Q. Yes, all right. Those are the only other instances that you can
 think of, or examples ?—A. Yes, my Lord.

Q. I see, all right.

Mr. MANNING : Does the R.C.A. Victor manufacture apparatus of
 the sort you saw in that control room ?—A. Yes.

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Q. And under what name does the R.C.A. Victor Company sell those items of apparatus ?

HIS LORDSHIP : Just a minute, now. Wouldn't that be hearsay evidence ?

Mr. MANNING : I think not, my Lord. This man is employed by that company and they sell that apparatus.

HIS LORDSHIP : I know, but he has told you what somebody else chooses to call something.

Mr. MANNING : No, my Lord, with deference, no. Somebody else is calling these things by a name. Well, I will have to ask the witness. 10

HIS LORDSHIP : How can that be evidence, Mr. Manning ? Suppose the Board of Directors of the Victor Company choose to call this particular form of device by some other name. Is that evidence that it is not a gramophone or a phonograph ?

Mr. MANNING : It may very well be, my Lord, and I shall have occasion to draw attention to these circumstances. This Statute was passed in 1938. It must be interpreted in the light of what the words meant in 1938, not in the light of the use of those words as it may have developed since 1938.

HIS LORDSHIP : That is, it would not extend to any improvements 20 on inventions existing at that date ?

Mr. MANNING : It would not extend, my Lord, in my submission, to anything that in 1938 was not known as a gramophone. I shall have to argue that but, of course, I have to develop the factual material first.

HIS LORDSHIP : Yes, but that is quite aside from the point that I raise at the moment. How can the term applied by a manufacturer to an article which he sells under a certain description, constitute evidence in this case ?

Mr. MANNING : Because, my Lord—

HIS LORDSHIP : Doesn't that offend against the hearsay rule ? 30

Mr. MANNING : No, my Lord, in my submission not, because if there was anything in 1938 of the character that my friends say, which is a gramophone, which was not sold under that name, a gramophone, these items were not even within that Statute and I, of course, am now anticipating argument, but I must establish a fact.

HIS LORDSHIP : Well, that is not establishing that fact. I don't care what they call it. A rose by any other name would smell as sweet but, surely, because they choose to call a certain kind of play-back device by a certain name does not make it so, does it ?

Mr. MANNING : Well, I would have submitted so, my Lord. 40

HIS LORDSHIP : Would that be evidence binding on me ?

Mr. MANNING : I would submit, my Lord, unless there is evidence that these very things are bought under a trade name, they do not qualify to come under that trade name.

Mr. FOX : My Lord, with respect, if I may interrupt my learned friend, I think this witness said he had been with the R.C.A. Victor for six years, wasn't it ?

The WITNESS : I didn't say how long.

Mr. FOX : But looking at the witness and his apparent age, I doubt whether he was employed by R.C.A. Victor at the relevant period and if my friend were directing his question to what these instrumentalities were called by R.C.A. Victor in 1938, he might have some ground to urge on your Lordship, but he certainly has no ground to urge on what Mr. Smith calls these instrumentalities to-day.

HIS LORDSHIP : I don't know that what they call these instrumentalities is evidence in the case, Mr. Manning. Have you any legal authority which would support that argument ?

Mr. MANNING : Well, it would not be only, of course, what the R.C.A. Victor calls them. There might be other people who might call them by that name, but I have to cover one stage at a time.

HIS LORDSHIP : You see, you are approaching the very particular problem which is presented to the Court.

Mr. MANNING : Oh, of course, my lord, I know that, and so is my friend.

HIS LORDSHIP : Quite so, but then you are trying to introduce into evidence something which emanates from witnesses who are not called here at all and of which this man knows only by hearsay. You see the difficulty that I have.

Mr. MANNING : Well, my Lord, I do submit this man knows what his company's practice is in making and inventing articles in this field, and it is some evidence, not all the evidence, but it is some evidence of what they are.

HIS LORDSHIP : You might as well say the T. Eaton Company are selling this material, not as silk, but as nylon. They call it nylon, therefore it is not silk. I think it goes as far as that. I don't know that this is evidence at all, what they choose to call it.

Mr. MANNING : Well, I would have submitted it was, my Lord.

HIS LORDSHIP : Well, there is no jury here. I am going to let you introduce it. It is a question of the weight I attach to it rather than its admissibility, but I do not think it has any weight. However, go on.

Mr. MANNING : Are you familiar with the description by which those articles are sold ?—A. Yes.

Q. And what are they called ?—A. Transcription turn-tables.

Q. Are you familiar with the names by which other companies in the communications field sell those articles ?—A. To a limited degree, yes.

Q. Now, what companies, for example ?—A. Presto calls them transcription turn-tables ; the Collins Radio calls them transcription turn-tables ; Gøetz call them transcription turn-tables. That is all I can remember at the present time.

Q. You did mention Presto ?—A. Yes.

Q. And you said it was a Presto machine you saw there ?—A. Yes.

Q. Do you know if they have ever been called by any other name in the trade ?—A. Yes.

Q. What ?—A. Play-back tables.

Q. Any other names ?—A. Just plain turn-tables.

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Q. Any other names besides those?—*A.* No.

HIS LORDSHIP: I suppose you could apply the same term to a gramophone?—*A.* Yes.

Q. It would still be a turn-table?—*A.* Yes.

Q. Whether you choose to call it that or not?—*A.* Yes. Likewise a locomotive turn-table for turning locomotives around.

Q. But you would not call that a gramophone?—*A.* No.

Mr. MANNING: Well, I am anticipating, my Lord, so I might argue the matter, instead of drawing your attention to something which—

HIS LORDSHIP: I like to absorb these things as I go along, 10
Mr. Manning.

Mr. MANNING: If you had that instrument, Exhibit 15, playing in the control room at the Bay Street premises of the Defendant, the Associated Broadcasting Company, could you hear it in the premises of the "Brass Rail"?—*A.* Not ordinarily, no.

Q. Or in the premises of the "Famous Door"?—*A.* No.

Q. Or on the premises of the Westminster Hotel?—*A.* Definitely, no.

Q. Why would you not hear it there?—*A.* The matter of physical distance.

Q. Well, let us develop that subject of physical distance. If the 20
sound were produced in the control room and produced by a volume loud enough to be heard at the "Brass Rail," or the "Famous Door," on Yonge Street, how long would it take to get there?—*A.* Well, I would say that sound travels at a definite rate of speed.

Q. Yes. What is that rate of speed?—*A.* 760 feet per minute.

HIS LORDSHIP: Per minute?—*A.* Per minute.

Mr. FOX: How many feet?—*A.* 760.

HIS LORDSHIP: So that if a speaker were speaking in a hall 760 feet along, and uttering a sentence now, it would not be heard by a man in the back row for a whole minute. Is that what you are telling us?—*A.* I am 30
subject to correction as to a minute, my Lord; a second.

Q. It should be a second?—*A.* Yes, I believe that is right.

Q. And how fast do electrical impulses travel?—*A.* Electrical impulses travel at 186,000 miles per second.

Q. Well then, as between a person who heard a sound produced in the control room on Bay Street from we will say the Westminster Hotel, and who heard a sound produced in the loud-speaker at the Westminster Hotel, which sound would be heard first?—*A.* I am afraid I am a little bit confused as to the question.

HIS LORDSHIP: Oh, well, I think the witness does not need to 40
answer that. It is a simple matter of deduction.

Mr. MANNING: How far away is the Westminster Hotel from the Bay Street premises?—*A.* Well, I would have to guess—a mile or a mile and a-half.

HIS LORDSHIP: Well, if it were, say, 3,000 feet, it would take practically four seconds to travel that distance, and it would take a very small fraction of a second to hear an electrical impulse which is carried over the wires and to the amplifiers and to the loud speaker?—*A.* Yes.

Mr. MANNING : And would it be possible, Mr. Dowding, to hear a sound produced in the control room at the Westminster Hotel—

Mr. FOX : No. Is there a control room at the Westminster Hotel ?

Mr. MANNING : No, no, I am speaking of the control room on Bay Street.

Mr. FOX : You said the control room at the Westminster Hotel.

Mr. MANNING : Would it be possible to hear a sound in the Westminster Hotel that was produced in the control room on Bay Street ?—
A. No.

10 Q. And why not ?—A. Because it is in an enclosed area.

HIS LORDSHIP : Probably sound-proof as well.

Mr. MANNING : I don't know. The witness has not said so. Did you notice whether it was or was not sound proof ?—A. Partially sound-proof.

Q. Now, is there any instrumentality in the control room on Bay Street which listens to a sound produced in that control room ? Is there audible sound made in that control room ?—A. Yes.

Q. Where, and by what ?—A. By a loud-speaker.

Q. And is that the sound that is transmitted to the Westminster Hotel ?—A. No.

20 Q. What is the sound transmitted to the Westminster Hotel produced by ?—A. Electrical impulses.

Q. Are they derived from the same source or from a different source from that which produces sound in the loud-speaker in the control room ?—A. That would require a longer answer than yes or no.

Q. All right, let us have the answer, then.—A. The electrical impulses derived from the pick-up head are amplified by the amplifier in the control room and fed to the Bell Telephone lines. This current spoken of is, in part, the current generated by the pick-up. The other part of the current is derived from the Hydro lines and transformed by an amplifier.

30 HIS LORDSHIP : From the Hydro lines ?—A. Hydro lines.

Q. You mean from the electricity ?—A. Electricity. The source of power supplied in the room to the Bell Telephone lines in the form of electrical current.

Mr. MANNING : Then, do I follow you correctly it is not the same channel of current from the pick-up head to the loud-speaker in the control room as it is to the Bell Telephone wires ? Is that what you are telling me ?—A. No, there is a difference, yes.

Q. That is, you do not have to introduce electrical current in carrying sound from the pick-up arm to the loud-speaker in the control room ?—

40 A. Yes, you do, my Lord. Speaking of electrical current, you are referring to the Hydro ?

Q. Yes.—A. Yes, that is right.

Q. That is the method employed ?—A. Yes.

Q. Even in the control room ?—A. Even in the control room.

Q. Then, what is the difference ?—A. Between the two ?

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Q. Yes?—A. That goes into the electron theory, my Lord, by the use of radio tubes, resistors, condensers, transformers, wires.

Q. That is, you have to have artificial aids when you are carrying those impulses any great distance?—A. Yes, my Lord, in all cases.

Mr. MANNING: You have got to have in the case of the outgoing impulses, boosters, if you like?—A. Right.

Q. Which are not present in carrying the impulses in the loud-speaker installation in the control room?—A. There is less to the loud-speaker in the control room than there would be to any other places in Toronto, or from the Associated Broadcasting studios.

Q. Yes, I see. Then, did you examine the premises at the "Brass Rail" and the "Famous Door" and in the Westminster Hotel?—A. Yes.

Q. Did you make a memorandum at the time of what you saw?—A. Yes.

Q. I suppose the witness may refresh his memory from the memorandum, my Lord?

HIS LORDSHIP: Yes, if he made it contemporaneously.

Mr. MANNING: It was made at the same time, was it?—A. Yes.

Q. Is that the memorandum?

Mr. SANKEY: Well, it is in type. How could it be?

THE WITNESS: Shall we say the original was made at the time?

Mr. SANKEY: Do you carry a typewriter with you?

Mr. MANNING: When was that made?—A. This got in typewriting—was done at a later date from original pencilled notes.

Mr. FOX: Hasn't he refreshed himself in a sufficient manner, my Lord?

HIS LORDSHIP: Yes. Did you type it?—A. No, I didn't.

Q. So it is not your own product at all?—A. I will have to verify the word and that was all.

Q. How soon after you made the original notes, did you verify the typewritten notes?—A. A matter of mailing date time from where they were typed.

Q. All within a day?—A. All within a day.

Q. Oh, well, all right.

Mr. MANNING: Well, now, what did you find? Let us take for example at the "Brass Rail"?—A. I found first of all, in sequence of their operation, an amplifier which was connected to the Bell Telephone lines. Attached to the amplifier were several wires. One pair of wires going to the speaker network in the ceiling of the main lounge; this amplifier being in a back office; I believe the owner's or some office of the owner.

Q. Yes?—A. Also two other sets of wires coming from the amplifier, one going to a microphone in the office, placed beside the amplifier, the other—

HIS LORDSHIP: One going to where?—A. The microphone.

Q. Where was it located?—A. In the same office, located next to the amplifier.

Mr. FOX: You say the same office located next to the amplifier? Which is it, the same or the next office?—A. The same office. The microphone placed next to the amplifier.

HIS LORDSHIP: Now, let us go back. Wait a minute. You said the amplifier was connected to the Bell Telephone lines?—A. Yes.

Q. Attached to the amplifier were several wires, one pair went to the speaker network in the ceiling of the main lounge. You are speaking now of the Westminster, are you?—A. We are talking of the "Brass Rail."

10 Q. One pair of wires was going to the speaker network in the ceiling of the main lounge, the amplifier itself being in the back office?—A. Yes.

Q. Now you said there were two other sets of wires going from the amplifier, one going to a microphone in the same office?—A. As the amplifier.

Q. As the amplifier was in?—A. Yes.

Mr. MANNING: What was the purpose of that microphone, Mr. Dowding?—A. The purpose of that microphone being used to page customers.

Q. That is, by speaking through the loud-speaker system. Is that it?—A. Yes.

20 Q. Any message they wanted to send out in that way?—A. Yes, that is right, over the microphone.

HIS LORDSHIP: Over the wire?—A. Yes. Correct. The other wire went to another microphone just outside the office door and set up beside a piano.

Mr. MANNING: And what was the purpose of that microphone?—A. The purpose of that microphone was used to pick up an artist's voice or instruments employed for entertainment at the "Brass Rail."

HIS LORDSHIP: Then how were these related to any other installations in the "Brass Rail"? Did you observe any loud-speakers there?—A. In the ceiling of the main lounge, yes.

30 Q. And how many of them were there?—A. Eight speakers.

Q. Eight loud-speakers in the ceiling. Were they connected up with the apparatus that you saw?—A. I saw the wires only going to them.

Q. Were they in operation at all when you were there?—A. Yes.

Q. That is, the wires running from the amplifier in the office?—A. Yes.

Mr. MANNING: And was the apparatus put on so that there were sounds coming from it?—A. Yes.

Q. Musical sounds?—A. Musical sounds.

40 Q. Was that from a switch in the office?—A. Yes.

Q. What about the controls?—A. The controls were three in number. Two were controlling the volume level of the two microphones, and the third for the level of the incoming music from the telephone lines.

Q. Was there any identification mark on any of that apparatus?—A. Yes, the manufacturer's name and—

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Q. The manufacturer's name on what apparatus?—*A.* On the amplifier.

Q. And what was that name?—*A.* Stromberg Carlson.

Q. Not the same company as Jenson?—*A.* No.

Q. And was there any other label on any of the apparatus?—*A.* On the same amplifier was the label, also the word "Muzak" on the microphones. I did not see any labels.

Q. Now, from your experience in the communication of business, have you ever known any of the apparatus physically in the "Brass Rail" that would be sold under names other than the names you have described here? —*A.* Yes. 10

Q. What other names?—*A.* Public address; amplifier; or P.A.

Q. Any other names?—*A.* No.

HIS LORDSHIP: It is the same sort of instrument that is used in connection with the public address system in halls?—*A.* Yes, my Lord.

Q. Or where speakers have their voices amplified?—*A.* Yes, my Lord.

Mr. MANNING: I think there is one difference that might be drawn. Were those amplifiers or loud-speakers physical projections into the room, Mr. Dowding, or were they concealed in the ceiling?—*A.* The loud-speakers were concealed in the ceiling. 20

Q. That is, they did not appear as something hung out on brackets, or something like that?—*A.* No.

Q. They were built in?—*A.* They were built in.

HIS LORDSHIP: But the principle is still the same?—*A.* Oh, yes, the principle is the same.

Q. I think, Mr. Dowding, we had finished with what you saw at the "Brass Rail." Now, we might go to the "Famous Door." Will you tell us what you found at the "Famous Door"?—*A.* At the "Famous Door" I found an amplifier and six speakers and one microphone in this installation.

Q. What manufacture was the amplifier?—*A.* A Stromberg Carlson. 30

Q. Was it the same model as the one in the "Brass Rail"?—*A.* No.

Q. Were you able to ascertain whose manufacture the loud-speakers were?—*A.* No.

Q. Were they out in the open or were they again built into the ceiling? —*A.* Built into the ceiling.

Q. So that unless you got up to inspect them on a step-ladder, you would not be able to see anything?—*A.* No.

Q. All right. You got one microphone. How was it located?—*A.* This microphone was located on a small platform in the main lounge, next to a small piano, for the same purpose as in the "Brass Rail," for amplifying 40 the entertainer's voice or instrument.

Q. Well, then, there will be a difference in the wiring visible, would there?—*A.* Yes.

Q. What was the difference in the wiring?—*A.* The wiring would be one microphone cable less. In other words, there would be a telephone line coming into the amplifier; the line going out to the speakers and also the line going to the microphone.

Q. And what about this switching equipment ?

HIS LORDSHIP : Just a moment, Mr. Manning. When you were dealing with the " Brass Rail ", you spoke of a pair of wires going to the speaker network ; that meant to each individual speaker, did it ?—*A.* Yes.

Q. There was not a central speaker, so to speak ; they were all separated speakers ?—*A.* All separated speakers.

Q. So when you spoke of the speaker network you meant all the various speakers in the main lounge ?—*A.* Yes.

10 **Mr. MANNING :** There were switches, were there, to enable the cutting out of the communications over the wire, and the use of the microphone in the room ?—*A.* Yes.

Q. And would it be possible to use them both together ?—*A.* Yes.

HIS LORDSHIP : I suppose they could use the microphone as well as the loud-speakers giving out sound from the telephone wires?—*A.* You could use the microphone to speak over the loud-speakers in the same manner.

Q. Yes, and at the same time to diffuse this sound which some people are pleased to call music ?—*A.* Yes, my Lord.

Mr. MANNING : You could superimpose one on the other ?—*A.* Yes.

20 *Q.* Can you do that with any gramophone that you know of ?—*A.* No.

HIS LORDSHIP : Well, you can rig up a gramophone, though, to enable that to be done ?—*A.* No.

Q. Can you rig up a phonograph ?—*A.* No.

Q. It could not be done ?—*A.* Not in the same manner.

30 *Q.* Are you telling me even an expert could not make the necessary attachments to enable that to be done to a phonograph ? Could you not take an ordinary phonograph and put it in the office of one of these establishments and, by means of the necessary equipment, establish the same system of sound diffusion ?—*A.* Are we referring to the electrical one, my Lord, or the mechanical one ?

Q. Well, couldn't you use the same devices on an ordinary phonograph that are used on these turn-tables that we are speaking of, and a system of amplifiers ?—*A.* You could not put a microphone on a mechanical gramophone, my Lord.

Q. Could you on an electrical phonograph ?—*A.* On an electrical phonograph the attachment is possible.

Q. Well, that is what I am trying to get at. It wouldn't be possible on a mechanical, but it would on an electrical ?—*A.* On an electrical.

Q. All right.

40 **Mr. MANNING :** Then, how many amplifiers did you say there were in the " Famous Door " ?—*A.* The number of amplifiers I only indicated as being those required to perform the duties which the Muzak have to perform there ; that, I mean, is inherent equipment, attached with this list. To be exact as to the number, I have not noted it. I don't know the exact number.

HIS LORDSHIP : There may have been more than one ?—*A.* There may have been more than one, yes.

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Mr. MANNING: Are you thinking of the "Famous Door"?—
A. Associated Broadcasting, did you ask for that?

Q. No, I am sorry. I was wondering if we were talking of the same thing. I was thinking of the installation at the "Famous Door."—A. At the "Famous Door," one amplifier.

Q. And how many loud-speakers?—A. At the "Famous Door," six.

Q. Were they all in operation?—A. All but one at the time visited.

Q. Now, were there—

HIS LORDSHIP: That is all the speakers were in operation, except one?—A. All of the speakers except one. 10

Mr. MANNING: Were there any identification marks on any of these units?—A. On the amplifier at the "Famous Door," yes.

Q. What?—A. The name "Stromberg Carlson."

Q. Yes?—A. And also the label, "Property of Musical Engineering Company."

Q. Was that on the amplifier?—A. That was on the amplifier.

Q. I see. Then, by the way, on what date did you visit the "Famous Door" and the "Brass Rail"?—A. Both on October 19th, 1949.

Q. And did you visit the Westminster Hotel?—A. Yes.

Q. What did you find at the Westminster Hotel? We don't need to 20
bother about the general dining-room. We are only concerned with things that are supposed to have happened in the "Town and Country Room."—
A. In the "Town and Country Room" one amplifier with seven speakers built into the ceiling.

Q. Yes, and what was the character, if I may call it, of the hook up in respect of the "Town and Country Room"?—A. Merely an attachment of the Bell Telephone—

Q. Attachment of what?—A. The wires.

Q. Yes, I know, but what was attached to the wires leading from the Bell Telephone wires?—A. The amplifier, and also attached to the amplifier 30
were two wires going to the speakers in the ceiling.

Q. Yes, I see. Now, is the function of the amplifiers in the "Brass Rail" and the "Famous Door" and the Westminster Hotel identical?—
A. The function of the—

Q. Of the amplifier?—A. The same?

Q. Yes?—A. Yes.

Q. All right. Then, will you tell us what those amplifiers do?—
A. The amplifiers transform the low current signal from the telephone line into a current great enough to actuate the speaker mechanism.

Q. Would it be beyond the apprehension of the layman to explain the 40
idea of a proportionate step-up of energy?—A. In terms of the common d. of the electrical amp., in watts would be the closest thing—I would think so.

Q. I was wondering if you could say if there was a ratio between the energy of the in-coming signal and the energy required to operate the loud-speaker,—if you could?

HIS LORDSHIP: Do you mean how many times would it be amplified?

Mr. MANNING : That is what I was trying to get at, my Lord.

HIS LORDSHIP : If you know.—*A.* I don't actually know.

Mr. MANNING : Then low current signals have to be transmuted into high current signals, that is, energy ?—*A.* The energy has to be greater.

Q. The energy has to be boosted ?—*A.* Yes.

Q. And that is done by amplifier ?—*A.* Yes.

Q. And it has to increase a certain degree of increase before it can allow the loud-speaker to function at all ?—*A.* Yes, my Lord.

Q. And then, when it reaches that degree, then, it is transmuted into sound that is audible to persons in the room where the loud-speakers are located ?—*A.* Yes, my Lord.

Mr. MANNING : Perhaps, Mr. Dowding, you can, without becoming too much of an expert for some of us to follow, tell us what happens when the intensified energy gets into the loud-speakers. Does it operate from an electro-magnetic coil ?—*A.* Yes.

Q. And what does that electro-magnetic coil do ?

HIS LORDSHIP : The electro-magnetic coil is not the amplifier ?—*A.* No, in the loud-speaker.

Mr. MANNING : And what does it do in the loud-speaker ?—*A.* It is moved in a plane back and forth from a central resting point in a manner in accordance with the sound or electrical impulses transmitted to it.

HIS LORDSHIP : That is what is moved ?—*A.* The coil of wire.

Q. Is moved in a plane back and forth from the central point ?—*A.* Of rest.

Q. With what result ?—*A.* With the result of moving the diaphragm which transmits then the sound to the area or ear.

Mr. MANNING : Well, would it be proper to compare that with what happens in a telephone receiver ?—*A.* Exactly.

Q. Is the process comparable ?—*A.* Yes.

Q. And see if I followed it correctly. The variable current coming into your electro-magnetic coil, operates on a substance responsive to magnetism, iron, or something like that ?—*A.* Yes.

Q. And the varying current causes an increase, greater or less, in the magnification, because of the coil ?—*A.* It causes the coil to move in a magnetic field.

Q. And that movement is communicated then to the diaphragm ?—*A.* Yes.

Q. Which is some kind of membrane, is it ?—*A.* Paper machette.

Q. And that causes sounds to originate by the vibration of that membrane ?—*A.* Yes.

Q. I see. I thought I understood something of that field when I was in the army, my Lord.

HIS LORDSHIP : It is the vibration of the membrane, then, that produces the sound of the voice ?—*A.* The sound, yes.

Mr. MANNING : Any kind of sound that might have been the cause of the original impulse ?—*A.* Yes.

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tion—
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tion—
continued.

Q. Duplicated by the course of the reverse act of the impulse?—
A. Yes.

HIS LORDSHIP : And makes no distinction between the pleasant and unpleasant?—A. No.

Q. They have never discovered anything like that?—A. They are trying hard.

Q. The resistant to the loud-speaker is what?—A. The frame-work to hold the mechanism.

Q. And has that frame-work got anything to do with the quality of sound that it ultimately emits? Is it perceptible to people who are present? 10
—A. Yes, it is.

Q. That is, there are some shaped to form or some peculiarities about it that produce a better result than others. Is that it?—A. Yes.

Q. Tell me this, Mr. Dowding, the loud-speaker in an ordinary radio works on the same principle, does it?—A. Exactly.

Mr. MANNING : Or any public address system?—A. Yes.

Q. Well, then, do I gather from you that it is optional on the part of the operators of the premises of the "Brass Rail" or the "Famous Door," or the Westminster "Town and Country Club," as to whether they do or do not receive the sounds that may be simulated from the control room 20
end?—A. Yes.

Q. And how is that part exercised?—A. By manipulation of the control on the amplifier.

Q. The amplifier at the receiving end?—A. At the receiving end.

Q. In the receiving premises. And do I follow that his controls may either result in a stepping up of the volume of the sound, or a reduction of it, or a shutting off of it? Is that it?—A. All three.

Q. Then is there anything else that I have overlooked, Mr. Dowding, in getting from you a description of the apparatus you observed? I was not sure whether we were altogether clear on all that was visible in the 30
control room?—A. In the control room, no, I did not elaborate too much on that. There are other controls—that is what I call them.

Q. Well, you might tell us about the other controls in the control room?—A. The controls are in the form of levers and knobs, the levers being to select any one of the turn-tables for playing on a given Bell Telephone line through the amplifiers.

Q. I wonder if you would translate that for us a little further. There are four turn-tables in there, in the control room?—A. There are four.

Q. Now, in terms of what goes out over the line, we will say to the "Brass Rail," what does that description of yours about the levers mean? 40
—A. It means that any one turn-table can be set ready for operation to the Bell Telephone line rather than press all four at the time or all three, or any combination of tables.

Q. You mean this, that if we number the turn-tables 1, 2, 3 and 4, you may, during the 1.00 o'clock hour it will be playing, throw turn-table No. 1 to the "Brass Rail," and then if at the end of that time you want to change

over, you pull a lever and throw the turn-table through No. 2. Is that what you mean?—*A.* Yes, that is what I mean.

Q. I see.

HIS LORDSHIP: You switch them on by means of those levers?—

A. By means of the levers.

Q. It simply makes a connection?—*A.* It just makes a connection.

Mr. MANNING: Disconnect one lead and throw another lead into action?—*A.* Yes.

10 *Q.* Are there any other items of apparatus?—*A.* Yes, there was a radio, a tuner radio receiving set.

Q. And what relation did it have?—*A.* The purpose being used to pick up from any local radio station a program of public interest to be played over the speakers for any individual or collection of subscribers to Muzak.

Q. Now, are these pieces of equipment characteristic of any particular type of enterprise that you are familiar with?—*A.* They are familiar with my own work.

Q. For example, in your own work?—*A.* Yes.

Q. Now, what about your own work, so that we may know how this is of some relationship here?—*A.* The nature of my business, you mean, is?

20 *Q.* Well, how that particular form of switching equipment is familiar to your work?—*A.* Oh, I see. I am familiar with it myself in the use of making recordings from several other sources of sound than just the one available. In other words, the continuation of sound is available from two turn-tables for any length of time and very often switch one to the other at the end of any given sound sequence.

HIS LORDSHIP: I don't follow that at all.—*A.* I am sorry.

Mr. MANNING: I don't follow it myself, my Lord?—*A.* You see—

30 Mr. MANNING: You are so full of your subject that we have to know where we are going. I am trying to get it in some different form so that we, who are not engineers, can understand it.

HIS LORDSHIP: You said I think, "several sources of sound" and then you got into the avenue where we lost you. You got around the corner.—*A.* Well, I guess I will have to go back to the exact question for the switches.

Mr. MANNING: Well, you had said, when I asked about whether these forms of equipment were characteristic of any other enterprise.

40 HIS LORDSHIP: Are you familiar—we were talking about the presence in the control room of a radio receiving set, and you said the purpose of it is to pick up any program of public interest to be played over the speakers of the Muzak subscribers, and you said, "I am familiar with that sort of operation in my own work," and I think you were going to tell us how that form of operation is used in your own work.—*A.* I misunderstood that.

Mr. MANNING: I think I am at fault in that regard, my Lord, because I think I did ask another question after that as to this series of levers for switching from one to the other.

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tion—
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HIS LORDSHIP : Oh, no, you had left that, and then you introduced the radio receiving set, and then he said that he was very familiar with that type of receiving set in the control room, because he said he used it in his own work. Isn't that what you said? Well, you said, "I make recordings from several other sources of sound" and to you that receiving set was just another form of sound. Isn't that it?—*A.* That is it.

HIS LORDSHIP : Unless I am over-simplifying it.

Mr. FOX : I took the same thing, my Lord.

Mr. MANNING : Well, my mind was running in a different direction. Perhaps I am guilty of confusing the witness. But what I meant to get at 10 was this. In this series of arrangements, levers, I think you called them, for switching from one turn-table to another, I asked if that was characteristic of any other kinds of enterprise or kind of work, if it was characteristic of any other kind of enterprise besides the one conducted by the Associated Broadcasting Company?—*A.* The answer is "yes."

Q. And that was where you said you were familiar with it in your own business?—*A.* In my own.

Q. Well, then, will you tell us how it operates in your own business?—*A.* In order to play sound continuously for any length of time greater than 20 is allowed on the disc, one has to have two turn-tables.

Q. Well, there are, of course, instruments such as automatic record-changers?—*A.* Did I say continuous sound?

HIS LORDSHIP : Even a mechanical changer brings about a cessation of it, sometime.—*A.* Well, yes. Well, I am getting at this other angle—continuous sound.

HIS LORDSHIP : You have to have at least two turn-tables?—*A.* Yes.

Q. And at the ending of the one table, a switch is used to start the sound on the next table and to continue the sound. That is, you switch 30 one off and switch the other one on?—*A.* Switch the other one on.

Mr. MANNING : Does the same switch do that?—*A.* In some cases, yes; in some cases, no.

Q. I see. That is a matter of design?—*A.* It is a matter of design.

Q. And are these designs sold at retail, or is apparatus of that sort sold at retail?—*A.* Not retail, no.

Q. Well, is it standard equipment, or is it specially made to order for a particular job?—*A.* Specially made to order.

Q. For a particular job?—*A.* Yes.

HIS LORDSHIP : You mean that those things are not kept in stock to be provided to persons who might have need of those things in their 40 business, or are you suggesting that they would only be made on a special order?—*A.* They are kept in stock for special order, yes.

Q. That is quite a different thing, isn't it?—*A.* I understood Mr. Manning to ask about the retail trade, my Lord.

Mr. MANNING : Where are they sold, Mr. Dowding ?—A. They are sold usually from the manufacturers and through distributors or through a local jobber.

Q. To whom ?—A. To anyone in the radio trade.

HIS LORDSHIP : In the broadcasting trade ?—A. No, it goes farther than that, sir.

Q. I was just wondering how far it does go. That is what I was asking you for ?—A. It goes down to the term “ experimenters.”

Mr. FOX : To anybody who wants it ?

10 The WITNESS : Not necessarily.

HIS LORDSHIP : Suppose I wanted to experiment in this field—and perhaps I will be qualified to do so after I have heard all these experts giving evidence—and I go in and buy that equipment as a member of the public, can I do so ? Are you saying that they would refuse to sell to me ?—A. I am afraid I am not too familiar with the selling of this equipment.

HIS LORDSHIP : I seem to recall there is a provision in the Patent Act for compulsory licence, isn't there ?

Mr. MANNING : Yes, my Lord, but that is for manufacturers. I mean, there are retail channels through which it could be bought, of course, but
20 I am trying to draw attention to such a course and the disposition of it.

HIS LORDSHIP : Well, I don't know what bearing it has on the matter, but I should think if they restricted the disposition of the distribution of these things in that manner, there might be something to be said about the desirability of that legislation dealing with compulsory licence.

Mr. MANNING : I do not think it is a question of that, my Lord. It is a question of where to go to buy and how you would achieve the buying.

HIS LORDSHIP : Well, I doubt if this witness is able to tell us that.

Mr. MANNING : However, it is a matter of argument really to develop
30 as to what significance that may be. May I be excused for a moment? That is all, thank you.

Mr. SANKEY : My Lord, we have the records here and we might have Mr. Raymond put them in and we might get rid of him and let him go.

HIS LORDSHIP : And then you might reserve your cross-examination until to-morrow ? Is that suitable to you ?

Mr. FOX : Oh, yes, my Lord.

HIS LORDSHIP : You might stand down, then, but you are not excused. You will have to remain.

—Witness stands down.

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tion—

continued.

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No. 11A.

Evidence of M. R. Raymond.

Plaintiff's
Evidence.

MURRAY R. RAYMOND, recalled.

No. 11A.
M. R.
Raymond.
Re-exam-
ination.

Re-examined by Mr. MANNING :

Q. Will you take one of these now, Mr. Raymond. I don't know whether it will go on that turn-table. We can try it?—*A.* It won't fit on this one.

Q. Then, I am afraid we will have to try something else?—*A.* We will have to get another one.

Mr. SANKEY : We have lots of 12 inches, but we have not got them 10 here.

HIS LORDSHIP : What is that—a 16 inch ?

The WITNESS : A 16 inch.

Mr. FOX : Are they all 16 inch?—*A.* They are all 16 inch.

Mr. MANNING : I am afraid we cannot do it now.

HIS LORDSHIP : Do you particularly want to use the mechanical gramophone, or phonograph, Mr. Manning ?

Mr. MANNING : I think it should be adaptable to this machine, but then again I am anticipating arguments.

Mr. FOX : These machines cost a lot of money nowadays. 20

Mr. MANNING : But you have other gramophones, if there is any doubt about that.

Mr. FOX : We can furnish you with a 12 inch.

Mr. MANNING : All right.

HIS LORDSHIP : Very well, you may stand down.

Mr. FOX : I suppose we can have Mr. Dowding back now, my Lord.

HIS LORDSHIP : Yes.

—Witness excused.

No. 12.
W. T. C.
Dowding.
Cross-exam-
ination.

No. 12.

Evidence of W. T. C. Dowding.

30

WILLIAM T. CHARLES DOWDING, recalled.

Cross-examined by Mr. Fox :

Q. Mr. Dowding, how long have you been associated with the R.C.A. Victor Company?—*A.* Ten years.

Q. That would bring us back to 1941?—*A.* 1941.

Q. And how old are you?—*A.* 30.

- Q. And you are a recording engineer?—A. Yes.
- Q. Do you hold any University degree?—A. No.
- Q. Did you attend University?—A. No.
- Q. Your experience is practical?—A. Practical.
- Q. As opposed to more academic qualifications. Have you been employed by the R.C.A. Victor continuously for this ten years?—A. Except during services in the Air Force.
- Q. And how long did that take?—A. 18 months.
- 10 Q. And what was your position when you first joined the R.C.A. Victor in 1941?—A. Much the same as it is to-day; making records.
- Q. I see. Then, I take it it is not an occupation that demands a great deal of skill. If you could do it immediately, what you are doing to-day, it did not need ten years to bring you to your present occupation?—A. Not ten years, no.
- HIS LORDSHIP: Well, when you first entered the employ of the Victor Company, you did the same work you are doing to-day?—A. After a training period.
- Q. Yes, of how long?—A. There was no specific time; just when able to perform my duties.
- 20 Q. Well, how long were you employed there before you undertook to discharge the duties you are discharging to-day?—A. A matter of a month.
- Q. All right.
- Mr. FOX: You told my friend, Mr. Dowding, that there was a difference between a transcription recording and an ordinary recording or record, and that difference you state lies in two things; one the speed of the turn-table and, two, the size of the recording groove or track. Now, as to the speed of the turn-table, what speed is used on the turn-tables of the Associated Broadcasting Company?—A. They are equipped to play two speeds.
- 30 Q. Yes, and those speeds are?—A. $33\frac{1}{3}$ revolutions per minute and 78. I speak of the time I was visiting there.
- Q. Of course. $33\frac{1}{3}$ revolutions per minute, and 78 revolutions per minute, which, for short, is r.p.m. Now isn't that the standard speed that all gramophones to-day are equipped to play ordinary records that you purchase in shops?—A. No, sir.
- Q. No. Now, think well, Mr. Dowding. The normal speed at which the electric gramophone has been running for many, many years past, and the records have been manufactured to play at that speed, is, if I am not misinformed, 78 revolutions per minute. Isn't that correct?—A. Yes.
- 40 Q. You may also purchase, without any difficulty in practically all radio-gramophone stores to-day, an instrument which is very often equipped with radio instrumentalities as well as gramophone instrumentalities, an instrument that will play records of speeds either 78 r.p.m., 45 r.p.m., or $33\frac{1}{3}$ r.p.m. Is that correct?—A. Yes.
- Q. Then, those speeds at which the Associated Broadcasting Company's turn-tables are designed to move are the same speeds as operate on gramophones purchasable at retail to-day? That is correct, isn't it?—A. Yes.

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Q. Well, then, any distinction between a transcription recording and an ordinary recording or a recording so far as it relates to speed of the turn-table, breaks down completely, doesn't it?—A. Yes.

Q. There is no distinction. That disappears. We are agreed on that?—A. On speed only, yes.

Q. All right. Then we come to the size of the recording groove or track. Now, isn't the size of the recording groove or track dictated by the number of grooves that you desire to place on a record?—A. Yes.

Q. So that if I have—and take the 12 inch record, if I have a record 12 inches in diameter, which plays at a speed of 78 r.p.m., I must place upon it to play the same period of time much more, many more grooves than I do on a 12 inch record playing on a 33½. Am I correct?—A. Yes. 10

Q. Let me take you back, because I am not even sure for a moment, myself, that I am correct. A rather unusual situation. On a long-playing record—see if we can reduce this to some simplicity—on a long-playing record, you have many more grooves cut to the inch than you do on a normal-playing record?—A. Yes.

Q. So that your grooves, when you have more per inch, must be of a different size than the others, mustn't they?—A. Yes.

Q. And that situation applies whether it is a record that you buy in a shop, or whether it is one of these things we call a transcription recording? When you have long-playing records, you have more grooves to the inch, therefore there is a difference in the size and shape between the two types isn't there?—A. Yes. 20

Q. Well, then, the second distinction breaks down, too, doesn't it? Coming to it this way, Mr. Dowding, isn't it simply in the trade that for some reason or other as long as a thing is sold generally in the stores, you call it a record and, when it is used in radio stations or broadcasting or something of that type, you dignify it or call it a transcription, and you don't really know why you do it? Isn't that a fair statement?—A. No. 30

Q. All right. Now, perhaps you will explain why not?—A. Because of the mere difference of the speed and the size of the records and the grooves.

Q. But, Mr. Dowding, we have agreed that there is no difference in the characteristic of speed. You have agreed with me that the speeds at which these electrical transcriptions are made are the same as the speed at which you can buy records in Eaton's store, so you cannot call one a record and the other a transcription, because they operate at different speeds, or because they do not operate at different speeds, and we have also come to the end of the lane, that there is no difference, no inherent difference, in either, between the size and shape of the grooves. Now, you tell me that one is called an electrical transcription and the other is called an ordinary recording. Well, let us leave it at that, Mr. Dowding. When you were at the Associated Broadcasting Company's studio, what size records or transcriptions— 40

HIS LORDSHIP : Mr. Fox, you are going to open up another subject now ?

- Mr. FOX : May I just deal with this one point, my Lord ?
- HIS LORDSHIP : Yes.
- Mr. FOX : What size of discs did you see ?—*A.* 16 inches in diameter.
- Q.* Only 16 inches ?—*A.* Yes, only 16.
- Mr. FOX : Thank you, my Lord.
- HIS LORDSHIP : If this is a convenient time to adjourn, I think we will continue to-morrow ; that is, if you are finished with this point ?
- Mr. FOX : Yes, definitely.
- HIS LORDSHIP : Just before you leave, may I ask on the second
- 10 point of distinction. You mentioned there the long-playing records which are made for ordinary domestic use in the homes. You can get long-playing records then normally ?—*A.* Yes.
- Q.* You can get two kinds ?—*A.* Yes.
- Q.* But in these broadcasting stations where they broadcast as does the Defendant, the Broadcasting Company, as in this case, they use only long-playing records ?—*A.* No.
- Q.* They use either ?—*A.* They use either.
- Q.* They use both kinds ?—*A.* Yes.
- Q.* And the size of the grooving would depend, then, on whether they
- 20 are long-playing records or not ?—*A.* Or transcriptions.
- Q.* Well, that is a play on words, isn't it ?—*A.* Well, they are being called, as opposed to ordinary records, transcription and long-playing records.
- Q.* And the records used, or the discs, let us say, used by this company for broadcasting purposes, you call transmission ?—*A.* I call them transcriptions.
- Q.* Or transcriptions, I meant to say, and yet they work on the same principle as records ?—*A.* Principally, yes.
- Q.* They can be long-playing or short ?—*A.* No, not transcriptions.
- 30 *Q.* That is what I asked you. Are they all long-playing ?—*A.* No.
- Q.* What are they ?—*A.* The transcriptions, you mean ? What are they ?
- Q.* Yes ?—*A.* A transcription is one name applied to a given set of speed and the size of groove.
- Q.* A transcription has two speeds, 33½ or 78 r.p.m., hasn't it ?—*A.* Well, then, I made a mistake, if that is what I said.
- Q.* Well, I thought you said that when you were speaking of the speed of the Defendant's turn-tables, they were equipped for two speeds, 33½ r.p.m. or 78 ?—*A.* Yes, my Lord.
- 40 *Q.* But you can get transcriptions at either speed ?—*A.* No, not transcriptions.
- Q.* No ? Those are only two speeds ?—*A.* One speed of transcription.
- Q.* What is that ?—*A.* 33½.
- Q.* So that any discs that these Defendants have were all discs which were made to play on a turn-table that turns at the rate of 33½ r.p.m. ?—*A.* The ones that I saw did that exactly.
- Q.* But they could have transcriptions that were continuous ?—

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continued.

A. Not transcriptions, my Lord.

Q. On the other?—A. No.

Q. What you call records?—A. What I call records.

Q. They could be played on the other turn-tables or on the device that operates the turn-table at 78 r.p.m.?—A. That is correct.

Q. Oh, I see. Well, that will be pursued further, no doubt?

Mr. FOX: It certainly will, my Lord.

HIS LORDSHIP: I had that question in my mind and I thought I might as well have it cleared up. I must keep an open mind right to the end of this case, I can see that. 10

Q. Mr. Dowding, you told my friend yesterday afternoon that these things you call electrical transcriptions are not suitable for use on private home instruments; in other words, on what we will call the cabinet gramophone, and as I understand your answer, you said no, but possibly yes. That is correct?—A. Yes.

Q. Now, I hand you what I would term a record, which is entitled "Electrical Transcription, R.C.A. Victor Company Limited, Montreal." That is your Company is it?—A. That is correct.

Q. "Record speed 78 r.p.m." Now, what does the word "record" there refer to?—A. To the material that you are handling. 20

Q. I see. This, then, that I have in my hand, as well as being an electrical transcription is also a record. Is that correct?—A. This is a record. That is a record.

Q. Yes?—A. That is correct.

Q. So there is no difference then, between a record and an electrical transcription?—A. Yes, there is.

Q. Well, I thought we had decided yesterday that there was not. Perhaps you would be good enough to tell me——

HIS LORDSHIP: Are you filing that as an exhibit?

Mr. FOX: In a moment, my Lord, if I may. Perhaps you would be good enough to tell me what is the difference between a record and an electrical transcription?—A. A record is as you have in your hand, a disc of approximately 10 inches or 12 inches in diameter, in contrast to an electrical transcription, which is 16 inches in diameter. 30

Q. Oh, I see. So the difference between a record and an electrical transcription is in the diameter of the body of the material composing it?—A. That is correct.

Q. Then, this article that I have in my hand, being 10 inches in diameter, is a record, not an electrical transcription?—A. That is correct.

Q. And then, I must take it it naturally follows that your Company, the R.C.A. Victor Company Limited, was in error in labelling this as an electrical transcription?—A. Correct. 40

Q. What would happen——

HIS LORDSHIP: Just a moment. Is that a 16 inch?

Mr. FOX: No, this is a 10 inch, my Lord.

HIS LORDSHIP: Well, he says an electrical transcription is 16 inches in diameter and a record is 10 or 12 inches?—A. Yes.

Q. So if it that be so, your company is not in error in calling it a record ?
—A. No ; a record.

Mr. FOX : No, but the title on the article itself, my Lord, bears the words, in large type, "Electrical Transcription," and then a little lower down your Lordship will note the words, "Record speed, 78 r.p.m."

HIS LORDSHIP : Oh. This witness maintains they should have called that a record ?

Mr. FOX : The witness maintains they should have called that a record all the way through, and as a matter of fact, your Lordship will see they call it both. What would happen if I placed this article on the gramophone, Exhibit No. 15, and played it ? Would it emit normal sounds ?—A. May I examine the article closely ?

Q. Oh, certainly. Let us play it ?—A. May I examine it first ?

Q. Certainly ; by all means ; if my friend does not object to my toying with its instrumentalities, perhaps now would be the proper time to have this marked.

HIS LORDSHIP : What is the musical entertainment we are going to have, Mr. Fox ?

Mr. FOX : Well, it is not music, my Lord, and I doubt if it is entertainment. The record, or electrical transcription, as the case may be, is labelled "Masked Articulation Test." I have never heard it before, but I am quite satisfied it is going to be a little erudite, but not for the Court.

(Reporter's Note : The Article entitled "Masked Articulation Test" is now played on Exhibit No. 15.)

Mr. FOX : That was listed No. 20. Then there is a very screeching sound on the record. I believe, my Lord, that is what it is supposed to do, strange as it may sound : "List No. 21, and then a screeching sound." That, I am informed, my Lord, is what the record is supposed to do, make those funny noises. It is one of these more erudite things made by a consonics engineer of the University, but your Lordship will notice it gives forth recognised sounds.

HIS LORDSHIP : But the voices which were audible, were very, very, clear.

Mr. SANKEY : We can call a witness, my Lord, to testify that it is what is called a masking noise.

HIS LORDSHIP : Was it perhaps a speaker who was in training for making speeches at hostile meetings ?

Mr. SANKEY : I am unable to say that, your Lordship.

Exhibit No. 23 : Record entitled "List No. 21, Masked Articulation Test."

Mr. FOX : In other words, Mr. Dowding, this Exhibit No. 23 which is labelled both "Electrical Transcription" and "Record," does, when played on gramophone Exhibit No. 15, emit recognisable sounds ?—A. As demonstrated.

Q. As demonstrated.

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Cross-examination—
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HIS LORDSHIP : Did you even recognise that hissing sound?—

A. Yes, my Lord.

Q. What would you call that?—A. Well, the best thing is as written on the disc, "Masked Voices," to use your own words.

Q. Masked voices?—A. Yes.

Q. That is a recognised thing in the trade?—A. I would say not in the transcription trade, but for the purposes for which the record was made.

Q. Yes, Mr. Fox?

Mr. FOX : On the turn-tables that you examined in the premises of the Defendant, the Associated Broadcasting Company, would it be possible 10 to play records as opposed to what you term electrical transcriptions?—

A. Yes.

Q. And you would get recognisable sounds?—A. Yes.

Q. Now, you also used another term yesterday, "Recording", which I presume you meant to refer to the making or cutting of these discs, and you said that the term "recording" was used only so far as it related to records and had no relation to electrical transcriptions. Is that correct?—A. Recording, if I may define the term in lay language to the average person would mean recording of all material, whether it be transcription recording, tape dictation, and so on. 20

Q. Recording is a generic term?—A. Yes.

Q. Whatever instrumentalities you use to make a record, whether it is what you have insisted upon narrowing down to call a record, also an electric transcription, or tape, or wire, or film, or any of those things, you call it a record when you place sound upon it?—A. That is correct.

Q. Now, when did the electrical type of recording start? You have referred to a certain date. By recording, as I understand it, you mean either the mechanical or of the acoustic type. You did not use electricity at all in making records or transcriptions. You did not have any electricity in reproducing the sound. It is obvious that the gramophone Exhibit 30 No. 15 operates without electricity?—A. Yes.

Q. Now, when did that change-over start?—A. I would say around the early thirties; around the early 1930's.

Q. Prior to that, what was on the market was records of a type that had been made by mechanical means, without the intervention of any electrical instrumentalities, and you reproduced your sound in mechanical instruments wholly mechanically operated. Is that correct?—A. That is correct.

Q. And then you started adding electricity to the operative functions, not only in the recording, but of the reproducing?—A. Yes. 40

Q. Well, what were those instruments called for reproducing the records when you had electricity added as an element?—A. The term is familiar to me only through hearsay as interested at that time as I would be, not direct. In other words, I would have to give a term which would to me be told to me.

Q. Oh, I can quite understand, Mr. Dowding. Please understand I am remembering that, in the early 1930's you were, as we all were, younger than

you are now, and I am not trying to suggest that your memory, as a ten-year-old boy, would tell you. But there has been a continuation and that goes back to ten years ago when you started with the R.C.A. Victor. What were these instruments called?—*A.* A phonograph.

Q. Oh, they were called a phonograph, and the mechanical instruments, such as Exhibit No. 15, were called what?—*A.* A gramophone.

Q. Exhibit No. 15, of course, is a portable type of gramophone, isn't it?—*A.* Yes.

10 *A.* Yes. *Q.* And uses a clockwork type of motor, that you wind by hand?—

A. Yes. *Q.* I suppose it is possible to purchase, to-day, a gramophone such as Exhibit No. 15, is it?—*A.* I would imagine so, not having tried to do so.

Q. Supposing I went into a store and was looking, not for a cabinet instrument, but one for my home in a cabinet of the type that is usually in the trade known as a console model, would it be possible for me to buy a mechanical type of reproducing instrument?—*A.* I would say no.

Q. No? They are completely obsolete, aren't they?—*A.* Yes.

Q. Their place having been completely taken by the electrical type of instrument which you call a phonograph?—*A.* Yes.

20 *Q.* Not a gramophone and not a graphophone, but a phonograph?—*A.* Yes.

Q. And is that universal in the trade, that these electrical reproducing instruments used for reproducing sounds on records, are universally known as phonographs, and not as gramophones?—*A.* That is correct.

Q. When you said before that such an instrument as Exhibit No. 15 could be bought, you did not mean it could be purchased retail?—*A.* I wouldn't like to answer on that. I wouldn't know.

Q. But as far as console models are concerned, they are not obtainable?—*A.* No.

30 *Mr. MANNING:* I may say, my Lord, I am leading evidence on that fact.

HIS LORDSHIP: Yes. Did the terminology change in the early 1930's when electrical recording and electrical reproducing was introduced?—*A.* I would say the introduction of different words were beginning to be brought in at that time.

Q. Yes. Then they were called phonographs from the early thirties, and prior to the early thirties they were called gramophones?—*A.* Approximately that would be so.

40 *Mr. FOX:* Do you know when the word "phonograph" first came into usage?—*A.* I do not, no.

Q. You have no knowledge, and then you told my friend yesterday you have no knowledge of the history of the words "gramophone," "graphophone," or "phonograph"?—*A.* Very little.

Q. You don't know who invented these devices, do you?—*A.* Both types?

Q. Any type?—*A.* Men's names I cannot recall, but I do know who started the term "gramophone."

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Q. And that was?—A. The Berliner Gramophone Company.

Q. When was that?—A. The date I could not give.

HIS LORDSHIP: Isn't that a very big question, Mr. Fox?

Mr. FOX: Well, I am afraid my friend is going to make an issue of it.

HIS LORDSHIP: There was a Mr. Gresinger, in Buffalo, who made one.

Mr. FOX: That is so, but I think we have a very much later authenticated record than Gresinger. What were these sound-producing machines called before Berliner's day?—A. I don't know.

HIS LORDSHIP: Was it the Berliner Gramophone Company? 10

The WITNESS: That is what I said.

Mr. FOX: My Lord, I shall have occasion to refer your Lordship to a case in which all this history is set out.

HIS LORDSHIP: Oh, yes.

Mr. FOX: Now, these electrical instruments for reproducing sounds to which you refer as phonographs, will you please describe one in some detail as to its instrumentalities and, in doing so, compare those instrumentalities with those you find on Exhibit No. 15?—A. You wish me to describe the electrical against the mechanical?

Q. That is right. Tell me the parts. Would it help you if I brought 20 this instrument, Exhibit 15, up to the desk for you?—A. I don't think so, no.

Q. All right. Perhaps I can help you, Mr. Dowding. Referring to an electrical instrument, termed by you a phonograph, we start with an electric motor for operating a turn-table, mounted upon a spindle, do we not?—A. That is correct.

Q. And in the mechanical instrument the only difference so far that we have is that the motor is of the clockwork type, wound by hand by the lever which is now sticking out of the side of the box, Exhibit 15. Is that right?—A. Yes. 30

Q. And on the turn-table of each one of them you place a record, or an electrical transcription, as the case may be. Is that correct?—A. We will say a record for the time being.

Q. Very well. I shall go so far with you as to say a record, say a record of the type shown in Exhibit 23?—A. That is correct.

Q. And then, each one of them has a needle, a playing needle?—A. Yes.

Q. Which is mounted in what we may call a playing head. Is that correct?—A. That is correct.

Q. Now, at this moment we start to come into the severance of the 40 ways between the two instruments, because in the mechanical type, there, you have a diaphragm, do you not?—A. That is correct.

Q. Whereas in the electrical type you have a magnetic coil?—A. Yes.

Q. The diaphragm of the mechanical type and the magnetic coil of the electrical type are each carried on what I will term a suspension arm?—A. Yes.

Q. And then in the mechanical type your sound is carried through into the sound box or a loud speaker, is that correct, and emitted?—*A.* Yes.

Q. And in the electrical type you will have, by virtue of the mechanical coil that we have just spoken about in the head, the mechanical vibrations set up by the needle, and the grooves of the record are at that point transmuted into electrical impulses, are they not?—*A.* Yes.

Q. And those electrical impulses are carried along wires within the instrument—correct?—*A.* Yes.

10 *Q.* Through the suspension arm?—*A.* Yes.

Q. And into the amplifier?—*A.* Yes.

HIS LORDSHIP: Just a minute, now. They are carried along wires in the instrument, to where?

Mr. FOX: Through the suspension arm, my Lord.

HIS LORDSHIP: Yes, and into?

Mr. FOX: An amplifier, and then, Mr. Dowding, they are continued along wires to a loud-speaker, are they not?—*A.* Yes.

Q. At which point those electrical impulses are transmuted back into mechanical vibrations in the loud-speaker?—*A.* At which point in the
20 loud-speaker are they?

Q. I am asking you—I say at the point of the loud-speaker or at the loud-speaker point?—*A.* Yes.

Q. The electrical impulses are then transmuted back into mechanical vibrations?—*A.* That is correct.

Q. And are emitted from the loud-speaker as mechanical vibrations which produce sound in the air?—*A.* That is right.

Q. Now, let us turn our minds for the moment——

HIS LORDSHIP: Just a moment, now. They are emitted from the loud-speaker as magnified mechanical vibrations?

30 Mr. FOX: No, I am sorry, my Lord. They are emitted into the air as mechanical vibrations, my Lord, which produce sound.

Q. Now, Mr. Dowding, if you would turn your mind to the instrumentalities that you found in the control room of the Defendant, the Associated Broadcasting Company, and I will take you beyond that point down to the “Brass Rail,” or the “Famous Door.” In the control room of the Defendant you have already told us that you found a turn-table, which I take it for granted was operated by an electric motor. Is that correct?—*A.* Yes.

Q. And on that turn-table would normally be placed a record of an
40 electrical transcription. Is that correct?—*A.* Yes.

Q. A needle was employed—perhaps while I am doing this, Mr. Dowding, you might see if there is accurately represented on this sketch that I place in front of you the instrumentalities that I am taking you through.

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Mr. MANNING : In diagramatic form ?

Mr. FOX : In diagramatic form. Numeral 1 represents the motor ; numeral 2 the turn-table and 2A the spindle, all of which you found at the Defendant's control room. No. 3 represents the needle which we have mentioned. Now, you also find the playing head carrying the magnetic coil. Is that correct ?—A. Yes.

Q. Which, on the diagram, is illustrated by the numeral 4. Then 5—numeral 5 indicates the suspension arm carrying the head No. 4, and you also found that suspension arm in the control room of the Defendant—correct ?—A. Correct. 10

Q. No. 6 represents the wires leading to the amplifier, which is No. 7, and those are the instrumentalities that you found in the Defendant's control room ?—A. There is one small change there.

Q. Right. I would be glad to hear it ?—A. That between 5 and 7 we have two steps.

HIS LORDSHIP : What is No. 7 ?

Mr. FOX : 7 is the amplifier, my Lord.

HIS LORDSHIP : Oh, yes. Now then, you were saying between 5 and 7 there is what ?—A. The introduction of a switching arrangement to accommodate more than one set of numbers, shall we say, on this diagram 20 from 1 to 5.

Mr. FOX : In other words, between the suspension arm No. 5 and the amplifier No. 7 as the instrumentalities are set up in the control room, you have a switching mechanism that will enable you, as you told us yesterday, to switch one turn-table into operation, or another one, as desired ?—A. Yes.

Q. But is it fair to put it to you this way that, when one of those turn-tables is switched into position, subject to the fact that the switch is there to enable it to be switched out of position, the instrumentalities illustrated in diagramatic form on this sheet of paper are exactly what you have in the 30 control room ? I said subject to the fact that there is a switch there.

HIS LORDSHIP : Making an exception of the switches ?

THE WITNESS : Yes.

Mr. FOX : And then leading out of the amplifier, No. 7, is a pair of wires un-numbered for the purpose of clarity—let us number those 7A, shall we, and you found wires comparable to wires 7A in the diagram leading out of amplifier 7 ?—A. Yes.

Q. And those wires led out of the building ?—A. Likewise as in the switching arrangement prior to No. 7, there is also a similar arrangement after 7, which would, I would take it, be put in the same class as we have 40 already put the switches.

Q. I see. A switching mechanism ?—A. Yes.

HIS LORDSHIP : The switching mechanism is between what, 5 and 7 ?

Mr. FOX : Yes, and now between 7 and 9, my Lord. We have not come to 9 yet, but we will in a moment.

Q. Now we come to the wires leading out of the amplifier in the control room through this switching mechanism, and we are now somewhere outside the building. Correct?—*A.* Yes.

Q. Let us go down to the “Brass Rail” and you there found as you told us yesterday, a loud-speaker, one or more which, on our diagram we label with a number 8. Is that correct?—*A.* Yes.

Q. And interposed between the loud-speaker in the premises of the “Brass Rail” is the amplifier which, on the diagram in front of you, is labelled No. 9?—*A.* That is right.

10 *Q.* So then our sketch, subject to the two switching mechanisms, represents the instrumentalities that existed in the control room of the Defendant, A.B.C., and all the way down to the “Brass Rail” and the “Famous Door” or the Westminster Hotel?—*A.* That is right.

Q. Now, if I go into a store and ask for a gramophone—pardon, my Lord, I tender this now as Exhibit No. 24 is it?

HIS LORDSHIP: Yes. I just want to have a look at this first.

Mr. MANNING: My Lord, my friend will have a copy made.

HIS LORDSHIP: Yes, that will be very helpful.

Mr. FOX: If my friend will agree to my taking that off the record, I
20 will have a number of photostats made, my Lord.

HIS LORDSHIP: Yes, thank you. That will be Exhibit No. 24.

EXHIBIT No. 24: Diagram of working parts of a gramophone or phonograph.

Mr. FOX: I started a question, but I would ask you to ignore it for the moment and turn your attention for a moment back to the sketch Exhibit No. 24. Do you know the reason for the amplifier which we have as No. 9 on sketch No. 24, being placed in the “Brass Rail,” “Famous Door,” etc., etc.?—*A.* Yes.

30 *Q.* What is that?—*A.* It is to raise the electrical impulses coming over the Bell Telephone Lines up to an electrical current capable of driving or operating the loud speakers.

Q. And that is occasioned, as we read in the contract between the Defendant and the Bell Telephone Company, by the fact that the Bell Telephone Company requires very low powered current to transmit these sounds. Is that correct?—*A.* That is correct.

Q. So that if it were not for that rule or regulation of the Bell Telephone Company, you would not need the extra amplifier, No. 9?—*A.* No.

40 *Q.* Now, if I go into a store and ask—let us assume that I go up to Eaton’s, College Street, which is a well-known store in Toronto, and where they have a department devoted to this sort of thing on the street level store, and I ask for a gramophone. I ask to be shown a gramophone. What happens? Am I shown something, or does the clerk tell me that you cannot buy those things any more, or what happens?—*A.* I would have to guess.

Q. Well, you are in the trade. I would like to know from your knowledge of the trade what you think would be likely to happen.

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Mr. MANNING : Oh, is it proper to ask what a witness thinks, my Lord ?

HIS LORDSHIP : I am just wondering if he would know that, Mr. Fox ?

Mr. FOX : Very well. If somebody came to you in the R.C.A. Victor and said, " I want to buy a gramophone. Where do I go to get it ? " what would you tell him ?—*A.* I would have to ask him to qualify what they are really wanting.

Q. A gramophone, then, would be meaningless to you, unless it had a further explanation ?—*A.* That is correct. 10

Q. If they came and asked you for a phonograph, you would know, I presume ?—*A.* To a greater extent than otherwise.

Q. It would still be to some extent meaningless ?—*A.* Yes.

Q. Very well. Then, let us take the fact that somebody comes to you and says, " I want an electrical phonograph for reproducing Victor R.C.A. records." Would you then know what was meant ?—*A.* Yes.

Q. And would have an instrument in mind ?—*A.* Yes.

Q. Or a set of instrumentalities ?—*A.* Yes.

Q. What would it look like to you ? I mean, we are talking about now—we have passed out of Eaton's College Street store. To you, what 20 would such a phonograph look like ?—*A.* It would be a cabinet—a wooden cabinet containing a turn-table, an electrical turn-table, an arm.

HIS LORDSHIP : Take this slowly. Containing an electrically operated turn-table.

Mr. FOX : An electrically operated turn-table, having instrumentalities 1, 2 and 2A, such as shown on the sketch, Exhibit No. 24. Is that correct ?—*A.* Yes. With dimensions—specific dimensions.

Q. Oh, yes, but substantially those are the instrumentalities that would be present ?—*A.* Yes.

Q. There would also be a record capable of being placed on the turn- 30 table ? Let me put that another way. The turn-table would be so built as to be capable of receiving a record for playing purposes ?—*A.* That is correct.

Q. Which would be played by a needle of the general type shown as No. 3 in the sketch ?—*A.* I may correct that, to be a specific type.

Q. Oh, yes, but there would be a needle ?—*A.* Yes.

Q. And would there be a playing head ?—*A.* Yes.

Q. Somewhat similar to No. 4 in the sketch, Exhibit No. 24 ?—*A.* Somewhat similar.

Q. Somewhat. I am not saying it would be the same, but it would be 40 of the same general type ?—*A.* Yes.

Q. It would have a suspension arm generally similar to No. 5 in the sketch ?—*A.* Yes.

Q. And you would find leading up the appropriate wires from the magnetic coil contained in the playing head 4, through the suspension arm 5, to an amplifier such as is generally and diagrammatically shown as No. 7 in the sketch ? Is that correct ?—*A.* That is correct.

- Q. By wires similar to these numbered 6 in the sketch ?—A. Yes.
- Q. You would then lead from the amplifier No. 7 by wires as 7A to loud-speaker No. 8 ?—A. Yes.
- Q. So that the only difference in the general type of instrumentalities that you would find in the phonograph we have been talking about and those of the Defendant, the Associated Broadcasting Company, is that in the phonograph there is no second amplifier which we numbered 9 in Exhibit No. 24. Is that correct ?—A. With reservation to the specific dimensions I mentioned before.
- 10 Q. Always with reservation as to dimensions and refinements, and talking only as to the general character of the instrumentalities, my statement is correct ?—A. That is correct.
- Q. You do, however, state that when somebody comes to you and says they want a phonograph, that would raise in your mind the picture of something contained in a cabinet ? I so understood you, did I ?—A. Yes.
- Q. Now, did you ever build or construct radios, Mr. Dowding ?—A. Yes.
- Q. Did you do it as part of your business ?—A. No.
- 20 Q. You do it as a side-line ?—A. Yes.
- Q. Somebody comes and says they want you to build a radio, or a phonograph, or both. Is that right ?—A. Yes.
- Q. As a matter of fact, these instruments, these modern instruments, are usually compounded of both radio and phonograph ?—A. Home instruments, yes.
- Q. In a great many instances ?—A. Yes.
- Q. And you build one of those for your customer or friend, as the case may be. Is that right ?—A. Yes.
- HIS LORDSHIP: That is, the combination, or either of them
- 30 separately ?—A. Correct.
- Mr. FOX: Are you a cabinet-maker, Mr. Dowding ?—A. No.
- Q. Do you build, yourself, construct, yourself, or do you purchase the cabinet in which you place this phonograph you make for your customer or friend ?—A. I could do both.
- Q. You could do, but you don't. You sell it without a cabinet. Isn't that correct ?—A. Yes.
- Q. Then, when somebody comes to you and orders a phonograph, you don't supply him anything in the way of a cabinet at all. You supply the instrumentalities that we have just been discussing, don't you ?—
- 40 A. Depending upon the request.
- Q. Yes. Did you ever purchase an empty cabinet and put the instrumentalities in it and sell it as a finished article ?—A. No.
- Q. No. You always construct the radio or phonograph or combination of the two, from instrumentalities which you purchase and sell completely apart from any enclosure in a cabinet, and to you that is a phonograph, isn't it ?—A. Yes.

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Q. Yes. Of course, it is exactly the same thing to you ; a radio or a receiving set to you does not need to be enclosed in a cabinet, does it ?—

A. Only for support of its component parts.

Q. Now, even for the support of its component parts, Mr. Dowding, the instrumentalities are all built up and connected and do not need to be in a cabinet at all, do they ?—*A.* Yes, they do.

Q. They do ?—*A.* Yes.

Q. You cannot operate as a radio unless they are in a cabinet ?—

A. The component parts all would not have to be supported, but some of them would by some cabinet or an arrangement such as that. 10

Q. Right. So that when you sell your customer these instrumentalities in response to an order for a radio or a phonograph, you sell him something that won't work ?—*A.* That is correct.

Q. I see ; that won't work. Something else has to be done ?—*A.* That is correct.

HIS LORDSHIP : That something else is to enclose the parts in a cabinet ?—*A.* Yes, my lord.

Mr. FOX : Mr. Dowding, when I place a record on a turn-table of a gramophone, or a phonograph, to use your terminology, and place the needle in contact with the groove, start up the motor and let the turn-table 20 revolve and sound is emitted from the instrument, at what point in the instrumentalities does the reproduction take place—the reproduction of the original performance which caused the record to be made ?—*A.* I don't think that is quite clear to me.

Q. Oh, I am sorry. Let us go back. In order to make a record, we must have a living performance in general, mustn't we ?—*A.* Yes.

Q. Let us assume that it is the "Sophisticated Lady" record.

HIS LORDSHIP : You prefer that to "Moon Glow," do you ?

Mr. FOX : Well, my lord, they are both equally dangerous, probably more so to the witness, at his age than at my advanced time of life. Well, 30 at any rate, I almost said something your lordship would have regretted, had I said it. But, we are making a record of "Sophisticated Lady" by means of what I believe, in common parlance, is called a jazz band. Is that right ?—*A.* Yes.

Q. And we have that in the studio and you have the instrumentalities which lead to cutting the stylus, and they cut the stylus and that cutting the stylus being agitated by the sounds coming into the instrumentalities which are transmuted into electrical vibrations, which are carried along and then transmitted back into mechanical vibrations, which make a series of cuttings or a number of grooves in the stylus as it is travelling around the 40 turn-table. Is that correct ?—*A.* Yes.

Q. And then, by a certain means you make a matrix of that cutting and you press out any number of records which you sell commercially ?—*A.* That is right.

Q. The records being mainly made of mud. Is that right ?—*A.* Not mud.

Q. All right. Well, then, when I put that record that I purchased on one of these sound-reproducing machines, I do it for the purpose of reproducing the sound of the original performance, don't I?—A. Yes.

Q. So that at some point in these instrumentalities forming the gramophone or the phonograph, according to how you or I call it, at some point in those instrumentalities the reproduction occurs. Is that right?—A. Yes.

Q. What is that point?—A. The first would be the mechanical point.

Q. Wait a minute. I want you to be careful about that. You say the first one would be the mechanical point? By the mechanical point, you mean the point at which the needle contacts with the record, the groove?—A. That is correct.

Q. Now, you say that is the first one?—A. That is the first one.

Q. You are assuming, then, that there is more than one point?—A. Correct.

Q. What are the other points?—A. When it first becomes electrical energy.

Q. That is in the coil there is a second reproduction?—A. Yes.

Q. Continue, please?—A. At that point it is transferred from mechanical to electrical energy.

Q. Yes. Well, is that the second reproduction, or is it merely a transmutation of the reproduction we have already got?—A. That would be difficult really to give a definite answer on.

HIS LORDSHIP: In other words, Mr. Fox, are you suggesting to the witness that what is in the first instance a mechanical vibration is transmuted into electrical impulses by the operation of the coil?—A. That is correct.

Mr. FOX: Yes, but the witness said there was a second reproduction at that point.

Mr. MANNING: I think perhaps the witness does not quite appreciate what my friend means by the word "reproduction."

Mr. FOX: Oh, he is an expert in this field. I am not using the word within the Copyright Act.

Mr. MANNING: Oh, I am not challenging your fairness. I think the witness does not appreciate the point you are trying to get.

Mr. FOX: Well, if I do not make myself clear, I am obliged to my friend for helping me, but I want to make this as clear as I can to you, Mr. Dowding, that we have a reproduction of the original performance at the point of contact between the needle and the groove. We have agreed on that, which sets up mechanical vibrations capable of constituting sound and, in the old mechanical gramophone, it was those mechanical vibrations that were merely carried along through the diaphragm and through the sound box to create the sound waves making sound. That is correct?—A. That is correct.

Q. So that in the mechanical type of instrument, such as Exhibit 15, your reproduction of the original performance took place at the needle

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ination—
continued.

and groove contact point and, from then on, you merely carried and amplified those vibrations?—*A.* That is correct.

Q. Well now, doesn't exactly the same thing happen in the electrical gramophone?—*A.* Except for added transformation.

Q. In other words you have your original reproduction at the point of contact between the needle and the groove and from then on, although you change the mechanical vibrations into electrical impulses and back to mechanical vibrations, you carry and amplify your reproduction through your loudspeaker up to the point at which it becomes audible. Is that correct?—*A.* That is correct.

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HIS LORDSHIP: And the witness used the words "except in the case of an electrical phonograph there is a transformation of these vibrations." That is your own expression?—*A.* Yes.

Mr. FOX: Yes. I do not think there is any question between us on that, my Lord.

HIS LORDSHIP: Then, there is a carriage of these vibrations through the amplifier to the loud-speaker.

Mr. FOX: Yes. They are turned back at that point, my Lord. You will recall the electrical impulses are there turned back into mechanical vibrations and so emitted in order to create audible sound.

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HIS LORDSHIP: Yes.

Mr. FOX: You referred yesterday to a play-back apparatus, or, rather, to a recording and play-back apparatus which you used, I believe, as a synonym for the turn-tables used by Presto. Do you recall that?—*A.* Yes.

Q. And defined that as that piece of apparatus required to transform sound from the recorded disc into audible sounds. Do you recall that?—*A.* Yes.

Q. Would the turn-table on Exhibit 15 fall within that definition?—*A.* Yes.

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Q. And so would the turn-table on an electrical gramophone or phonograph?—*A.* Within the definition, yes.

Q. And you said that your company, the R.C.A. Victor, manufactures similar apparatus which sells under the name of transcription turn-tables. They are also turn-tables, aren't they?—*A.* Yes.

Q. They serve the same purpose?—*A.* With exceptions as to dimensions.

Q. Oh, yes. One can take a 16-inch record as well as a 10 and 12, and another turn-table may be limited to 12, another turn-table may be limited to 10 inch, or even smaller?—*A.* That is correct.

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Q. Does your company sell other parts besides these transcription turn-tables?—*A.* Yes.

Q. They sell loud-speakers?—*A.* Yes.

Q. They sell amplifiers?—*A.* Yes.

Q. In fact, they sell all parts necessary to construct radios phonographs or gramophones, do they not?—*A.* I will have to qualify and say that

they only sell parts for transcriptions, but phonographs are assembled—the parts are assembled as electrical phonographs.

Q. So that R.C.A. Victor would not sell me a part of a phonograph or a gramophone if I went to their warehouse?—*A.* Unless there was a replacement of one to them.

Q. They do not sell to dealers?—*A.* No.

HIS LORDSHIP: But transcription apparatus is sold, and parts?—*A.* Yes.

Mr. FOX: So you can buy a transcription turn-table as a part, but nothing else?—*A.* That is right.

Q. You told my friend that you could not hear a performance on Exhibit 15 if it were played in the A.B.C. studio; you could not hear that performance in the "Brass Rail," on account of the distance. Do you recall that?—*A.* Yes.

Mr. MANNING: He also said because it was shut off in the control room.

Mr. FOX: Oh, yes, yes, because it was enclosed within the walls of the studio and was too far away?—*A.* Yes.

Q. And that would also apply to an electrical gramophone or a phonograph if it had no other instrumentalities than those we exhibit on the sketch, Exhibit 24, if those are all contained within the studio?—*A.* Yes.

Q. And the only way it could be heard at that distance is by conducting the electrical impulses over wires to a loud-speaker.—*A.* Yes.

Q. There is one point I want to clear up, *Mr. Dowding*, that I was a little bit unclear about yesterday, and that was when you were talking about the electrical energies and the instrumentalities operated by the Defendant, A.B.C., you told us that there were two sources of electrical energy, and I think possibly your lordship was a little puzzled by this, too; I know I was at the time. You recall that statement?—*A.* Yes.

Q. You stated that one source of electrical energy was that taken from the Hydro Electric System and led into the instrumentalities by the normal method of plugging wires. Is that right?—*A.* Right.

Q. And you also said that there was another source of electrical energy generated by the magnetic coil in the playing head?—*A.* Yes.

Q. Now, the electrical energy that is generated at that point is that amount of electrical energy generated by the mechanical vibrations of the needle in the groove, is it not?—*A.* Through the use of the coil, yes.

Q. Yes, through the use of the coil. In other words——

HIS LORDSHIP: I want to get this. It is the electrical energy generated——

Mr. FOX: By the mechanical vibrations of the needle in the groove transmitted to and picked up by the magnetic coil?

THE WITNESS: Yes.

Q. You agree?—*A.* Yes.

Q. In other words, if I rap on the table, as I do now, those raps create mechanical vibrations and electrical energy. Is that correct?—*A.* Yes.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 12.
W. T. C.

Dowding.
Cross-examination—
continued.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Cross-examination—
continued.

Q. Which electrical energy is dissipated in the surrounding atmosphere—correct?—A. No.

Q. All right, then; goes out, then, into the surrounding atmosphere?—A. Not electrical energy, no.

Q. Purely mechanical vibrations, which are dissipated in the air—right?—A. Transmitted into the air.

Q. But in the instrumentalities in the A.B.C. control room, those mechanical vibrations caused by the needle knocking up against the indentations of the groove are picked up and transmuted into electrical energy by the magnetic coil?—A. Yes.

Q. And exactly the same thing happens in what you term a phonograph, does it not?—A. Yes.

Q. And what I term a gramophone?—A. Yes.

Q. So that—am I going too fast, your Lordship? My Lord, to me a gramophone and phonograph are identical; to the witness not. That is what I keep repeating, as you term it, a phonograph. So that, in the electrical reproducing instrument which you refer to as a phonograph, you have exactly the same phenomena and the same set of circumstances when you plug it in to a suitable source of electric supply, usually the Hydro? That is one source of electrical energy?—A. That is right.

Q. You also have the second type of electrical energy generated by the needle in the groove creating mechanical vibrations which are picked up and turned into electrical impulses by the magnetic coil in the playing head?—A. Not identical, no; they have differences.

Q. What are those differences?—A. A matter of different voltage; different amperage and wave form.

Q. Oh, certainly. One understands that: but I am talking of their general character. Mr. Dowding, isn't it a fact that the general type of electrical impulse picked up by the magnetic coil and the playing head is exactly the same in the A.B.C. Studio and in what you are pleased to call a phonograph?—A. Yes.

Q. No difference in it at all, is there in type? I am not talking about the quality. One may be stronger than the other. One may produce different sounds but, in type, it is exactly the same phenomenon that occurs in each case, isn't it?—A. It is electrical energy, yes.

Q. Did I stop you—finish your answer?—A. It is electrical energy. I qualified it for both.

Q. And both created in the same way?—A. Yes.

Q. These instrumentalities you found at the "Famous Door" the "Brass Rail," and the Westminster Hotel, the microphones, whose property were those, do you know?—A. I don't know.

Q. You don't know whose property any of those instrumentalities were?—A. Other than by the name on one or two.

Q. Yes, I understand. The microphones in each case were more or less a supplementary part of the equipment, were they not?—A. Yes.

Q. The instrumentalities that you saw there would have emitted music or sounds, pleasant or otherwise, from the central studio, if those microphones had not been placed in the circuit at all?—A. Yes.

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Mr. FOX : Mr. Dowding, just before we adjourned, we were discussing the question of the purchase of parts from the R.C.A. Victor Company and you told me that your company did not sell parts separately with the exception of transcription turn-tables. Is that correct?—A. To my knowledge, yes.

Q. Well, now, do you know whether it is or is not a fact that your company puts out a catalogue of parts for sale? I think it only fair that I should tell you that I am going to call evidence to contradict what you have told me, that your company does sell parts generally. Now, do you know of a catalogue?—A. I don't know of a catalogue, no.

Q. You don't know?—A. No.

HIS LORDSHIP : The witness did say that if you had a Victor console model and parts were required, they would supply them.

Mr. FOX : That is right, but I am advising the witness that I propose to call evidence to show that his company will sell parts, all kinds of parts, for radios and gramophones, to anybody who wants them.

HIS LORDSHIP : All right.

Mr. FOX : Now, when you build one of these gramophones, phonographs or radios for one of your customers or friends, you told me that it would not work until it was placed in a cabinet. Do you recall that?—A. Yes.

Q. Now, I want to give you an opportunity of correcting that by saying whether or not you meant that it would not work until it was assembled in a chassis, rather than placed in a cabinet?—A. That was not my real intention, no.

Q. I see. You still say that it won't work unless you put it in a cabinet?—A. That is correct.

Q. And you never have placed them in a cabinet when you have transferred them to your customer?—A. No.

Q. Therefore you have sold these instrumentalities that you construct in response to an order for a phonograph or a radio, without testing whether they will work or not?—A. They can be tested to work without the—

Q. Well, Mr. Dowding, aren't we being just perhaps a little precise about the wording? What is the difference between testing and working?—A. There is a difference.

Q. Well, what is it?—A. The difference being that the component parts can be broken down for testing purposes.

Q. Now, when you sell one of your customers a radio in response to his order, which is not mounted in a cabinet, as a matter of fact you receive sounds on it, don't you? You receive electrical impulses and turn that into sounds and make sure that it will pick up various stations and reproduce before you turn it over to your customer and friend in response to the money he pays you?—A. With a radio, yes.

Q. All right. What do you do with a phonograph? Don't you try it out before you give it to him?—A. The amplifying portions are tested. The turn-table may not necessarily be tested. The pick-up can be. The tone arm can be tested with the amplifier.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

—
No. 12.
W. T. C.
Dowding.
Cross-exam-
ination—
continued.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Cross-exam-
ination—
continued.

Q. Now, you don't know what these things that we refer to, or that you refer to as phonographs,—do you know of your own knowledge what they are called in the United States of America?—*A.* Let me get your question correctly.

Q. Are they called "phonographs" or something else in the United States?—*A.* The units bought for home, yes.

Q. Yes?—*A.* Yes.

Q. They are called phonographs?—*A.* Yes.

Q. And nothing else?—*A.* I would not say they were not called anything else.

Q. But to your knowledge?—*A.* To my knowledge.

Q. Do you know what they are called in England and Great Britain?—*A.* Yes.

Q. What?—*A.* Well, I will take a guess—I will say I don't know. I will guess. I would prefer to answer that question, "I don't know."

Q. You don't know?—*A.* No.

Q. Have you ever seen any literature of the Victor Company, H.M.V. Company of England?—*A.* No.

Q. You have never seen any. It is an affiliated company of your company, isn't it?—*A.* I know that.

Q. But you have never seen any of their advertising literature?—*A.* Yes, on their instruments.

Q. Well, have you never seen any literature describing what you refer to as phonographs?—*A.* No.

Q. You have never seen any of that?—*A.* No.

Q. No; everything else they put out, but that.

Mr. MANNING: He didn't say that.

The WITNESS: It is a large company.

Mr. FOX: All right. You have not seen any. Now, when you were talking about the "Famous Door" yesterday, you got to the point of the installation of the instrumentalities at the "Famous Door" and you told us there was an amplifier and six speakers, and one microphone, and that the microphone you expected was used in combination with the other instrumentalities to send words or music over the loud-speaker system. You were asked could you do that with any gramophone that you know of, and your answer was, "no." Now, I ask you, can you do that with any phonograph that you know of?—*A.* No.

Q. You cannot.

HIS LORDSHIP: That is, you could not use such a microphone which is supplementary to this equipment, on one of these outlets? You could not use it in the same way with an electrical phonograph?—*A.* No.

Mr. FOX: Mr. Dowding, your company places upon the market a radio combination; a radio and gramophone or phonograph, which is numbered in your company's nomenclature as No. Q.U.8, is it not?—*A.* I wouldn't know.

Q. You wouldn't know?—*A.* No.

Q. Would you recognise this pamphlet that I hand to you, entitled "R.C.A. Victor" Model Q.U.8, as a publication of your company?—*A.* As long as it has its name on, that is all I have to go by.

Q. I see. But you recognise this pamphlet, "Operating Instructions of R.C.A. Victor Instrument for Complete Home Entertainment" and on the fly-leaf "R.C.A. Victor Model Q.U.S." Would you recognise that as a publication of your company, or one of its associated companies?—

A. I would recognise it as such.

Q. Yes. And, turning to the latter publication, you find at page 26 a heading, "Public Address." Do you know that instrument, Mr. Dowding?—A. No, I do not.

Q. Have you ever seen the instrument put out by your corporation known as the Capehart gramophone and radio?—A. I have heard of them. I have never seen one.

Q. You have never seen it?—A. Not an instrument, no.

Q. Do you know anything about such an instrument?—A. All that I do know is that it exists.

Q. Do you know that it has furnished with it a microphone?—A. No, I do not.

HIS LORDSHIP: That is a combination radio and phonograph, is it, Mr. Fox?

Mr. FOX: Yes, my Lord. My friend, Mr. Sankey, prompts me, my Lord, to suggest to your Lordship that when I acknowledge the word "phonograph," I did so only out of deference to this witness and must be taken to have it read as synonymous with the word "gramophone."

HIS LORDSHIP: And that applies throughout this trial?

Mr. FOX: Yes, my Lord. I don't want to keep repeating it for the purposes of the record.

HIS LORDSHIP: No, quite so.

Mr. FOX: Now, Mr. Dowding, I don't want to question your veracity, but it seems to me extraordinary that you should tell me you have never seen an instrument of the type displayed in the two booklets I lay in front of you, and I want to give you every opportunity—

Mr. MANNING: May I see those?

HIS LORDSHIP: Mr. Fox, that was a combination radio and phonograph or gramophone, with a loud-speaker attachment?

Mr. FOX: Oh, of course, my Lord, and a microphone, having a public address system as part of the instrumentalities contained in the cabinet.

Mr. MANNING: Did my friend say this describes it as a gramophone?

Mr. FOX: No, I said a radio-phonograph.

Mr. MANNING: Yes. I see. All right.

Mr. FOX: Did you acknowledge those two documents as being publications of your company?—A. They have the "R.C.A." name on them, that is as far as I can qualify.

Q. I tender these as exhibits, my Lord.

HIS LORDSHIP: I am just wondering if they are proven at this time. Why not mark them for identification and prove them properly later?

Mr. FOX: Very well, my Lord.

HIS LORDSHIP: You may mark them as Exhibit "B" at the moment.

In the
Supreme
Court of
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Plaintiff's
Evidence.

No. 12.
W. T. C.

Dowding.
Cross-exam-
ination—
continued.

In the
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Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Cross-exami-
nation—
continued.

Two pamphlets displaying R.C.A. Victor radio-phonograph
Q.U.8, marked Exhibit " B " for identification only.

Mr. MANNING : I take it, my Lord, my friend is going to lead evidence
to show that this instrumentality that he referred to is in common
merchandising practice.

HIS LORDSHIP : Well, I am not allowing them to be marked as
exhibits now. I am allowing them to be marked for identification only.

Pamphlet without cover : Exhibit " A. "

Pamphlet with a cover : Exhibit " B. "

HIS LORDSHIP : That perhaps is the better way to differentiate 10
them.

Mr. FOX : Would it come as a surprise to you, Mr. Dowding, if I
told you that these two documents were contained in a drawer of a cabinet
containing the instrumentalities shown in these documents marked as
Exhibits " A " and " B " for identification, which was sold by the Robert
Simpson Company Limited in Toronto in the year 1940 or 1941 to a person
living in the City of St. Catharines, Ontario ?—A. No.

Q. It would not surprise you ?—A. No.

Q. And it would not surprise you if I told you that, as part of the
equipment of this radio, which we will call a radio-phonograph in deference 20
to you, that, as part of this instrument, there was also contained means for
recording or cutting your own records ?—A. Would you ask that question
again, please ?

Q. I say, would it surprise you to learn that, as part of the instru-
mentalities that went along with the machine sold by the Simpson Company
at that time, there was also included as an integral part of it, means for
making records ?—A. It would not surprise me, no.

Q. In fact, you have seen such things, haven't you ?—A. In that
instrument ?

Q. No, but you have seen similar instruments ?—A. No. 30

Q. You have not ?—A. No.

Q. As part of the instrumentalities for cutting records on a machine
of this type, you would naturally assume that a gramophone would be
present, would you not ?—A. Yes.

Q. You would also assume, would you not, that a gramophone could
be used to turn the instrumentalities contained in the instrument and the
loud-speakers into what might generally be termed a public address
system ?—A. That would have to require a further definition to qualify
the name, as I understand it.

Q. Very well. Let me put it this way. On the cabinet of the instru- 40
ment illustrated in Exhibits " A " and " B " for identification there is a
knob marked " Public Address. " You are familiar, I take it, with
instruments in which a microphone is attached to one of these cabinets so
that you can speak into the microphone and your voice will go out the
loud-speakers contained in the cabinet ?—A. I have not seen one, but I
would say it would be possible.

Q. And if I tell you that such a thing is illustrated in these booklets, would you please look and find it? Take Exhibit "B." I show you on page 23 figure No. 12, which is indicated by the word "microphone." Is that an ordinary microphone such as is used and commonly employed?—

A. To my knowledge it is not uncommon.

Q. It is used in radio stations?—A. Yes.

Q. Is it of the general type that you find at the "Famous Door" and the "Brass Rail"?—A. No.

10 Q. What is the difference?—A. I would have to say that the exact difference—I know the pictured microphone; I do not know how the exact one in the "Famous Door" operates. There is a difference, mainly in their quality.

Q. Oh, yes, in quality, but in character?—A. In character—

Q. In character they are substantially the same thing?—A. Yes.

20 Q. Now, when you turn to page 26 under the heading "Public Address," you read, "The microphone may be used for a P.A. reproduction." "P.A." meaning, I suppose, "Public Address," "with the master controls set to show 'Public Address' included in the indicator window in the master control panel." That would indicate that you can turn this gramophone instrument into a public address system and use the microphone in exactly the same manner that the microphone at the "Famous Door" and the "Brass Rail," does it not?—A. Not that instrument, no.

Q. Oh, well, what is the difference? I say that you can use this instrument in the same way that you use the microphone at the "Famous Door" and the "Brass Rail," in order to send sound out through the loud-speakers?—A. As far as generalities are concerned, I would have to answer "yes."

30 Q. Yes. I am not trying to be specific and tie you down to little things, Mr. Dowding. I want the general character of this thing.

HIS LORDSHIP: The general working of the two systems would be substantially identical?—A. Yes, my Lord.

Mr. FOX: Now, in other words, the microphone of the type illustrated on page 23 of Exhibit "B" for identification, can come with any length of cable attached to it that may be desired, can it not?—A. Yes.

Q. So that, assuming the existence of an instrument such as depicted in this brochure I have in my hand, I might take that microphone and have it in this Courtroom, but the radio-gramophone, phonograph, might be outside the door, down the hall, might it not?—A. Yes.

40 Q. And I could speak in here and my voice would be emitted at whatever place the loud-speaker was placed?—A. Yes.

Q. And that could continue to the point where I could have it across the road, in Eaton's store?—A. Possibly.

Q. Yes. Now, in the instruments known to you as phonographs, and to me as gramophones, is it usual to add additional loud-speakers?—A. No.

Q. Is it done at all?—A. Yes.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

—
No. 12.

W. T. C.

Dowding.

Cross-exam-

ination—

continued.

In the
Supreme
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Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Cross-exam-
ination—
continued.

Q. Again referring to Exhibits "A" and "B" if you turn to page 28 of Exhibit "B," there appears the heading "Auxiliary speakers," and the letterpress goes on to say, "R.C.A. Auxiliary speakers can be obtained from your dealer." I would ask you to note that particularly?—A. Yes.

HIS LORDSHIP: May be obtained from—

Mr. FOX: "May be obtained from your dealer." That must be of the permanent magnetic type, and then is set out certain details and other terminals for the connection of the external speaker, which are provided on the back of the instrument. That does not strike you as an unusual statement, does it?—A. No. 10

Q. No. In fact it is fairly usual with this type of instrument, isn't it?—A. With that type of instrument.

Q. By the emphasis on "that," you mean the Q.U.8 type of instrument?—A. Yes.

Q. Or do you mean in general the expensive type of instrument?—A. The terms are synonymous.

Q. The Q.U.8 is an expensive instrument, isn't it?—A. That is right.

Q. And when you get into a reasonably expensive radio record-playing combination, you expect to find additional terminals on which you can connect additional loud-speakers, do you not?—A. I would not expect to. 20

Q. Well, it is not unusual that you would find them?—A. No.

Q. And if you connect an additional loud-speaker, where do you usually put it?—A. The speaker itself, that is?

Q. Yes?—A. That would depend on circumstances.

Q. Depend on where you wanted it, wouldn't it?—A. That is correct.

Q. The customary thing, and I am sure you have built some of these for your customers—however, we will check that in a moment.

Mr. MANNING: He doesn't say he does manufacturing.

Mr. FOX: Oh, he has already qualified himself as building these things for his own customers. 30

HIS LORDSHIP: As a side-line.

The WITNESS: But not for the R.C.A.

Mr. FOX: No, no, I quite understand. When you build one of these, let us say for a friend, it will be one of your own side-line customers; did you ever put on additional terminals for loud-speakers?—A. No.

Q. You never have?—A. No.

Q. Have you ever seen—let us take first your own place of abode, do you have a radio or a phonograph?—A. Yes.

Q. And do you have only the loud-speaker in the cabinet, or do you have an additional one or more?—A. I have one fastened in the cabinet. 40

Q. Fastened in the cabinet?—A. That is right.

Q. Is it a radio or a combination?—A. A combination.

Q. It is a record reproducing instrument as well?—A. Yes.

Q. And you place that in one room?—A. Yes.

Q. And where do you place the loud-speaker?—A. In the same room.

Q. In the same room, but in a different location?—A. That is right.

- Q. Do you mind telling me how far apart the instrumentalities are, the reproducing instrumentalities on the one hand and the loud-speaker on the other?—A. Not at all. Approximately 25 feet.
- Q. There is no loud-speaker operating within the cabinet?—A. No.
- Q. Only the one that you have 25 feet away?—A. Yes.
- Q. So that, as a matter of fact, the only difference between that instrument and the one in the A.B.C. studio, is the additional amplifier between the instrument and the loud-speaker, isn't it?—A. Yes.
- 10 Q. Now, in any of your friends' or customers' houses, have you ever seen these instruments with loud-speakers leading off to another room?—A. Not personally, no.
- Q. You have never seen one?—A. No.
- Q. It could, of course, be perfectly possible and a feasible thing to be done?—A. Yes.
- Q. Let us take, not necessarily the Q.U.8, but any ordinary radio, or any ordinary combination instrument of which we have been talking, which has additional terminals. You could lead a loud-speaker or a number of loud-speakers off to other locations in the same house, could you not?—A. As stated, yes.
- 20 Q. You could also lead them off to the house next door, couldn't you?—A. Yes.
- Q. In fact, you could lead them a mile away, couldn't you?—A. No.
- Q. Why not?—A. Because very often there has to be introduced further equipment to carry the electrical impulses a greater distance.
- Q. In other words, you say that at some point along the line, the electrical impulses gradually die out so that you do not get audible sound?—A. Yes.
- Q. And let us say that to next door, your electrical impulses will carry so that they will turn into mechanical vibrations capable of being
- 30 heard, but a mile away they dwindle in intensity?—A. That is correct.
- Q. And therefore you put an amplifier in to boost them up again?—A. That is correct.
- Q. They are the same electrical impulses, are they not?—A. That would have to require a further definition.
- Q. All right. You start out in your first instrumentality and we will assume that it is a phonograph, gramophone, and I am using both terms, and that certain mechanical vibrations are set up by the needle and the record which, in the playing head, are transmuted into electrical energy, which are carried over the wire into the loud-speaker,—those are the
- 40 electrical impulses I am talking about—and when you have your loud-speaker next door, those electrical impulses will be transmuted in the loud-speaker into mechanical vibrations which will produce waves in the air and sound from the loud-speaker?—A. Correct.
- Q. But that, in leading that loud-speaker a mile away, those same electrical impulses have dwindled in intensity, so that they will not set up sufficient mechanical vibrations to create audible sound? Is that correct?—A. Roughly speaking, correct.

In the
Supreme
Court of
Ontario.

Plaintiff's
Evidence.

No. 12
W. T. C.

Dowding.
Cross-examination—
continued.

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Plaintiff's
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No. 12.
W. T. C.
Dowding.
Cross-exam-
ination—
continued.

HIS LORDSHIP : Or to activate the loud-speaker.

Mr. FOX : Either way, my Lord ; to activate the loud-speaker merely means to change the electrical impulses into mechanical vibrations, as we heard yesterday from this witness. And therefore, as I say, you put an amplifier on to boost up those electrical impulses and make them stronger. Correct ?—A. Correct.

Q. They are the same electrical impulses, aren't they ? Well can they be anything else ?

HIS LORDSHIP : They are the same electrical impulses amplified.

Mr. FOX : That would be better, my Lord.

The WITNESS : Yes, that would be better.

Mr. FOX : Well, thank you.

HIS LORDSHIP : The witness accepts the premise I hold out to him ; they are the same impulses only amplified.

Mr. MANNING : And I think it makes no difference for the purposes of this action.

Mr. FOX : Well, this action may turn on refinements, may it not ?

Mr. MANNING : Well, I am not worrying.

Mr. FOX : Do you know the Viking Radio, put out by the T. Eaton Company ?—A. I know of it.

Q. Have you ever seen it ?—A. No.

Q. Does your company put on the market what is commonly called a record player ?—A. Yes.

Q. Would you describe one of those to His Lordship ?—A. First of all, they could be of two general types ; one unit containing all the necessary equipment to reproduce sound from a disc so that it can be heard. The second would be equipment which could be attached to a home radio, a phonograph combination.

HIS LORDSHIP : Did you say a home radio ?—A. A home radio.

Mr. FOX : It is, I believe, Mr. Dowding, quite a customary thing for a person owning a radio receiving set only, to which there are not attached any instrumentalities for reproducing sound from records, it is quite usual for such a person to go to a store and purchase what is called a record player, on which you can place your records, that is, the needle and the head and the tone arm, the suspension arm and so on, and it is connected by a pair of wires which you plug into your radio receiving set and then you turn down your radio receiving impulses control but, using the loud-speaker in the radio receiving set, you turn the whole thing into a gramophone or a phonograph ?—A. Yes.

Q. Yes. In other words, referring to our sketch Exhibit No. 24, by using the instrumentalities that I have just mentioned, you have the motor, 1, the turn-table, 2, the spindle, 2A, the needle, 3, the head, 4, the suspension arm, 5, the wires, 6, the amplifier, 7, and the loud-speaker, 8, is it not, my Lord ?

HIS LORDSHIP : Yes ?—A. Yes.

Mr. FOX : You have all those in these instrumentalities ?—A. Yes.

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Q. And you may, for instance, have your record player in one room and your radio receiving set, the loud-speaker, in the next room, may you not?—*A.* Yes.

HIS LORDSHIP : So that you employ all the parts that you employ in Exhibit No. 24, except the second amplifier?—*A.* Yes.

Q. And if you went a great enough distance away, in order to reproduce the sound from that instrument you would have to have a second amplifier?—*A.* Yes, my Lord.

Q. To increase the volume of the vibrations?—*A.* Yes, my Lord.

10 **Mr. FOX :** You told my friend yesterday, Mr. Dowding, in referring to the instrumentalities that you found in the "Town and Country Room" at the Westminster Hotel, and I think you were referring also to the "Famous Door" and the "Brass Rail" that in the loud-speaker electromagnetic coil it moves back and forward through a central point with the result of moving the diaphragm which transmits the sound to the air. That is exactly the same as happens in the loud-speaker of the radio receiving set, the phonograph, gramophone and all of that?—*A.* Yes.

HIS LORDSHIP : And the telephone receiver?—*A.* Yes, my Lord.

20 *Q.* That is a coil, is it a magnetic coil?—*A.* It is a coil moving in a magnetic field.

Q. And that increases the vibrations?—*A.* Produces an electrical current, my Lord, in the coil.

Q. Which does what?—*A.* In turn moves the diaphragm to make the sound audible.

Q. It moves the diaphragm?—*A.* Yes, my Lord.

Q. That is that material?—*A.* Which is cone-shaped.

Q. And that increases the vibration and volume so that they can be heard?—*A.* Yes, my Lord.

Q. Oh, yes.

30 **Mr. FOX :** That is all, my Lord.

Re-examination by Mr. MANNING :

HIS LORDSHIP : Any re-examination?

Mr. MANNING : Very short, my Lord, really only two points which are merely out of curiosity. There was some discussion at the end of the evidence yesterday, Mr. Dowding, and I think I didn't understand you. Perhaps it may not have been conclusive, as to the difference between the so-called transcription of the pattern at $33\frac{1}{3}$ revolutions per minute and what is sold to the public now as the long-playing record, also operating at $33\frac{1}{3}$ r.p.m. Now would you tell us, or do you know when the so-called
40 long-playing record first became available for public use?—*A.* Roughly two to three years ago?

Q. Well, then, would it be proper to say that it was not available at all prior to 1947?—*A.* I wouldn't know exactly. I would say, roughly, no.

Q. All right. Now, there was one other matter.

Mr. FOX : My Lord, with respect, this brings up a totally new point.

Mr. MANNING : I think that is exactly what was brought out.

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Court of
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Plaintiff's
Evidence.

No. 12.
W. T. C.

Dowding.
Cross-exam-
ination—
continued.

Re-exam-
ination.

In the
Supreme
Court of
Ontario.
—
Plaintiff's
Evidence.
—
No. 12.
W. T. C.
Dowding.
Re-exam-
ination—
continued.

Mr. FOX : Now, there is a question here as to a date in which, to my knowledge, the witness is clearly in error.

HIS LORDSHIP : I think, Mr. Fox, what you were dealing with was the method of making one of these long-playing records.

Mr. FOX : My Lord, I do not want to restrict my friend at all. I am sure he would be equally agreeable to me. I want all the evidence brought out, so long as your Lordship will permit me to cross-examine.

HIS LORDSHIP : Strictly speaking, your point being this is not re-examination.

Mr. FOX : It does not arise. 10

HIS LORDSHIP : Does not arise directly out of the cross-examination. No, I do not think so, dealing with it strictly, so I reserve to Mr. Fox the right to cross-examine this man.

Mr. MANNING : I won't object. Then, there was another thing I took up. You said this morning, and I don't know that I have got it exactly—I just made a note of it, but you said something like this, if I followed you :—that the sound was reproduced at the needle of the—call it a gramophone or a phonograph or a radio-phonograph combination or a turn-table, or whatever you like—and then you followed through some various steps and it was reproduced in the loud-speaker. Now, I am 20 going—

Mr. FOX : The amplifier.

Mr. MANNING : Did he say the amplifier ? Well, I want to ask you this. Are there any people who can identify and follow and literally hear the sound without going beyond the operation of a needle at the head ?—*A.* You mean can you hear the needle ?

Q. Well, are there any people who do hear it ? Are there any people who hear that ?—*A.* Yes.

HIS LORDSHIP : I don't follow that. Are there any people who hear what ? 30

Mr. MANNING : Who can hear the sound produced on an instrument like this, even though the loud-speaker is not on ?—*A.* That is correct, yes.

Q. And how does that come about ?

HIS LORDSHIP : Well, I suppose one can hear very faint vibrations on an ordinary record-player, without it being attached to the radio ?—*A.* Yes.

Q. But very faintly ?—*A.* Yes.

Mr. MANNING : But I am not suggesting it would be a very practical sound. I don't want any other questions, my Lord.

HIS LORDSHIP : Well, I think, if I may introduce a personal 40 experience, I think I have seen record players before being attached to loud-speakers and radios, which would give you faint vibrations that you could distinguish ?—*A.* You can distinguish them very faintly.

Q. You have to have a pretty good sense of hearing ?—*A.* Yes, my Lord.

Q. And those are amplified in the amplifier and radio loud-speaker. Is that what you mean ?—*A.* Yes, sir.

HIS LORDSHIP : Is that what you mean ?

Mr. MANNING : Yes, that is what I mean. Just a matter of technical accuracy, that is all.

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Re-Cross-examined by Mr. FOX:

HIS LORDSHIP : Now, you have some further cross-examination ?

Mr. FOX : Very short, my Lord.

Q. Mr. Dowding, you told my friend the long-playing records only came into existence, that is, for public consumption, about three years ago, and that they were unobtainable, say, before 1947 ?—A. I will have to generalise. I am not exact on dates.

Q. What speed do your company's records operate at, 78 r.p.m. 33½, or 45 ?—A. All three.

Q. Do you know of long-playing records placed on the market in the United States and Canada by the Columbia people at 33½ revolutions per minute, or thereabouts, at least as early as 1935 ?—A. I don't know of them, no.

Q. You have never heard of them ?—A. No.

Q. But you are not prepared to say they were not on the market ?—A. Well, if I don't know, I cannot say they were not on the market.

Q. Referring again just a moment, just to Exhibit " A " and " B " for identification, what is the name of the person in your company who would be capable of identifying those pamphlets, so that we may subpoena him to come here ?

HIS LORDSHIP : The pamphlets " A " and " B " ?

Mr. FOX : Yes, my Lord ?—A. I presume you mean the title, or his personal name ?

Mr. FOX : His name ?—A. For sure, I could not name one man. I could give one name who could possibly refer to the proper man.

Q. Could you find out for us and tell us after lunch ?—A. Yes.

Q. Who is the person in your organisation who could speak with knowledge as to those pamphlets, as to whether they were or were not published by your company ?—A. I could find out.

Q. In Toronto, of course ?—A. I would hesitate to say that. Perhaps a man in Toronto might. It would be difficult to be found.

Q. Now, Mr. Dowding, the machine was purchased in Toronto and at least one of your officials discussed the purchase of it, so I am satisfied that one of your officials in Toronto can speak as to this. I am sure your company does not turn out instruments costing over \$2,000 without knowing what it is all about ?—A. I agree with you.

Q. Let us have the name after lunch, will you please ?—A. I will try, yes.

HIS LORDSHIP : Well, it is almost 1.00 o'clock now. Have you a short witness ?

Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Re-Cross-
examina-
tion.

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Plaintiff's
Evidence.

No. 12.
W. T. C.
Dowding.
Re-Cross-
examina-
tion
continued.

Mr. MANNING: No, my Lord. I have two more witnesses, both of whom will engage my friend's attention for some little time.

Mr. MANNING: My Lord, my friend and I have arranged the next witness I am going to call is to discuss this Q.U.8 and it won't be necessary to recall Mr. Dowding, and it has been suggested that I conclude first with Mr. Raymond.

HIS LORDSHIP: Very well. Are we still going to have that demonstration, Mr. Manning?

Mr. MANNING: I was just going to try it and then there were a couple of questions about invoices.

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No. 11B.
M. R.
Raymond.
Re-exam-
ination.

No. 11B.
Evidence of M. R. Raymond.

MURRAY R. RAYMOND, recalled.

Re-examined by Mr. MANNING:

Q. You have here now, Mr. Raymond, some further transcriptions?—

A. Yes.

Q. And what are they. Will you describe them to us so that we know what they are?—A. These two are 16-inch Muzak records.

Q. Those were the type that we had tried to play on the instrument Exhibit 15 and that we could not get them to go?—A. They were two 20 which?

Q. And they are $33\frac{1}{3}$ r.p.m.?—A. $33\frac{1}{3}$ r.p.m.

Q. Unless my friend wants them I do not see any point in making them exhibits. Then, what have you next?—A. These two are 12-inch Muzak $33\frac{1}{3}$ records.

Q. Now, it is not necessary to load up the record. You have two 12-inch. Now, what have you besides that? You don't need to open it—if you can tell me what it is?—A. Well this is a 12-inch Columbia $33\frac{1}{3}$.

Q. Is it one of the so-called long-playing records?—A. This is long-playing.

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Q. Of the micro-groove type?—A. Yes.

HIS LORDSHIP: Well, every one that has a small number of revolutions per minute is a long-playing record, Mr. Raymond?—A. I believe so.

Q. Would I be correct in saying that?—A. You would be correct in saying that, yes.

Mr. MANNING: Well, perhaps I might add, are the Muzak recordings micro-groove?—A. Yes, I believe they would be known as that, although as far as I know, micro-groove is a trade-name.

Q. No. This need not go on the record, my Lord, but I think my friend had elucidated from the previous witness the information that the number of grooves per lineal inch of radius in a micro-groove record was much greater than the number of grooves in one of the $33\frac{1}{3}$ r.p.m. recordings. Is that right ?

HIS LORDSHIP : I think he indicated that a long-playing record had much narrower or shallower grooves.

Mr. FOX : I don't think I made any distinction, my Lord, between the different character of the grooves in a $33\frac{1}{3}$ r.p.m. record and a $33\frac{1}{3}$ r.p.m. micro-groove record. I do not think I brought out anything concerning that. There is a distinction in the size of the groove and the numbers per inch.

HIS LORDSHIP : I think what you brought out, Mr. Fox, from the last witness was that one of the characteristics of a long-playing record was that it had smaller grooves, that is, narrower.

Mr. FOX : Narrower, in order that there should be more of the grooves per inch of playing surface.

HIS LORDSHIP : Yes, that is the only point.

Mr. FOX : Yes, quite so ; but also it was elucidated, if I recollect correctly what the witness, Dowding, said, that the transcriptions that are used on this Muzak system are deeper and wider cut.

HIS LORDSHIP : I do not seem to recall that.

Mr. MANNING : I may be faulty in my memory.

HIS LORDSHIP : Are you able to compare the cutting of the grooves on these Muzak records with the cutting of the grooves on ordinary records used on phonographs or gramophones ?—A. Well, I believe they are finer, but the terminology, micro-groove, as I understand it, is just a trade name with the Columbia people, and which they use.

Mr. FOX : If I may just, to freshen up on this point, the witness, Dowding, in talking of what he called a disc record, which your Lordship will remember he characterised as a recording on the ordinary records, then made this statement, which I have in my notes, " Transcriptions of " Muzak are made by following the same method and using the same " grooves." Your Lordship may remember that statement in the witness's evidence in chief.

HIS LORDSHIP : Yes ; that they follow the same method.

Mr. FOX : Following the same method and using the same grooves. I took particular note of that, my Lord ; and, being satisfied with the answer, I did not cross-examine on it.

Mr. MANNING : Well, perhaps we had better have both these—one specimen of the 10-inch record $33\frac{1}{3}$ Muzak recording, and the specimen of the Columbia, then.

Mr. FOX : The 12-inch record.

Mr. MANNING : I am sorry, 12-inch.

HIS LORDSHIP : Then, you are filing as Exhibit No. 25, two records or one ?

Mr. MANNING : As Exhibit No. 25 the Muzak recording, 12-inch, $33\frac{1}{3}$ r.p.m.

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Evidence.

— — —
No. 11B.
M. R.
Raymond.
Re-exam-
ination—
continued.

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Evidence.

No. 11B.
M. R.
Raymond.
Re-exam-
ination—
continued.

EXHIBIT No. 25 : Muzak recording, 12-inch $33\frac{1}{3}$ r.p.m.

HIS LORDSHIP : And the Columbia will be Exhibit No. 26.

EXHIBIT No. 26 : Columbia recording, long-playing, micro-groove record.

Mr. MANNING : Called the long-playing micro-groove, also a 12-inch, is it ?

The WITNESS : That is also a 12-inch, Mr. Manning, yes.

HIS LORDSHIP : And the witness says he thinks "micro-groove" is a trade appellation.

Mr. MANNING : Yes. Well, that may be proved to be wrong. Now, 10 will either one of those records, Exhibit 25 or Exhibit 26, reproduce on this instrument, Exhibit 15 ?—A. If that instrument will travel at $33\frac{1}{3}$ r.p.m.

Q. Yes, but will it travel at $33\frac{1}{3}$ r.p.m. ? Would you like to try it ?—A. We will try it, yes.

Q. Which would you rather take, the micro-groove, Exhibit No. 26, or the Muzak record, Exhibit 25 ?—A. Makes no difference ; whichever you prefer yourself.

Mr. FOX : I should like to point out to your Lordship that it will spoil the exhibit to some extent. It won't be the same exhibit as it is now. I am not telling my friend anything he doesn't know, but different needles 20 are used with these long-playing records than are used with the ordinary records, and, of course, the speed also is a factor on the content of the groove, but we have no objection to it being tried.

HIS LORDSHIP : Then, the Court of Appeal might not get as sweet music as the trial Court.

Mr. FOX : Yes. I mean, this is my friend's experiment. You go ahead.

HIS LORDSHIP : Have you any other needle ?

Mr. MANNING : I have no other needle. I will try and find out. I am informed there is only one type of needle which works on this machine, 30 or is prepared for this machine.

HIS LORDSHIP : Well, do you wish to make the experiment being forewarned of what may happen ?

Mr. MANNING : I am content, my Lord, if my friend will put it this way and I think in substance that is what he has done now, that we may take it as done. There is no reason to—

Mr. FOX : Oh, no, I won't say that.

Mr. MANNING : All right. Put it on.

HIS LORDSHIP : But the witness has said it could be played on Exhibit 15 if that turn-table could be turned at the rate of $33\frac{1}{3}$ revolutions 40 per minute, and it is not known at what rate that turns.

Mr. MANNING : It is understood to be 78 revolutions per minute, my Lord.

Mr. FOX : It could be slowed down.

HIS LORDSHIP : Well, what is the point, in view of what the witness has said, in making that experiment ?

Mr. MANNING : Well, I am anticipating, my Lord, with the greatest respect, when my friend's turn comes that he will endeavour to establish the contrary by cross-examination. But it is material for you to know that at the date for the interpretation of the section we are dealing with, that there was in common use for reproducing sounds in the hands of the public only material which operated at 78 r.p.m.

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HIS LORDSHIP : And you will argue, therefore, that anything that operates at a different rate from that prevailing at the time of the enactment cannot be covered by the enactment.

No. 11B.
M. R.

Raymond.
Re-exam-
ination—
continued.

10 Mr. MANNING : Not necessarily so, my Lord, but it may very well be so, and there are certain reasons for saying that, but I am merely saying I am anticipating what the witnesses are going to endeavour to prove and what would, I think, be proper for me to say at this time.

HIS LORDSHIP : Well, why not deal with that when you come to it and deal with it when you come to reply ? I am not preventing you from doing it, or ruling it out.

Mr. MANNING : Oh, no, I understand.

HIS LORDSHIP : But perhaps you are crossing a bridge you may never have to cross.

20 Mr. MANNING : That is true. All right. I do not think any profit is derived from spoiling the record, anyway.

Q. Now, Mr. Raymond, I had asked if you would produce invoices to you of the various types of equipment which you used in the control room on Bay Street and elsewhere, in your company. Have you been able to locate the invoices ?—A. We brought some down, but I believe they were all of recent date. I didn't understand at the time that they should be dated prior to this case coming up.

30 Q. Well, what I am concerned to find is the invoices particularly covering the purchases by you of turn-tables in the control-room. They have been searched for ?—A. They have been searched for and, up to date, we have not been able to discover them.

Q. How does that come about ?—A. Well, at the time they were purchased our head office was in Montreal and the purchasing was done there. Since that time, the Montreal operation has been sold and the head office moved to Toronto. In the moving, certain documents and records have—I should not say been lost, but they are just not as readily available as if it had been in Toronto all the time. We endeavoured to find those.

Q. How long ago since they were purchased ?—A. That was about four years ago.

40 Q. You will recall that I asked you about the purchases on the examination for discovery ?—A. That is right.

Q. And they have not been found in the interval of time since then ?—A. No, we have not found them yet.

HIS LORDSHIP : Well, that may lay the ground work for your introducing secondary evidence.

Mr. MANNING : Yes, my Lord. Do you know what was ordered when they were ordered ?—A. No, I did not have the ordering of those.

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M. R.
Raymond.
Re-exam-
ination—
continued.

Q. Did you see the documents which covered the invoices of those turn-tables?—*A.* No. That was all done through Montreal, our head office.

Q. Have you seen any correspondence relating to them?—*A.* None whatsoever, no.

Q. Have you seen any catalogues of the Presto Company, exhibiting turn-tables such as you used in the control-room?—*A.* I believe I have.

Q. Have you seen those particular instruments in the catalogues?—*A.* I would not say that I have. It will be some time ago if I had seen them.

Q. Do you know what they were described as in those catalogues?—*A.* I believe they were called turn-tables.

Q. You believe they were called turn-tables?—*A.* Yes.

Q. Were there any other descriptive adjectives attached to them?—*A.* That I could not say, Mr. Manning.

Q. My friend has been good enough to show me a catalogue of the Presto Company. Is this what you have in mind, Mr. Raymond?—*A.* Yes, I believe I have seen this before; not this identical catalogue.

Q. You have seen an identical catalogue of the Presto Company and is there, in that catalogue, a reproduction of the kind of turn-table you have in your control room?—*A.* Yes, there is.

Q. At what page of the catalogue?—*A.* Now, just a moment, page 24.

Q. And is this the description, then, of the type number of the instrumentalities you have in the control room?—*A.* I believe that is the type.

Q. I wonder, my Lord, if we might put in, and perhaps my friend would agree to a photostatic copy of that page instead of the whole catalogue. There is no point in cluttering up the record with a great deal of unnecessary material.

Mr. FOX: Tear the page out, itself.

Mr. MANNING: Well, if that is agreeable to you.

Mr. FOX: No objection. The manufacturers always supply them.

Mr. MANNING: Well, if that is agreeable, all right.

Mr. FOX: Yes, tear the page out.

HIS LORDSHIP: And the next one, on page 23.

Mr. MANNING: The part that is to be read, yes, my Lord.

Mr. FOX: What page is that?

Mr. MANNING: That is page 24, and it is type 62, and letter A, "Transcription turn-table." There is on the other side, on page 23, a different number, "Transcription turn-table," but I take it that the one you have is 62A type?—*A.* That is right.

EXHIBIT No. 27: Page of catalogue referring to Type 62A turn-table.

Q. Then, perhaps I might cross out what is on the opposite side of the page. It is not referable, my Lord.

HIS LORDSHIP: Very well.

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Mr. MANNING : Then, you have not told me anything of the invoices of the other equipment used, for example, the amplifiers and the loud-speakers ?—*A.* Mr. Sankey—

10 Mr. SANKEY : Perhaps I could assist the Court in saying that we have here two Stromberg-Carlson invoices and one from the Copper Wire Products Limited. The Stromberg-Carlson ones are dated in October of 1950 and December of 1950, and the Copper Wire Products, in August, 1950. Now, my Lord, the writ was issued in April of 1949, so they would hardly be relevant. The rights of the parties were crystallised then, but if they are of any use to my friend, even though irrelevant, he is welcome to them.

Mr. MANNING : Well, I don't know that they would necessarily remain relevant. The witness says they are the same type of thing they bought before. I have been anxious to get invoices to relate to specific equipment used in the premises in this action.

Q. Can you tell me whether invoices covering that equipment are available in Toronto or not available ?—*A.* Yes. The only invoices which we have not been able to obtain are the ones for the Presto turn-tables.

Q. Now, I do want to have those invoices relating to that equipment.

20 HIS LORDSHIP : That is, the turn-tables ?

Mr. MANNING : The turn-tables. We cannot get those covered by Exhibit No. 27, but the invoices for the amplifiers, loud-speakers, and microphones, have you got them, and the switching equipment ? I suppose that is all the separate equipment there is—I don't know ?—*A.* Yes, that is all there is.

30 *Q.* But if you have any invoices of that sort, I thought you would have them here ?—*A.* Well, we will do our best to get those. I was under the impression that we were simply to produce the invoices for speakers or amplifiers and that they would be all that would be required. I understand differently now.

Q. Yes. My friend says those are irrelevant. I want the ones that are relevant. If we can take it that what appears on these invoices is identical with what appeared on the invoices that were furnished with respect to the equipment you have there, and it can be agreed that is so, I am content to use these without putting the witness to the trouble of getting the proper invoices.

Mr. SANKEY : May we have just exactly what my friend wants. He wants the invoices covering all the equipment in the studio on the 14th of April, 1949, when the writ was issued ?

40 Mr. MANNING : As far as you can get it. For instance, there are three types of equipment spoken of on these invoices produced. Now there are a certain number of speakers there, from the Copper Wire Products. There are a certain number of amplifiers, giving the serial number, from Stromberg-Carlson, and there are a certain number of microphones from the Stromberg-Carlson Company.

HIS LORDSHIP : Isn't that only for the purpose of establishing the point that these parts are bought separately from different companies ?

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Raymond.
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continued.

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nation—
continued.

Re-Cross-
examina-
tion.

Mr. MANNING : Yes, my Lord.

HIS LORDSHIP : Well, cannot that be admitted for the purposes of the trial ?

Mr. SANKEY : Well, that has already been admitted.

Mr. MANNING : Well, if that is understood, that is all I want, of course.

HIS LORDSHIP : It may unduly prolong the trial if you try to be too perfect. May I ask you, these are these transcription turn-tables, such as shown in Exhibit No. 27, similar to the ones used in the radio broadcasting stations ?—*A.* I believe they are, your Lordship. yes. 10

Q. Mr. Fox, have you any cross-examination ?

Mr. FOX : Yes, my Lord.

Re-cross-examined by Mr. Fox :

Q. You produced, Mr. Raymond, several long-playing records, 33 $\frac{1}{3}$ r.p.m. Do you, in your studio, use any other speed of turn-table and record ?—*A.* Yes. We use 78 r.p.m. speeds, and also records suitable for that speed made by R. C. A. Victor and Columbia and others.

Q. In other words, the ordinary commercial record which you purchase in a shop ?—*A.* That is right.

Q. And is it correct that you also use the ordinary commercial record that you purchase in a shop, of 33 $\frac{1}{3}$ r.p.m. ?—*A.* Yes. 20

Q. Well, now, I show you—

HIS LORDSHIP : That is, you use records other than those purchased from the Muzak ?—*A.* Yes, that is right, sir.

Mr. FOX : I show you a record labelled, "Columbia, long-playing micro-groove." Is that the sort of thing you use in your studio in many places ?—*A.* Yes, we have and do use these.

Q. And would that play on Exhibit 15 ? This is a new exhibit, my Lord, if I may offer it in evidence as an exhibit.

HIS LORDSHIP : That will be Exhibit No. 28. 30

EXHIBIT No. 28 : Columbia long-playing micro-groove record.

HIS LORDSHIP : How is that described ?

Mr. FOX : A Columbia long-playing micro-groove record. Would that play on Exhibit No. 15, this portable gramophone ?—*A.* Provided the speed was correct.

Q. Well, supposing you do nothing to the speed, what will happen ?—*A.* You will get some sound out of it. You will get music out of it.

Q. This one I do not mind being destroyed, your Lordship, so let us try it and see ?—*A.* Very good.

Reporter's Note : Long-playing record, Exhibit No. 28, is placed and partially played on Exhibit No. 15. 40

HIS LORDSHIP : It sounds something like something ultra-modernistic, I would say, and reminiscent of the function of the first Berliner Gramophone.

Mr. FOX : I am obliged to your Lordship for the statement that it sounds like a gramophone.

HIS LORDSHIP : I want that on the record, because there is no way in which the other forum will hear these sounds my ears have been treated to.

Mr. FOX : I do not believe it will record your Lordship's notes. Now, what were the sounds that came to you from that playing, Mr. Raymond, for the purpose of the record ? Would you call them musical sounds ?—
A. Yes, they were definitely musical sounds.

10 Q. You could recognise the tune ?—A. I believe I recognised it, but I cannot name it, I am sure I have heard the tune before.

Q. We are not all as completely erudite as is your Lordship on the music of the day : but, assuming that the tune were a familiar one to you, is it fair to say that you would have recognised it ?—A. Quite.

Q. It was recognisable as music ?—A; Oh, yes, yes.

HIS LORDSHIP : I wonder if Shakespeare would include that in what he so beautifully referred to as " a chord of sweet sounds " ? I hardly think so.

Mr. FOX : Very possibly, your Lordship, and I might be in serious
20 disagreement on the tune alone, but I think perhaps it might be entered for the record that the speed was very much accelerated beyond the normal. It may be that would not appear otherwise in the record.

HIS LORDSHIP : Well, what you say, witness, is that the results were not as satisfactory as they should be, because this record is one designed for playing on a turn-table revolving at $33\frac{1}{3}$ revolutions per minute ?—
A. Yes.

Q. Whereas this Exhibit No. 15 has a turn-table moving at a very much faster speed ?—A. Yes, at 78.

Q. Though adjusted.

30 Mr. FOX : Yes, but for the purposes of the record your Lordship will note I made no adjustment. The turn-table of Exhibit No. 15 turned at a speed of 78 r.p.m., or thereabouts.

HIS LORDSHIP : And the witness says there were recognisable sounds emanating from the machine.

Mr. FOX : I think he went a little further and said " Recognisable musical sounds."

HIS LORDSHIP : Recognisable familiar sounds.

Mr. FOX : Yes. If it had been a recognisable familiar tune he could have recognised it.

40 HIS LORDSHIP : The tune is not familiar to you ?—A. Not by name, but I have heard the tune before and I could recognise certain instruments there.

Mr. FOX : My friend asked you something about the first time when these long-playing records came on the market. Have you any knowledge of long-playing records put out by the Columbia Gramophone people about the year 1935 ?—A. I would not like to be tied down to the year 1935, Mr. Fox, but certainly quite a few years ago I had heard some Columbia long-playing records.

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No. 11B.
M. R.
Raymond.
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tion—
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Q. Where did you hear those, Mr. Raymond?—A. They were at a friend's home in Toronto.

Q. Well, I am not trying to tie you down to a precise date. You say a considerable time ago?

HIS LORDSHIP: He said some few years ago?—A. Yes. Well, the reason I am unable to tie it down to about ten years ago, he has been dead for eight years, and it was a year or two before his death that I heard them at his home.

Mr. FOX: So that somewhere, your recollection carries you back to about 1940?—A. Yes, I would say that. 10

Q. That to your knowledge, there were on the market—

Mr. MANNING: No, he did not say "on the market."

Mr. FOX: Very well, I will rephrase my question. You did hear records played at a speed of considerably less than the standard speed. Would it have any relation to $33\frac{1}{3}$ r.p.m. A. I believe that was the speed it was played at—I know it was very slow.

Q. And those were manufactured by the Columbia people?—A. Yes.

Q. Were they available on the market, to your knowledge?—A. Well, I imagine they would, because he had no—

Mr. MANNING: No, please do not imagine. What does he know? 20

The WITNESS: He was not in the musical business, nor in the broadcasting business.

Mr. FOX: But you saw the name "Columbia" on them?—A. Yes, I did.

Q. And they emitted musical sounds when played at $33\frac{1}{3}$ r.p.m. on instrument, on a turn-table which operated at $33\frac{1}{3}$ r.p.m., did it?—

A. Yes, that is right.

Q. That is all. Thank you.

Witness excused.

No. 13.
W. St. Clair
Low.
Examina-
tion.

No. 13.
Evidence of W. St. Clair Low.

30

W. ST. CLAIR LOW, sworn.

Examined by Mr. MANNING.

Q. Mr. Low, you are general manager of the Plaintiff Corporation?—
A. Yes, I am.

Q. And have been for how long?—A. Since September, 1947.

Q. Are you engaged in any other business?—A. Yes, I am.

Q. What business?—A. I have been engaged in the music business in its entirety since 1930.

Q. Yes. You might give us a short summary of the various concerns with which you have been associated during that period, from 1930, and what those concerns did?—A. There is the Canadian Music Sales Corporation Limited, is a company which publishes music and distributes the music through the dealer channels across Canada. I was president and general manager of that company until September, 1947.

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Q. From what date?

HIS LORDSHIP: Is that the old publishing company that used to be on Dundas Square in the old days?—A. Yes, your Lordship.

10 Q. And the present company is?—A. It is still existing as the Canadian Music Sales Corporation Limited; the same company exists to-day.

Mr. MANNING: When were you first associated with it?—A. The latter part of 1930?

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tion—
continued.

Q. And what other concerns have you been active with besides the Canadian Music Sales Corporation?—A. There is the Anglo-Canadian Music Company Limited.

20 Q. When was that?—A. In the early 1940's prior to its incorporation it was a proprietorship, which was operated by a party other than myself but, at the time of incorporation, I became president and manager and it also published and distributed sheet music, but a different type of sheet music. It was more—it was very largely identified with music.

HIS LORDSHIP: When was it incorporated?—A. My Lord, I don't remember the date. It was in the early 1940's.

Q. And you became president?—A. President and manager. It was identified with music for churches very largely.

Mr. MANNING: Then, were there any other musical concerns with which you were connected in 1930?—A. Yes, there was the Dominion Music Distributors Company Limited.

30 Q. When did you first become associated with it?—A. When the company was first formed in—during the mid '30's. Again I have not got the exact date.

Q. Yes. What did the Dominion Music Distributors do?—A. When it was first incorporated and formed it handled the distribution of music to what we called a chain or syndicate stores, such as the F. W. Woolworth Company and Kresge. Latterly that company became a chain company for a chain of retail record and musical instruments and sheet music stores.

Q. When did it go into the record and musical instruments?—A. Are you referring now to the company, the Dominion Company, or to myself?

40 Q. Well, I will deal with the company first—A. The Dominion Company became active in the operating of retail stores about 1937.

Q. Had you, prior to 1937, any experience in the handling of other forms of presentation of music than sheet music?—A. Yes.

Q. When, first, if we can get the earliest date?—A. Well, at the very inception of my advent in the music business, the Canadian Music Sales in 1930 operated the old Song Shop on Yonge Street here in town, which is on the east side of Yonge Street, below the Yonge Street Arcade. Shortly

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after I took over control of the operation of the company, it was found for the purposes of internal economy wise to close that location. Immediately thereafter we opened and operated for some period of time, a year or two years, possibly, a retail sheet music, record and instrument store in the Yonge Street Arcade, Toronto.

Q. Now, you spoke of a record and instrument store. What instruments did you sell—but first give us the date?—*A.* The Arcade would be around 1931 or 1932, because it was immediately after the closing of the Yonge Street Song Shop.

Mr. MANNING: Now, what instruments did you sell?—*A.* Instru- 10
ments, if you like, within the scope of this trial, for the playing of records. We sold other instruments, but we sold certain types of ukeleles and guitars.

Q. Well, we don't need to bother about any other type of instrument. What specific merchandise did you sell for the playing of records?—*A.* When?

Q. In the early stages of 1930?—*A.* We sold—in those days we sold gramophones and we sold instruments which were given trade names, if I may say so, to distinguish them from gramophones.

Q. All right. What trade names were applied to the instruments 20
that you sold other than gramophones?—*A.* We sold the Brunswick line, which was called "The Brunswick Panatrope." We sold the Victors, which were called various names. They were called Victrolas, but latterly they were known in those days—in the early '30's they were known as Orthophonic machines.

Q. Any other makes besides the Victor and the Brunswick?—*A.* No. Those two were the principal lines when I took over the operation of the company in 1930. They were agents in this area for the Brunswick line. That is why that particular instrument was one of the principal items 30
within their stock-in-trade.

Q. You spoke of a gramophone. Now, what was the instrument that you called gramophones?—*A.* They were a hand-wound, acoustic instrument for the reproduction of sound from a record. If the Court will permit me, I think there has been a transposition of words there for the production of acoustic sounds, not acoustic instruments.

HIS LORDSHIP: Instruments for the reproduction of acoustic sounds.

Mr. FOX: For the reproduction of acoustic sounds?

The *WITNESS:* Yes, from a record.

Mr. MANNING: Were there different types of these gramophones? 40
—*A.* Different types. There were different companies made different models. We had the console or the cabinet models. We had table models. We had portable models such as we have here.

Q. You are referring to Exhibit 15 now?—*A.* Yes, Exhibit 15. Different companies, by the way, had different styles of cabinet work and design.

Q. And what speed did those instruments operate at in the early part of the 1930's?—*A.* They were supposed to operate at 78 r.p.m. and very largely they did operate at 78 r.p.m., but they were operated by a spring motor, which was anything but completely accurate as to its timing.

Q. In fact, I think if you will look at Exhibit No. 15, you will see an adjustment pointer. Is that to adjust the tension?—*A.* Yes, because the weather was a factor which had to do with the timing. In hot weather it moved at a different rate of speed and in cold weather the spring expanded and contracted, and the spring had to be adjusted in order to get equitable sound.

Q. Now, from your contact in the music business, can you tell us when the trade name "gramophone" came into use and how it was used?—*A.* To my knowledge it was a trade name established by H. S. Berliner, by the Berliner Gramophone Company, to identify a particular machine which he made.

Q. And do you remember what the trade information was as to what happened to the Berliner rights?

HIS LORDSHIP: Just a minute. I want to get this. The Berliner Gramophone Company, to identify the product that he made?—*A.* Yes, my Lord. That was in the early stages of sound reproduction.

Q. You don't know about what year?—*A.* I could not—it would be, I imagine—

Mr. MANNING: Well, never mind. You don't know. That's all. Can you tell us whether the trade name "gramophone" always continued to be the property of the Berliner Company?—*A.* No. The Berliner trade name, trade mark, which was the famous dog and horn symbol of the letters H.M.V. were sold by the Berliner Company to, I think it is the Radio Corporation of America, is the correct title.

Q. H.M.V. standing for His Master's Voice?—*A.* Yes, but I believe the Radio Corporation of America is what we commonly call the R.C.A. Victor Company.

Q. And do you know about the date?—*A.* I don't know the date from accurate knowledge. I have not got it before me.

Q. When did you first become aware of it—put it that way?—*A.* Well, I became aware of it as soon as I entered this business.

Mr. FOX: In 1930?—*A.* Yes, sir, but it I believe existed before that time, but I became aware of it when I first entered the business.

Mr. MANNING: Now, a word or two about the other instrument, the Victor Victrola, for example. What type of instrument was it?—*A.* In the early days the victrola was a trade name that they, in turn, gave to an instrument which was designed on the same principle as the gramophone, which was the trade name of the Berliner Company.

Q. And how was it activated?—*A.* In the same manner as the Berliner gramophone in the early days.

Q. And in the period of time when you were first active, in 1930, 1932, was it still provided with motive power, being hand-wound?—*A.* The gramophones were, yes.

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Q. No, I am thinking of the Victor Victrola?—A. Yes; Victor had, in the early 1930's, instruments which were sometimes called victrolas, which were hand-wound. They also had an electrical instrument which was frequently called orthophonic.

Q. Now, let us deal for a moment with the electrical instruments. Were they all of the one type as to the method of operation, as far as you saw them in your business? That is what I want to get?—A. No. We sometimes did have some instruments which did the winding by means of a motor, but at no—

Q. You mean an electric motor?—A. Yes. 10

Q. You mean the power was provided by an electric motor?—A. Yes, instead of by hand, to activate the turn-table.

Q. And what method was used of reproduction?—A. By acoustic.

Q. By acoustic?—A. Yes.

Q. By acoustic, you mean mechanical rather than electrical?—A. Yes.

HIS LORDSHIP: The only thing done electrically was the turning of the turn-table?—A. Yes there were instruments of that kind available.

Mr. MANNING: And then you said something about the orthophonic?—A. Orthophonic and the panatrope of the Brunswick Company took the next step along the line of sound reproduction, where electricity 20 became a factor in the sound on reproduction itself.

Q. Now, you do not profess to be an expert on sound apparatus?—A. No.

Q. But at any rate, there were two types of machine in succession with the hand-wound, which had mechanical reproduction of sound by electrical drive, and those machines which carried one stage beyond that and had electronic sound on reproduction. Now, what were the ones called that carried the electronic system?—A. Well, in the inception of my advent in the business in 1930, they were most commonly known by their respective trade names, that is, the manufacturer's trade names, but within a com- 30 paratively few years those trade names were apparently, by common consent, put into the discard, and then they became known at the time they were combined with radios themselves, when I think the next step came, they became known as radio combinations, or radio phonographs, or just merely phonographs. But very largely—well, in fact almost entirely so, that there was a radio attached to it; they were known by the common terminology of a radio combination.

Q. Well, now—

HIS LORDSHIP: Or electronic radio-phonographs?—A. Yes.

Q. They were either radio combinations or radio-phonographs?— 40 A. Yes, my Lord, but—

Q. And if they were not part of a radio, they were known as phonographs?—A. Yes, my Lord.

Mr. MANNING: Now, there was some stage at which perhaps that became noticeable, was there?—A. To my knowledge, at the time it became most noticeable, the adaptation of the words by the public to describe what they meant was most noticeable to me when these machines

became combined with radios. When we got what we call the combination.
Q. Now, you have got us down, as I follow it in a chronological statement of your activities, in selling instruments, to 1933. Then we left you engaged, so far as we have the record now, in public business. Did you have anything further to do with sound reproduction apparatus?

HIS LORDSHIP: Before you go into that, Mr. Manning, there is one question I would like to have answered. You say that the adaptation of this terminology by the public was the most notable, as far as you were concerned, when these instruments were combined with radios?—*A.* Yes,
 10 my Lord.

Q. Now, can you tell me approximately what year that was, Mr. Low, as accurately as you can remember?—*A.* I don't think I can tell you the date or the year of the first combining of radio and phonograph, but when it became the accepted—

HIS LORDSHIP: When it became more or less known to the public? —*A.* I would think it would be to me about 1934—about 1935 and from then on.

Q. I see.

Mr. MANNING: Now, when were you next, after 1933, associated
 20 with the instrument business, Mr. Low? I am thinking of instruments for playing records?—*A.* Well, there was a period of about three years from the time we closed both the Song Shop on Yonge Street and the shop in the Arcade, when my retail activities were confined to a series of departments, in either departmental or syndicate stores across Canada, for the purpose of selling sheet music only.

Q. Well, I am not concerned with that period of time if it does not coincide with any active dealing with this kind of apparatus. —*A.* Well, then, in 1936, as part of my activities, I had the Canadian distribution of Columbia records.

Q. When you say you had the Canadian distribution of Columbia records, what do you mean by that?—*A.* Columbia records at that time were not manufactured in Canada and, if I might interject, the record business was at its lowest point apparently since the inception of the record business, and there was a very limited business being done.

Q. Could you just, for a moment, give us a lifelike picture of what the situation was then? Were there any companies that predominated in the market?—*A.* Yes. In Canada at that time there was the R.C.A. Victor Company, which had remained in the record business in Canada, that is the manufacturing the distribution of records, in spite of the fact
 40 that the bottom had literally dropped out of the market. But the Columbia and the Brunswick and others that had been manufacturing and distributing records in Canada had closed their plants some years prior to this time and gone out of business. Now, in 1936 Columbia Records was not owned by the present corporation owning Columbia Records. It was owned by a man by the name of Yates, who had the Republic Picture Company. I was doing some business with him in connection with some music and we made an arrangement whereby I would import Columbia records from the

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factory in Bridgeport, Connecticut, for distribution to the trade across Canada.

Q. Did anybody else have the right to do that?—A. Not when I had it, no.

Q. Yes, I see. And is that Columbia record business the historical progenitor of the present Columbia Record business?—A. It is.

Q. So there is a continuous chain of identity?—A. There is.

Q. All right. Now, let us go on. You got exclusively the Canadian rights in 1936?—A. That is right.

Q. And how did you attempt to dispose of those rights?—A. We 10
imported records from Bridgeport, Connecticut. The effect of the Columbia Company and the Yates operation, it is now the factory for the Columbia present company. These records were imported from Bridgeport to Canada and then, by virtue of our sales staff and organisation we attempted to and did sell them across Canada.

Q. What period of time, by the way, did you have this, you call it exclusive agency?—A. For almost three years.

Q. Carrying down to what date?—A. The date I have not got, sir.

Q. Well—?—A. Some time in 1939; just prior to the war.

Q. What records did you have made available to you in that time?— 20
A. I had made available to me for distribution in Canada, all the records that were manufactured or made by Columbia, for distribution to the public, for domestic consumption.

Q. Yes, and what type of machine were they adapted for?—A. They were only adapted for the 78 r.p.m. turn-table.

Q. Now, there has been a suggestion made here that as early as 1935 there were Columbia records available at no great trouble to the public, so I gather, which were designed to perform at 33½ r.p.m. What have you to say?

HIS LORDSHIP: Well, that was suggested by counsel. 30

Mr. MANNING: Oh, yes, I know that, and I think the witness Raymond.

Mr. FOX: Raymond said in 1940.

Mr. MANNING: Well, now, I am directing the witness's attention to the subject matter, and I don't want to go any further than that. I want to know, Mr. Low, whether any of those records were available to you, in your business?—A. They were not, no.

Q. Were you aware at that time of the method of—

HIS LORDSHIP: That is, they were not available to you in what year?—A. In any of the years when I was in the business, prior to— 40

Q. 1936 to 1939?—A. Yes.

Mr. MANNING: Were any records of a more rapid speed than 78 r.p.m., or less rate than 78 r.p.m. speed available from other manufacturers, for sale to the public?—A. Not for sale to the public for domestic use, no.

Q. Well, then, do I infer from that there was some kind of recordings—

HIS LORDSHIP: Do you mean records of other manufacturers?

Mr. MANNING: Yes, my Lord. You did not have the agency, did you, to sell any of the others?—A. We did not sell any other manufacturer's label to the trade but, as the result of having this agency for Columbia distribution, I then directed the activity of my Dominion Music Corporation back to the retail store operation for the purposes of furthering and exploiting these records of which I had the agency and, during that time, I expanded the operation to a total of 17 locations from coast to coast in Canada; from Vancouver right through to Quebec.

10 Q. You might give us the names of some of the stores to which your branches were integrated?—A. Well, in Vancouver we had a sheet music and record department in the David Spencer Company. In Calgary we had a sheet music and record division of the Hudson Bay Company on a concession basis, where our rental was based on a percentage of our sales. In Edmonton we had the same operation with Heintzmann & Company, and in Edmonton with the Metropolitan Stores in Edmonton, and in Hamilton we had Heintzmann & Company. By the way, I want to make it clear we were not selling companies and I was not selling anything but our sheet music, records and our allied instrumentation. In Toronto, we had the Promenade Music Centre at 83 Bloor Street. In Ottawa we had
20 the C. W. Lindsay Company, the Metropolitan Store on Sparks Street, Ottawa; the Metropolitan Store, Rideau Street, Ottawa. In Montreal we had a branch of the Promenade Music Centre on Mansville Street. We had the C. W. Lindsay Store in Montreal. We had in fact five C. W. Lindsay Stores. There was the west end, the north end, the east end and Verdun—four, I am sorry. In Three Rivers, we had the C. W. Lindsay Store, and in Quebec City we had the C. W. Lindsay Company.

Q. Well, at any rate, it was an extensive operation?—A. That is right.

30 Q. And you did among other names mention the Promenade Music Centre. When did it virtually get its inception?—A. It first came into operation during the period I was distributing Columbia records, because I was finding it difficult to get acceptance of the Columbia records by the local trade in Toronto.

Mr. FOX: 1936 to 1939?—A. Yes. We did not start the Promenade Music Centre in 1936, however. We tried for a year or two to develop the trade without going into the direct retail business ourselves.

Mr. MANNING: Well, let us get the approximate date?—A. I think we opened the Promenade Music Centre at a different location, that is, 69 Bloor Street West, in 1937.

40 Q. Is it still going, by the way?—A. Yes, at its present location, at 83 Bloor Street West.

HIS LORDSHIP: What do they sell, only sheet music and records?—A. Sheet music and records, and radio, radio combinations, and devices for the playing of records and the reproduction of sound such as tape recorders and things of that nature.

Q. Mr. Low, in your activities with the Song Shop, which I gather was wound up in 1933, and the renewed activities in connection with the

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instruments and records which began, as I understand it, with the Canadian Music Sales operation in 1936, and thereafter, did you have any contact with the customers in the stores?—A. Oh, yes.

Q. In what manner?—A. Direct contact with them in supplying some of the items. We had a staff, of course, as well and in, if you like, anticipating their requirements by buying from the required sources of supply, merchandise which we, in turn, as an organisation, offered to the public for sale.

Q. Then, perhaps I may summarise it by saying you had enough behind-the-counter experience and administrative experience and supervising operation?—A. That is correct. 10

HIS LORDSHIP: Or promotional experience?—A. Right.

Mr. MANNING: Well, I am concerned for the moment in asking questions of behind-the-counter experience. When a customer came into your shop to order one of these devices,—I won't give a name—what would he ask for?

HIS LORDSHIP: Don't answer this question till I have ruled on it.

Mr. MANNING: What did a customer ask for?

Mr. FOX: Now, with respect, my Lord, surely that is hearsay if we ever heard hearsay. 20

Mr. MANNING: I submit not, my Lord. That is the main point.

HIS LORDSHIP: Well, Mr. Manning, this is not a passing off case. It is quite a different thing, and I don't know upon what principle of law you would offer that. Perhaps you can tell me.

Mr. SANKEY: What did the lady say to the soldier, "It ain't evidence."

Mr. MANNING: I understand that, but we are dealing here with the use of words, and the use of words is a factor which is relevant.

HIS LORDSHIP: Did John Jones, or Hector Smith, still call a phonograph a gramophone? What more does it prove than that? 30

Mr. MANNING: Yes, it may mean more than that. What was in the mind of the Legislative drafters when they drew the 1938 amendment? There are authorities, for example, my Lord, that indicate the meaning of words is a matter to be established by evidence, and the meaning of words, I take it to be establishable in this case by finding out what people wanted and called to get.

Mr. FOX: My Lord, there again, I would point out the limitations of the argument my friend advances. That is, after all, the question your Lordship has to decide. I have no objection if this witness is asked, "Upon being asked for a certain thing, what did you understand was required of you?" But I certainly would object to the testimony in the form of a question, "What did Joe Jukes, or some unnamed person, come in and say to you?" 40

HIS LORDSHIP: No. That offends undeniably, I should think against the hearsay rule.

Mr. MANNING: Well, my Lord, I will try and frame the question more in conformity with the suggestion of my friend.

Q. Did you, in the period of time when you were active in the Song Shop, get requests from the public for gramophones ?

Mr. FOX : Now, there again, my Lord, that is generalising a particular question.

HIS LORDSHIP : Mr. Fox does not object if you were to put it in this form, as I understand it, that if a member of the public came to you and asked you for a gramophone, what would you show him, or what would you understand him to mean by that request ?

Mr. FOX : What would you take his intention to be ?

10 *HIS LORDSHIP :* Well, that is just another way of putting it.

Mr. MANNING : All right, I am content to put the question to the witness that way, and we will confine it first to the Song Shop ?—*A.* That would be the early '30's.

Q. Yes—*A.* If a customer asked me for a gramophone, I would show him and attempt to sell him a machine such as that in Exhibit 15. It could be in many different forms ; that is different cabinet construction and it could have a larger horn or a larger speaker. I mean it could have a larger baffle behind the speaker.

20 *HIS LORDSHIP :* You would show him all the different models, the console, the table model and the portable ?—*A.* Within that structure.

Mr. MANNING : And if he asked for a panatrope, what would you show him ?—*A.* I would have shown him at that time, as I had an instrument known as a panatrope, which was made by the Brunswick Company.

Q. And if he asked for a phonograph, what would you show him ?—*A.* You are now referring to the early '30's ?

Q. Yes—*A.* My recollection does not take me to that. That question might have been asked. I do not think the word " phonograph " would have been used in the early 1930's. My memory does not recall it.

30 *Q.* Now then, we have got on several years, and when did you next begin to be busy on the merchandising of these devices for playing records ?—*A.* In 19—— the latter part of 1937.

Q. That is when you had your Promenade Music Centre ?—*A.* And then various branches developed from there.

Q. Did you have agencies for any trade manufacturer ?—*A.* We had the agents I am going to refer to, whether I had them in 1937, or whether it came in 1938 or 1939, I am not sure of the date, but we did bring in from the United States certain gramophone equipment. I think it was from Harman, Chicago. I think it was known as the——I think the word " Bird," or something like Bird. I don't know whether there is any point
40 in following this up. We brought some in. I just for the moment now cannot remember the name, but it was a firm in Chicago.

Q. Well, never mind. We perhaps don't need to be very particular—*A.* But we bought an instrument without having exclusively the agency, but we bought instruments for sale in our stores.

Q. Now, does what you said as to the earlier period with respect to your activities behind the counter and demonstration, apply to the later period as well ?—*A.* Yes.

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Q. Then, you have some of this gramophone equipment purchased from this firm in Chicago, and what type of equipment was that?—A. That equipment would be almost exclusively the same as Exhibit 15. Some of them would be in a larger case, some of them would be in a brown case. Some, I think, would be fabrikoid covered, as against another type of cover, but it was that type of equipment.

Q. In other words, mechanically operated?—A. That is right.

Q. And mechanically produced sound was developed by it?—A. That is right.

Q. Then, what other equipment did you buy and dispose of during that period of time, Mr. Low, following on from 1937?—A. We bought gramophones, and we bought radio combinations, radio-phonographs, phonographs themselves, record players apart from instruments for the playing of records. We sold tape records and various other allied parts of sound reproduction.

Q. Can you give us some indication of the volume, in terms of numbers of units?—A. That is very difficult. It was a very substantial volume of our business when I had the big load of stores, ran into several millions of dollars a year.

Q. You would not have any financial figure in front of you as to the unit numbers in that sort of operation?—A. I have never thought of it in unit numbers. I have dealt only in totals.

Q. Yes. Well, you had a variety of instruments, radio-phonograph combinations, radio combinations?—A. Radio combinations, radio-phonograph combinations; phonographs apart from where the radio instrument is combined with it; record-players, record turn-tables.

Q. And if a person wanted a record-player, what did he ask for?

Mr. FOX: Well, again, my Lord, the same objection.

Mr. MANNING: Well, all right.

HIS LORDSHIP: Record-players or record turn-tables, you call it. Did you use those terms to express the same idea?—A. I do not think so, my Lord. I don't think my memory—my memory doesn't serve me that the public would come in and ask for a record turn-table. They would ask for a record player. Among ourselves, within the operation, we might refer to them as the same thing, but the public might not.

HIS LORDSHIP: I see. You might have framed that question in the same way as you framed the earlier one. If a person came in—

Mr. MANNING: Yes, if a person came in and asked for a record-player, what did you show him, Mr. Low?—A. I showed him an attachment—I think would be the correct word to describe it—which could be plugged into a radio, if the radio was of modern construction. It could be plugged in by merely inserting a jack into the back of the radio. If it was of earlier vintage, there would have to be some service work done on the radio in order to attach the wires of the attachment to the radio.

Q. And what would the record player do?—A. The record player played recordings on its turn-table, and the sound became audible through the amplification and sound equipment in the radio.

Q. Then, how were those record players activated?—A. By—there was an attachment whereby they could be plugged into an electrical circuit.

Q. I see. And then the motor was an electric motor?—A. That is right.

Q. To operate the turn-table?—A. That is right.

Q. And what instrumentality was there used in taking the sound off the record?—A. A needle contained in a tone arm, or pick-up. I think it has been previously described as a head, has it not?

HIS LORDSHIP: A playing head?—A. Yes.

10 Mr. MANNING: And then there was some electrical apparatus in that. Is that what you mean?—A. Well, I am not an electrical engineer or sound engineer. I don't know what was in it.

HIS LORDSHIP: An electro-magnetic coil. I think we have had enough of that.

Mr. MANNING: I think we have, but I just wanted to be sure of what the mechanics were.

HIS LORDSHIP: At least, the Court knows the terminology by now.

Mr. MANNING: I think so. Now, when did the record-player first come on the market?—A. I previously said the record business was at a very low ebb in the late '30s, and the first record-player that I know within the term record-player, was made available to the public by the R.C.A. Victor Company at a very low price as an inducement to have people again ask for records, and I think that first came on the market in 1938 or 1939. I am not sure of the exact date. It was in the latter part of the 1930's.

Q. And did that have any effect upon the record business?—A. Oh, yes, a very substantial effect on it. As a result of that we then opened up our various branch store operations, in order to supply the demand.

Q. And when did that begin to reach some appreciable volume?—
30 A. In the late '30's.

Q. You do not put a specific date on it?—A. No, I do not.

Q. Well, now, during that period of time and with your subsequent operations, did you familiarise yourself with the ways of other people in the same business?—A. Oh, yes, we handled practically all makes, you see, within the retail operation.

HIS LORDSHIP: Records?—A. Records and record-playing equipment.

Mr. MANNING: Did you, for example, keep track of the Eaton offering?—A. Oh, yes.

40 Q. I show you here, Mr. Low, what purports to be a catalogue of Eaton's Fall and Winter, 1937-38. I am going to ask, my Lord, if I may exhibit this to the witness and then substitute a photostatic copy of the relevant passages. It is a bulky document, and it comes from the library unfortunately and a gentleman let me have it.

Mr. FOX: Provided it can be proved.

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Mr. MANNING : What ?

Mr. FOX : Well, you are not offering Eaton's catalogue as evidence yet, until it is proven, are you ?

HIS LORDSHIP : It is not printed by the King's Printer.

Mr. MANNING : Oh, no. I am asking if this is a catalogue with which he was familiar in the period of time in which he was in business.

HIS LORDSHIP : Well, we will mark it for identification.

Mr. MANNING : Well, my Lord—

HIS LORDSHIP : You see, it is not a document that proves itself.

Mr. MANNING : Oh, I quite appreciate that, my Lord, and I suppose 10
for that matter a newspaper is not, but if I say I bought a newspaper on the street and that is the name of it, isn't that evidence ?

HIS LORDSHIP : I am wondering why it is necessary to indicate in the Evidence Act that any document which bears the name of the King's Printer shall be received as evidence. I don't know whether it does prove itself or not. It might be a spurious copy.

Mr. FOX : My Lord, it cannot be evidence against us.

HIS LORDSHIP : Probably the best course is to produce the person from whose custody it comes, to identify it.

Mr. MANNING : Well, we might call that person if he is available, 20
in town.

HIS LORDSHIP : Yes, mark it for identification at the moment.

Mr. MANNING : I mean, I hesitate to ask to keep a document when it comes from the library.

HIS LORDSHIP : Of the Eaton Company ?

Mr. MANNING : Of one of the managers, and I am under some obligation to return the document.

Mr. FOX : Surely, my Lord, this witness can tell us what he saw in Eaton's store in 1938, or whatever the relevant year is, without telling us 30
what purports to be published in some document that is not going to form part of the record. Now, this witness has given us plenty of information about his experience in this particular trade, and I do not think he needs this type of extraneous document to refresh his memory. Surely he can tell us what it was.

Mr. MANNING : It is merely showing what people did offer.

Mr. FOX : Well, is he the correct person to bring forth ? How does he know they offered it ? He can tell us what he saw, but how can this witness tell us that John Smith offered something to the public, and Joe Jukes offered something, by virtue of looking at some printed document.

HIS LORDSHIP : You can prove the catalogue in the proper way, 40
Mr. Manning, and offer portions of it in evidence, I should think, to show as a matter of fact here was a general offer to the public made in a printed publication, provided you prove that this is a publication which was given out, or a true copy of it.

Mr. MANNING : Well, I suggest, my Lord, that a witness who was in the business and who, in the course of his dealing in the business, became familiar with the catalogue, and it was the practice of sending catalogues

around, would be competent to give that evidence. It is just that the Court permits evidence to be given on things that happen, if you like, in society.

Mr. FOX : We have no evidence that it was sent around.

HIS LORDSHIP : We have no evidence that this is Eaton's catalogue except that it bears Eaton's name on it.

Mr. MANNING : Well, if the witness saw it then and recognised it.

HIS LORDSHIP : Well, if he can swear he recognises it as something he got in 1937, I suppose that might be a very broad declaration for him to make.

Mr. MANNING : He may not be able to say that, I don't know, my Lord. This document did not come from his custody.

HIS LORDSHIP : That would be admissible, I should think.

Mr. MANNING : Well, the witness has heard some of the discussion. I don't want to prompt him ?—A. Well, whether this should go on the record or not, for the clarification of the Court, in this catalogue are a whole group of items of merchandise which are published as being manufactured in Canada, by the head of the T. Eaton Company, for the express purpose of putting in this catalogue. Eaton's issue their catalogue, as you know, half-yearly, and each year prior to the issuing of the catalogues, we submit and they accept items of merchandise that they then subsequently list.

HIS LORDSHIP : Then, would you look at the catalogue. Can you look at that catalogue and tell us if that is a true copy of the catalogue distributed by Eaton's among prospective purchasers in various parts of Canada ?—A. By looking at this catalogue, my Lord, I can.

Q. In 1937 ?—A. I identify a substantial number of items at page 70 which I, myself, supplied to Eaton's for the purpose of listing in this catalogue, and we were in the main most anxious, when the catalogue was released, to verify our list as we recalled them, therefore I am familiar with the catalogue.

Q. This is in 1937 ?—A. Oh, yes, right through from 1930 on.

Q. And you saw this catalogue in 1937 ?—A. I did not see this particular copy.

Q. No, but you saw a copy of a catalogue which was issued to the public generally ?—A. Yes ; and if we had not destroyed our own files of many years back, I could have produced my own copy.

Mr. FOX : That, my Lord, with respect, is the type of evidence to which I could have no objection—those things of which he is speaking of his own knowledge, and which happen to be pictured in the catalogue. But that, surely, is not evidence of all the other contents of the catalogue of which he has no personal knowledge.

HIS LORDSHIP : Well, if it is offered, surely his evidence does not need to be corroborated by a catalogue from which he supplied the articles.

Mr. MANNING : Oh, my Lord, by no means, but if it is offered of certain items, he can tell us all about it.

HIS LORDSHIP : Why corroborate his evidence ?

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Mr. MANNING : Yes, but I don't need to hear anything about the other items that he was not offering, just because they happened to be in the same catalogue.

HIS LORDSHIP : Oh, I think, Mr. Manning, this case may go very far and you had better follow the rules of evidence. If you want to use that catalogue, you had better prove it properly. I will allow you now to mark it for identification and, if it is not proved, it will not become an exhibit. I must try to keep this record as free from error as possible.

Mr. MANNING : It would not be of any benefit to either of us if somebody should say we made a mistake. 10

HIS LORDSHIP : That is so.

Mr. MANNING : I bow to your Lordship's ruling, but I would submit from what the witness has said, that his part of what is contained in the document should be admissible.

HIS LORDSHIP : Oh, no. If you want to file that, you may file that by proving it, just as Mr. Fox wished to file two brochures. I gave the same ruling to Mr. Fox, and it is a poor rule that does not work both ways.

Mr. MANNING : Oh, quite so ; unless my friend would agree to let me, I would not like to have that document kept on the files of the Court. 20 There could be photostatic copies of it put in.

Mr. FOX : I will facilitate my friend in every possible way so long as it does not hurt me.

Mr. MANNING : That is a somewhat unpredictable remark, my Lord.

HIS LORDSHIP : That might almost have been made by Mr. Malik in diplomatic negotiations.

Mr. MANNING : Then, I would tender also, my Lord—

HIS LORDSHIP : Then, you are filing for identification only, a photostatic copy of what purports to be page No.—

Mr. MANNING : Page 271 of Eaton's Fall and Winter Catalogue of 30 1937-1938—page 270 and 271, yes. There are two pages ; I am sorry—

Two pages of the T. Eaton catalogue for the year 1937-1938, numbered 270 and 271, marked Exhibit " C " for identification.

Mr. MANNING : And I think perhaps I had better leave the original document there. Then, likewise to be tendered for identification, Eaton's Spring and Summer Catalogue for 1938.

Eaton's Spring and Summer catalogue for the year 1938, page 200, marked Exhibit " D " for identification.

Mr. MANNING : And the page there is page 200.

HIS LORDSHIP : Is there another page on that ? 40

Mr. FOX : No, just the one.

HIS LORDSHIP : I see listed here, Mr. Manning, a good many old tunes that probably would be familiar to counsel, in looking at the document marked " C," for instance, very old time tunes.

Mr. FOX : Oh, I can remember that far back.

HIS LORDSHIP : Oh, no, they go farther back than that. They were then called "old time tunes."

Mr. MANNING : Likewise, for the same purpose, my Lord, Simpson's catalogue, fall and winter, 1940, and the particular page is page 261.

Simpson's fall and winter 1940 catalogue, page 261, marked Exhibit "E" for identification.

Mr. MANNING : And finally, the spring and summer catalogue of Simpson's for 1941, at page 175.

10 Simpson's spring and summer catalogue for the year 1941, page 175, marked Exhibit "F" for identification.

Mr. MANNING : I have it endorsed on each of these that a photostatic copy will be produced of the volume and the page from which they come so that they can be identified again. Now, I want to ask you, Mr. Low, if you were particularly familiar with the music and the record department of Eaton's for a period later than 1937 ?—A. Yes, I was.

Q. Down to what date ?—A. Right down to to-day.

Q. And what do Eaton's offer for sale there ?—A. In these catalogues?

20 Q. No, never mind the catalogues. Those, of necessity, have to be identified before I can ask you what the catalogues show.—A. Well, Eaton's offer for sale in their record departments to-day the exact parallel of the merchandise which I in turn offer for sale in my own operations ; that is, records, record-playing machines, record turn-tables, portable gramophones, radio combinations and all of the other allied instrumentalities by which records or sound can be produced.

Q. Do you see them separately described when you go on the floor of Eaton's, or what do you see if you go to that department ? Is there some label on the merchandise ?—A. Yes. Eaton's almost invariably have a label describing the product and the price.

30 Q. And what do those labels say ?—A. Well, they would describe the particular product. If it were a combination, they would call it a combination, putting the trade name. For example, it might be a Stromberg-Carlson combination ; it might be an R.C.A. Victor 45 ; player 45 being the speed of it, and they are known as 45 players to-day.

Q. What do they show under the specific name gramophone, if anything ?—A. You are referring to to-day ?

Q. Yes, to-day ?—A. I don't think that I have seen exhibited for sale within the recent period of months, such a thing as a gramophone.

Q. Did they exhibit such things in 1937 and 1938 ?—A. Oh, yes.

40 A. They exhibited an instrument such as our Exhibit No. 15, in a different style and different make-up.

Q. And you point now to Exhibit No. 15 ?—A. No. 15.

HIS LORDSHIP : As a gramophone ?—A. Yes.

Mr. MANNING : Did they show anything else under that name ?—A. Not that I have ever observed and as I was competing with them it

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was necessary for me to observe so that we could keep in step with them, whatever the moves or developments might have been.

HIS LORDSHIP : They set the pace, did they ?—*A.* Not necessarily so, but the public, unfortunately, seemed to consider that was the store.

Mr. MANNING : Now, do you know where this instrument Exhibit 15, came from ?—*A.* Yes, I do.

Q. Where did it come from ?—*A.* It came from the Promenade Music Centre, 83 Bloor Street West.

Q. When ?—*A.* Yesterday, when we brought it in here, yes.

Q. How did it happen to be at the Promenade Music Centre ?—*A.* Because it is a stock item. 10

Q. A stock item, by that, you mean ?—*A.* An item which we are currently selling.

Q. Now, how many parcels do you ever find when somebody sells a gramophone ?—*A.* How many parcels ?

Q. How many parcels ?—*A.* For the gramophone only one. There may be a second parcel with the records, but a gramophone, there is only one parcel.

Q. How many parcels do you find shipping a phonograph ?—*A.* One parcel.

Q. How many parcels do you find in shipping out a record-player ?—*A.* One parcel. 20

Q. How many parcels do you find in shipping out a radio-phonograph combination ?—*A.* One parcel.

Q. Are loud-speaker extensions supplied with an article ordered as a gramophone ?—*A.* No.

Q. Or ordered as a phonograph ?—*A.* No.

Q. Or ordered as a record player ?—*A.* No.

Q. Do all electronic and electrically operated phonographs have extension apparatus ?—*A.* No.

Q. Can you give us an estimate of the proportion, in terms of units, number of pieces of a record-playing device sold in your business which have facilities for extension by remote loud-speakers ?—*A.* Limited to my own operations ? 30

Q. Yes ?—*A.* I would say not one in a thousand.

HIS LORDSHIP : What was the question again ?

Mr. MANNING : Can he give us some idea of the percentage of units for playing records which have devices enabling the extension of the sound to remote locations, in your business, and he said not one in a thousand.—*A.* That is an estimate quite frankly. It is very seldom that there is such an attachment on an instrument. Very seldom. 40

Mr. FOX : Are you talking of your own business now, or generally ?—*A.* My own business.

Mr. MANNING : No, talking of his own business.

Mr. FOX : That is all I asked. Are there any recognised trade reports which would give some clue to the percentage in the business at large ?—*A.* I don't believe so.

Q. Are you familiar with the business records of any other concerns besides your own?—*A.* No.

Q. Then, I cannot ask you about any other.

HIS LORDSHIP: If a person wants an extension, I suppose he should order it, and you put the necessary adjustments on it?—*A.* Yes, my Lord. There would have to be a rebuilding, in fact, of the machine, in order to do that, in most cases.

Q. They do not come as a stock article. There have to be adjustments made on order?—*A.* Yes, my Lord.

10 Mr. MANNING: I perhaps should not anticipate this, but I simply ask this—it is not called for when it is sold; it is not a part of that machine. That is the whole purpose of the evidence. Then, we had some evidence about so-called transcriptions, Mr. Low, musical transcriptions. Are you familiar with them?—*A.* I am familiar with electrical transcriptions due to the fact that music transcriptions are restricted to the Muzak enterprise. I have not, in fact, ever been able to get one, nor have I ever had one in my hand.

Q. Have you ever been asked to supply it?—*A.* No.

20 *Q.* Without asking you to be too precise about it, can you try to estimate the proportion of the record business that your Promenade Music Centre does in Toronto with that done by other people? Have you any idea of the relative volume?—*A.* I couldn't do it very precise, but I think we are reputed to be the largest single operator. I don't know what the percentage would be on the over-all total, but I do not think there is any operation in the retail record business in the Toronto area that exceeds ours as a unit.

Q. You recently had occasion to buy out another business didn't you?—*A.* Yes.

30 *Q.* You recently had occasion to buy out another business competing in the same field?—*A.* Yes—pardon me, I think there is a misconception there. We took over another location. We did not buy out the business.

Q. Oh, I see?—*A.* No, we did not buy out the business. We took the location over.

Q. Now, do you find record-playing devices offered to you from time to time?—*A.* Yes.

Q. In connection with purchases from you?—*A.* From other businesses all of the time, in the course of trade by the manufacturer.

40 *Q.* I was thinking of record-playing devices that have been sold—I call them that deliberately, because I do not want to give them a name, that are outstanding on the market?—*A.* They are in the hands of the public.

HIS LORDSHIP: You mean by way of exchange?

Mr. MANNING: By way of exchange, and asking for a trade-in allowance?—*A.* Yes. That happens when a new instrument is being sold. A customer quite frequently negotiates on—we call it a trade-in, by turning it in.

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Q. My friend has been talking about an electrical gramophone, that being the common parlance. Have you looked through the current types of offerings of that description?—A. Yes, I have.

Q. Well, I am going to tender as evidence what is presented from many extracts from newspapers of Toronto published in the last ten days, or the last month and a half.

HIS LORDSHIP: How would that become evidence?

Mr. MANNING: Well, my friend says, or has said the public uses the words "electrical gramophone" and there is no evidence tendered on that subject, but here are extracts from a number of Toronto newspapers, daily offerings of instrumentalities in this field, and I offer them to show what is to-day the terminology expressed by these exhibits. 10

Mr. FOX: Do I need to say anything, my Lord?

HIS LORDSHIP: Well, what is your objection, Mr. Fox?

Mr. FOX: Oh, I beg your pardon. I thought your Lordship said, "I had noted your objection." Very well, my Lord. Again, we are in the same position that what people may call a thing, what people may say or are alleged to have said is not evidence in this Court, but what your Lordship has to decide is what is a gramophone; not what do the citizens A, B and C mean when they say that. I submit this is again hearsay.

HIS LORDSHIP: Oh, in the first place, Mr. Manning, what you are tendering purports to be a copy of an extract from a newspaper, and that purports to contain offers made to various people of secondhand articles. 20

Mr. MANNING: Certainly.

Mr. FOX: How do we know what the articles are?

HIS LORDSHIP: In 1950.

Mr. MANNING: In 1950, in December.

HIS LORDSHIP: How do we know what they are?

Mr. MANNING: I have not any idea, but my friend says those are certain words used by the public to-day, and there is what you find in the press to-day. 30

Mr. FOX: Now, when did I say that? My case has not gone in yet.

Mr. MANNING: Well, I listened quite carefully to my friend in making a speech, and he mentioned that.

Mr. FOX: I have not been making any speeches. I have been cross-examining, I think.

HIS LORDSHIP: It may very well be that the problem will arise when you come to put in your reply, but I do not think you can lead that evidence in chief, and I don't know how that would be admissible.

Mr. MANNING: Very well, my Lord. 40

HIS LORDSHIP: I have heard, in passing, of cases where people have gone into the witness box and said what they understood a certain thing to mean, but I have not yet heard of any case where counsel was allowed to file a magazine or a periodical, or newspapers purporting to indicate what certain people had chosen to call a certain thing. I think that is going pretty far and beyond the rules of evidence.

Mr. MANNING : Well, I won't press it then for the moment, my Lord.

HIS LORDSHIP : Well, I am presently disposed not to receive it under the rules of evidence, unless you can give me authority which would change my view.

Mr. MANNING : Well, I don't know that the point possesses enough importance at the moment, at any rate, that I should try to press it to be admitted, but I just make the formal submission.

Q. Now, we were discussing again these Muzak recordings, and you said you had never been able to see them. To your knowledge, are they sold to the public in the, shall I say the record consuming groups of public ? —A. I know, to my knowledge, they are not so sold.

Q. Is there any particular reason why they are not so sold ?—A. Yes. They are not designed for sale to the public. They are not designed to be played by the public ; oh, no.

HIS LORDSHIP : Well, how can you say that when you have never had one in your hands ?

The WITNESS : Because, my Lord, by virtue of the necessity of licensing the mechanical production of sound on these discs, we know the limit of the licence and we know what they are.

Mr. FOX : Now, my Lord, with respect, there, the witness is talking about something that he certainly does not know, himself.

HIS LORDSHIP : You see, you can tell us about facts within your own knowledge, not facts based on suppositions or reasoning.

Mr. MANNING : I think the witness is drawing his deductions from some evidence he heard in another proceeding, and I am not presenting that evidence at all.

Q. Mr. Low, yesterday afternoon at the close you made mention of something in connection with the licensing as affecting the transcription which is used by the Associated Broadcasting Company. Now, I want to ask you before you say anything about it, what you are proposing to say. Has it to do with your knowledge of something that is done, or has to be done by the Associated Broadcasting Company ?—A. Not by the Associated Broadcast, but by the—

Q. No, don't tell me anything more, because it may be that is not admissible evidence at all, and I want to make it short. Were you thinking of something specific, or general, in which respect, to the system of recording these transcriptions ?—A. It is specific knowledge to me.

Q. Affecting this company ?—A. Not affecting this company,

Q. Well, we will have to leave it aside, because it is not evidence here. Now, what were the standard sizes of records playable on phonographs, radio-phonograph combinations and gramophones in 1938 ? —A. 10 and 12 inch and a smaller size for what was known as trade discs.

Q. Were there any such instruments sold on the market capable of taking larger records ?—A. For domestic purposes ?

Q. Yes ?—A. No.

Q. Then, what is the size of these transcriptions ?—A. 16 inches.

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Q. Could they be played on any—

Mr. FOX : Which transcriptions ?

The WITNESS : The transcriptions that are in question in this action.

Mr. FOX : Couldn't he identify one of the exhibits, my Lord ? I am sorry to interrupt my learned friend but we have a dispute as to what a transcription is.

Mr. MANNING : Well, I am using it merely to identify what the Defendant broadcasting system use. I did not think there was one in. They were shown.

HIS LORDSHIP : Yes, they were brought here and I thought you were going to have a demonstration on what was called a gramophone. 10

Mr. MANNING : We did have one here, but it was not put in as an exhibit.

HIS LORDSHIP : No. I thought you were going to put one in.

Mr. FOX : If I may interrupt, with apologies to my friend, there is on the record an article as an exhibit labelled as an electrical transcription. I want to be sure my friend is directing his question to some specific item, if I can.

HIS LORDSHIP : Well, there is a Columbia transcription, isn't there ? Oh, no, it is an R.C.A. Victor. 20

Mr. MANNING : Yes, it is called an electrical transcription, if I recall correctly.

HIS LORDSHIP : And it contains words electrically recorded ?

Mr. MANNING : I do not think it is in as an exhibit, my Lord.

HIS LORDSHIP : Yes, that is Exhibit 23.

Mr. MANNING : I understand that, but what I had in mind was, my friend brought here some large 16-inch discs and it is in evidence that they are 16-inch discs.

HIS LORDSHIP : Yes ; that was by Mr. Raymond. He went in the witness box and he attempted to fit one on Exhibit 15 but it just wouldn't go and he couldn't make it go. 30

Mr. FOX : On account of its size.

Mr. MANNING : Now, I am framing another question as to the possibility of using transcriptions of that sort, on any kind of instrument sold to the public in 1938.

HIS LORDSHIP : Well, he has already said there was nothing made at that time, that he knew of, to take anything larger than 10 and 12 inches.

Mr. MANNING : That is all I am directing my question to. Now, are there any of these instruments sold to-day ?—A. To the public, for domestic consumption ? 40

Q. Yes ?—A. No.

Q. Now, when you speak of the micro-groove recording, how long do the standard records of the micro-groove recording now sold, play ?—A. The 10 or 12 inch ?

Q. Take the 12 inch ?—A. The 12 inch micro-groove long-playing record would play from 20, 21 minutes to 24 minutes, depending on the amount of music that is transcribed upon the 12 inch. It would play, I

believe, a maximum of 25 minutes, and there may be a 12 inch electrical long-playing micro-groove that would play as low as 20 minutes.

Q. Depending on whether it was filled right up?—A. Yes, depending on the length of the composition that was put on it.

Q. Now, how long do the 16 inch records that are played in these so-called transcriptions play?—A. The 16 inch electrical transcriptions used by commercial institutions, play for 15 minutes.

Q. Well, are they the micro-groove type?—A. They are not what is known in the trade as micro-groove at all.

10 Q. Well, then would it be fair to suggest that micro-groove is the description of the result obtained?—A. I don't think it is the result of—

HIS LORDSHIP: The witness already said yesterday that that is a trade name.

THE WITNESS: Well, that was another witness, my Lord.

HIS LORDSHIP: Oh, it was not you?—A. No, sir.

Mr. MANNING: Is it descriptive of the appearance of the record?—A. I don't know whether a mere glance by the naked eye could determine very much from the appearance.

20 HIS LORDSHIP: I don't know how all that affects the question that is at issue here, Mr. Manning. It seems to me we are going pretty far afield.

Mr. MANNING: Well, I am going to present argument, of course, my Lord, that what was meant by a gramophone was not in issue.

HIS LORDSHIP: Oh, I know; but is it necessary to go into all types of groovings and all records of that sort? I don't think that is going to affect it.

Mr. MANNING: I am not going to be more than a minute or so.

30 HIS LORDSHIP: Oh, no, but I don't want this trial to get out of bounds. I don't want to curb counsel if they think they have a point on which to base argument, but at the same time I like to keep the record within a reasonable scope.

Mr. MANNING: When did the micro-groove record become available to the public for purchase?—A. During—to a very small degree—during 1938 and the beginning of 1939—1948 and 1949, I am sorry.

Q. And had they been available to the public prior to that?—A. No.

Q. In retail circles?—A. Not in retail circles.

40 Q. Now then, how do you buy the record reproducing equipment that you sell—under what description?—A. We buy them under the title that describes what they, in fact, are. That is, if we wish to buy a radio combination, we will order a radio combination. If we wish to buy a record player attachment we will buy it under that name. If we want to buy a self-contained record-player, we would buy it as a record-player. If we want to buy a gramophone, we would buy it as a gramophone.

Q. Are all the devices that you sell for the purposes of performing the records in public and private, described by one of those names?

HIS LORDSHIP: Are the records, did you say?

Mr. MANNING: No, the devices for performing the records in public or private, described by one of these names you have given us?—A. My

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answer immediately preceding that question did not exhaust all the names. I did not mention a radio phonograph. I did not mention a phonograph. I did not mention an electronic phonograph. I did not mention an electric phonograph, and it is possible there may be another term.

HIS LORDSHIP: Well, is there any other kind of phonograph other than an electric phonograph?—*A.* Not that I know of.

Q. Well, how do you distinguish between an electric phonograph and an electronic phonograph? I thought a phonograph had to have electric elements within it?—*A.* That is right, my Lord, but sometimes in asking for these things we don't put the word "electrical" before it, and some- 10
times we do. In other words they may ask for a phonograph or, on the other hand, they may ask for an electric phonograph.

Q. Well, the public don't know whether there is an electrical element in this playing head or not?—*A.* By and large, I think they do, my lord. That is, they know the difference between this type of playing and another type.

Q. Well, they don't specify whether it is an electric phonograph or a phonograph, do they?—*A.* In some cases they do, but they mean the same thing entirely. That is, some people will come in and say a phonograph; 20
other people will come in and say an electric phonograph.

Q. Well, the main point of distinction you make is that a gramophone as you know it, is a mechanically operated device producing mechanical vibrations, and a phonograph is operated electrically, that is, the turntable is operated electrically, but then it has an electric coil in it which transmutes the mechanical vibrations into electrical impulses?—*A.* Yes, my Lord.

Q. Now, that is the broad distinction that you make?—*A.* That is right, my Lord, yes.

Mr. MANNING: Then, Mr. Low, I show you a group of pamphlets here. Can you tell me what they are?—*A.* These are monthly catalogues 30
which are published—printed, published and distributed by the Promenade Music Centre and which we call our record supplement.

Q. I think they might be put in as one exhibit, my Lord. There are a number of them.

EXHIBIT No. 29: Number of record supplements from the Promenade Music Centre.

Q. Perhaps I might read short extracts from them. There is a great deal of material about records and recordings which is not material. What is done with these, Mr. Low?—*A.* They are—

Mr. FOX: My lord, with all respect, are these any more evidence than 40
the fact that they do publish a catalogue. They are not evidence of their contents.

HIS LORDSHIP: Well, the witness has been saying how he describes the various instruments all along; his negotiations with the public, and now he offers a written testimony of the same thing. I don't know that it advances the case beyond the point which it has already reached, unless the witness—

Mr. FOX : I don't know that it does, my Lord. I make the objection, however, for what it is worth.

Mr. MANNING : What is done with these two things ?

HIS LORDSHIP : You are the author and distributor ?—A. Yes ; two things. One, we mail them out across Canada to the customers who are on our mailing list. That, at the present time, is something in the neighbourhood of 9,000. Then, they are available for our staff in the stores to hand to customers who come in and want information ; so we distribute them in the two ways ; one by mail to our customers and one by direct
10 contact with the customer.

Q. And do you receive orders referring to these ?—A. Oh, yes, that is the purpose of sending them out, is to get orders back again, of course.

HIS LORDSHIP : You couldn't justify the cost of printing and distributing, otherwise ?—A. No, my Lord.

Mr. MANNING : Well, I see the earliest of these is dated in April, 1946. Had you been in the habit of sending them out before that date ?—A. Yes.

Q. Have you any of the earlier ones ?—A. No. It is a matter of clearing out space for records, but the earliest one, I think, is 1946.

Q. Then, I notice on No. 61 of the year 1946, on the back page—
20

HIS LORDSHIP : I take it there is only one page you are interested in ?

Mr. MANNING : For the most part, my Lord, yes.

HIS LORDSHIP : Don't you think you ought to limit your exhibits to the one page ?

Mr. MANNING : Oh, yes, but I don't want to mutilate the documents by removing the back page, but I think perhaps we might, for the record, correctly note what is said in each of them—what is said for each of these items. We can run over them rapidly in the record. April, 1946, there, that is on the back page and it describes what is called a new electronic
30 phonograph, and then over I see it has a pencil date of September, 1945, and there is a description of a record-playing attachment to play records through your radio. Now, No. 75, of June, 1947, on the 21st page, there is a reproduction of a cabinet of what is called the new Stromberg-Carlson combination. Now, No. 69, December, 1946, there is a cut of what is called the Astro automatic electronic phonograph. In No. 77, of August, 1947, there is a cut of what is described as a thrilling new Victrola with automatic record changer. In No. 67, on October, 1946, there is a cut of descriptive material covering the new Delnac, the thrill tone automatic
40 electric phonograph. Then, in a number of June, 1946, No. 63, there is a cut on page 11 of what is called the new Electrahome phonograph, and on page 10 there is a cut of something which is introduced by the words, "Turn your present radio into an automatic phonograph combination "with one of these Boyes automatic changers." In a number of July,

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1948, No. 87, there is a cut and descriptive material of the Phillips radio-phonograph combination, giving the serial number. A number of December, 1946, on the 14th page, there is an advertisement of what is called a practical combination. In No. 61, of April, 1946, there is a cut of what is called the new electronic phonograph.

Mr. SANKEY : Well, no.

HIS LORDSHIP : It is not the practical combination you are stressing, it is the Astro thrill tone electronic player, isn't it ?

Mr. MANNING : No, I think your Lordship has one of these in before.

HIS LORDSHIP : No. You referred to the words " Practical 10 combination," as being one that is important. It seems to me that what is important here is the thrill tone electronic player.

Mr. MANNING : Yes, my Lord. I think we are talking of two different ones.

The WITNESS : Mr. Manning, no. You were not reading the small print in here.

Mr. MANNING : Oh, I am sorry. Oh, yes. My eyesight had not picked it up. I am sorry. Then, this one I think I had, and at any rate there is No. 64 of 4th July, 1946, a descriptive page entitled " Covered 20 " record players," and there is a descriptive sentence, " Turn your radio " into a radio-phonograph combination with one of these new Sparton " attachments." That is all, thank you, unless there is something you want to say.

HIS LORDSHIP : Then, Exhibit No. 29 is the group of catalogues. But what I thought you ought to do is to extract from them the page that is relevant. There is a whole lot of other material which is irrelevant and should not go in.

Mr. MANNING : No, what I will do is, if my friend will consent to let me remove these exhibits, is to have a typewritten copy of what is relevant. 30

Mr. FOX : By all means.

HIS LORDSHIP : I suppose the cut is made and we might as well have photostats.

Mr. MANNING : Yes, my Lord.

Cross-exam- Cross-Examined by Mr. Fox :
ination.

Q. Mr. Low, my friend indicated to me that you were going to be kind enough to identify documents " A " and " B " which we had marked for identification ; that you were going to indicate that those were published by the R.C.A. Victor Corporation, representing an instrument such as 40 therein depicted, which has been sold to the public in Canada. Is that correct ?—A. Yes, that is right, yes. I do so, because I happen to have seen the documents before.

Q. Yes, you have seen the documents before. As a matter of fact, you personally own one of these instruments, do you not ?—A. Yes.

Q. And the instrument is such as I described in the cross-examination of Mr. Dowding, is it not ?—A. Yes. I am not attempting to remember

your cross-examination, but I do not think you described it in any way that was not according to my knowledge of it.

Q. May I ask that these be marked as exhibits now, my Lord ?

HIS LORDSHIP : Yes.

EXHIBIT No. 30 : Technical information and service data concerning R.C.A. Victor Model Q.U. 8.

EXHIBIT No. 31 : Pamphlet put out by the R.C.A. Victor headed, " Operating Instructions " for the Q.U. 8.

10 Mr. FOX : These instruments, known as the Q.U. 8, as well as one of them being in your possession, were also sold in your store, the Promenade Music Store, on Bloor Street, were they not ?—A. May I answer it by saying that the reason I have one in my possession is that we were unable to sell it at the Promenade Music Centre, Bloor Street.

Q. The reason I take it being that you were charging a little more for it than the general public wanted to pay ?—A. We were only charging the list price.

Q. Oh, exactly. I mean, those are expensive instruments ?—A. That is right.

20 Q. Would you mind telling me what they retail for ?—A. Speaking from memory now, back about 10 years, I think the price in 25 cycle was \$1920 ; the 25 cycle referring only to the motors.

HIS LORDSHIP : Only wealthy people can afford to have one of those, Mr. Low ?—A. Yes, my Lord.

Mr. FOX : May I add one word, my Lord, the music enthusiasts.

Q. These instruments do, however, have on as part of them the instrumentalities that we discussed yesterday, do they not ; they had a microphone ?—A. The microphone was not and is not normally attached. It can be attached to it, and it was sold with it.

30 Q. It was sold with it as an integral part ?—A. Yes, but only attached to it when you put it there.

Q. Oh, well, now, Mr. Low, the instrument was so constructed to be used with a microphone as an integral part of its instrumentalities, was it not ?—A. That is right, yes.

Q. And the method of using the microphone, either for making your own records on the machine or for turning the machine into a public address system, are all carried in the operating instructions in these booklets, Exhibits No. 30 and 31 ?—A. That is right, yes.

40 Q. So that while you had to take the cord of the microphone and plug it into a suitable electrical supply, etc., you had instrumentalities on the machine by which you turned a button and then spoke into your microphone and your voice emanated out of the loud-speaker in the instrument ?—A. That is right.

Q. And the cord on the microphone was long enough to be taken into another room, wasn't it ?—A. Not on mine.

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Q. There would have been no difficulty, even to a non-engineer, in adding 20 or 25 feet, or 100 feet to that cord, would there?—*A.* I don't think you need to be an engineer, no.

Q. As a matter of fact, you have done it yourself, haven't you?—*A.* Not on this instrument, but I have made an extension cord myself.

Q. Yes. It is a simple thing to make an extension cord?—*A.* Yes.

Q. In the vernacular, any fool can do it?—*A.* Yes, sir.

HIS LORDSHIP: But you will note he said, "I have done it myself."

Mr. FOX: He already said he had done it himself, my Lord.

HIS LORDSHIP: But that is before that suggestion was made by 10
counsel.

Mr. FOX: Your Lordship may recall that I am using chiefly the language that Lord Asher used in one of the Bell Phonograph cases.

Q. And, if you had wanted, with this instrument of yours, to add a loud-speaker out in the garden of your home, you would have had no difficulty doing so, would you?—*A.* No.

Q. There were terminals on the radio-phonograph, gramophone—you will note I am using both words—I am giving you your choice and my choice on the instrument, shall we say, there were terminals provided to attach auxiliary speakers such as mentioned on page 28 of Exhibit 31?— 20
A. Yes, there were terminals on the Q.U.8, yes.

Q. I might perhaps refer your Lordship to the page relevant to the public address system at the same time. Your Lordship will find that on page 26 of Exhibit 31.

HIS LORDSHIP: What is the date of those publications, Mr. Fox?

Mr. FOX: I don't think they bear a date, my Lord.

Mr. MANNING: Perhaps it might be agreed, my Lord, that only so much of the exhibit is in.

Mr. FOX: 1940 is the date on Exhibit 30. Your Lordship will find it about two inches down the page. 30

HIS LORDSHIP: You were saying something, Mr. Manning?

Mr. MANNING: I merely suggested, my Lord, that, having regard to the contingencies that may arise, it might be recorded that only so much of these exhibits as was referred to in the examination, will be the exhibit.

HIS LORDSHIP: Oh, I suppose so.

Mr. FOX: Photostatic copies, my Lord, in each case.

HIS LORDSHIP: Yes. These models were available to the general public through retail outlets?—*A.* Only to a very limited degree. I am told there is only 20 of them released in Canada.

Q. Well, the reason why they were not readily picked up was because 40
the price was prohibitive?—*A.* The price and, quite frankly, I think the war had something to do with it. They came out just at the beginning of the war, and I believe production was called off.

Q. But it was intended as an offering to the public?—*A.* Yes.

Mr. FOX: Not only intended as an offering, but actually offered?—*A.* Yes.

Q. Where, beside your store, were these offered for sale?—A. They were offered in most of the principal outlets, Heintzmann's, Eaton's, and Simpson's; in England and Canada.

Q. They were available to everyone silly enough to buy them?—A. I do not subscribe to the word "silly." That goes to the backbone of my business.

HIS LORDSHIP: You explained that you were stuck with it?—A. Yes.

Mr. FOX: Now, the next two or three questions, so that I shall not
10 embarrass you in the slightest degree, I am going to use your own nomenclature and, if you admit anything to me, I shall understand. You referred to this instrument as a radio-phonograph. You admit it was a phonograph?
—A. You are talking of the Q.U.8?

Q. The Q.U.8?—A. It was a radio-phonograph, yes.

Q. In operating that instrument, there is a control panel of buttons on the front of it, isn't there?—A. Yes, sir.

Q. Which allows you to select the instrumentalities that you wish to bring into operation? Perhaps we might point that panel out to his Lordship in the exhibit. On page 11, figure 5 shows the control panel that
20 I am referring to?—A. Yes.

Q. Figure 6, of course, is nothing but the ordinary radio dial?—A. Yes.

Q. Having a number of bands?—A. Well, it is a little extraordinary.

Q. Well, a little extraordinary, but having the normal band and certain short-wave bands, and so on?—A. Yes.

Q. Referring to figure 6———A. Figure 5, isn't it?

Q. 5, thank you. There is, at the top of the panel, a circle, which perhaps you wouldn't mind explaining what that circle is?—A. The circle at the top of the panel is labelled, or entitled "Power." That is what is turned in order to start the machine operating.

30 HIS LORDSHIP: Well, that is a sort of switch, is it?—A. A switch to start to operate it.

Mr. FOX: To turn the power on?—A. Yes.

Q. And then below that, you have the word—what is the word?—A. The next word below that in mine is "radio." You have to go to the very bottom of it.

Q. I am losing myself without the picture in front of me, my Lord. My memory is not good enough. At the bottom and we see this perhaps better in figure No. 4 on page 10, do we not?—A. Oh, yes, yes.

Q. We have there represented diagrammatically the panel which we
40 have in figure 5, and I think I might correct you to a certain degree. The circle at the top of figure 5 is not the switch. Isn't that what you call the "magic eye" for level control?—A. Not in mine. The magic eye in mine is on figure 6, which is in the radio tuner.

Q. Well, in pictures Exhibits 30 and 31, isn't it in both?—A. It is in those pictures, but it is not on my set at home, and mine is a Q.U.8.

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Q. But in the exhibits, figure 5 and figure 4, there is the magic eye, which has really no relevance to what we are discussing, has it?—*A.* I don't think so.

HIS LORDSHIP: Mr. Fox, I am just wondering if there are not two magic eyes. Isn't there one for the radio only and one for the recording?

Mr. FOX: Well, there is one for both, but nothing turns on that so, with your Lordship's permission, I will pass on. At the top of the control panel shown on page 4 there is a button "main switch" for turning the current on or off?—*A.* Yes.

Q. And when we come down to the bottom of the control panel, there is a button for switching on selective instrumentalities that you wish to bring into operation?—*A.* I wouldn't call it a button, sir, but it is the same thing. It is a knob. You don't push the button, you turn it.

Q. Then, turning at figure No. 5, of Exhibit 31, I do remember the two words, one for starting and then it says phonograph, then radio record, then microphone record, then public address?—*A.* Well, mine is different again. Instead of "public address" it has the two words "Home Broadcast." Those are the words on my set.

Q. Home broadcast. Now, with the knob at the bottom of the control panel that we have been discussing, you can, I take it, switch instrumentalities in that instrument so that you can use it either as a radio, as a phonograph, or for any of the purposes indicated on that panel?—*A.* Yes.

Q. Now, is that clear to your Lordship, or would you like to have a look at the exhibit, my Lord?

HIS LORDSHIP: I have the sketch here. I was looking at that, yes, thanks.

Mr. FOX: When the knob is switched to the position "radio," then the only instrumentalities that are brought into play are the instrumentalities of the usual radio receiving set?—*A.* That is right, yes.

Q. And when you switch the knob to the position indicated by the word "phonograph" then the only instrumentalities in play are those of a phonograph. Is that correct?—*A.* Yes.

Q. Then, to all intents and purposes after that particular time, when you switch the control knob to the word "phonograph," you have a phonograph and nothing else?—*A.* That is right, yes. You cannot use the radio at that time.

Q. That is right. You have a phonograph and you have a loud-speaker, of course, in the instrument?—*A.* Yes.

Q. Putting out the sound waves?—*A.* In fact, there are two in the instrument.

Q. Yes. There are two operating, as you say, one against the other?—*A.* Yes, bass and treble.

Q. Now, when you add a pair of wires to the terminals at the back, and add another loud-speaker, which you would bring into the next room, you are still operating a phonograph, aren't you?

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Mr. MANNING : Oh, now, that is a question, surely, not for this witness, but that is a question of law.

Mr. FOX : Now, my friend has asked him many questions as to what this witness understands by "phonograph."

HIS LORDSHIP : I cannot see any objection to that, Mr. Manning.

Mr. MANNING : Well, I—

Mr. FOX : Would you answer the question, please ?

HIS LORDSHIP : The question is that, when you attach a wire to the terminals provided for that purpose on this instrument—

10 The WITNESS : It is my conception, my Lord, that by the instrumentality we are operating a phonograph ; that, in my recreation room, where I happen to have such extension, I am not operating a phonograph in my recreation room, I am operating a loud-speaker in my recreation room. I hear my sound from the loud-speaker. I have no phonograph in my recreation room.

Q. Where does it emanate from ?—A. The sound emanates from the drawing-room, in which the phonograph is located.

20 Q. And works on the same principle as the loud-speaker contained inside the machine, except that it is on a longer cord ; it is attached to a longer wire ?—A. In this particular case, inasmuch as it does not work, I cannot be technical. I am not technical, but let me put it this way. The sounds are different because, in my drawing room, I have the sounds emanating there to synchronize the speakers and, in my recreation room, I do not think that there are different sounds.

Mr. FOX : You don't quite get the quality in the recreation room ?—A. Nothing like it at all.

30 Q. But, of course, you could synchronize the speakers in your recreation room, too, couldn't you ?—A. Not unless I reconstructed the jacks and things in order to be able to connect, or to be synchronized. I only have facilities for connecting one at the moment.

Q. But that would not be much of a job, would it ?—A. That I don't know.

Q. But subject to the difference in the quality of the music, you get substantially the same music in your recreation room that you do in your drawing-room ? You may not get as many overtones as on the highly refined performance, but you do get what we in the vernacular can call the same music ?—A. You get musical sounds.

40 Q. Now, Mr. Low, let me put it to you this way. If you put on this instrument of yours in the drawing-room, having turned it to the "phonograph" operating position, so that it becomes a phonograph, and you place on there a record, let us say Mozart's Piano Concerto, No. K587—I am not sure that I have the numbers correctly ?—A. That is one of the numbers.

Q. Let us take Mozart's K587—the sounds emanating from the loud-speakers in your drawing-room will be substantially the acoustic performance of Mozart's Concerto, K 587, will they not ?—A. Yes, but I wouldn't listen to it.

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Q. Oh, that we may grant, but in your recreation room, the sounds emanating from the speaker there will also be substantially an acoustic performance of Mozart's Concerto, K587, will they not?—A. Yes.

Q. And recognisable as such, without any difficulty?—A. That is right.

Q. You told my friend that, as you developed the change-over from what you call gramophones to phonographs, you had a lot of other things, among them something called an orthophonic—we call it an orthophonic in one place and in another place you referred to it as an orthophonic machine. Is that all they were called, "orthophonic"? The word "Orthophonic" is an adjective, isn't it?—A. "Orthophonic" was the trade name of the Victor Company and it was an orthophonic victrola, I think was the term. 10

Q. That was not a gramophone?—A. No; that is why it was called an orthophonic.

Q. And it was not a phonograph?—A. Well, a phonograph was not a common term at that time.

Q. A phonograph was not a common term at that time?—A. It was not a term that was used in blank to describe all these units.

Q. What was it used for then?—A. Well, whether my activities were restricted to a great degree to what I actually had agencies for, I don't know, but I don't remember having a unit in 1930 which was, in fact, called a phonograph. I think that word came along at a later date, in my operations. 20

Q. You don't know anything about the word having been in general use in the 1870's and 1880's, do you?—A. No. I know it was not in general use when I was selling this merchandise in 1930.

HIS LORDSHIP: The word "phonograph"?—A. "Phonograph," yes.

Mr. FOX: You told us something about the trade name "gramophone" not continuing to be the property of the Berliner people, and that that and other trade marks were sold to the R.C.A. Victor. What trade marks were you referring to—gramophone among them?—A. The letters "H.M.V.," I think was one; the famous horn and the dog listening. Whether it is a part of H.M.V., I don't know, but it is another factor of the gramophone. 30

Q. The gramophone was a trade mark, was it?—A. I don't know whether it was a trade mark.

Q. Do you know whether it was ever registered as a trade mark?—A. No, I don't know that. 40

Q. Anywhere?—A. No, I don't know that.

Q. Have you ever been to England, Mr. Low?—A. Yes, I have.

Q. What do they call these things over there?—A. What things.

Q. That we are talking about in this action?—A. Well, that No. 15 came from England, and it is called a gramophone.

Q. All right. Now, what do you call a phonograph? Let us see what you call a radio-phonograph. What do they call it in England?—A. In England, as you know, they call the radio “wireless,” and they have combination names in England. The word “wireless” sometimes appears.

Q. How many times have you been to England?—A. Quite a number of times.

Q. Have you stayed there for any length of time?—A. My home is in Scotland, and I am generally in England on the way through to Scotland.

10 Q. Well, let us say Great Britain. Do you know the ordinary name that is applied to these electric sound reproducing instruments in England and Scotland?—A. I think I do, yes.

Q. And it is what?—A. It is very largely the word “gramophone.”

Q. We are talking of the combination?—A. Well, in combination, then, they combine other adjectives or additions to the word.

Q. Mr. Low, is not the common accepted colloquial name for these instrumentalities in the British Isles “radiogram”?—A. Radiogram is not the usual word.

Q. Isn't that the word usually used?—A. That is the word normally used, yes.

20 Q. And isn't that a version of radio-gramophone?—A. Could be.

Q. What, Mr. Low, is a graphophone?—A. As I understand it, a graphophone is the trade name of the Graphophone Company. That is my understanding. It may not be perfect in the matter. There is a Graphophone Company.

Q. Is there not a difference between a phonograph and a graphophone?—A. That is a question I could not answer. I don't think I have ever seen a graphophone. That is an instrument labelled a graphophone.

30 Q. Well, if I show you a record bearing on it the words “Columbia Graphophone Company,” would that help you?—A. It would not help me in connection with having seen an instrument labelled a graphophone. I know the name exists.

Q. This that I show you now is a Columbia record, is it not?—A. Yes.

Q. Bearing on it “The Columbia Graphophone Company”?—A. Yes, that is right.

Q. And is presumably adapted to be played on the instrumentalities we have been discussing?—A. Yes, that is right.

Q. It would emit musical sound if it were played on Exhibit No. 15, or on the instrumentalities shown on Exhibits 30 and 31, of varying quality?—A. Yes.

40 Q. May I offer this as an exhibit, my Lord?

EXHIBIT No. 32: Record of the Graphophone Company.

Q. What is a grafonala?—A. A Grafonala is also a name put to an instrument for the reproduction of sound, being a specific company. I believe it was the Columbia.

Q. And this record, Exhibit No. 32, also bears the word “Columbia Grafonala,” does it not?—A. Yes, in the seal on the top.

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Cross-exam-
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Q. I should like to get this quite clear, if I can, from you, Mr. Low. To you there is only one difference between a gramophone and a phonograph, and that is that the former is entirely mechanical and that the latter is electric. Is that correct?—*A.* A gramophone is mechanical and the other instrumentalities that we have been talking about under various names are electrically activated.

Q. They become a phonograph when they are electrically activated?—

A. Yes, or radio combinations, or whatever other terms we have been using.

Q. But as long as you have something that is called a gramophone, 10 then, it has no electric instrumentalities to it at all?—*A.* That is my understanding. Pardon me. I think I have suggested there were some minor refinements, where there was instituted at one time the electric motor to turn the turn-table, but not to activate the sound.

Q. But that was still a gramophone when you had an electrically activated motor?—*A.* Just to turn the table.

Q. But you had no electric pick-up?—*A.* That is right.

HIS LORDSHIP: Mr. Fox, may I ask what significance if any, Exhibit 32 has, the record bearing the title, "You ain't heard nothing"?

Mr. FOX: My Lord, with all humility and modesty, I suggest to your 20 Lordship the title is quite evident.

Q. Well, in any event, the moment the word "gramophone" is mentioned, it refers to an instrument having no electrical instrumentalities in the playing head?—*A.* That is to my knowledge and experience.

Q. Until, of course, you depart from these shores and when you get to the British Isles, then, of course, a gramophone means exactly what you have told me?—*A.* That I am not prepared to say, because I do not do business in the British Isles.

Q. But you have been there often enough?—*A.* Yes, and I also suggested that they call radio a wireless. 30

Q. Oh, yes, and we also had our little discussion about radiograms. Perhaps I can put that question to one side.

Q. Mr. Low, have you ever heard of an instrument described in these terms, "an electrically operated device adapted upon the insertion of a coin therein to make audible a series of sounds corresponding to markings on one or other of a number of discs or records with which the device is equipped"?—*A.* Pardon me. Is the question if I heard of an instrument like that?

Q. Yes?—*A.* Yes.

Q. What is it commonly called?—*A.* It is called the juke box, in 40 common parlance.

Q. And is this the same instrument, the electrically operated gramophone which, on the insertion of a coin, performs musical selections from one or other of the records placed therein?—*A.* I am afraid I don't understand your question. Is it the same instrument?

Q. Is that the same type of instrument, yes. Is that also a juke box?—*A.* I do not see how it could be a juke box and a gramophone.

Q. No, an electrically operated gramophone which, on the insertion of a

coin, performs musical selections from one or other of the records placed therein?—*A.* Well, if the records are performed and the sound was heard as the result of electrical impulses, then I have never heard of that type of instrument being called a gramophone.

Q. No, but obviously the print I have just read to you is referring to juke boxes, isn't it?—*A.* I have never heard of it in that way.

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10 Mr. MANNING: May I make one observation. I do not want to interfere with my learned friend's cross-examination. I am not opposing it, because there will be a reference to a decision in the Privy Council during the argument, and there will be a discussion as to how far that decision goes, but I have a specific reason for making a note now and an observation with the greatest respect. The words that were used in the Privy Council were words that were taken out of evidence given by witnesses who, in my submission, were not qualified to give the evidence, and there was no actual contest on the evidence, although there was a contest in the formal pleadings and I would just like to have my remark noted.

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HIS LORDSHIP: Oh, Mr. Fox does not give me the source of the article he is reading from.

Mr. MANNING: I know he is reading from the judgment, my Lord.

20 HIS LORDSHIP: Well, I know, but the witness says he does not agree with that suggestion.

Mr. FOX: Is a juke box a gramophone?—*A.* No, it is not.

Q. Is it a phonograph?—*A.* I don't think—I would say it is not a phonograph.

Q. Well—you know, of course, how a juke box operates, do you?—*A.* They operate by coin insertion.

Q. Let us get back to that. You have examined juke boxes?—*A.* I have never had—never examined the inside workings of a juke box, no. I have seen the outside of a juke box.

30 *Q.* But do you know, from your cursory examination of them, that they use records?—*A.* Yes.

Q. And that there is a needle?—*A.* Yes.

Q. Operating in the grooves of those records. The records are turned on a turn-table; have a motor?—*A.* Yes, they are turned on a turn-table, yes. I have not seen the motor.

Q. There is an electrical pick-up head carried on a suspension arm?—*A.* It appears to be an electric pick-up head, yes.

40 *Q.* In other words, the instrumentalities in a juke box are substantially the same in what you term the phonograph, subject to this addition, that the instrumentalities will not work until you insert a coin. Is that correct?—*A.* Well, you have not described all the instrumentalities within a juke box. The instrumentalities that you have described are, in fact, similar to the instrumentalities within that gramophone, or in a phonograph.

Q. But what else is there?—*A.* There is a selector equipment so that one record can be played as can another record, and when No. 10 is played, it goes back into position, so No. 1 can be played or No. 7 can be played. Those are not within a phonograph.

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HIS LORDSHIP : No, but apart from those characteristics, such an instrument is substantially the same thing as what you would call a phonograph ?—*A.* The sound, my Lord, is activated in the same manner.

Mr. FOX : The reproduction of sound is caused by substantially similar instrumentality ?—*A.* That is true, yes.

Q. In addition to which it has means whereby you may selectively operate a particular record upon the insertion of a coin. The record is selected that you desire and is placed in a playing position, played, and then returned to its appropriate position in the stack, whereupon the next selection is played according to the selection made by the operator of the machine ?—*A.* If I may qualify myself. The only point is this. I am only qualified to deal with what is made available to the public for home and domestic use. That is what my business is, and when you say, is the juke box the same as a phonograph, the phonographs that I deal with are not the same as juke boxes. That is the only reason I make the qualification. 10

Q. Quite. I understand. If your Lordship would be good enough to look at these documents while I speak to the witness about them ?

HIS LORDSHIP : Yes.

Mr. FOX : On this document, which is marked for identification as " D," from Eaton's catalogue— 20

Mr. MANNING : May I interject, my Lord ? If my friend uses that on cross-examination, it goes in as an exhibit.

Mr. FOX : Well, that is one I never heard of before.

HIS LORDSHIP : You have introduced that and, in order to obviate the necessity of your having to call a witness to prove them as exhibits, I allowed you to mark them for identification on the understanding that they would be proven.

Mr. MANNING : Oh, quite, I understand that.

HIS LORDSHIP : Now then, is your opponent not entitled to the same privilege as was extended to you when you were granted that indulgence ? 30

Mr. MANNING : My submission is they are not in the record now. If he wants to put them in I will be happy to have them in.

HIS LORDSHIP : They will be in the record if, as, and when, you prove them, but you have already dealt with them. It would be obviously unfair not to allow your opponent to deal with them.

Mr. MANNING : Well, I would agree with that. If my opponent does want to deal with them, then they do become part of the record without further proof.

HIS LORDSHIP : Oh, no, I suppose, strictly speaking, I should not have allowed them in at all until you proved them, but, on the understanding you would prove them, I allowed them in and allowed them to be marked for identification. 40

Mr. MANNING : Let us accept that, but I only say this ; if my friend is going to cross-examine the witness on a document which had not been brought here at all, then he would have to file the document.

HIS LORDSHIP : Yes, but inasmuch as you have used it to suit your purposes, I must have the rule work both ways.

Mr. MANNING : Oh, yes, I know, my Lord, but as I understand it, and perhaps I am mistaken in this, what has happened so far is that the documents were tendered and not accepted in evidence at all.

HIS LORDSHIP : Are you suggesting what Mr. Fox ought to do now is wait to see whether or not you are going to prove these documents as exhibits ?

Mr. MANNING : No, not at all, my Lord. I do not suggest that but I do suggest this : if he does cross-examine on them they become part of the record, that is all.

10 HIS LORDSHIP : Well, I am going to allow Mr. Fox to cross-examine on them, and I am still going to require you to produce proof of them.

Mr. FOX : Thank you, my Lord. In these documents——

HIS LORDSHIP : Because they were accepted on the understanding that you would prove them. Yes, Mr. Fox.

Mr. FOX : Eaton's seem to be offering a portable gramophone and I presume you would say that that is a non-electrical instrument. It is mechanical. Is that correct ?—A. According to the description, both visual and in type, it appears to be a gramophone.

20 HIS LORDSHIP : And not electrically operated ?—A. Not electrically operated.

Mr. FOX : What about the device shown in document " E " ?—A. According to the descriptive matter, the item in document " E " appears to be operated by a G.E., or General Electric, I imagine it is, motor.

Q. Now, you imagine ?—A. Well, I am sorry. G.E.

Q. Operated by a G.E. motor ?—A. Operated by a G.E. motor.

Q. Is there anything in the letter press or in the picture or the cutting there represented, showing a means of attaching that instrument to a source of electric energy ?—A. No, there does not appear to be anything shown.

Q. Or described ?—A. Or described, no.

30 Q. You are merely making an assumption that it is an electric, because it has the words " G.E. motor " ?—A. That is true, yes.

Q. Why do you assume that " G.E. Motor " means that that instrument is electrically operated ?—A. Well, the only thing that I know complies with " G.E. " stands for—may I say it this way ; that " G.E. " stands for, or I believe it stands for " General Electric."

Q. Now, are you sure, Mr. Low ?—A. No, I am not sure what those two particular initials, in fact, stand for.

Q. No. As a matter of fact, you have no means of knowing whether those letters stand for " General Engineering," have you ?—A. No.

40 Q. And there is a corporation in Canada known as the General Engineering Company, isn't there ?—A. I don't know that either.

Q. Well, if I advise you that there is, you wouldn't dispute it, would you ?—A. No, I wouldn't be able to dispute it. I don't know about it at all.

Mr. MANNING : May I object ? Does it do any manufacturing ?

Mr. FOX : That is not the point.

Mr. MANNING : Counsel shouldn't make that statement.

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Mr. FOX : I make the statement that there is a General Engineering Company. I don't care what it does.

HIS LORDSHIP : Well, I suppose one person's guess is as good as another's, but that proves nothing, "G.E. Motor."

Mr. FOX : "G.E. Motor" proves absolutely nothing.

HIS LORDSHIP : The company that operates in Canada is the Canadian General Electric Company, and the company that operates in the United States is the United States General Electric, but would you find a portable phonograph, or part of an instrument of this nature that would be fitted with attachments so that it could be plugged in to an electrical outlet?—A. No, my Lord, I do not think so. I read the words that were printed here, and it is just reading these words, if you like, confused me, because it does not appear to have an electric motor in it, and yet, it refers to a "dependable G.E. Motor." 10

Mr. FOX : That is fine. Then, the instrument depicted in document "E" does not appear to have an electric motor in it?—A. That is right.

Q. And yet it is called a portable phonograph?—A. Yes.

Q. And therefore your distinction between a gramophone and a phonograph, based upon electrical instrumentality, completely breaks down, doesn't it?—A. Well, I don't think so. I am giving you my definition. I understand what I believe and what my knowledge is. 20

Q. Do the same remarks apply to the document marked "F"?—A. Yes, including the "Dependable G.E. Motor."

Q. Now turn over a moment to document "C." I notice in the top left hand corner and in the top right hand corner the words "Portable Gramophone" in each case, and there is depicted what are apparently two mechanical devices, because they both have winding levers; and those are what you would refer to as gramophones, are they?—A. That is right, yes.

Q. Now, at the top of the centre of that page, there appear the words "Phonograph Records." Do you see that?—A. That is right, yes. 30

Q. And nowhere on the two sheets, the two pages, page 270 and 271, do you see any gramophone records advertised for sale?—A. That is true.

Q. Therefore they are selling an instrument of one type, but they are selling records for an instrument of another type. Is that correct?—A. I don't think that is a correct statement. Records are playable on either instrument.

Q. As a matter of fact, Mr. Low, aren't the words used on that document as completely interchangeable?—A. The record is playable on either instrument. 40

HIS LORDSHIP : But looking at documents "D" and "E" and document "C," where you see one instrument called a portable gramophone and the other a portable phonograph, Counsel asks you if the persons who issued the publication from which these pages marked for identification come, did not use the terms interchangeably?—A. Yes; I think that appears to be what happened.

Mr. FOX : And on document " C," Mr. Low, about the middle of the right-hand part of the page, we have the words " Vicor Record-Player " ?
 —A. That is right.

Q. " An instrument that converts any radio into a phonograph."

HIS LORDSHIP : Where is that, Mr. Fox ?

Mr. FOX : About the middle of the right-hand part of the page. Your Lordship will see the " Victor Record-Player " on page 271.

HIS LORDSHIP : Oh, yes.

Mr. FOX : And that refers, Mr. Low, I take it, to an instrument having all the instrumentalities of what you call a phonograph, with the exception of the loud-speaker ?—A. And the amplifier.

Q. And the amplifying needs ?—A. Yes, that is right.

Q. In other words, it is what we discussed yesterday. You take a record-player, it has a turn-table, a motor, a needle, a pick-up head, suspension arm and all connecting wires, then you connect those wires to your radio receiving set, turn off the radio receiving instrumentalities and use the amplification and the loud-speaker means of your radio set and you have a phonograph, in your own words ?—A. In my words we have a radio combination, then ; an electric combination.

20

Q. Very well. You have a radio combination—a radiogram ?—

A. A radio combination.

Q. All right. You told us quite a lot yesterday afternoon about what you understood when people came into you and asked you for gramophones and phonographs and radio combinations and all sorts of things, and I gathered from what you told us that nobody was ever confused ; nobody was ever mistaken as to what they wanted. Now, did you ever have anybody come in and ask for a gramophone and when you showed them a mechanical instrument they said, " oh, no, that is not what I want.

30

" I want something you plug into the wall " ?—A. I did not say yesterday that nobody was ever mistaken or confused. I answered the question, " What did I say when I was asked for a specific instrument ? " We have many times shown people this instrument or this counterpart of Exhibit 15, and then if that was not what they wanted, we have also on other occasions shown people an electrically operated instrument and found that they wanted it for a canoe trip and we had to go back to a gramophone.

Q. As a matter of fact, the public use both words indiscriminately ?—
 A. Not indiscriminately. The degree of confusion is very limited.

Q. But it is by no means universal that the public refer to one only as referring to one specific type of instrument ?—A. No. There have been mistakes of that type made in people coming into the store.

40

Q. Now, wait a minute, Mr. Low, there. What you call mistakes ?—
 A. Oh, well, what I have shown a customer in response to a specific request has not turned out to be what that customer, in fact, wanted.

Q. On a number of occasions ?—A. Not very many, but some occasions.

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HIS LORDSHIP : You have found people who wanted a gramophone asking you for a phonograph, and *vice versa* ?—*A.* Yes, *vice versa*, yes.

Mr. FOX : I would like to get back to these long-playing records. As I understand it you had the Columbia agency from the United States for a certain period and no long-playing records were available to you until a certain time, 1948 and 1949, and I noted particularly that you said they were not available to you. Now, were they available to anybody else ?—*A.* Not to my knowledge.

Q. As a matter of fact, Mr. Low, haven't the gramophone or phonograph companies, those companies manufacturing these types of instrumentalities, haven't they been trying for many years, at least for 20 years, to place upon the market long-playing records and instrumentalities ?—*A.* Oh, yes, they have been experimenting for a number of years. 10

Q. They have made a number of experiments, a number of which have been tried out on the public market ?—*A.* I have never known them to be tried out on the public market with regards to long-playing records.

Q. Do you not know of the Victor instrument placed upon the market in the United States in the mid 1930's, playing long-playing records of 33 $\frac{1}{3}$ r.p.m., or thereabouts ?—*A.* No, I never heard of it.

Q. You never knew that the D'Oyly Carte Opera Company from Paris, were recording on long-playing records about that time ?—*A.* No, I did not. I want, Mr. Fox, to be clear, though. I knew experimentation was going on. 20

Q. Yes, I am content to accept your word. You did not know at that time that they were on the market ?—*A.* That is right.

Q. You would not be surprised if I told you that they were ?—*A.* I would be very surprised.

HIS LORDSHIP : You are speaking of the Victor putting on long-playing records ?

Mr. FOX : About the middle of the 1930's, in the United States, my Lord. 30

The WITNESS : Oh, pardon me. You limited it to the United States ?—*A.* Oh, yes.

Q. Oh, yes ?—*A.* Then, I think I had better qualify my answer about being surprised, because my business did not take me to the United States. When I said I would be surprised to learn it was on the market commercially, I was referring to Canada, the zone in which I operate.

Q. But you would not be surprised if I told you they were in the United States ?—*A.* I take back the fact that I said I would have been surprised. 40

Q. Yes. What about England and Scotland ?—*A.* Again I don't know whether they were on the market or not.

Q. Well, you made it very clear those records were not available to you in that period. Well, to whom were they available ?—*A.* To my knowledge they were not available to anybody.

HIS LORDSHIP : Before 1949 ?—*A.* Yes, before they came on the market for distribution by means of the retail trade to the consuming public.

Q. Which you said was 1949 ?—*A.* 1948, your Lordship.

Q. Then you say they were not available to anybody in Canada, prior to 1948 ?—*A.* To my knowledge, sir.

Q. Yes.

Mr. FOX : These loud-speaker extensions we were talking about placing on the R.C.A. Victor Q.U.8, I can buy one of those at a radio supply house ?—*A.* At a radio supply house, yes.

Q. They are available to any member of the public who wants to add an extra speaker to his radio set or phonograph set ?—*A.* Yes. There are radio supply houses where you can go in and purchase that type of equipment.

Q. At retail ?—*A.* At retail.

Q. And, as a matter of fact, if I want to get an amplifier, I can do the same thing ?—*A.* That is right, yes.

Q. And if I want to get a player, I can do the same thing ?—*A.* Yes, that is right.

20 *Q.* And if I want to get a turn-table, I can do the same thing ?—*A.* That is right.

Q. In other words, I can buy all the instrumentalities to play what you term a phonograph, by retail ?—*A.* In what we call radio supply houses ?

Q. That is right ?—*A.* Yes.

30 *Q.* You told my friend that, talking on record-players, not one in a thousand would have an extension apparatus. May I quote you correctly, for the extension of a loud speaker ?—*A.* I find it difficult to follow the terminology by "record-player." Do you mean the attachment which comes into the radio to enable the radio to be converted into a radio combination ?

Q. Yes ?—*A.* Well, I said in my experience in retail operation, not one in a thousand of that type of equipment would have any added mechanism or points, or anything you might like to call it, to permit something else to be added at the same time.

40 *Q.* Perhaps I have mistaken you, Mr. Low, and I would like to get it correctly for his Lordship. What you meant was that, of these record-players adapted to use the radio receiving set as the loud-speaker, not one in a thousand had the instrumentalities to put on more than one loud-speaker. Is that what you meant ?—*A.* That is what I said to you just now, because you used the word "record-players" yesterday. Mr. Manning asked me with regard to all types of instruments.

HIS LORDSHIP : I don't think the witness was speaking of record-players in chief, Mr. Fox.

Mr. FOX : Well, I have a note.

HIS LORDSHIP : I thought he was speaking of phonographs generally in his evidence.

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Mr. MANNING : I asked about instrumentalities by which these things were reproduced, or something of that sort, if my memory serves me right.

HIS LORDSHIP : Because I think everyone understands that a record-player is designed to operate through a loud-speaker and is attached by a wire.

The WITNESS : Yes, and Mr. Fox referred to a record-player. That is why I answered.

Mr. FOX : Yes, but what I understand the witness to mean by record-player, of course, all these things, phonographs, gramophones, whatever they are, they are all record-players, but whether you are using the word record-player as meaning an instrument that you will play records on, you get no audible sound until you attach the loud-speaker such as is found in the radio receiving set. 10

HIS LORDSHIP : And the witness has said, in the trade, the record-player is known as something which can be attached to your radio, thereby converting it into an electrical phonograph as described in Eaton's catalogue.

The WITNESS : That is right.

Mr. FOX : And then in chief, he made some statement which apparently I have not got correctly in my notes, and I would like to have it, about 20 not one in a thousand were fitted with something or other. My friend prompts me that the wording was—

HIS LORDSHIP : I have it here, in my own notes. He was dealing with the loud-speaker extension, and he said they are not generally sold—that gramophones, phonographs, record-players, or radio combinations, “there is not one unit in a thousand which would be devised to enable the “original extension of sound to go to remote places,” and he said, of course, he was speaking of his own experience and in his own business.

The WITNESS : That is right. 30

Mr. FOX : Then, you are referring to record producing devices generally? —A. Generally, yes.

Q. That not one in a thousand, in your business, have these extra terminals for adding additional loud-speakers?—A. That is right, sir.

Q. Unless it is what is known in there as a record-player?—A. Well, a record-player would not have had added terminals. A record-player would be added to some instrument.

Mr. FOX : Oh, yes, but the record-player could be placed at any distance from the loud-speaker?—A. Yes, with an extension cord.

Q. And so far as other instrumentalities and the addition of loud-speakers is concerned, you told me, I believe, or perhaps it was Mr. Dowding, that there is very little work involved in adding additional terminals?—A. I am not prepared to say how much work there is, but I know it can be done, and we have to send radio servicemen out to do that. 40

Q. It can be done and frequently is done?—A. Yes.

Q. And you have it in your own home?—A. In that case, we didn't have to have the service, because we have the jacks.

Q. You had the terminals in the instrument, in your own home ?—
A. That is right.

Q. And so far as we term record-players to be attached to radio receiving sets to use the radio as a loud-speaker, that, as a matter of fact, is practically a standard fitting on radio receiving sets to-day, is it not ?—

A. On radio receiving sets it has been built and sold within the period of the last few years as a standard. But on radios that were in homes prior to the last few years then, certain major changes had to be instituted in order to put the attachments on.

10 Q. Yes. May I see those record supplements, Mr. Low ? On this Exhibit No. 29, I notice you advertise an electrohome phonograph ?—A. Yes.

Q. And you also, on several of them, advertise an electronic phonograph ?—A. That is right.

Q. And in some of them you advertise the electric phonograph ?—
A. That is right.

Q. What is the distinction between those three types ?—A. If I may answer your question this way, we advertise them according to the name designated to the instrument by the manufacturer. We do not choose the name ourselves. In other words, none of these names by which we have
20 described the instruments, which we advertise to the public are in the title of the instrument ; none of these are our own use of words.

Q. Well, who supplies you with the one you advertise as an electronic phonograph ?—A. Well, I would have to see the advertisement. The electric phonograph, the Freelton Automatic Electric Phonograph was supplied to us by Brand & Millen.

Q. And the electronic phonograph ?—A. The electronic phonograph, it was also manufactured by Brand & Millen.

Q. Well, therefore in your mind, in your calmer moments when you are getting out this advertising literature, there seemed to be a difference
30 between an electric phonograph and an electronic phonograph ?—A. In getting out this type of advertising, Mr. Fox, whether there is or is not a difference in those words does not enter my mind at all. The purpose in advertising from our own location, the Promenade Music Centre, is so that our advertising can have a direct bearing, or some collateral results, if you like, from the over-all advertising done by the manufacturer ; therefore, if the manufacturer calls it anything he likes or anything, any title at all, that is the name I use.

Q. No matter how descriptive it may be ?—A. No matter how descriptive it may be, because I am tying into what he has already done.

40 HIS LORDSHIP : Even if he chose to call it an automatic phonograph ?
—A. Then, if I wanted to sell that instrument as largely as I could sell it, I would use that title. I could not even think what he meant.

Mr. FOX : The same way if he called it the best phonograph, you would use that ?—A. I would use that.

Q. Do you conduct your advertising methods on that slavish adherence ?—A. No. I am talking of the printed material. The rest of the material is my own choice.

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W. St. Clair
Low.

Cross-exam-
ination—
continued.

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W. St. Clair
Low.
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ination—
continued.

Q. I should think you, being in the public business as much as you are, would be the first name to avoid that slavish advertising which sometimes goes by the name of plagiarism?—*A.* But might I also make it known that there is no plagiarism here, but most frequently the manufacturer of this instrument has paid us part of our cost of the insertion of this ad, so we have to follow.

Q. Quite; but there is, then, a distinction that you made between the electric phonograph and a phonograph?—*A.* Well, in my operations—in my business, I do not make any distinction. If anybody says “phonograph,” I think of an electric phonograph. 10

Q. This document, Exhibit No. 29, part of your operations, you there make a distinction between a phonograph and an electric phonograph, and I would like to know what it is?—*A.* Well, I have here an electronic phonograph, an electric phonograph, and what is known as an Electrohome phonograph. I do not think I have got advertising here for a phonograph as such.

Q. They are all the same thing, aren't they, substantially, as to the character of instrumentalities?—*A.* These items so advertised, yes; electronic, electric and Electrohome, they are substantially the same thing in different cabinets and different pick-ups. 20

Q. Thank you, Mr. Low.

HIS LORDSHIP: Any re-examination, Mr. Manning?

Mr. MANNING: No, my lord.

Witness excused.

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Evans.
Examina-
tion.

No. 14.
Evidence of G. L. Evans.

GEORGE LANDRY EVANS, sworn.

Examined by Mr. MANNING.

Q. Mr. Evans, what is your business?—*A.* I am the manager of the Promenade Music Centre. 30

Q. How long have you been manager of the Promenade Music Centre?
—*A.* I have been manager for approximately four years.

Q. What were you before?—*A.* I was a sales clerk with the Promenade Music Centre.

Q. When did you go to the Promenade Music Centre?—*A.* Some time in 1940.

Q. Where were you before that?—*A.* I started my career with the Canadian Bank of Commerce. I worked for two years part-time with the

Robert Simpson Company, and I think it was in 1924 I went full time with them.

Q. You went full time with the Robert Simpson Company in 1924. In what department?—*A.* In the radio department.

Q. What did the radio department sell?—*A.* They sold radios, gramophones and instruments of that nature.

Q. And how long did you remain in that department?—*A.* I was in the radio department the whole time.

Q. When did you leave the radio department of the Robert Simpson Company?—*A.* About—some time in 1940, I think it was.

Q. Can you give us some indication of what part of 1940? I don't mean exactly, of course?—*A.* Oh, I think in the late spring.

Q. Did you have anything to do with the merchandising of instrumentalities—we will call them that for the moment—for the playing of records in various private places?—*A.* Yes. The word "merchandising" is perhaps a little confusing to me. My particular function there—I was assistant manager in the radio department, looking after the radio services staff.

Q. Did you sell any instruments for reproducing records?—*A.* Yes, sir.

Q. What were they called?—*A.* They were generally called gramophones; they were also called phonographs, radio combinations.

Q. You said they were called originally gramophones, phonographs?—*A.* Yes, and radio combinations.

Q. And what else?—*A.* And record players; to introduce a new term that has not been used yet, recorders. There were probably some others that I have forgotten.

Q. Now, in time sequence in the operations of the department that you served in, when did the radio phonograph combination come in: do you recall?—*A.* As I recall, it was in the early '30's.

Q. And when a customer asked you for a gramophone what did you offer to him?—*A.* An instrument something like Exhibit 15.

Q. Of the same shape?—*A.* It could be of different shapes, but fundamentally that type of instrument.

Q. And when the customer asked you for a phonograph, what did you show to him?—*A.* An instrument which has been described here as an electrically operated instrumentality.

Q. Was that true throughout the whole period?—*A.* I believe that, originally, the gramophone was somewhat of the only method for reproducing records, when I was first there.

Q. Were you familiar with the advertising material that was put out by the Robert Simpson Company?—*A.* Yes, I was, sir.

Q. Throughout that period?—*A.* Yes.

Q. Could you identify catalogues of the Robert Simpson Company that were circulated to the public during that period?—*A.* I believe so.

Q. Have you ever seen this document before—not that specific one?—*A.* A similar one to this, yes.

Q. Can you identify it as something emanating from the Robert Simpson Company?—*A.* Yes, it is their Mail Order Catalogue.

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tion—
continued.

Q. And what was done with that Mail Order Catalogue?—*A.* It was sent to the mailing list that was compiled for that purpose.

Q. Now, of course, the whole of this catalogue is not of importance to us. Can you identify particularly the entries on page 261 of that catalogue?

Mr. FOX : What date is that ?

Mr. MANNING : That is the 1940 one.

Mr. FOX : And page 261 ?

Mr. MANNING : Page 261.

The WITNESS : Yes. That is a portable gramophone from the 10 appearance, of a type current at that time.

Q. And what is the descriptive language used?—*A.* "Pocket model " with a tone quality equal to much larger."

Q. Well, I am not particular about the whole. I suppose this may be removed now, my Lord, and the photostat marked as the exhibit ?

HIS LORDSHIP : Yes, I think perhaps if you identify it. Is it "C," "D," "E" and "F" ?

Mr. MANNING : I don't know whether he can identify these other documents or not.

Mr. FOX : "E" is Simpson's, and "F" is Simpson's, and the others 20 are Eaton's.

HIS LORDSHIP : What about "E" ?

Mr. FOX : "E" is Simpson's.

Mr. MANNING : I don't know. I will have to ask him about that. This document "E," now, that we have will be Exhibit No. 33.

EXHIBIT No. 33 : A page from the Robert Simpson Company Mail Order Catalogue for the year 1940.

Mr. MANNING : Now, you were not with the Robert Simpson Company at a later period, I gather?—*A.* No, sir.

Q. Did you have occasion to receive the Robert Simpson Company 30 catalogue in a subsequent period?—*A.* I have seen, I think, most of them, just to keep abreast of what one of our main competitors was doing.

Q. Did you, after you left the Robert Simpson Company, receive their catalogue?—*A.* I am not on their mailing list, but one way or another, I have seen most of their catalogues.

Q. Well, I suppose I cannot identify it by this witness in that way, my Lord, except something he may have received. I will have to let that go. Now, Mr. Evans, when did the so-called record-player come into stock for selling, in the Robert Simpson Company?—*A.* When you are speaking of a record-player, you are referring now to the attachment 40 that would be connected to a radio receiver to enable it to play records?

Q. Well, we will deal with that. When did that come?—*A.* That was about the middle '30's.

Q. Was there something else that was called a record-player?—*A.* The combination radio-phonograph was occasionally referred to as such.

HIS LORDSHIP : What was referred to as a record-player ?

Mr. MANNING : The combination radio-phonograph. Now, this instrument, Exhibit No. 15, came from—— ?—A. The Victor Company. It is an English gramophone.

Q. I quite understand that, but what was its immediate source ?—

A. Oh, the Promenade Music Centre.

Q. And from what part of the Music Centre operation, the museum or—— ?—A. No, it is something currently carried in stock.

Q. Have you sold any identical instruments within the last few months ?—A. Yes ; we have sold two or three within the last few months.

10 Q. And what do people ask for when they want to buy them ?—

A. Well, if that is what they want to buy——

Mr. FOX : I don't think my friend is entitled to ask that.

HIS LORDSHIP : No. You can cover it in another way.

Mr. MANNING : Yes. I think I covered it another way.

HIS LORDSHIP : You may ask what he would supply if a person asked for one.

Mr. MANNING : What did you supply or what did you offer a customer when they asked for a gramophone ?—A. I would offer something similar to Exhibit No. 15.

20 Q. Did you offer anything else ?—A. I offered him then one of the other types of electric playing devices, because from our immediate interest the others are much more expensive, and it generally turns out that the person would sooner have an electrical instrument.

HIS LORDSHIP : You are a good salesman, in other words ?—

A. I try to be, sir.

Mr. MANNING : Now, it is pretty difficult, Mr. Evans,—I know perhaps it may not be possible for you to do it, but can you cast your mind back to 1938 and make any comments as to what was the practice in 1938 ?—

A. In just exactly what way ? When a person did come in ?

30 Q. What people asked for and you would offer in 1938 ?

Mr. FOX : No, no. Not what they asked for.

HIS LORDSHIP : No, no. If a person, in 1938, came to you and asked you for a gramophone, what would you give them ?—A. It is a little difficult trying to get at the exact date, but I think if a person in 1938 had come in asking for a gramophone, my immediate reaction would be to offer them a gramophone.

Mr. MANNING : Are you able to put a specific date on your practice ? Has there been any change in the terminology that people have used with respect to instrumentalities since 1938 ?

40 Mr. FOX : Now, just a moment. How does he know that ?

Mr. MANNING : Surely, he is in business all the time.

HIS LORDSHIP : What was the question again ?

Mr. MANNING : Has there been any change of terminology by people who would come to ask for such things, since 1938 ?

HIS LORDSHIP : Oh, that would be hearsay, would it not ?

Mr. MANNING : My Lord, here is a man dealing with customers every day, dealing with very many of them from day to day, and in one

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period of time customers may or may not be—I don't know—in the habit of coming and asking for article "A" and, three years later they may come in and ask for article "B"; five years later they may ask for article "C."

HIS LORDSHIP: Well, you can call those people and say, "What do you understand by the term?" But, you see, you are asking this man to report something that has been said to him by people.

Mr. MANNING: No, with deference, not.

HIS LORDSHIP: Well, in effect.

Mr. MANNING: No. My submission is this man deals with a customer from year to year and he knows what happens from year to year. 10

HIS LORDSHIP: He may have dealt with a particularly stupid lot of people.

Mr. MANNING: He may have.

HIS LORDSHIP: What does it prove? People seem to enjoy some of these records.

Mr. MANNING: In my submission it may very well prove, and I don't know whether it will or it won't, but it may very well prove there has been a change in the use of words.

HIS LORDSHIP: Oh, I think that would be extremely dangerous, Mr. Manning, and our problem might be a very simple one if all members 20 of Parliament had musical instruments of this kind.

Mr. MANNING: Well, I wish there were, because I happen to have read some of the references, and I cannot refer to them.

HIS LORDSHIP: No, they are ruled out.

Mr. MANNING: But we are precluded by some rules of interpretation.

HIS LORDSHIP: Oh, Mr. Manning, I think that would be extremely dangerous to let evidence like that into the record. I think it offends against the very fundamental rule. Can you quote me any authority?

Mr. MANNING: No, I cannot quote any authority, but I am only going to make one observation. 30

HIS LORDSHIP: Phipson has covered the ground pretty well.

Mr. MANNING: Oh, I am not going to quote rules of evidence, but I think we are dealing with something that comes almost within the realm of *res gestae*.

HIS LORDSHIP: Oh, no; many sins are committed under the caption *res gestae*.

Mr. MANNING: You remember I used the word "almost."

HIS LORDSHIP: I think it goes very far from the field covered by *res gestae*.

Mr. MANNING: Now, Mr. Evans, I am going to ask you, when 40 people asked for a phonograph, how many parcels of goods did you show them?—A. Just one, sir.

Q. And when they asked for a gramophone, how many parcels of goods did you show them?—A. One.

Q. And for a radio-phonograph combination?—A. That is one.

Q. And when you sell a phonograph, or a gramophone, or a radio-phonograph combination, how many pieces are there that go out?—A. Just the one.

Q. And if you want them to have a loud-speaker extension or supplementary apparatus, what do you have to do to get it?—*A.* We would have to go out and buy the necessary extra speaker as we do not carry them in stock.

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Q. And under what name would you buy that necessary extra speaker?—*A.* Just as a loud-speaker.

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Q. A loud-speaker?—*A.* Three various sizes and makes.

Q. I suppose you would have to give some reference numbers, or a descriptive item?—*A.* Probably the size would be the determining factor of what we got for that type of installation. I might add that we have not made to my knowledge, any such installations from the Promenade.

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Q. You have not, from the Promenade, made any such installations?—*A.* Of extra speakers.

Q. Now, what do you mean by that? Do you mean those customers who have bought gramophones, or phonographs, or whatever you like to call them, have not come to you?—*A.* No, they have not come to us to get them, and I don't think that in many cases—

Mr. FOX: No, please, no "thinking."

Mr. MANNING: No, just what you know. You say they have not come to the Promenade Music Centre to have such supplementary equipment installed?—*A.* If I can change my thinking to I know most people do not know that it is possible to have an extension speaker put on.

Mr. FOX: No, no. Surely not, my Lord.

HIS LORDSHIP: You would have to do a lot of canvassing to know that, and, even so, it would only be hearsay.

Mr. MANNING: You can only speak from your personal knowledge.

HIS LORDSHIP: Well, the "jury" will disregard that evidence.

Mr. MANNING: At any rate, what I understand is that you have not been asked by any customer to do that?—*A.* Yes, sir.

Q. Now, when you were with the Robert Simpson Company from 1924 to 1940, do you know of any cases where customers came to the Robert Simpson Company to ask for such installations?—*A.* I don't recall any such cases. It is possible that they did, though.

Q. But they did not come to your attention?—*A.* No, sir.

Q. Did the Robert Simpson Company invite people to add such extensions to apparatus sold by them?

Mr. FOX: Did this witness?

Mr. MANNING: Well, did you, when you were with the Robert Simpson Company?—*A.* No, sir.

Q. Do you know of any other person serving the Robert Simpson Company who did?—*A.* No, sir.

Q. Does the Robert Simpson Company sell these loud-speakers, in your department?—*A.* Not at the time that I was there.

Q. Your witness.

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Cross-Examined by Mr. Fox :

Q. Mr. Evans, you told my friend that when a customer asked you for a gramophone, you offered him something like Exhibit 15 ?—A. Yes.

Q. And when he asked you for a phonograph, you never offered him anything like that Exhibit 15 ?—A. Yes, sir.

Q. And that was invariable and universal, was it ?—A. I believe so.

Q. You merely believe so ?—A. No. That was as far as I am concerned, that is the case.

Q. But a combination radio-phonograph was occasionally referred to as a record-player, and a record-player was occasionally referred to as a recorder, according to what you told my friend ?—A. Yes. 10

Q. There were all kinds of variable and duplicate names for all these instrumentalities until you come to a gramophone and phonograph, and then you are absolutely immutable, and there is no change and no error and no mistake ? Is that correct ?—A. No, sir.

Q. I see. A gramophone always meant to you a mechanically operated instrument ?—A. To me, yes.

Q. And when somebody came in and said to you, "I want a gramophone," you always did and you still do offer them something of the order of Exhibit 15, subject to the fact, of course, that in the heyday of the mechanical instrument you might offer him a console or a table model or any number of models ? That is correct ?—A. Yes. You are speaking of some little time ago ? 20

Q. I said in the heyday of the mechanical instrument—A. Yes.

Q. And to-day when a person comes in and asks for a gramophone for his home, as I presume they sometimes do—?—A. Yes, sir.

Q. Then, if you know it is a gramophone for his home, you automatically take it for granted that he wants one with a carrying handle, that he can lug around from place to place, do you ?—A. From my experience I would find out what his requirements are. 30

Q. You did not answer my question. In all these other cases, without any hesitation, when a person comes in and asks you for a gramophone you offer him something to the order of Exhibit 15. Now, when he comes in and asks you for a gramophone for his home, you don't do that. You start to ask him questions as to what he wants. Is that right ?—A. Yes. But, with every sale, you do carry on a certain amount of conversation with the customer.

Q. Of course you do, and you do not, as a matter of fact, when a person comes in and asks you for a gramophone, automatically show him something like Exhibit 15 at all now, do you ?—A. If the customer comes in very emphatically and says, "I want a gramophone," that I do. 40

Q. Now, look. Customers don't come in and say emphatically, "I want a gramophone." They come in and say, "I would like to look at something in gramophones." Now, don't they, in a nice, light, pleasant tone of voice, like I am using to you ?—A. Yes. Generally, when they come in their mind is reasonably made up. I had one case just a few

months ago, where a person came in and said, "I would like to see something in a gramophone," and because we have not sold, or don't sell many gramophones in this type of instrument, Exhibit 15, I then showed one or two instruments on the floor there and the customer said, "Well, I want to take it into the country with me, where we have no electric power, and the first one is the one I want."

10 *Q.* Yes, but as a matter of fact, in these modern days, if a person came in and asked you for a gramophone, you would first of all make pretty sure that you were not going to waste a lot of your employer's time by selling him something that he could not use with facility and ease, would you not?—*A.* Certainly.

Q. Just at the noon adjournment we had arrived at the point where somebody would come into your shop and ask for a gramophone when they were really intending to get an electrically operated instrumentality or what you call a phonograph?—*A.* Yes, sir.

Q. Now, how do you finally ascertain what they are after? Do you do it after you show them something like Exhibit 15, or do you ask them what they really want?—*A.* You ask them.

Q. You ask them?—*A.* Yes, sir.

20 *Q.* And do you say to them, "Now, do you want a gramophone, or do you want a phonograph?" or what words do you employ?—*A.* We generally find it best to ask them if they want an instrument that plays entirely by itself, other than that which is plugged into electricity, or if they require an instrument to play through a radio.

Q. And if a person comes and asks for a phonograph, you don't bother asking any of those questions?—*A.* No, sir.

Q. You just assume that he is *au fait* with the nomenclature of this art in asking for a phonograph and he is directing to your attention a specific type of instrument?—*A.* The electric instrument.

30 *Q.* Do you have in your premises any non-electric reproducing instruments other than a portable?—*A.* Yes, sir, we have. We have a child's phonograph, which is more or less—

HIS LORDSHIP: A phonograph?—*A.* Yes, my Lord, which is an open box, like an affair with an electric motor and an acoustic type of tone arm on it.

Mr. FOX: But I said a non-electric equipment, other than a portable?—*A.* No, we have not, sir.

Q. As a matter of fact, you have no phonographs at the Promenade Music Centre at all, have you?—*A.* We have electric phonographs, sir.

40 *Q.* I am asking you the one question. Do you have phonographs at the Promenade Music Centre?—*A.* If you came in and asked me that question in the store, I would certainly endeavour to sell you a phonograph, and it would be an electric phonograph.

Q. Now, Mr. Evans, it seems to me my question is quite simple. Do you deal in phonographs, and do you offer for sale phonographs at the Promenade Music Centre where you are manager?—*A.* Yes, sir.

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Q. Mr. Evans, you are the George Landry Evans who swore an affidavit in this cause on the 29th day of April, 1949, before Mr. Richard J. Stanbury, are you not?—*A.* Yes, sir.

Q. I am going to read you some of the things you said in that affidavit, and ask you if they are correct then and now :

“ 1. I am manager of the Promenade Music Centre and have
“ knowledge of the matters herein deposed to.

“ 2. The Promenade Music Centre is owned and operated by
“ a company known as the Dominion Music Distributors Limited ;
“ it conducts and has for many years conducted in the City of 10
“ Toronto the business of selling gramophones and gramophone
“ records of all well-known makes. I myself have been engaged
“ in the business of selling gramophones and gramophone records
“ for upwards of 25 years.”

You recall swearing that?—*A.* Yes, sir.

Q. And that is a correct statement?—*A.* It was at that time, sir, yes.

Q. It is not correct to-day? Is that the implication?—*A.* In not referring to the gramophone, that is a certain change in, I think, the first paragraph about the Dominion Music Distributors.

Q. Well, subject to something about the Dominion Music Distributors 20 Limited, the rest of that paragraph is correct?—*A.* Yes, sir.

Q. “ 3. It is my duty to be familiar with the activities of all
“ rival and competing companies engaged in selling gramophones
“ and to be thoroughly familiar with the merchandise they offer.”

You recall swearing that?—*A.* Yes, sir.

Q. And I take it, then, that it was not part of your activities or duty, rather, to be familiar with the activities of all rival and competing companies engaged in selling phonographs, but merely gramophones?—*A.* No. It would cover phonographs and every type of merchandise.

Q. Exactly. According to you then, the gramophone covered also the 30 phonograph and that type of merchandise?—*A.* Yes, sir.

Q. And the word still has that connotation to you to-day, Mr. Evans?
—*A.* Yes.

Q. I would ask that this be entered, my Lord, and if my friend insists upon the original, we can obtain it from Osgoode Hall and file it. It is on your own paper.

Mr. MANNING : Let me see it for a minute, and I can identify it.

Mr. FOX : Perhaps my friend will not like the underlinings.

Mr. MANNING : You didn't read the rest of No. 4.

Mr. FOX : I shall be glad to. My friend suggests I read paragraph 4, 40 my Lord :

“ I know that there is no place in Canada where, if one asked
“ for a gramophone, he would be offered anything which was not
“ a wholly self-contained unit, producing sounds immediately
“ from that unit and without the intervention of any extraneous
“ sound producing apparatus. A turn-table, operated either

“mechanically or electrically for the purpose of developing sound
 “from recordings, which does not produce sounds made audible
 “from within the instrument by some form of mechanical or
 “electrical amplification so as to be audible within the normal
 “listening area of a room in an ordinary house, is not and never
 “has been known or sold under the description of a gramophone.”

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Now, by “extraneous sound producing apparatus” in that affidavit,
 Mr. Evans, I presume you mean these added loud-speakers?—A. Yes, sir.

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Q. Yes. And I note your use of the word “recordings.” I take it
 10 for granted that by the use of the word “recordings” you include both
 what we have talked of here to-day as records, and electrical transcriptions?
 —A. No, I do not include what I know as electrical transcriptions.

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 ination—
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Q. Well, now, perhaps we may get a little light from you on the
 difference between a record and an electrical transcription. What is the
 difference?—A. The fundamental difference is that what I know as an
 electrical transcription is a 16-inch disc, whereas a record, you know—

HIS LORDSHIP: Records you know as 10 and 12 inch?—A. Yes,
 my Lord.

Mr. FOX: So that Exhibit No. 23, which is labelled “R.C.A. Victor
 20 “Electrical Transcription” is not what you know as an electrical
 transcription at all. Is that correct?—A. Yes, sir.

Q. I see. And you talk in paragraph 4 of the affidavit of making
 sounds audible from within the instrument by some form of mechanical or
 electrical amplification, which is merely confirmatory of your statement
 that the word “gramophone” includes both mechanical and electrical
 instrumentalities. Is that correct?—A. Yes, but with the reservation
 that, in the store, I think there is a little more difference in referring to the
 instruments.

Q. In which?—A. In referring to an instrument in the store, by a
 30 customer, who came in and pointed to Exhibit 15 and say, “What is that?”
 I would say that is a gramophone.

Q. Oh, yes. But on the 29th day of April, 1949, the word
 “gramophone” to you meant all these things, didn't it?—A. I was
 using the word in the broad sense.

Q. Yes. As a matter of fact in April, 1949, you had known of this,
 if I may say so, term by some sophisticated distinction between a
 gramophone and a phonograph, had you?—A. Yes, I did, sir.

Q. Why didn't you say so in your affidavit?

Mr. MANNING: Let him finish his answer—A. A gramophone,
 40 in my mind, from very early days, has meant a mechanical type of
 instrument. I mean, that is specific. I know that the term can be used to
 cover the whole.

Mr. FOX: Now, Mr. Evans, just let me caution you. You are now
 going back on the evidence you gave us just ten minutes ago and I don't
 want you to do that. I mean, you have told us that not only in April,
 1949, but now, the word “gramophone” to you means both mechanical
 and electrical and it includes both what we have been calling a gramophone

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and a phonograph. Now, you do not propose to go back on that now, do you?—*A.* No.

EXHIBIT No. 34 : Affidavit of George Landry Evans, dated 29th April, 1949.

Q. You told us that, at your store, you had never made any installations of added loud-speakers to the electrical sound reproducing instrumentalities that you sell. Do you recall that, this morning?—*A.* Yes, I don't know if I specified to electrical instrumentalities or not. No, I don't recall making any installation of a loud-speaker to a customer.

Q. But on some machines that you do sell there were, of course, 10 terminals that such extra loud-speakers could be added?—*A.* With the exception of the Q.U.8, I never know of one make that I recall seeing either a pair of terminals, or some connection for a speaker to be readily attached.

Q. It would not be much of a job for one of your radio mechanics to add a loud-speaker, would it?—*A.* It would call for certain experience or knowledge in the radio servicing, and the addition of possibly three or four small parts.

Q. What do you charge a customer who asked to have that done?—*A.* I have already said that we have not done such a thing. 20

Q. Oh, I see. I thought perhaps you meant you do send out one of your radio technicians?—*A.* No.

Q. You never did?—*A.* No.

Q. Therefore you have no idea what you would charge to have it done?—*A.* Not without pricing parts at this time.

Q. But it isn't a big job?—*A.* It isn't an immense job, no.

Q. As a matter of fact, how much do radio receiving sets sell for?—*A.* Anywhere from roughly, \$20 up.

Q. So that if you can buy a whole receiving set for \$20, it wouldn't be a very great figure?—*A.* It might be \$25, or 50 per cent. of the cost of 30 that cheapest radio.

Q. Oh, yes; it might be \$10?—*A.* Yes.

Q. Do you know anything about the history of sound reproducing devices?—*A.* I am not terribly up to date on it, sir.

Q. Do you know when the word "gramophone" first came into existence?—*A.* I believe about 1878, and I am giving that date—

HIS LORDSHIP : You were not here then?—*A.* That is right, sir.

Mr. FOX : Well, now, we have been trying to get this for a long time. Now, perhaps, my Lord, we have an informed witness who can tell us. Tell us something about the historical perspective of these words 40 "gramophone," "phonograph" and "graphophone," if you will?—*A.* To the best of my ability, the gramophone and graphophone, I believe were originally trade names and, during the course of time with improvements in the instruments—I think the word "phonograph" was brought into the picture.

Q. About what time?—A. Oh, early '30's.

Q. Not before the early '30's?—A. That is as far as I can say.

Q. You don't know if the word "phonograph" was ever used at all prior to the early 1930's?—A. Not that I definitely know, sir.

Q. Oh, yes, I am talking about your own knowledge. You have not read about it being employed at an earlier date?—A. No, I don't remember.

Q. Well, now, if I were to suggest this as a definition of a gramophone, would you agree with it: an instrument for reproducing sound by transmitting to the air mechanical vibrations of a stylus in contact with
10 a senuous groove in a moving record?—A. Yes, sir.

Q. You would agree with that as a definition of the word "gramophone"?—A. I quite agree with it, yes, sir.

Q. In a wider sense, the term might be applied to any instrument for the recording or subsequent reproduction of sound? Now, taking the first definition that I read, you say you can agree with that as a definition. Do you agree with that?—A. Well, to be very frank, sir, I can see that dictionary and it looks to me as though it is the P's instead of the G's.

Q. Well, we have apparently here a direct descendant of the famous
20 Thomas Iddimus, otherwise a Doubting Thomas. Witness, I am glad to show you the Encyclopedia Britannica, Volume 10, 14th Edition, page 515, title "Gramophone"?—A. Yes, sir.

Q. Now, perhaps you would like to read the sentence yourself?—A. I will accept it as already read, sir.

Q. Then, do we agree that you accept that as a definition of a gramophone?—A. Yes, sir.

Q. And if I were to read you this definition, would you accept it:
30 "An instrument for recording and reproducing vocal, instrumental and
"other sounds; especially a reproducing instrument consisting essentially
"of a revolving turn-table capable of carrying discs on which are impressed,
"in a spiral track, wave forms corresponding to sound vibrations, to
"reproduce which a stylus, attached to an acoustic device or electric
"system, travels along the track." Now, I think it is fair before you
answer, witness, to advise you that this is a definition of a gramophone
given in the shorter Oxford English Dictionary, 2nd edition, 1933?—
A. Yes. At the very start of that, sir, you said, or you read—

Q. Perhaps it would be fairer, to let you have it in front of you; the top one, Mr. Evans?—A. "An instrument for recording and reproducing"
—I would question the gramophone being an instrument for recording
vocal, instrumental and other sounds.

40 Q. Apart from that?—A. And here where it says, "capable of
"revolving on a turn-table capable of carrying discs on which are impressed,
"etc." That, I presume, is meant for the circular for carrying the disc
on which is impressed—otherwise it could be meant to be an automatic
mechanism, which is a little more complicated.

Q. Well, now, Mr. Evans, merely because you play a number of records consecutively on an instrument, that doesn't make it any less a

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phonograph or a gramophone, does it?—*A.* No. It would add an adjective to the description, "automatic."

Q. Yes. It would become then an automatic gramophone?—*A.* Yes.

Q. And, as a matter of fact, there are many instruments on the market to-day that play a number of records or discs consecutively, are there not?—*A.* Yes, sir.

Q. In fact, it is the rule to-day, rather than the exception?—*A.* To have them automatic, yes.

Q. So that you play something of the order of ten without touching your machine again?—*A.* Yes. 10

Q. Ten discs?—*A.* Yes.

Q. But subject to these two qualifications, would you support the definition of a gramophone that I have read to you?—*A.* Yes.

HIS LORDSHIP: And you would not recognise a gramophone as a recording instrument?—*A.* No, sir, I would not.

Q. Just as a reproducing instrument?—*A.* Yes, sir.

Mr. FOX: As a matter of fact, on some gramophones—no, we do not need to say phonographs now, because we have got phonographs within the generic term gramophone—on some gramophones you have recording equipment, haven't you?—*A.* The Q.U.8 comes equipped with a home-recording section, or special instrumentalities added to the rest of the instrument. It is not, by any means, standard equipment, though. 20

Q. No, but in fact, aren't you aware, Mr. Evans, that the first sound reproducing instruments were also sound recording instruments?—*A.* Yes.

Q. Oh, yes, you do, of course you do. As a matter of fact, the original invention of Thomas Edison, in 1877, was both a sound recording and sound reproducing instrument, wasn't it?—*A.* Yes, that is right.

Q. And also made by Taylor and Bell, in 1878. Am I correct?—*A.* You are far more advanced than I am in your sources of information.

Q. Take Berliner. The Berliner in 1887 was also a sound recording and sound reproducing instrument, wasn't it?—*A.* I am not familiar with that, but I am sure it must have been. 30

Q. Well, take the modern dictaphone, what we sell under the trade name "Dictaphone" or "Ediphone," they are both trade names. Are they anything other than gramophones?—*A.* I am not familiar with them at all, sir.

Q. Have you never used a dictaphone?—*A.* I have not used a dictaphone.

Q. Have you used an Ediphone?—*A.* No, sir. I have used a tape recorder and a Secretary, that is the extent of my dictation. 40

Q. Let us not get into tape recorders; we are in enough trouble now. Thank you, Mr. Evans. I mean the Court Reporter need not be offended.

HIS LORDSHIP: No one has suggested that the Court Reporter is not a recorder.

Mr. FOX: Not so far.

Witness excused.

Mr. MANNING : I have only one witness that I would like to put in, and that is to prove Eaton's catalogues. I had intended that he should be here, but I understand not, unless I subpoena him.

HIS LORDSHIP : Well, perhaps you don't object to these copies going in without formal proof ?

Mr. SANKEY : No, my Lord.

HIS LORDSHIP : Because they do not add anything to Exhibit 33. But, while you are on that subject, I would like for a moment to have this last witness recalled.

10 Mr. MANNING : Very well, my Lord.

GEORGE LANDRY EVANS, recalled.

Re-examined by HIS LORDSHIP :

Q. Mr. Evans, looking at Exhibit 33, that is a copy of something that was in Simpson's catalogue ?—A. Yes, sir.

Q. At the time when you were employed by Simpson's ?—A. Yes, sir.

Q. I notice that that instrument is called a portable phonograph ?—A. Yes, sir.

Q. There doesn't appear to be any electrical attachment or device connected with it ?—A. No. That is a mechanical type of instrument.

20 Q. And yet it was called a phonograph ?—A. Yes, my Lord. I think that was about the period when the phonograph was a more advanced name.

Q. What year was that ?—A. Around about 1940, I guess.

Mr. MANNING : That was 1940, my Lord.

HIS LORDSHIP : But notwithstanding the fact that Simpson's advertised it as a portable phonograph, you would never have to refer to it as anything but a gramophone ?—A. Well, nowadays, sir, the term phonograph means a much finer instrument and better reproduction.

Q. No, but this was in 1940 ?—A. Yes. Well, that is, it is ten years ago. I still don't know how I can answer you very definitely on that.
30 A gramophone was the original phonograph, and then there was a period when both the name gramophone and phonograph meant very much the same.

Q. They were used interchangeably ?—A. Yes, and to-day a phonograph means, or really it could mean a high fidelity instrument costing \$1,000 or more.

Q. Yes. Well, I just wanted to draw your attention to that and get your comments on it.

Mr. FOX : My Lord, I just could not hear the last little bit.

HIS LORDSHIP : Well, perhaps Mr. Reporter will read it to you.

40 The REPORTER : " No, but this was in 1940 ?—A. Yes. Well, " that is, it is ten years ago. I still don't know how I can answer you " very definitely on that. A gramophone was the original phonograph, " and then there was a period when both the name gramophone and " phonograph meant very much the same.

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“ Q. They were used interchangeably?—A. Yes, and to-day a
“ phonograph means, or really it could mean a high fidelity instrument
“ costing \$1,000 or more.

“ Q. Yes. Well, I just wanted to draw your attention to that and
“ get your comments on it.”

Mr. FOX : Thank you, my Lord.

HIS LORDSHIP : That is what you mean, Mr. Evans ; they were
used interchangeably at the date of the catalogue, 1940 ?—A. Yes, my Lord.

Mr. SANKEY : I wanted to ask the witness what was the situation
on the date of the writ, my Lord, or at the date of the alleged infringement. 10

HIS LORDSHIP : Well, that was in April, 1949. What was the
situation ? Were the terms used interchangeably then ?—A. The term
“ gramophone ” would cover in a broad sense this other electrical instrument.

Q. In a broad sense, it would cover a phonograph ?—A. Yes, sir.

Q. So it would cover a mechanically operated or an electrically operated
reproducing instrument ?—A. Yes, in a broad sense.

Q. In April, 1949 ?—A. Yes.

Q. Have you any more questions, Mr. Manning ?

Mr. MANNING : No, my Lord.

HIS LORDSHIP : Well, then you have already filed document 20
marked “ E ” as Exhibit No. 33, and counsel say they have no objection
now to your filing “ C,” “ D ” and “ F.” Now, just for the record, “ C ”
comes from—

Mr. MANNING : They are all marked on the back, my Lord.

EXHIBIT No. 35 : Document marked “ C,” from Eaton's
Fall and Winter Catalogue, 1937, at page 271.

EXHIBIT No. 36 : Document marked “ D,” from Eaton's
Spring and Summer Catalogue, 1938, at page 200.

EXHIBIT No. 37 : Document marked “ E,” from Simpson's
Spring and Summer Catalogue, 1941, at page 175. 30

Mr. MANNING : That is the case for the Plaintiff, my Lord.

HIS LORDSHIP : Defence.

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Mr. SANKEY : My Lord, at this stage I propose to make a formal
motion for non-suit. I know that it is not likely your Lordship is disposed
to grant it and, in fact, if your Lordship were, I would invite you to reserve
it until after the defence be put in, because, as your Lordship knows, this
is a case which may go further and I propose to indicate the reason for my
motion and not to argue it at length at this stage.

If your Lordship would look at the pamphlet copy of the Copyright
Act, at page 21, the new added Section 10, which is found half way down, 40
and I want to concern your Lordship only with Sections 2 and 3, sub-section
2 requires to be filed a list of works, up to date lists, and the old Act as
originally stood contained a provision in 1931 that if they did not, then
they could not take action for infringement, a provision similar to that now
found in subsection 3, but as that is not now so particular I need make
nothing of it.

Coming to subsection 2 :

“ Each such society, association or company shall, on or before the 1st day of November, one thousand nine hundred and thirty-six and, thereafter, on or before the 1st day of November in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licenses.”

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10 Then subsection 3 :

“ If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.”

20 Now, my Lord, if you look at the statement of claim, there is no allegation that any such lists were filed or that the consent of the Minister was obtained.

Now, I would like to refer your Lordship to Rule 146 of the Rules of Practice. It has neither been pleaded nor proved that any such statements were filed with the consent of the Minister to bringing such action, was obtained. At first blush, my Lord, one would think that Rule 146 might excuse my friend from pleading, in which event I would not now be moving.

Rule 146 is as follows :

30 “ Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, and an averment of the performance or occurrence of all conditions precedent necessary for the case by the Plaintiff or Defendant shall be implied in his pleading.”

40 My Lord, that rule was considered by the Supreme Court of Canada in the case of *The Sentinel-Review Company v. Robinson*, 1928, Supreme Court Reports, 258. That was a libel case, my Lord, in which it was necessary, by Statute, to give notice to the Defendant of the alleged libel. A question arose as to the sufficiency of the notice that was given, and Mr. Justice Duff, as he then was, discussed the practice prior to the rule, and the rule itself, and a main part of the decision will be found at page 262 at the top.

HIS LORDSHIP : That is one of Sir Lyman Duff's judgments ?

Mr. SANKEY : Yes, my Lord—I am sorry, at the bottom of 261 :

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“ Under the practice established by the Judicature Acts, the
“ necessity of a general averment of the performance of conditions
“ precedent was dispensed with, such an averment being implied ;
“ but it is still, as required by C.R.146, incumbent on a party who
“ intends to contest the performance of any condition precedent
“ to specify it distinctly in his pleading.

“ The distinction (between a condition precedent in this
“ sense, and a condition which is one of the constitutive elements
“ of the Plaintiff's right) is perhaps not easily capable of statement
“ in abstract form ; and differences of opinion will arise as to the
“ category to which a particular fact belongs. But as Mr. Justice
“ Magee points out, statutory notices of action, which presuppose
“ the existence of a completely constituted cause of action at
“ common law independently of the notice, have commonly been
“ held to be conditions precedent in this sense, as, for example,
“ in the case of notice to a magistrate.”

10

My Lord, it is my submission, very briefly, that in order to establish the status to bring this action my friend must plead and must prove and file his statement under subsection 2, or that he was relieved of that necessity by the consent of the Minister.

HIS LORDSHIP : Well, subsection 3 is conjunctive. He needs the consent of the Minister only where he has not filed the statements.

20

Mr. SANKEY : That is right, my Lord.

HIS LORDSHIP : That is, he may bring action, not having filed the statement, if he obtains the consent of the Minister ?

Mr. SANKEY : Yes.

HIS LORDSHIP : Well, in the Gazette which was filed it sets forth a tariff, does it not, and that can only be brought into operation by the filing of these statements ?

Mr. SANKEY : It only became a tariff, my Lord, after it had been processed by the Copyright Appeal Board in the manner prescribed by the Act.

30

HIS LORDSHIP : Yes, but they do not act until the statement has been filed. They do not exercise their powers as a Copyright Appeal Board until the statement is filed.

Mr. SANKEY : That may be so, my Lord. I submit with respect that he has not proved the actual filing of the statement. It may be possible to argue—

HIS LORDSHIP : But the Copyright Appeal Board having promulgated this tariff which they would only do upon the filing of these statements, does not the maxim *omnia praesumuntur rite esse acta* stand in your way, as far as this motion is concerned ?

40

Mr. SANKEY : If it were the same document, my Lord, but, by the time it leaves the Appeal Board—

HIS LORDSHIP : No, but the fact that they have promulgated a tariff, surely is enough to bring into operation the maxim, which would

carry with it the proof that everything required to be done has been done ? I am thinking of the maxim only.

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Mr. SANKEY : Quite so. If the document which was sent by the Appeal Board to the Minister as a tariff approved by them was the same document as was filed, then I think if my friend can show that, then he can show that he had filed it. But how that document found its way into the hands of the Copyright Appeal Board, I do not know. It just has not been proved. You see, there are so many changes and amendments before the Board, as my friend well knows, within a year. That is all I have to

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10 say at the moment.

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HIS LORDSHIP : What has become of the old \$10 charge that was imposed with respect to other juke-boxes ?

Mr. MANNING : Oh, my Lord, that disappeared in the course of time. The enactment in 6 (a) which is the one the Defendants have raised in this action (because the Copyright Appeal Board was then thrust in the position of having, if it could, to find means of indemnifying the performing right only for the use of some material by imposing a tax in advance on the manufacture of gramophones, or on the radio broadcast—

20 HIS LORDSHIP : Oh, the Privy Council held that this assessment could not be made.

Mr. MANNING : It is rather peculiar in that decision. The action was not taken to recover any sum of money or any damages, because there was not any tariff which would warrant the imposition of a charge upon the Defendants. It was taken to be and was successfully maintained in Canada, that any such intervention of supposed conditions precedent as my friend puts it, admittedly in the absence of any tariff filed, admittedly in the absence of any tariff proved, or in the obtaining of any injunction, and the action was sustained in the Canadian Courts, and on appeal to the Privy Council, the Canadian Courts were reversed on this simple theme,

30 that there was a statutory free licence for gramophones and it having been conceded in the evidence that the instrumentality in the appeal case were gramophones, the whole case petered out.

HIS LORDSHIP : The juke-box was held to be a gramophone ?

Mr. MANNING : Well, it was said in evidence to be a gramophone.

Mr. FOX : Oh, now—

Mr. MANNING : Well, I have the record here and I will show it to you, in argument.

HIS LORDSHIP : Well, what do you say about your failure to prove that you filed statements as required by subsection 3 of Section 10 ?

40 Mr. MANNING : My Lord, I would refer you to the *Vigneux* case, which would show whether there was any right to sue in respect of an infringement of this sort without the approval of a tariff. That right was upheld in the Canadian Courts, and the only reason why the injunction granted in the Exchequer Court—

HIS LORDSHIP : Was the question raised in the Canadian Courts ?

Mr. MANNING : Yes, my Lord, very definitely.

HIS LORDSHIP : Would you give me the citation ?

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Mr. MANNING : I can give it to your Lordship.

HIS LORDSHIP : Was there an appeal there ?

Mr. MANNING : No, my Lord, it was tried in the Exchequer Court. I have my notes here and I will be able to tell your Lordship in a minute. Tried in the Exchequer Court before the President, Mr. Justice McLean, the relief sought being an injunction, only I do not appear to have the citation in the Exchequer Court, but in the Supreme Court of Canada, it is reported in 1943 Supreme—

HIS LORDSHIP : I have not the name of the case.

Mr. MANNING : *Vigneux v. The Canadian Performing Rights Society*, 10 reported in the Supreme Court of Canada Reports, 1943, page 348, and they merely sustained the Exchequer Court judgment. That was reversed in 1945 Appeal Cases on the ground which was not accepted in the Supreme Court of Canada, or the Canadian Courts generally, that the exemption applied to gramophones.

HIS LORDSHIP : And that was an electrically operated juke-box ?

Mr. MANNING : Yes.

Mr. FOX : 1945, Appeal Cases, page 108.

HIS LORDSHIP : They ruled that it came within the exception which is to be found in Section 10 (b), subsection 6 (a) ? 20

Mr. MANNING : Yes, but there was not anywhere along the line any effect given to my friend's preliminary question. I should say, in any event, my Lord, that there is the usual provision of the Judicature Act, if your Lordship thinks that is relevant in the circumstances, that all matters at issue between the parties may be dealt with now and here, and if my friends were really anxious to inform the Court, they might have told your Lordship that in 1949 a tariff was filed and opposed by this very company, before the Copyright Appeal Board. But it is purely a technical question. It is not pleaded as an objection to the action at all by the Defendant.

Mr. SANKEY : Oh, yes, it is. 30

Mr. MANNING : Where ?

Mr. SANKEY : The first paragraph, in which I say you have not pleaded a good cause of action.

HIS LORDSHIP : Oh, well, that is hardly a compliance with Rule 146.

Mr. SANKEY : No objection made to it as a pleading, my Lord.

HIS LORDSHIP : No, but the Rule distinctly says that any condition precedent, the purpose or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, so that I should think that you have failed to distinctly specify, by a general pleading such as that. However, this is a case which involves questions of great importance to the parties to this action and I should think it would be the course of wisdom and prudence that I should reserve judgment on the motion which is made for non-suit and hear the defence. 40

Mr. MANNING : Well, my Lord, if your Lordship feels there is anything in that, I am going to make formal application for leave to amend and to establish that document. We simply prove its issue in the Canada Gazette.

HIS LORDSHIP : Well, in a criminal case the Court has the right to re-open at the closing of the case, but isn't there a difference between a civil and a criminal case in that respect, Mr. Manning ? The Court's powers are defined in the case of *Rex v. Greguire*, in the criminal case.

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Mr. MANNING : Let me put it this way. If this action should fail here and now by reason of this technical ground, there is no reason why this trial should not start over again as rapidly as possible.

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HIS LORDSHIP : I want to be shown that I have discretionary power to allow you to re-open a civil case.

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10 Mr. MANNING : It is sometimes done in the Court of Appeal, my Lord.

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HIS LORDSHIP : If you are making an amendment, you will have to call evidence.

Mr. MANNING : No. I am merely submitting that it is in the Canada Gazette.

HIS LORDSHIP : Yes, but have I the right, in a civil case, to allow you to re-open the case, once it is closed ?

Mr. FOX : If I may add a word, my Lord, at this point. The right to admit further evidence, whether at this stage or as my friend suggests in the Court of Appeal, I respectfully submit is limited to evidence which, in the nature of things, could not be discovered at the time of the trial.

HIS LORDSHIP : Oh, quite so, but that is quite a different thing, Mr. Fox, from allowing a case to be re-opened.

Mr. FOX : I know, and that is even more so.

HIS LORDSHIP : But I thought what Mr. Manning was alluding to was the Court of Appeal's right to allow amendments even after trial and after the verdict.

Mr. FOX : And further evidence.

30 HIS LORDSHIP : Well, as far as further evidence is concerned, I think the cases are clear that you have to show that such evidence was not discoverable with reasonable diligence prior to the hearing of the action.

Mr. MANNING : I may say this—

Mr. SANKEY : I just want it quite clear, my Lord, that this is an unnecessary constituent part of the cause of action. It is not just an administrative rule of pleadings, although it is neither pleaded nor proved.

Mr. MANNING : I might add this, my Lord, of course. The precedents on which these actions have been fought have been in existence for quite a large number of years and I find, for example, in looking at the statement of claim in the *Vigneux* case, no such suggestion as my friend suggests.

40 HIS LORDSHIP : No, but counsel may not have been as astute in that case as he is in this case.

Mr. MANNING : No, but the point was taken, my Lord.

HIS LORDSHIP : It may very well be that the maxim protects you in view of the fact that you have filed the tariff which is found in the Canada Gazette : that may well be, and that is a point on which I would hear argument later, if I thought it was necessary. But what I am concerned with at the immediate moment is whether I have the right to re-open, to

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allow you to produce that evidence, Mr. Manning; just as a matter of interest, you say that in the *Vigneux* case, that it was admitted that a juke-box, though electrically operated and controlled, was a gramophone?

Mr. MANNING: No, my Lord, not by counsel, but a witness so stated.

Mr. SANKEY: My Lord, I think I can help things and save time, if I may. I would not like this case to go off on a narrow technical point, and if I knew what form of amendment my friend proposed to ask, if now he intends to ask, I might well be inclined to consent to your Lordship making the amendment now.

HIS LORDSHIP: You consent to it? 10

Mr. SANKEY: I would like to see the form of it first, because it might require an answer.

HIS LORDSHIP: Yes. Perhaps if we took a recess now counsel might discuss the form of the amendment and you may come to some conclusion as to whether you will admit or not. We will rise for recess.

On resuming:

Mr. MANNING: My Lord, I propose, just by way of super-added caution, to amend sub-paragraph 8 (a) which will read this way:

“The Plaintiff duly filed with the Honourable the Secretary
“of State at the Copyright Office, a statement of fees charged or 20
“royalties which it proposed to collect in compensation for the
“issue or grant by it of a licence for the performance of its works
“in Canada in the year 1949, and the Plaintiff's tariffs of such
“fees, charges or royalties was duly approved by the Copyright
“Appeal Board,”

and then if I may have an opportunity to make that amendment, I tender also by way of supplement to the Plaintiff's case—

Mr. SANKEY: Before my friend tenders that, may I state my position. If your Lordship sees fit to allow that amendment, I would like to be taken as not objecting. That is to say, if your Lordship will permit 30 me to take the position of neither consenting nor objecting.

HIS LORDSHIP: Well, I have satisfied myself that, even in a civil case, I have the right and the discretion to allow a case to be re-opened and to introduce evidence that has been inadvertently overlooked.

Mr. SANKEY: I respectfully concur.

Mr. MANNING: I intend to file as a supplement to the Plaintiff's case, Extra No. 12 of the Canada Gazette, Volume 82.

HIS LORDSHIP: Haven't you already filed that?

Mr. MANNING: No, not that one, my Lord. I filed the one which succeeded this, which is dated at Ottawa on the 4th November, 1948. I 40 filed the one with the Copyright Appeal Board approval.

HIS LORDSHIP: That is the one that preceded that approval?

Mr. MANNING: Yes, my Lord.

EXHIBIT No. 38: Extra No. 12. Canada Gazette, Volume 82.

HIS LORDSHIP : And that contains evidence of the filing ?

Mr. MANNING : Yes, my Lord, it contains some tariff items so far as the particular matter is concerned, and I think it appeared in the other one, Exhibit No. 10.

HIS LORDSHIP : Does it give the names ?

Mr. MANNING : Oh, no, it does not give the licensees. It sets out the various categories in which the charges are set forth for this kind of service, such and such a basis of fees, and for that kind such and such a basis, and what that is in relation to this action depends and will develop
10 in the course of argument.

HIS LORDSHIP : Yes. Well, that is all the evidence you propose to adduce and you are now closing your case ?

Mr. MANNING : I close my case again, my Lord.

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Plaintiff's
Evidence.

No. 14.
Discussion
between
Court and
Counsel—
continued.

No. 15.

Opening Remarks of Counsel for Defendants.

HIS LORDSHIP : Then I will hear the defence.

Mr. FOX : My Lord, I presume you want nothing but the witnesses at this stage. You do not require anything in the way of a statement ?

HIS LORDSHIP : Oh, Mr. Fox, I would be very glad to have a state-
20 ment from you.

Mr. FOX : Well, very well, my Lord. I think your Lordship has the whole point at issue in this case, which shortly is this, that Parliament has seen fit to give an exoneration in respect of certain public performances by way of radio receiving sets or gramophones, in certain places. Now, those places are all those places other than a theatre regularly used for entertainment and to which an admission fee is charged, so that in all other places, so long as the performance is by way of a receiving set or gramophone, there is a complete and unconditional exoneration by Statute. We say our
30 I submit, is quite the short and simple point your Lordship has to decide.

Mr. Black.

Defendants'
Evidence.

No. 15.
Opening
Remarks of
Counsel for
Defendants,
11th
January,
1951.

Evidence of D. B. Black.

In the
Supreme
Court of
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Defendants'
Evidence.

DELBERT B. BLACK, sworn.

No. 16.
D. B.
Black.
Examina-
tion.

Examined by Mr. Fox.

Q. What is your occupation, Mr. Black?—A. I am a sounds system engineer, lab. supervisor.

Q. By "lab.", you mean laboratory?—A. That is correct.

Q. Of what laboratory?—A. The Stromberg-Carlson, Toronto, Canada.

Q. How long have you held that position?—A. Six years. 10

Q. And what was your occupation prior to that time?—A. For the eight years preceding I was with the Northern Electric Company in Montreal.

Q. Doing substantially the same type of work?—A. Very much the same type of work, yes.

Q. And prior to that?—A. Prior to that I was concerned with radio operating.

Q. Where?—A. Ships at sea and some coast stations.

Q. Ships at sea and shore stations?—A. Yes.

Q. All told, how many years experience have you had in sound systems and radio?—A. About 22 years. 20

Q. About 22 years. In the course of those years, have you had experience with the type of instrumentalities we have been discussing in this Courtroom for the last few days? Those that have been described in these various terms, gramophones, graphophones, phonographs, record-players, sound recording and reproducing instruments and systems, radio transmitting and radio receiving apparatus?—A. That is correct, yes.

Q. With all of them?—A. That is correct.

Q. You have had intensive experience—is that a fair statement?—A. I would say so, yes. 30

Q. Have you yourself, built, constructed any of these types of equipment?—A. Yes.

Q. Tell us what particular ones, will you, please?—A. Well, I have built transmitters, receivers, audio amplifiers of all types for electronic equipment associated with transmitters and receivers.

Q. Now, when you are talking about transmitters and receivers, are you referring to radio instrumentalities, or to sound instrumentalities in general?—A. Both. They are very closely associated with each other.

Q. Have you ever constructed a gramophone?—A. Yes.

Q. How many?—A. Oh, too numerous to mention. 40

Q. That, as a matter of fact, is your job? It is your business, isn't it?—A. That is correct, yes.

Q. Now, perhaps, Mr. Black, you might tell us, when you say you have constructed gramophones on too numerous occasions to mention, just what

do you mean by that? Tell us something of the various installations, will you?—*A.* Well, the gramophones, phonographs, record-players, or any, thing of that nature, are used very extensively to-day and they are used in the home; they are used in factories; they are used in schools, churches, and in connection with anywhere where sound has to be reproduced.

Q. Let us take for example a school. Can you give us here, in the City of Toronto, the name of a school where you have made one of these gramophone installations you are referring to?—*A.* Not in the City itself. Outside the City you can see one in the Swansea Public School.

10 *Q.* That is to the west of Toronto?—*A.* That is right.

Q. All right. What instrumentalities did you construct and erect, or place, in the Swansea School? What was the apparatus?—*A.* In the Swansea School we were required to provide to the school authorities a program which could be voiced, that is through a microphone, and also a program which could be supplied by radio, and a program which could be supplied by a record-player.

Q. Yes. All right now. Starting at what we might call the central point of that installation what did you place there?—*A.* We contained the equipment in a radio tuner—I would say a radio chassis, actually.

20 *Q.* Perhaps we do not quite know what a radio tuner or a radio chassis is.—*A.* A radio chassis or a tuner—we apply the word “tuner” when we use it to drive an amplifier to a volume greater than the radio itself will deliver.

Q. Wait a minute now, Mr. Black. You are getting technical. I want to keep this non-technical.

HIS LORDSHIP: So that the Court can understand it.

Mr. FOX: My Lord, with respect, so that counsel can understand it. I am quite sure the Court is ahead of me.

30 *Q.* Is it fair to say that what you are talking about, a radio chassis or a radio tuner—my friend might ask you not to answer this question—is it fair to suggest that is a radio receiving set without a cabinet surrounding it?—*A.* That is correct, yes.

Q. In other words, it is what you would call a radio receiving set, except that it is merely mounted on the chassis without any fancy cabinet for sale?—*A.* That is what we call a tuner. That is right.

HIS LORDSHIP: You call it a chassis or a tuner?—*A.* That is right.

Mr. FOX: So that, in other words, to clear up a point by one of the other witnesses, you do not have to have a radio set in a cabinet before it will operate?—*A.* Definitely no.

40 *Q.* All right. We start with what I call a radio receiving set, and you call it a chassis or a tuner. What do you do then?—*A.* The other requirements if they are record playing, for instance, we require a mounting turntable, or a record-player in association with the other equipment, at a central point.

Q. What do you mean by the “other equipment”?—*A.* Well, there are amplifiers and there is the radio tuner.

Q. One thing at a time. We have got now——

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Examina-
tion—
continued.

HIS LORDSHIP : Well, the witness says we contain the radio chassis and the radio tuner and then, you didn't finish. You contain it in a cabinet?—*A.* That is correct, sir.

Mr. FOX : Now, I understood the witness to say we might not.

HIS LORDSHIP : No. He had not completed what he started out to say. He started out to say, "We contain a radio chassis and a radio tuner," and then you asked him to explain what they were.

Mr. FOX : Oh, that is why I asked the succeeding questions. Let me go back. Why do you contain the radio receiving chassis in a cabinet?—

A. Well, the only reason we do that is because there are other associated 10 parts which are to be controlled from the same point.

Q. And then, at that point, you mount a turn-table for the purpose of playing the records?—*A.* That is right.

Q. Alongside the radio chassis?—*A.* Either above or below, or alongside.

Q. In the same cabinet?—*A.* In the same cabinet.

Q. And then?—*A.* And then we add to it the necessary switches, controls, to make these circuits perform in the manner they were required.

Q. May I ask if this description of the Swansea installation was a 20 general one?

HIS LORDSHIP : Can you do what? You add what?

The WITNESS : Controls, to control the function of the total equipment.

Mr. FOX : All right. We have the turn-table mounted on the spindle, I presume, and operated from a motor electrically driven?—*A.* That is correct.

Q. And I presume the turn-table was adapted to receive what?—*A.* We have various types of turn-tables.

Q. What do you put on the turn-tables?—*A.* Well, we put records on the turn-tables of varying sizes. 30

Q. Do you put anything else on the tables except records?—*A.* No.

Q. What types of records do you put on?—*A.* We put either the 78 or the 33 $\frac{1}{3}$.

Q. By 78 and 33 $\frac{1}{3}$, you mean?—*A.* r.p.m.

Q. r.p.m.?—*A.* That is correct, and the 78's take the form of 10 or 12 inch records. There are also certain schools—the Swansea School does not—but there are certain schools that require transcription players, or a record player, or a phonograph player, that will take 16 inch discs.

Q. You said, "They require a transcription player that will take 16 inch records"?—*A.* Yes, that is right. 40

Q. Would you name those schools where you have installed instrumentalities for taking 16 inch transcription records?—*A.* There is one in Guelph.

Q. You actually installed instrumentalities there?—*A.* No, I didn't instal it. I just made up the stock list and saw it put together, that is all.

Q. And you knew it was destined for the school in Guelph?—*A.* That is correct.

Q. All right. Let us get back to Swansea. We got as far as the turntable with records on. What happens next? How do you play these records?—A. The output, or the energy derived from the pick-up head or the playing head is fed to an audio amplifier.

Q. A moment, Mr. Black, if you please. How do you get the electrical energy into the playing head?—A. The electrical energy into the playing head is accomplished by means of turning the record by means of the turntable and the needle associated with the playing head.

Q. You have a needle in the playing head?—A. That is correct.

10 Q. Certain instrumentalities in the playing head; and you spoke then about electrical energy. Will you go on from there?—A. Electrical energy, then, that is developed by the transmuting—

HIS LORDSHIP: Would “generate” be a good word there?—A. The needle?

Q. It is the needle acting in unison with the turn-table on which this record is placed, following those grooves or a sinuous act, as it is called, does that?—A. Well, that actually is the electrical generator.

Q. And it generates what, electricity?—A. It generates electrical energy.

20 Mr. FOX: All right. We have electrical energy in the playing head. Where does it go from there?—A. From the playing head it is carried by means of wires to the in-input section of an audio amplifier.

Q. To the in-input section of an audio amplifier. Now, we have a couple of terms I would like you to explain.

HIS LORDSHIP: I would like to get that; the in-input section of the audio amplifier.

Mr. FOX: Now, what is the “audio amplifier”?—A. The audio amplifier is a device whereby a small or a minute amount of electrical energy can be increased or magnified to the proportion required for its use.

30 Q. Now, what is the difference between an amplifier and an audio amplifier?—A. Well, an amplifier can often amplify things other than audio sounds or an audio wave form.

Q. In other words an amplifier will amplify or make more power impulses other than sound impulses?—A. That is correct, yes.

40 Q. Now, we have heard a great deal about amplifiers in this case, Mr. Black. Have you examined the instrumentalities that have been described in this Courtroom as being present at the premises of the Defendant, the Associated Broadcasting Company and the “Brass Rail” and the “Famous Door”?—A. I have examined only that contained in the Associated Broadcasting Company’s studios.

Q. All right. Now, we talked, or the witnesses did, at a considerable length about the amplifier in the premises of the A.B.C. Is that the same thing or different from the thing that you are calling an audio amplifier?—A. It is basically the same thing. It is the same thing.

Q. So that when you talk about an audio amplifier, you are merely giving a more correct name to what we have heretofore been referring to as an amplifier?—A. That is correct.

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tion—
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HIS LORDSHIP : Now, the witness, I think, said—and I want to make sure my notes are correct—an audio amplifier is a device by which a small amount of electrical energy can be magnified and, in cases such as this and to be a little more particular, when sound impulses which are another form of electrical energy can be amplified?—*A.* That is right.

Q. You would call a sound impulse a form of electrical energy would you?—*A.* If it is transmuted into electrical energy, for instance, energy developed by a pick-up head could be called sound energy.

Q. Sound energy?—*A.* That is right.

Q. And that is another form of electrical energy?—*A.* My Lord, I don't want to create confusion. Sound energy can also be mechanical if you like. It does not necessarily have to be electronic.

Mr. FOX : That is electrical sound energy you are talking about?—*A.* That is what we are talking about.

Q. You also have sound energy of a mechanical type in the needle, do you not?—*A.* We have sound energy of the type from the needle.

Q. Now, following it from the playing head and the suspension arm, you said that the energy impulses went into the in-put section of the audio amplifier. Now, what do you mean by the "in-put section"?—*A.* The in-put section of an audio amplifier is that section which is receptive to small amounts of electrical energy. 20

Q. Well, is it conceivable enough to say that it is the receiving end of it?—*A.* It is the receiving end of the amplifier.

Q. All right. Then, it passes through the amplifier and where does it go?—*A.* From there—from the amplifier it goes to whatever is connected to it; in other words, additional equipment.

Q. Just a moment. Is it fair to say it comes out the out-put section?—*A.* It comes out the out-put section.

Q. It goes in the in-put section and comes out the out-put section of the amplifier?—*A.* That is correct. 30

Q. Now, is that the same or different from the amplifier at the A.B.C.?—*A.* It is the same thing.

Q. All right. We have got through the amplifier. Where does it go from there?—*A.* From the amplifier it goes to either a loud-speaker or a line of loud-speaker networks, or to transformers which may be necessary to—

HIS LORDSHIP : Just a moment. It goes to a loud-speaker or a network of loud-speakers?—*A.* Or to matching transformers, which may be necessary to control.

Q. What kind of transformers?—*A.* Matching transformers, which may be necessary to control either the level or the matching impedences. 40

Mr. FOX : Yes. Your last words were inaudible down here. We will have to get you some sound reproducing system that can be heard at the counsel table?—*A.* Impedences.

Mr. MANNING : Matching impedences.—*A.* Matching impedences.

Mr. FOX : You are getting awfully technical, Mr. Black. I am going to suggest we keep this as simple as possible, finally, for my sake. Now,

we will come to the matching impedences in a moment, but first of all I want to get what you mean by using matching transformers. I think you said your transformers were for the purpose of adjusting the level of matching the loud-speakers. Was that the expression?—*A.* Transformers are used, but not always, but they can be used to adjust the levels of difference.

Q. What do you mean by levels?—*A.* I mean the power out-put.

Q. What is the effect if you do not have the power out-put level?—

A. Well, it is not a question of level—I am sorry. It is hard to talk about these things without using some of these words. “Level” as we use it, is a word which indicates the level of power.

Q. As a matter of fact, what you are telling us in technical language, Mr. Black, is that you use the instrumentalities so that the same amount of out-put will come out of a number of loud-speakers, isn't it?

Mr. MANNING: Well, I would like the witness to give the evidence.

Mr. FOX: All right. Don't answer that question, but put it in your own way.

HIS LORDSHIP: What do you have to match, for instance?—*A.* It is the impedences that we have to match.

Q. All right. What is an impedance?—*A.* The impedance is the resistance or the reaction that is formed by the electrical circuit to the electric current or voltage. It is a difficult thing to explain.

Q. It is the resistance to what?—*A.* It is the resistance or the reactance which is created by a coil or a condenser, or a combination of a coil and a condenser.

Q. It is a form of resistance that has to be overcome?—*A.* That is correct.

Q. And, in lay language, that resistance is what?—*A.* The resistance is the effect of damming or blocking the energy which is trying to approach that particular point.

Q. I suppose impedance would go back to the root from which it comes, and is a stepping in of something?—*A.* That is correct, it is a blocking.

Mr. FOX: Well, let us have the dictionary definition of it. Perhaps my friend won't object to my putting that on the record for a better understanding, if I can find it. Is it fair to define “impedence” as virtual resistance due to, as induction, in an electrified body?—*A.* It could be explained like that, yes.

HIS LORDSHIP: Let me have that again please.

Mr. FOX: Virtual resistance due to, as induction, in an electrified body.—*Q.* All right. We have got lost in impedences and levels and so on. Now we will have to forego these impedences and get back.

All right. Jumping over this, will you tell us why you have these transformers. What is the effect of doing all these things?—*A.* The effect in the case of using a transformer as an instrument is to lower the power in the speaker—well, that is the effect actually, to lower the power in the speaker by changing the resistance or the impedance of one section of the transformer.

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tion—
continued.

Q. All right. And if you have more than one loud-speaker, do you have to have those instrumentalities?—A. Not necessarily so, no.

Q. But to do a good job, it is usual to have them?—A. Usually, yes.

Q. And if you only have one loud speaker, do you have those transformers and things?—A. Well, you usually have a transformer associated either with a radio or an amplifier to feed or to supply the power to the loud-speaker.

Q. Is there a transformer, or is there not a transformer in the amplifier at the A.B.C. studio?—A. Yes, there is.

Q. Well, couldn't we, Mr. Black, keeping all these technical things out of it, just talk about the amplifier?—A. Yes. 10

Q. So that we have got all these technical instrumentalities back again to the point that you have got the amplifier at Swansea?—A. Yes.

Q. Connected to a number of loud-speakers?—A. Yes.

Mr. MANNING : We are still talking about Swansea ?

Mr. FOX : We are still talking about Swansea.

Mr. MANNING : But we had got out to the studio, hadn't we ?

Mr. FOX : Oh, yes ; that was just a quick trip and back again.

Q. Now, may I show you Exhibit No. 24 ?

HIS LORDSHIP : Sound travels very rapidly. 20

Mr. FOX : Now, I show you Exhibit No. 24, Mr. Black, and am directing your mind to Swansea. Would you tell me what difference there is between the installation at Swansea and the installation diagrammatically shown on Exhibit No. 24?—A. The radio part or the phonograph part or the player part of the installation at Swansea is identical with that as far as the schematic diagram is concerned.

Q. That is, you have, at Swansea, in addition to a gramophone type of instrumentality, you also have a radio instrumentality but, leaving the radio instrumentalities out of consideration and referring only to your gramophone type of installation, at Swansea, you have placed there exactly the instrumentalities shown on Exhibit 24 in a schematic form?—A. That is correct. 30

Q. How, now many installations of that sort of thing have you there, Mr. Black?—A. I think in the last three years, I think we have—I have developed—built at least 32.

Q. And when they are in buildings like schools and factories, I presume you have installed the same in factories?—A. That is correct.

Q. Do you have one or a number of loud-speakers?—A. Well, we usually have more than one.

Q. So that when we look at Exhibit No. 24 and you tell me your phonograph instrumentalities are identical, you are qualifying that, I presume, subject to the number of loud-speakers?—A. That is correct. 40

Mr. MANNING : I wonder if I am understanding what the witness means by qualifying it.

Mr. FOX : Well, I take it by that, Mr. Black, qualified is the word identical with the fact that, on Exhibit 24 there is shown one loud-speaker and in your installation of the gramophone at Swansea there was more than

one loud-speaker. Is that correct?—*A.* Well, I accept that as being a schematic form of diagram which was for one or more.

Q. Yes; on a schematic form or diagrammatical form, one may include a number of others?—*A.* That is correct.

HIS LORDSHIP: And there would be a separate wire leading from each amplifier to each loud-speaker?—*A.* That is correct so far, but possibly they can all be connected into one wire, if you like; depends on how the arrangement is made.

10 *Mr. FOX:* Your Lordship will understand it will depend on the method of wiring. There are different methods: in series and in parallel and so on.

HIS LORDSHIP: Yes.

Mr. FOX: Now, in addition to these installations, Mr. Black, have you ever built gramophones for use in a home?—*A.* Yes.

Q. Approximately how many?—*A.* Well, we have been instrumental in building about six special jobs, which are self-contained, say; a group of equipment which was put together to form a record-playing or a gramophone unit in a private home.

20 *Q.* When you build one of these units, as you call them, is it sold in a cabinet?—*A.* Not necessarily, no.

Q. Have you ever sold any not enclosed in a cabinet?—*A.* Yes.

Q. Does it operate?—*A.* Oh, yes.

Q. Apart from being enclosed in the cabinet?—*A.* That is correct.

Q. That is, those that you have actually made have operated without being enclosed in a cabinet?—*A.* That is correct, yes.

Q. Are they mechanical instruments or electrical?—*A.* They are electronic gramophones, if you like.

Q. Well—

30 *Mr. MANNING:* I suggest that is a very neat way of basing a conclusion.

HIS LORDSHIP: I think I have heard a lot of others do the same thing, and quite studiously.

Mr. MANNING: Oh, yes, I quite agree, but I think the witness should be permitted to give the evidence.

HIS LORDSHIP: Well, the witness says they are electronic gramophones. Would you object to their being called electronic phonographs?

The WITNESS: No, my Lord.

40 *Mr. FOX:* I have no desire, and your Lordship is too astute for me to do so, but I do, however, know that one of my friend's witnesses agreed to the use of the word "gramophone" as a generic expression. If my friend wants me to use the word "gramophone" or "graphophone" I shall do so. No intent to impress the Court at all.

HIS LORDSHIP: I do not think a great deal turns on what terms the witnesses use. I don't think it matters a great deal.

Mr. MANNING: No, my Lord, within certain limits I don't think it does: but there are certain limits within which I am only trying to avoid being factious about it and at the same time trying to keep within limits.

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I appreciate there is a great deal of urbaneness in it.

HIS LORDSHIP: The witness said he would describe these as electronic gramophones or phonographs, that is the installations in private homes.

Mr. FOX: Where was the loud-speaker, or where were the loud-speakers associated with those instruments placed with respect to each?—

A. Well, it depended on the type of home the equipment was going into, or the type of room. Sometimes they were placed in walls, in a partition between walls; sometimes they were placed in the basement in a panel box in the basement, come up through the floor. They go in different 10 places actually.

Q. In other words, you would have what I just called a gramophone or a phonograph in one room, and you would have a loud-speaker in another room in some cases?—A. They are different, that is correct.

Q. Would you have more than one loud-speaker?—A. Yes, there might be more than one loud-speaker.

Q. But had you?—A. To my knowledge in the private home one loud-speaker was sufficient in any case we had to deal with.

Q. And were there instrumentalities for placing more loud-speakers?—A. Oh, yes. 20

Q. Is that much of a job, Mr. Black, to place additional loud-speakers on an existing gramophone or phonograph?—A. No, it is not a big job.

Q. Now, you are familiar in the trade with what is the normal, the usual or average charge of a radio technician for placing terminals on an instrument of this type on which an additional loud-speaker can be accommodated?—A. I cannot answer that in a general way, because different instrumentalities require a little bit different type of work.

Actually, for example, to take an ordinary mantel model radio, or a small radio chassis, in many instances it is sufficient to connect a pair of leads to the terminals of the loud-speaker itself and extend them to 30 whatever distance you require.

Q. What would that cost you to do?—A. Well, if somebody told you how to do it, you could probably do it yourself. The cost of a speaker is about \$4 or \$5.

Q. And then you could do it yourself, if somebody told you how?—A. That is correct.

Q. Yes. But, you see, of course we are a little sensitive on that, you know. That is what we lawyers get paid for, is telling other people how to do things. Now, you must keep your trade secret, too, and what would a radio technician's time normally be for that? What would he 40 charge?—A. Oh, he would probably charge you possibly a couple of dollars an hour.

Q. And how long would it take?—A. Depend on the run of the wire, where it was located. If it is in the next room—

Q. No, I just mean to attach it?—A. Oh, about three minutes.

Q. All right. We have got that down to something round \$4 or \$5 for the loud-speaker, and three or four minutes of a radio technician's time,

or you can do it yourself on one particular type of model. Now, there are other models on the market I am talking about now, of gramophones, phonographs, radio-phonograph combinations; these things, they must cost more, I presume?—A. That is correct.

Q. You still think your \$4 or \$5 will be constant for the extra loud-speaker?—A. Well, if you want a larger, a more expensive type of speaker than is in the set,—the speakers could go to 20 speakers, depending on the type of the speaker.

10 Q. Oh, of course. We could all buy a Ford car or a Cadillac, if we could afford it. I am sorry I brought that up. And the length you have the speaker away from your instrument is dependent upon the length of wire you want to put, is it?—A. To some degree, yes, but there are limitations. There are limitations. To run a lot of wire on a speaker, you have to determine the size of wire and what result you expect to get at the other end.

Q. But we are still on the main point of what it would cost to set up this extra loud-speaker?—A. I would say the average cost on the more expensive set would be probably \$35 or \$40.

Q. Including the speaker?—A. That is correct.

20 Q. So that for an inclusive cost, the most expensive to have an added loud-speaker or to have an extra loud-speaker to an existing instrument, is of the order of \$35 or \$40?—A. That is correct.

Q. Mr. Black——?—A. My Lord, I would like to correct the location of the equipment as mentioned yesterday as having been a 16 inch turntable. It was not Guelph, but London.

Mr. FOX : I understand, my Lord, the witness is correcting a statement he made yesterday that the installation of the equipment mentioned was not at a school in Guelph, but at a school in London, Ontario.

The WITNESS : That is correct.

30 Mr. MANNING : That does not alter any of the other evidence he gave yesterday with respect to the installation at Swansea ?

Mr. FOX : Does that or not affect any of the installation at Swansea ?—A. Not at all.

Q. And your installation at London was of substantially the same type or was it different from the installation at Swansea?—A. The same type.

Q. There might have been a variation in the details, I suppose?—A. That is correct, yes.

40 Q. Now, when you go to construct those installations, or these sound reproducing devices which we call variously gramophones or phonographs, self-contained things for homes, where do you get the parts to complete them?—A. The record-players, which are the basic units, the record-players are obtained from manufacturers of equipment of that type.

Q. Now, what do you mean by the "record-player"?—A. Well, I mean the turn-table, the playing head, the arm that is used to hold the head, and the frame upon which the complete unit is mounted.

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Q. That you term the record-player part of the equipment?—A. That is correct, yes.

Q. Is the amplifying means contained as part of the record playing equipment or not, or is it something apart?—A. Not in our equipment.

Q. Where do you buy or how do you get possession of the amplifier or amplifying equipment?—A. The amplifiers are designed and built in our own plant.

Q. Are they obtainable by purchase?—A. Oh, yes.

Q. What about the loud-speakers?—A. The loud-speakers—we have two sources of supply. We complete the loud-speaker in our own plant 10 and we purchase some loud-speakers.

Q. In all these operations we have been talking about, you act as an employee of the Stromberg-Carlson?—A. That is right.

Q. You do not do any of this on your own?—A. No, not at all.

Q. You do not do like Mr. Dowding does and oblige a friend here and there, I judge?—A. I have done that and probably have had friends ask me to do it.

Q. But you do not make a business of it?—A. Definitely not.

Q. Now, can you name me specifically any of the places where you have gone, who supply this equipment, and tell me whether you have had 20 any difficulty obtaining it?—A. Well, the company—I don't actually purchase the equipment, but our purchasing agent extends orders to the people we recognise as being suppliers of that particular equipment.

Q. Let us come down to your own people, or a particular instrument for a friend. Where would you go to buy the equipment?—A. Well, being in the trade, I might purchase from the company which employs me, and I have access to them.

Q. Anywhere else?—A. I could go down to any radio parts supply house and buy similar equipment there.

Q. Oh. There are radio supply houses are there?—A. That is 30 correct, yes.

Q. Who is entitled to go into these radio supply houses and purchase these parts that we are discussing?—A. Usually radio supply houses deal with two types of customer. One must be a person in the radio business who is given the equipment at a so-called net price, or dealer net, and they also sell to individuals at list price, or which has been pointed out as being the retail price.

Q. You mean at retail?—A. That is right.

Q. Could I go in and purchase those parts?—A. Yes.

Q. Could my friend?—A. Yes.

Q. Could anybody?—A. Anybody could go in and purchase them.

Q. Now, you spoke about part of this installation at these two schools, those two being typical of many of your installations. You spoke of a part of the equipment as the record-player, and then you went on to describe the difference in terms of the turn-table, the needle, the head, the suspension arm. Now, would you compare that record-player, as you call it, called a record-player that we have been discussing earlier in this hearing, in which 40

you go into a store to buy for the purpose of attaching to your radio receiving set. Would you compare the instrumentalities?—*A.* Fundamentally they are exactly the same thing.

HIS LORDSHIP: Now, just what are exactly the same thing?—

A. They have the—

Q. No, no, but you are comparing the units that you installed in industrial establishments?—*A.* Yes.

Q. Then, those units are fundamentally the same thing as an ordinary record-player that you can purchase from a dealer for attachment to a radio?—*A.* As far as the working operations and the intent and result are concerned they are identical. They may take different forms as far as the physical dimensions are concerned, or the containers.

Mr. FOX: In other words, Mr. Black, in each one of them do you or do you not have a motor?—*A.* Yes.

Q. A spindle operating a turn-table?—*A.* Yes.

Q. A turn-table?—*A.* Yes.

Q. A needle?—*A.* Yes.

Q. A head containing a magnetic coil?

HIS LORDSHIP: No. A turn-table and what?

Mr. FOX: A needle and playing head?—*A.* Yes.

Q. And in each case does the playing head operate, turning the mechanical vibrations set up by the needle and groove into electrical impulses?—*A.* That is correct.

Q. And in each case do you or do you not have a suspension arm?—*A.* Yes.

Q. And wires leading up to additional instrumentalities?—*A.* Yes.

HIS LORDSHIP: And the electrical coil is in the—?—*A.* The electric coil, my Lord, that is one type of pick-up. There are other types which do not use the magnetic coil.

Mr. FOX: There are other types of instrumentalities in playing heads, other than electric coils?—*A.* That is correct.

Q. They are of an electric nature or an electronic nature, are they?—*A.* That is correct.

Q. And they all serve to do the same thing, turn mechanical vibrations into electrical impulses?—*A.* That is correct.

Q. And these other devices, are they all electrical devices?—*A.* With the exception of the type used on Exhibit 15, I would say yes.

Mr. FOX: Now, Mr. Black, we have compared the part of your installation in the schools with the standard retail type of record-player. Will you now go on? We have got the identity between the instrumentalities in those two pieces of equipment. Will you now go on and make a comparison between those and the instrumentalities that you found in the studio of the Defendant, the Associated Broadcasting Company?—*A.* Over-all, as far as the equipment used in the Associated Broadcasting Company studios is concerned, there with the exceptions possibly of the arrangement of the circuits and power the capabilities of the amplifiers and

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that sort of thing, the instrumentalities are identical with what we would use in a school system.

Q. I have been, without taking you through each part, starting from the turn-table up to the suspension arm and the wires carrying it to further means, been discussing the instrumentalities. Are all those instrumentalities present in the A.B.C. Studio exactly as they are in these school installations and in the commercial retail record-player?—*A.* That is correct.

Q. And you say the only exception you would make would be the dimensional characteristics?—*A.* Well, my Lord, I said dimensional and power, and there are things which do not affect the basic instrumentalities; they are different. 10

Q. Sturdiness, yes, but the dimensional characteristics are the outstanding differences?—*A.* I wouldn't say exactly that, my Lord, because the power capabilities and the type of equipment can vary and that, in the application of the equipment, is very important.

Q. Well, what is the essential difference?—*A.* The essential difference would be in the power capabilities and the switching circuits.

Mr. FOX : What about the relative sturdiness of the other equipment and give a reason for their being different. Take the ordinary record player and compare it with the A.B.C. installation as to sturdiness and with the sturdiness of the other equipment. Does that have any effect on the differences you have been talking about?—*A.* Oh, definitely. The Associated Broadcasting Company have apparently made an effort to supply their customers with a good program over a long period of time. In other words, many operating hours a day, with the result they have learned apparently by experience that it is necessary for them to have turn-tables of a very rugged nature and very smoothly operating in order to produce the programs which they feel are suitable for their customers, and for that reason everything purchased in the way of equipment is of a superior nature, or superior in nature to the ordinary record-player and reproducer. 20 30

Q. In other words, the retail record-player is not designed to operate the number of hours a day that the A.B.C., the Defendant's instrumentalities are designed to operate?—*A.* Well, that would be one reason.

Q. And the other, I gather from your statement, if I can paraphrase it into short words, is that it is the difference between a professional and an amateur job?—*A.* A professional and a domestic job, we would say.

Q. Yes, a professional and a domestic job. That is probably better. We were talking about buying these instrumentalities at retail, and you mentioned radio supply houses. I would like to mention a few of them, if you will, where I might go, for example, if I had the temerity to attempt to build my own gramophone or phonograph, or whatever it is called, or record-player?—*A.* In the Toronto area, you can go to— 40

Mr. MANNING : Or something else.

Mr. FOX : Or something else that my learned friend calls by one of his favourite names.

HIS LORDSHIP : Such as a Q.U.8.

The WITNESS :| In [the Toronto district or the Toronto area, you could go to the A. & A. radio.

Q. The A. & A. Radio. Do you mean to the Alpha Aracon Radio Company, Limited, who are located at 29 Adelaide Street West in this city ?

—A. That is correct.

Q. And I could buy any of these instrumentalities from them, that I want ?—A. That is correct, yes.

Q. And do they probably from time to time catalogue those instrumentalities ?—A. Yes, they do.

10 Q. Anybody else ?—A. The Canadian Electrical Supply Company. I believe they are on Yonge Street. The Wholesale Radio Supply. I believe they are on Bay Street. I don't know the number.

Q. Yes ?—A. There are other sources, but that is all I recollect just now.

Q. What about the R.C.A. Victor ?—A. I am not too familiar with how the distribution set-up is made in R.C.A. Victor, but I would imagine they are very much like ours.

20 Q. No, I am just asking you. Don't imagine anything. If you know, tell us. If you don't, just say you don't know. Do you know anything as a fact ?—A. Not as far as the R.C.A. Victor is concerned, no.

Q. Have you ever bought anything from them, yourself ?—A. As an individual, no.

Q. You have on behalf of your company ?—A. Well, I have started the purchasing department to buy from them.

Q. You have asked your purchasing department to, and have they come through ?—A. That is correct.

Q. Have you ever seen any of the R.C.A. Victor catalogues advertising these parts for sale ?

Mr. MANNING : Well !

30 Mr. FOX : Well, he can say whether he has seen them.—A. Yes, I have.

Mr. MANNING : I thought there was an objection to that sort of thing.

Mr. FOX : Oh, no. I objected to your putting catalogues in without proof. I have no objection to the catalogues as catalogues.

Q. Mr. Black, we have had a good deal of definition here and I want from you, if you will, what you understand is meant by the word "gramophone," and I want you just to pause for a moment and answer in this way. That if an acquaintance of yours came to you and said, "I want you to build me a gramophone," what would that mean to you ?—

40 A. First of all I probably would make an attempt to put the thing into language which I use, which is a phonograph reproducer, or a phonograph.

Mr. MANNING : Would you mind going slowly ? I want to take this down. I don't write fast enough to get this. "Put his language into what I would use."—A. The term "gramophone" has not been used recently in the trade. There is no question about that. Reference has been made to phonographs or record-players, or something of that nature, and once having qualified, if he wanted a reproducer, a phonograph reproducer,

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then I would immediately assemble the equipment necessary to make such an instrument.

Mr. FOX : Well, what, if any, is the difference in your mind between a gramophone and a phonograph reproducer?—*A.* None, except that I am not familiar or too familiar with the term “gramophone,” that is all.

Q. In other words, in ordinary parlance, people talk of phonographs now more than they talk of gramophones?—*A.* That is correct, yes.

Q. To you they mean the same or a different thing?—*A.* They mean the same thing to me.

Q. Suppose you give me now, if you will, a definition of what the word “gramophone” means to you?

Mr. MANNING : Well, my Lord, would that be—

HIS LORDSHIP : I see no objection to it.

Mr. MANNING : All right.

The WITNESS : The word “gramophone” to me means a device on which can be played records or discs.

HIS LORDSHIP : Would you take this slowly, Mr. Black, please, as we do not all write shorthand. A device on which what?—*A.* On which can be placed records or discs with the intent of producing from such records a reproduction of the program contained on the record.

Q. A reproduction of what is contained—?—*A.* On the record.

Q. Yes. Does that end your definition?—*A.* Yes.

Mr. FOX : Perhaps the Reporter might be good enough to read that definition back, my Lord, and if I asked you to define the word “phonograph,” would you define it in similar or different terms?—*A.* I would define it very similar.

Q. Well, very similar, or identical?—*A.* Well, it would be the same thing.

Q. And if I asked you to define the expression “record-player” would you define it in the same or similar terms, or different?—*A.* I would define it exactly the same way.

Q. And then if I come to the expressions, “combination radio-phonograph,” and “radio-gramophone,” what definition would you give to those?

HIS LORDSHIP : Wait now. Combination phonograph and radio-phonograph and gramophone?—*A.* Well, the instrumentalities that make it a radio-phonograph—you can take the phonograph section or the radio-gram section or the gramophone section of the radiogram, or the phonograph section of the radiogram, are all identical with what has been described as a record-player, or any of the others.

Q. And you add radio receiving instrumentalities, too?—*A.* That is correct.

Q. And you have a control method so that you can switch the instrumentality in to the radio operating position, or the gramophone operating position, at will?—*A.* That is correct.

Mr. FOX : Now we are on definitions, Mr. Black, perhaps you would describe to me what is commonly known as a “juke box.” You have had

experience with them, have you?—*A.* I have seen them and heard them and, on occasions, looked at some of the parts in a juke box.

Q. Just describe the instrumentalities to me, will you, as an expert?

HIS LORDSHIP: You are asking for a technical description, and for an expression of opinion as to the desirability or otherwise?

Mr. FOX: Oh, no, by no means. I have fixed notions on that point. But I want him to describe the instrumentalities that he found in the juke box.

The WITNESS: Well, in a juke box you have, first of all, the mechanism whereby the records can be changed, which, as it only provides means of selecting their programs (which can be done manually or any other way)—but there is a means of selecting a selection, maybe of 10 or 12 and, from that point on, from the point of contact, if you like, of the needle on the groove of the records that are being used or selected, to the actual sound that you hear reproduced by the juke box, it is identical with a phonograph.

Q. Or a gramophone?—*A.* Or a gramophone.

Q. In other words, the juke box takes all the instrumentalities of an electrical gramophone or phonograph, and precedes those instrumentalities with a selective instrumentality operated by coins. Is that correct?—*A.* That is correct.

Q. In other words, you put a coin in, push a button to select the piece of music you want, it automatically is placed on a turn-table and from that point on you have an electric gramophone?—*A.* That is correct.

HIS LORDSHIP: You put in a nickel and you take your choice?—*A.* That is correct.

Mr. FOX: Well, I don't think you do take your choice in that sense. You make your own selection.

HIS LORDSHIP: Well, a very narrow limited choice available.

Mr. FOX: Now all these instrumentalities we are talking about, *Mr. Black*, will you just look at Exhibit No. 24 and am I being fair to you if I say that the instrumentalities diagrammatically represented on Exhibit No. 24—

Mr. MANNING: Wouldn't it be better to ask him the question not in a leading form?

Mr. FOX: All right, I am trying to shorten it.

HIS LORDSHIP: Well, it is less objectionable when you are dealing with a highly qualified expert. *Mr. Manning*, I know in the Exchequer Court that rule is considerably relaxed, dealing with experts.

Mr. FOX: Well, at the same time I respect my friend's objection.

Mr. MANNING: I do not want to be too technical.

Mr. FOX: My friend is quite right to take objection. No objection to re-framing my question.

Q. Would you look at Exhibit No. 24 on the one hand, and would you then consider in your mind all the instrumentalities we have been talking about for reproducing sound? First of all one of these electrical gramophones or phonographs that you build for domestic use; secondly, the installations that you made in the schools at Swansea and London;

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thirdly, the juke-box and, fourthly, the instrumentalities located in the studio of the Defendant, A.B.C. Do I make myself clear?—A. Yes, sir.

Q. I want you to give me a comparison between those instrumentalities; on the one hand of the instrumentalities on the diagrammatical section on Exhibit No. 24?—A. The actual basic components, I mean by that, the point of reproduction and of amplification or recreation, if you like, and amplification and the conversion of electrical energy into mechanical energy are identical. That is with all those you have mentioned.

Q. Now, you mentioned one thing that interests me for a moment, Mr. Black. You mentioned the point of reproduction or recreation, and I think we might have that clarified?—A. A record as is transcribed or as is impressed or as is played is just a record or a history, if you like, of what has happened to the stylus which has made that record. 10

Q. One moment. The stylus being something different from what we call the needle?—A. Well, it is the device whereby the original record has been mechanically transferred to the record itself.

Q. It is a record cutting stylus?—A. That is correct.

Q. In other words, we have, let us say, it may be a few days earlier, it may be several years earlier, we have a living performance in a studio, and, by suitable means, the sounds of that living performance are cut by 20 a stylus on to a record.

Mr. MANNING: A matrix, I suppose.

Mr. FOX: Well, no. The matrix is made from that.

The WITNESS: That is one way to make a record. I must say it is not absolutely necessary to have living talent. For instance, a record can be made from another record.

Mr. FOX: Oh, yes, I think we understand that. But substantially, the usual method is to have a living performance. You create a noise, anyway?—A. That is correct.

Q. And then you impress it on a record and you make a matrix from 30 which you can then reproduce any number of those records?—A. That is correct.

Q. And then, when you desire to reproduce that performance from the record, you take the record and you place it on the turn-table, you place the needle in the grooves, the turn-table revolves and, at the loud-speaker end, you have sounds emitted which are substantially the same as the sounds of the original living performance?—A. That is correct.

Q. In other words, that is an acoustic reproduction?—A. That is correct.

Q. That is what you hear coming out of the loud-speaker as an acoustic 40 reproduction of the original performance?—A. That is correct.

Q. But until it becomes acoustic by means of the loud-speaker, there are instrumentalities prior to the loud-speaker which reproduce the performance. Is that correct?—A. That is correct.

Q. So that you have a reproduction before you have an acoustic reproduction. Is that correct?—A. That is correct.

Q. Am I going too fast for you, my Lord?

HIS LORDSHIP : No, thank you.

Mr. FOX : Now, at what point in the instrumentalities does the reproduction or recreation, as you call it, take place?—A. At the point at which the needle contacts the grooves in the records.

Q. Thereby setting up—

HIS LORDSHIP : That, of course, is the witness's opinion, not the basis of a legal opinion.

Mr. FOX : Oh, that obviously is the witness's opinion. It will have to be a matter of opinion all the way through, on that point?—A. May I qualify that a little bit by saying that if the record is changed, the reproduction or the recreation, if you like, is an altogether different unit, nothing having been changed but the record.

Q. Now, what do you mean by that, "if the record is changed"?—A. Well, you take one record off and put another one on.

Q. Oh, of course. Then you get the reproduction of an entirely different performance?—A. Yes, by merely changing one item, which is the record.

Q. Oh, yes. By merely changing one item, you change the reproduction to a different performance?—A. That is correct.

Q. But speaking as to any particular performance, your reproduction occurs at the point of contact between the needle and the groove?—A. That is correct.

Q. Is my friend prepared to base his position on that, and that there is nothing else?

Mr. FOX : We will find out in the course of argument. In these various installations you have made, you told me that you used additional loud-speakers at considerable distances from the turn-table?—A. In the case of school installations or industrial installations, yes.

Q. Now, in doing so, about how many amplifiers did you have?—A. The number of amplifiers are determined by the number of simultaneous programs which are required by a particular installation, and in the case of a school system sometimes we have three simultaneous programs. Any one program has a complete channel, or a complete amplifying system of its own.

Q. That is the point I want. We take a line, a channel I think you have called it, which would be as diagrammatically represented on Exhibit No. 24. Is that what you mean?—A. Yes.

Q. Now, taking one channel in your system, how many amplifiers did you use?—A. There would be one amplifying unit.

Q. Did you ever use more than one?—A. Oh, yes.

Q. How and why?—A. Well, sometimes the equipment that we use requires further amplification for a specific purpose, to cover large areas or to operate in devices which may require further amplification to complete the operation.

Q. Well, that is a little technical, isn't it, Mr. Black?—A. Well, I can give you an example, for instance, of requiring further amplification. We provide a given power for a classroom in which 40 students may be

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seated and there is a power that has been established as being suitable for that particular class-room. When we come to the auditorium or the gymnasium of the school, we run a line similar to what we run for the class-room and, at the point of the line ending in the auditorium or the gymnasium, we would there put in an amplifier to cover three or probably four hundred people that may be in the auditorium.

HIS LORDSHIP : You mean a new amplifier or an additional one ?—

A. It would be an additional amplifier, my Lord.

Q. With the same power or a greater power ?—A. It may be anything, my Lord, depending on what is required.

Mr. FOX : It may be somewhat greater or less ?—A. Not necessarily less. You would not want to amplify it any less.

Q. What about the effect of distance from the main reproducing instrumentalities ?—A. Distance has certainly some effect on the loss of power, but it has very little effect as far as being able to reproduce a program. Lines, wires, and that sort of thing have been arranged so that—well, we can carry, as you know, programs from coast to coast. Now, most of that is done over wires using amplifiers.

Q. I see ; what are commonly called boosters ?—A. That is correct.

Q. Which merely amplify or strengthen the power of the electrical impulses ?—A. That is correct.

Q. You have heard evidence given in this Court relative to the installations at the " Brass Rail," " Famous Door," and the " Town and Country Room," Mr. Black, and you have heard that in those premises was located a loud-speaker—at least one loud-speaker, and I think in each case never less than five loud-speakers ; that there was also an amplifier. You recall that evidence ?—A. Yes, Mr. Fox.

Q. And that from wires leading in from the Bell Telephone Company. Do you know any reason why that amplifier would be present in the premises of the subscribers mentioned ?—A. Yes.

Q. Would you be good enough to tell us what it is ?—A. The Associated Broadcasting Company use Bell Telephone lines to transmit their programs to their subscribers and because they are Bell Telephone lines they must limit the amount of power which is being fed into any pair of wires to a definite point which is below a level, or a power, if you like.

Mr. MANNING : Take this very slowly, please. I am sorry to interrupt, but I just want to get it exactly. The amount of power fed into lines ?—A. They limit the amount of power fed into lines, into any lines or pair of wires, a limit is placed on it because they have thousands of other customers who are also using lines similar.

HIS LORDSHIP : You started to use the expression, " below a level of power." ?—A. Below the level of power that would be usable to the average human ear. In other words, there is a power level of approximately zero decibels which is sold fairly closely. In other words, it may go to a plus four or a plus ten, or a minus four. Those limits are actually maintained by the Associated Broadcasting Company in their studios, and the limit is placed on the power level because of the fact that subscribers

for the Bell Telephone Company, the subscribers' lines also probably run in parallel with lines that might be used by the Associated Broadcasting Company and if the level of power were higher than the limit, the music—

Mr. FOX: That is, if the level in the Associated Broadcasting line on the Bell Telephone?—A. That is correct; if that level were higher the current in the circuit would create cross-talk. In other words, it would interfere with the telephone lines that are normal Bell Telephone lines.

Q. Is that what you call induction?—A. It is induced cross-talk. It is induced current.

10 Q. In other words it is fair to say that if they did not maintain as low a level, the music might play over into the talk lines of the Bell Telephone?—A. That is correct.

HIS LORDSHIP: I suppose the expression "play over" is referable to the soap operas.

Mr. FOX: As a matter of fact, my Lord, I borrowed it from the printing art, but it seemed to me apt. And that situation, Mr. Black, is, I take it, why you have the term and condition on the back of the Bell Telephone Company contract, Exhibit No. 20, under, and I am quoting now, "Under no circumstances shall the electrical potential applied to
20 "such special circuits exceed 120 volts, nor shall the current in such special "circuits exceed 30/100 amperes for more than three seconds out of any "twenty second continuous use." You said "special circuits"?—A. That is correct.

Q. That is the reason. Now, what would be the position if the Defendant, the A.B.C., did not use the Bell Telephone wires, but if it merely strung its own wires from its own studio to, let us say, the "Famous Door"?—A. Well, under those circumstances it would not be necessary to place any amplifier at the "Famous Door," or the "Brass Rail," or wherever the subscriber may be, until you reach a point which is well, I would say,
30 probably 50 miles away, the line loss might enter, which is the drop in the line.

Q. Within the City of Toronto?—A. There would be no necessity for actually using an amplifier on the premises where the music is desired to be produced.

HIS LORDSHIP: But it would not be at least as great as that covered by Toronto?—A. No, my Lord, not to any appreciable extent, providing that the lines were of suitable dimensions.

Q. Of course, when the amalgamation goes through, it will be another story?—A. Well, it may not change appreciably, my Lord.

40 Q. The greater the area the greater the lines and then you need a booster?—A. That is correct.

Mr. FOX: And the additional amplifier we are talking about is that indicated diagrammatically as No. 9 on Exhibit 24?—A. Yes.

HIS LORDSHIP: In other words, Mr. Black, if this company ran its own wires through to the receiving outlets of its various subscribers they

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would only require the one amplifier which is in the studio?—*A.* That is correct, my Lord.

Q. And that would be sufficient to turn these mechanical vibrations into electrical impulses strong enough to activate these loud-speakers?—

A. That is correct, my Lord.

Q. I see.

Mr. FOX: I think you told me in these school-room installations of yours, you added a microphone in order to turn it into a public address system as well?—*A.* That is correct.

Q. That is added instrumentality, is it?—*A.* Well, it is added, yes. 10
It is added as being required. In other words, if they required a microphone, we had it.

Q. The same as in the "Famous Door" or the "Brass Rail." May I have Exhibit No. 23 please? *Mr. Black,* what is the distinction in your mind, if any, between a recording and a transcription?—*A.* Only one distinction in my mind, and that is the diameter of the disc.

Q. Is that an electrical transcription that I am handing to you, Exhibit No. 23?—*A.* Yes, that is correct.

Q. And that is a 10 inch disc, is it not?—*A.* Yes. I may say that I would like to qualify that in this manner, that now in my business we refer 20
to a 16 inch record to distinguish it from the domestic type. We call it a transcription. Now, as far as a transcription is concerned, a record is a transcription just as much as a 16 inch disc is a transcription, but we distinguish it by the name "transcription" the same as the word "record" has been used to distinguish its dimensions, but it does not necessarily have to be a 16 inch record to be a transcription.

Q. As a matter of fact, the words are interchangeable, aren't they?—*A.* That is correct.

HIS LORDSHIP: And you simply use that term to distinguish it from what is known as a disc?—*A.* My Lord, we have this problem. They 30
ask us for a record player when they mean a device for 16 inch records, and we use the word "transcription" or records only to identify the size. That is not common.

Q. I see.

Mr. FOX: When did you first see or hear of the so-called long-playing records or transcriptions: that is, discs which revolve which were adapted to revolve on turn-tables and which revolve at some speed less than 78 r.p.m.?

Mr. MANNING: No. Excuse me, my Lord. My friend is now interpreting and putting to the witness a form of definition of the long-playing 40
record which, in my submission, is very, very strongly leading and, apart from that, is, as I am instructed at any rate, inaccurate.

HIS LORDSHIP: Well, one of the witnesses has said that a long-playing record was usually one that works on a turn-table turned at a rate of $33\frac{1}{3}$ revolutions per minute.

Mr. MANNING: Oh, it is more than that. I think there is a distinction in the trade between the long-playing record and the slow-playing record at $33\frac{1}{3}$ for example.

HIS LORDSHIP : Well, is that argument ?

Mr. MANNING : No, my Lord. I think it is fact, and I do not think counsel ought to put it to the witness of his own interpretation.

HIS LORDSHIP : Well, it can be put in two questions, Mr. Fox, which will not offend.

Mr. FOX : I shall be delighted.

Q. What is the long-playing record commonly sold on the market with the initials " L.P. " ?—A. The long-playing record as sold on the market to-day and designated by " L.P. " is a record which has been recorded at a
10 speed of roughly 250 lines per inch.

Q. 250 lines ?—A. Lines or grooves per inch, and having a pick-up stylus diameter of approximately one-thousandth of an inch.

Q. By " stylus " are you referring to the needle ?—A. That is correct.

Q. And in order to reproduce the original performance with reasonable fidelity, at what speed is that record adapted to revolve ?—A. There have been established two speeds which are defined, not standard speeds ; they are standard in acceptance but not as far as parity is concerned, and one is 33½ r.p.m., and the other is 45 r.p.m.

Q. Both of which are obviously less than 78 r.p.m. ?—A. That is
20 correct.

Q. And that is what you understand by a long-playing record ?—A. There are other types of long-playing records, but that is what is classed as an " L.P. " on the market to-day.

Q. What other types of long-playing records are there ?—A. The 33½ record which has been recorded or pressed could also be classed as a long-playing record. By the same token that 33½ domestic record, commercial, domestic records are of the same nature.

Q. That is, they revolve at 33½ ?—A. Yes, the possibility being that the number of lines may be less.

Q. Well, of all those things that were bought under the name of long-playing records—

Mr. MANNING : No.

Mr. FOX : Do you still object ?

Mr. MANNING : I still object.

HIS LORDSHIP : Well, the witness has referred to what he calls the standard long-playing records, and he says in his view any record revolving on a turn-table going at the rate of 33½ revolutions per minute could be classed in his opinion as a long-playing record, but the essential difference would be that the number of lines per inch would be less than the standard.

—A. That is correct.
40

Mr. MANNING : Perhaps he would tell us how many lines there are on this type.

HIS LORDSHIP : Do you know that ?—A. I would say in the vicinity of 100 lines per inch.

Q. 100 lines or grooves ?—A. That is correct, my Lord.

Mr. FOX : Now, Mr. Black, so that we won't offend my learned friend, these discs which you have described as meaning long-playing records to you—fair enough ?

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Mr. MANNING : Fair enough.

Mr. FOX : When did you first see or hear of any of them ?—*A.* That is a difficult thing to answer as to giving a time. I think we should appreciate that all sorts of speeds were used by men who actually were instrumental in developing the phonograph and to tie it down to a specific date I would have to be given a definite speed. If I selected $33\frac{1}{3}$, I would say to my knowledge—

HIS LORDSHIP : Well, that is what we are speaking of.

Mr. FOX : No, no, my Lord. We are speaking of something less than 78.

HIS LORDSHIP : You said what is to you a long-playing record, 10 and he spoke of $33\frac{1}{3}$ r.p.m.

Mr. FOX : And 45 r.p.m.

HIS LORDSHIP : No, that is speaking of a standard. I thought you were getting away from standard acceptance.

Mr. FOX : No, what it means to him. He has given two speeds ; one 45 and one at $33\frac{1}{3}$.

HIS LORDSHIP : No, it is not what it means to him. That is standard acceptance, and then he goes on to say there are other types and he specifies what that other type is, and he says on his record that, on a turn-table which turned at $33\frac{1}{3}$ revolutions per minute it could be classed as a long- 20 playing record ?—*A.* That is correct.

Q. And he said it is the same as the standard L.P. record but it has less grooves per inch. Now, I thought you were finished your question with respect to this latter type of long-playing record.

Mr. FOX : I am bringing all these different things to his mind as long-playing records.

HIS LORDSHIP : Well, then, your question would be referable to what you call the standard type of long-playing record, or what you regard as any long-playing record. When did you first hear of their coming into being— 30

Mr. FOX : Yes, my Lord, I am obliged to you.

HIS LORDSHIP : Or when did you first hear of that ?—*A.* When I first heard of that was around 19—approximately I would say—approximately 1932 or 1933, in that vicinity somewhere. That is what is classified as being a standard $33\frac{1}{3}$, so-called.

Mr. FOX : You say they were classed as being a standard $33\frac{1}{3}$?—*A.* They were classed as being a standard $33\frac{1}{3}$ record, yes.

Q. Now, where did you hear of those ?—*A.* Well, they were used to some extent in testing. In other words, they were—the reason they could be recorded with a standard type of stylus, such as had been developed 40 over the period of years, was to get more material on a disc and, in those days when they required that the material contained on a disc be longer than could be put on the standard 10 or 12 inch unit, they recorded a 16 or even other sizes, if you like, at a slower speed. Now, they did lose something in quality, but, for the purposes that they were intended, they were sufficiently accurate, and they had sufficient fidelity at $33\frac{1}{3}$ r.p.m.

Q. Did you see any of those records?—A. Oh, yes, I saw them at that time.

Q. Where?—A. They were used in the Northern Electric Company actually.

HIS LORDSHIP: They were 16-inch records, were they?—A. They were both 12 and 16, my Lord.

Mr. FOX: What was the first time you ever saw a 16-inch record?—A. The first time I actually saw it would be 1937; actually saw it.

Q. 1937?—A. That is correct.

10 Q. But the 33½ r.p.m. you saw earlier than that, although not on 16-inch records?—A. Mr. Fox, I didn't say that. You asked me if I knew of them. I knew of them around that time.

Q. I am glad to stand corrected. But you actually saw a 16-inch record adapted to revolve at 33½ r.p.m., or thereabouts, in 1937?—A. That is correct, yes.

Q. Where did you see that?—A. In the Northern Electric Company, Montreal.

Q. Did you have anything to do with its making?—A. I had nothing to do with its making, no.

20 Q. Did you play it?—A. Yes, I played it.

Q. Yourself?—A. Yes.

Q. And it revolved at the speed we have been discussing?—A. That is correct.

Q. And on what instruments did you play it?—A. We played it on a phonograph, if you like. In other words, we played it on a group of equipment which was intended to reproduce sounds from that record.

Q. Such as we have been discussing, with the turn-table, needle, head, playing-arm head and loud-speaker?—A. That is correct.

30 HIS LORDSHIP: Strangely enough, no one has mentioned a phonogram.

Mr. FOX: No, my Lord. I think, as a matter of fact, we have too many words in this case, and I would like to draw your Lordship's attention to the fact that our word is not a phoney, it is a gram.

Q. Now, you described a phonograph in terms of certain instrumentalities as contained in a cabinet. Is that correct?—A. That is correct.

Q. And that was a 16-inch record which revolved at what speed?—A. 33½ r.p.m.

40 Q. Now, looking at Exhibit No. 24, Mr. Black—it has already been established in evidence that instrumentalities 1 to 7 exist in the studio of the Defendant, the A.B.C.; that 7A are the wires connecting those instrumentalities to instrumentalities 8 and 9 located in the premises of the subscribers as, for example, the "Brass Rail" and the "Famous Door." Now, let us take the subscriber, the "Brass Rail." Of the instrumentalities depicted in Diagram No. 24, how many does the proprietor of the "Brass Rail" use in obtaining his music?—A. The proprietor of the "Brass Rail" would use items 8 and 9.

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Q. And would he thereby get music?—*A.* When connected to item 7A, he would get music.

Q. Which would bring into play the instrumentalities Nos. 1 to 7: is that correct?—*A.* That is correct.

Q. If they were operating and connected by numeral 7A, by the instrumentalities depicted by numeral 7A, he would get music?—*A.* That is correct.

Q. Then, on that basis what instrumentalities does the owner of the "Brass Rail" use?—*A.* The owner of the "Brass Rail" would use all the instrumentalities contained in Exhibit No. 24. 10

Q. Yes. If he did not use all of them, what would he get?—*A.* Well, if he did not have them all, his results would be nothing.

Q. Yes; in order to get music or sound through loud-speaker No. 8, he would have to use all the instrumentalities from 1 to 9?—*A.* That is correct.

Q. Now, we have used the word "system," Mr. Black. What do you understand by a radio or a gramophone system?

Mr. MANNING: Well—

Mr. FOX: I am asking the witness what he understands by it. If that is not a good question for an expert, I never heard one. 20

HIS LORDSHIP: I will allow the question.

The WITNESS: The word "system," we use that word to refer to a group of components which may be put together in any form, to provide an equipment to obtain a certain result.

Q. Well, will you tell me whether you can or can not apply the word "system" to the instrumentalities that we have been discussing in the course of this hearing?—*A.* Oh, yes, it is a system.

Q. To all of them?—*A.* They are all systems.

Q. They are all systems?—*A.* Definitely.

Q. Now, let me have that plainly. Do I understand you to tell me 30 that a radio receiving set is a system?—*A.* It could be called so, yes.

Q. Is it a system?—*A.* It is a system, yes.

Q. Although it is enclosed in a cabinet?—*A.* That is correct.

Q. And does that same answer apply, or does it not, to a gramophone or a phonograph?—*A.* It definitely is a system.

Q. Well, take Exhibit No. 15, the mechanical portable gramophone. Is that a system?—*A.* The parts which are contained in Exhibit No. 15 altogether form a system to provide acoustic sound, yes.

Q. Thank you.

Cross-examination. CROSS-EXAMINED BY MR. MANNING.

40

Q. You live in Toronto, Mr. Black?—*A.* I live just outside Toronto.

Q. You have lived in the area quite a long while?—*A.* I have been here for just over six years.

Q. Do you know the geography of Toronto pretty well?—*A.* I am fairly familiar with it.

Q. You know, of course, where Yonge and Bay Streets and where Jarvis Streets are?—A. Yes.

Q. And do you know the location of the “Brass Rail” and the “Famous Door” and the Westminster Hotel?—A. I am sorry; I am not familiar with the locations of any of them.

HIS LORDSHIP: That may be to your credit?—A. Thank you.

Mr. MANNING: You know, of course, it is some distance from Bay Street to Yonge Street?—A. Yes, that is right.

10 Q. And there are streetcar rails on both of them, and on Bloor Street near where the studio of the Defendant, the Associated Broadcasting Company, is?—A. Yes.

Q. Would it be fair to say that the distance between Bay Street and Yonge Street is somewhere about 200 yards?—A. I would believe so, yes.

Q. And then the number on Bay Street is 1100 and something, isn't it?—A. I believe so; I am not familiar with the number.

Q. Bay Street runs from the harbour front to Bloor Street and beyond?—A. That is correct.

Q. And does Jarvis run from the harbour front to Bloor Street and beyond?—A. Yes.

20 Q. The number on Bay Street of the Associated Broadcasting Studio is 1100 and something, and the number of the Westminster Hotel is 240 Jarvis Street. That will bring it well down below College Street, won't it, or Carlton?—A. I would believe so, yes.

Q. As a matter of fact, I think the Westminster Hotel is located below Gerrard Street. Now, can you give us any estimate of how far it is from the studio on Bay Street to the location on Jarvis Street where the Westminster Hotel is? Would it be safe to say it is around a mile?—A. I am not too sure. I really don't know that.

30 Q. Well, you are familiar with a map of Toronto, aren't you?—A. Yes.

Q. Now, perhaps you might like to look at it, because, after all, one could not be expected to give us those things without some reference to it. This is one of the ordinary guide maps that anybody can buy at a stationery store.

Mr. FOX: We will admit it is about a mile, to save time.

HIS LORDSHIP: A mile from where?

40 Mr. MANNING: From the studio on Bay Street to the Westminster Hotel. In between the studio on Bay Street and the Westminster Hotel there are a number of streets, of course, on which there is quite heavy traffic?—A. Yes.

Q. There is Yonge Street, for example, with a car line, and there is a diversion of Yonge Street where they are now building the subway, and there is a streetcar line on Church Street; there is a streetcar line on Carlton Street, and there is very heavy traffic up and down Jarvis Street?—A. Yes.

Q. So there would be a tremendous amount of noise in that area that would interfere with any propagation of sound contact from one place to another. In fact, it is not suggested that there is propagation of sound

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that is heard in the studio of the Associated Broadcasting Company to the locations by any acoustic means: if it were, of course, it would take some time to arrive there, wouldn't it?—*A.* To arrive?

Q. To arrive at the location of the Westminster Hotel?

HIS LORDSHIP: Oh, I don't think you need elaborate that. It is a matter on which I think the Court could take judicial notice.

Mr. MANNING: Very well. At any rate, when the performances are heard at any one hour or moment in the three subscriber locations the "Brass Rail," the "Famous Door," and the Westminster Hotel, they are heard at what is, for all practical purposes, the identical moment of the performance in the studio of the Associated Broadcasting Company?—*A.* That is correct. 10

Q. An infinitesimal fraction of a second difference?—*A.* That is correct.

Q. And it is not the same instrument that makes the sound heard in the Westminster Hotel as makes the sound heard in the "Brass Rail"?—*A.* I would say it is the same instrumentalities.

Q. Well, I am not talking about the instrumentalities. I am using for the moment the word "instrument"?—*A.* Well, the instrument that makes it possible to be heard at the Westminster Hotel is the same instrument that provides music other places. 20

Q. Let us get over and past what happens in the studio. If you turn off the instrument in the Westminster Hotel, do you still hear the sound in the "Brass Rail" and the "Famous Door" if the switches are closed?—*A.* That is correct.

Q. And any combination of those circumstances would lead you to hear sound in whatever location there is a closed switch?—*A.* That is correct.

Q. And you open the switch and you do not hear it?—*A.* That is correct. 30

Q. So there is something at each of the premises which causes sound to be heard, without which the sound cannot be heard?—*A.* There is something in each of the premises that causes the owner or the subscriber to have the facility to be able to hear the program that is being played.

Q. Yes. I just wanted to put it in the very concise way in which I put it. There is something in each of the premises of these subscribers without which the sound cannot be heard?—*A.* That is correct in this instance.

Q. And if you take the sound as being produced at any one of the four locations, it could not possibly be heard by direct means at any other of the four locations at the same moment, and it may by direct means—I mean without the intervention of the electronic process or electrical processes, whatever the word is— 40

Mr. FOX: Could we have the Reporter read that question again, please, my Lord?

HIS LORDSHIP: You might break that question down. It is unintelligible to me.

Mr. MANNING : I will. Then, let us take that in regard to the sound used at the Westminster Hotel. The origin of the sound—

HIS LORDSHIP : The sound emitted through the loud-speaker ?

Mr. MANNING : Well, I am not thinking for the moment of the mechanism at all. If sound is heard at the Westminster Hotel.

HIS LORDSHIP : Well, sound heard through the instrumentalities found at the Westminster Hotel. Is that what you mean ?

Mr. MANNING : Yes, my Lord ; the sounds that are in question here. If any one of those sounds is heard at the Westminster Hotel, it could not
10 be heard at the same moment at any of the other places, unless you had the intervention of the electrical circuit.—A. I am not familiar with the location of the other positions.

HIS LORDSHIP : I don't think you need a witness to tell you that.

Mr. MANNING : No, I don't suppose we do, only sometimes one does find extraordinary things.

HIS LORDSHIP : You would have to have a pretty keen hearing if you were sitting at the " Brass Rail " to hear what comes over the loud-speakers in the Westminster Hotel. I wouldn't need the evidence to convince me of that, sitting as a jury.

Mr. MANNING : Now, my friend discussed with you at great length
20 the systems for combining the transmission to listeners in schools and other auditoriums, of sounds that were generated by records with the spoken word and other things he took.

HIS LORDSHIP : Are the sounds generated by the records ; they originate on the records.

Mr. MANNING : Well, I will accept your lordship's correction, that originate in the record. Did you see the specifications for the system which was installed at Swansea ?

HIS LORDSHIP : Now, wait. To be perfectly accurate, the witness
30 says the sounds originate at the point of contact between the needle and the groove.

Mr. FOX : My Lord, with respect, the witness said the sounds were reproduced ; they originate with the living performance in the studio, but they are reproduced at that point.

HIS LORDSHIP : They originate from the standpoint of reproduction.

Mr. FOX : I am just being a little puristic, my Lord.

Mr. MANNING : I shall even cross-examine on that, but I don't want to get into a technical discussion of that for the moment. What I wanted to
40 get at, was the calling of the witness's mind to what was required in Swansea and then perhaps I propose to ask if he saw the specifications.—A. That system was developed by me.

Q. Oh, I see. Well, now, how had it come to you—by discussion with the people responsible for the ordering of the Swansea installation ?—A. That is correct.

Q. What did they ask you to do ?—A. They asked us to provide a system, a sound equipment which will provide certain facilities to the principal of the Swansea School.

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Q. And what they did, then, was to describe to you the results they wanted to obtain? Was that it?—*A.* That is it, yes.

Q. They wanted, in other words, to be able to take records and have those reproduced in a number of locations in the school. They wanted to have a means whereby, from a remote location, some person, a teacher or the principal, might address selected groups in the school?—*A.* That is correct.

Q. And they wanted to have a system so adjustable that they could arrange in permutation or in combination all the addresses, I suppose, so that they could talk to all of them at once or talk to a single class at once, or talk to the auditorium?—*A.* That is correct. 10

Q. So they could switch in a program, or a speech, or a lecture, whatever it was that was derived from a record, to the desired place?—*A.* That is correct.

HIS LORDSHIP: Did they have more than one turn-table?—*A.* Just one turn-table, my Lord, only installed.

Mr. MANNING: They did not tell you what instrumentality you were to use for assuring that result?—*A.* Some items were specifically mentioned, yes.

Q. What were the items specifically mentioned?—*A.* The type of microphone power that was over-all required. 20

Q. May I stop you there? The power that was over-all required, you mean, having regard to the number of listeners who may be satisfactorily communicated with?—*A.* Yes.

Q. But they did not give you the technical description of the voltage or the amperage, or whatever it was that was required, did they?—*A.* No. They gave us an idea of what we know in any number of outlets, whether—we know from experience how much power they need and what we asked from them was, “Well, are you having any possible expansion in the next ten years? If so, we will provide it.” 30

Q. Yes. You have to know, in other words, basically, the requirements on which your engineering could be projected.—*A.* Yes.

Q. Did they say anything else to you about the equipment that was to be part of the system?—*A.* Nothing particular, except the microphone—that it would be a long impedance microphone.

Q. What did they say to you about the production of sound from records?—*A.* They asked us something in that instance; what type we could make available in a rack mount. In other words, it is a particular type of mounting and, at that time, we told them we have two types developed which are available in rack mount. 40

Q. My hearing is not perfect, Mr. Black, and I was wondering was it a rack mount?—*A.* Yes.

Q. Is there any special significance to the word “rack” as applied to mount?—*A.* Yes, because of the type of the system and its use. We find it necessary to contain, in most instances, all the equipment in a rack, which will keep it tidy and looking nice and keep it clean and dry and, because of that, we design components to be physically mounted on a rack, and the

components, while they are similar and the same as the components mounted in other ways, they are specially treated in this particular environment.

Q. To protect them from unwonted interference and other interference, from smoke, from dirt and things like that?—*A.* That is correct, and also, in consideration of Canadian Standards, we have to have them approved for a particular installation.

Q. Oh; you have a Trade Association which makes specifics or standards which it sets up for the trade?—*A.* No. I believe it is a Federal Association. The Canadian Standards Association, which control possibly the hazards that might be associated with electronic equipment.

Q. Oh, I see. There might be hazards to the public, which you do not protect in the way of devices in this equipment?—*A.* Correct; that applies to irons, toasters, or anything else.

Q. I understand. In other words, there is a safety factor that has to be regarded?—*A.* That is correct.

Q. And I suppose there is some slight possibility fires might originate from some of those installations?—*A.* That is correct.

Q. Therefore you have to have them enclosed to keep them insured and protected from the public?—*A.* That is correct.

Q. And when you do enclose it in that way, I take it that you have a compact unit?—*A.* Yes.

Q. And you cannot get access to the various parts in the unit by opening doors, or whatever you have, covered plates or something like that?—*A.* That is correct.

Q. And they are all in one situation for the convenience of necessity, or in the interests of effective operation—in one place?—*A.* That is correct.

Q. Now, you spoke of this rack mounting and that is what you had in mind. Was there any other instrumentality that was specified to you by the officials of the School Board, or whoever it was who communicated with you?—*A.* Well, actually it goes a little farther than that. We do not deal directly in every instance with the consumer. We deal through what we call a sound contractor, and the preparation of the specifications are pretty well detailed before we actually see a specification.

Q. All right. Well, let us take the Swansea case. Was there some sound contractor there?—*A.* Yes, there was.

Q. Who was that?—*A.* R. A. Butler and Company, at 249 Coxwell.

Q. What are they, experts in school equipment?—*A.* We call them sound contractors.

Q. I see. And Butler & Company came to you with a fairly full schedule of the desired results?—*A.* That is correct.

Q. But they did not tell you how those results must be obtained?—*A.* Well, that is determined by the results that they expect to get.

Q. Oh, quite so. They did not tell you how you were to achieve those results?—*A.* That is correct.

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Q. They might suggest to you some things, but they left it to you, I take it?—A. That is correct.

Q. The results within the specifications. Now, did that specification contain any designation of instrumentalities whatsoever, by which the results were to be obtained?—A. I would say it would be necessary that they contain some of the details; I am not just too sure. I cannot bring it to my mind just what the details were.

Q. Well, you told us about the rack mounting, and you told us about the microphone, but I do not recall that you have told us about any other specific items of equipment and I would like you to do so, if you recall any. 10

HIS LORDSHIP: Now, he does not say they prescribed the rack mounting. He said they had two types available in rack mounts, and then he went on to tell us what the rack was. Now, he has not told us what types there were yet that are available. You see, you started on something else after that.

Mr. MANNING: Yes, perhaps my mind has jumped across the gap, my Lord, assuming they had been told that, but I assume it originated in the chain of questions in which I asked what the customer had asked for, and he mentioned the rack mounting.

HIS LORDSHIP: No, he did not say they asked for that. He said, 20
“We had two types available in rack mounts,” and he did not describe the two types.

The WITNESS: I was referring then to the record-player unit itself, when I said two types. Both types are developed for the same purpose. In other words, you reproduce sound from records, and they are both developed to be bound in racks.

Mr. MANNING: Now, do you want to explore that further and tell me what the two types were?—A. We have one type which was capable of carrying records up to the size of 12 inches, and we had another type—

Q. Do you mind at the moment telling me what you call the other 30
type?—A. We call it a record player.

Q. Yes, I know, but have you got some specific name attached to it?
—A. I call it a record-player assembly.

Q. All right. Now, the second type?—A. The second type is a unit which is capable of playing records up to 16 inches diameter.

Q. And it carries the same generic name?—A. That is correct.

Q. But it will have, I suppose, a catalogue number, or something like that?—A. That is correct.

Q. That is the only distinction you make between the two types in your listing, is it?—A. In our list we show the 16-inch, as I mentioned 40
before, as a transcription player, for the simple reason that it is a dimensional difference from the record player that we spoke of before.

Q. I see. Now, I would like to be sure that we are not at cross purposes as to what the sound contractors specified to you, and I would like to be sure that you have given me the specific names of the specific instrumentalities, if any, which the sound contractors invited you to supply?—A. My Lord, I have got a typical specification in my coat.

Would that help the situation any ?

Q. Well, I have no objection to the witness using it to refresh his memory.

HIS LORDSHIP : Yes, you may look at it.

Mr. MANNING : May I have a glance at that, please ?—A. Yes, sir.

HIS LORDSHIP : Is that the specification form that you provide ?
—A. No, my Lord. It is a written specification which is prepared and submitted to us by our sound contractor.

Mr. MANNING : Now, this you have showed me was dealing with
10 the Guelph school ?—A. Yes.

Q. I was thinking of Swansea ?—A. I am sorry I have not got it, but it is very similar as far as the specifications are concerned.

Q. All right. Now then, you provide these various items of equipment and they were installed in Swansea and you call them a sound system ?—
A. That is correct.

Q. You say, of course, that there are elements in them that function in identically the same manner as the electric phonograph, or whatever else you like to call it ?—A. That is correct.

Q. They were not all bought as the same thing. This is a special
20 contract job.

Mr. FOX : The same thing as what ?

Mr. MANNING : As the ordinary electronic or electric phonograph or gramophone ?—A. They were bought—

Mr. FOX : Who knows what was in the mind of the purchaser ? You are asking this witness to say what they were bought as, which means what the purchaser intended to buy.

HIS LORDSHIP : What he described. You have already put it on record that they specified that they wanted to get certain results, and they did that in this case through a contractor and that contractor conveyed
30 this information to the manufacturer, and the manufacturers installed what they thought was necessary to produce that result.

Mr. MANNING : I suppose I need not pursue that, my Lord.

HIS LORDSHIP : And the witness said that whole system would be the same thing as Guelph, be it a gramophone, or phonograph, or whatever means of reproduction was used.

Mr. MANNING : Yes. Now then, Mr. Black, before you heard of this action at all, if anybody had asked you to go to the studio of the Associated Broadcast Company, that they had there a very fine gramophone and you went up there not knowing what it was they had, would you have
40 expected to find the instrumentalities that you found there ?—A. Yes.

Q. You would ? Would you have expected to find them in the form in which you did find them ?—A. Knowing his business, yes.

Q. I am not asking you about knowing his business. I am asking you if anybody said, without knowing his business, that that is what he had.

HIS LORDSHIP : You said if he were asked to go to the studio of the Associated Broadcast. I suppose the name would imply what the business was.

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The WITNESS : Definitely.

Mr. MANNING : I see. Well, supposing it was not the name of the Associated Broadcast Company, but some other person ; would you expect to find what you found there ?—A. If I may, I would like to answer it in this way.

Mr. MANNING : If you were told to go to Joe Walsh's room on Bay Street, in a boarding house, to see a very fine gramophone there, wouldn't that cover it ?

HIS LORDSHIP : Would that cover it ?—A. My Lord, my mind would be wide open as to the class of equipment I would expect to find. 10

Mr. MANNING : You have not, of course, Mr. Black, any experience in selling goods to the public of the sort that you are speaking of ?—A. Oh, yes, I do selling as well.

Q. Oh, I see—by what—a special assignment ?—A. On special assignment, yes.

Q. You do not sell in the retail stores ?—A. No.

Q. And having had no experience with what people ask for there ?—A. No.

Q. Did you, prior to this action, ever hear of a gramophone or a phonograph in which you could not see all in one place ?—A. Yes. 20

Q. Where ?—A. There are certain friends of mine, people I know of that have such an instrument. I mean to say—they are not all located in the same spot.

Q. Where are they located ?—A. Well, in one instance that I call to mind, the phonograph player is located in one section of a room near the centre wall, and the loud-speaker is located down at the far end of the wall—the far end of the room.

Q. Any other cases of that sort ? Give me an exhaustive statement of them ?

HIS LORDSHIP : Did you ever see a gramophone in a drawer of a cabinet ?—A. Oh, yes. 30

Mr. MANNING : Now, I perhaps invited the kind of answer you gave me, Mr. Black, I did not define the word "Place," with the same kind of accuracy that I would like. Before this action came on, had you ever heard of a gramophone in working order, part of which was in one building and part of which was in another ?—A. Yes.

Q. You had heard of it spoken of as a gramophone, partly in one building and partly in another ?

HIS LORDSHIP : No. You first asked him if he had heard of a gramophone. Then your second question, you had heard it spoken of as a gramophone. Now, which question do you want an answer to—the one spoken to, or had he heard of it as a gramophone ? 40

Mr. MANNING : Well, I will try and phrase the question again, my Lord. Prior to this action, before you ever heard about it, had you ever had anybody show you as a gramophone something that was not wholly within one building ?—A. I don't quite get what you mean by show me.

Q. Invited you to look at, demonstrate to you, exhibit to you ?—

A. Meaning a gramophone ?

Q. Yes ?—A. No.

Q. Or a phonograph ?—A. Oh, yes, a phonograph.

Q. No, no. Had you ever had anybody prior to this action being begun, show you, invite you to look at, exhibit to you a phonograph, the whole operating parts of which were not in one building ?—A. Yes.

Q. Oh—where ?—A. Well, I have had occasion to see several installations of friends of mine in Rochester, who have phonographs—who are a bit of an enthusiast in high fidelity, and they have their equipment all
10 over the house.

Q. Yes, but a house is one building, Mr. Black, and I said in one building. I am afraid your example does not coincide with the answer “ Yes ” ?—A. I am sorry. Do you mean two buildings ?

Q. Yes, in separate buildings, belonging to different people ?

Mr. FOX : No, you said in one building. Now you are making it in two buildings. Let him answer the first one.

Mr. MANNING : No, I said in more than one building.

Mr. FOX : No, in one building.

HIS LORDSHIP : Just a moment. Your first question was, “ Did
20 anyone ever show or demonstrate or exhibit to you a phonograph the operating parts of which were not contained all in one building.” Now, what was your answer to that ?—A. I am sorry, I confused it with the other. All not contained in one building ?

Mr. MANNING : In one building, yes ?—A. I just don't know about—for instance—the Sunnybrook Hospital has a system. I don't know whether you would class that as one building or not.

HIS LORDSHIP : How many units are there ?—A. There is actually four phonograph units in Sunnybrook Hospital.

Q. No. Is it all one building, a continuous structure, or are there
30 several structures ?—A. I am not just sure, my Lord, but I know the speakers are scattered throughout the whole establishment, and controlled from a central unit. That is one I happen to be familiar with.

Mr. MANNING : Yes they have a public address system. Would that be a fair way of putting it ?—A. Well, a public address system is not necessarily true in that particular instance, because they use phonograph players to produce music for their performances.

Q. Yes, at remote locations ?—A. At remote locations that is right.

Q. Now, if they show you that and call it a phonograph, would that be consistent ?—A. Oh, yes. The term “ phonograph ” would be a system
40 like this is ; definitely applied.

Q. And definitely they also told you it was a sound system ?—A. Yes.

Q. And they did not use the word “ phonograph.” They speak of it as a “ sound system ” ?—A. It has been done, yes.

HIS LORDSHIP : Now, wait a minute. That is offending against the rule again. You see, that is hearsay evidence. That is introducing evidence by what somebody else thought and said he thought. I couldn't give it any weight.

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Mr. MANNING : No.

Q. You have mentioned Sunnybrook. Now, have you in mind any others?—A. Not that I know of.

Q. And, of course, Sunnybrook—

HIS LORDSHIP : If I recall rightly, there are several separate buildings?—A. I believe so, my Lord, yes.

Q. And you say that there is a connection from one building to another?
A. They provide music from one to the other.

Q. But that is a wholly sound reproduction system?—A. That is correct, my Lord.

Q. Yes, Mr. Manning.

Mr. MANNING : Are there any other buildings besides Sunnybrook?
—A. I don't recall any just now.

Q. When did you become aware of the Sunnybrook installation?
A. We supplied the amplifiers for that installation.

Q. Oh, I see. You had a number of separate amplifiers?—A. We have package items in sound which we supply to jobs of that nature.

Q. In other words, there is an amplifier for each sound unit?—A. For each generator.

Q. But not for each loud-speaker, or anything of that sort?—A. Not necessarily, no.

HIS LORDSHIP : Do you draw a distinction, Mr. Manning, between a system of this kind that is contained in one building and if it is not contained in one building? You say one may be assessable and the other not?

Mr. MANNING : My Lord, I draw a distinction finer than that, but I am trying to come to it by degrees. Now, Mr. Black, I think I have said as much about that part of our discussion as I want to say at the moment, so we might go to something else. Would it be correct to say that, in the control room of the Associated Broadcast Company, there are many electric, mechanical devices such as push-button switches for quick selection of any one or more play-back tables to keep a continuous flow of music going at scheduled times?—A. That is correct.

Q. And patch panels and inter-connecting jacks for quick selection for various amplifiers in case of emergency or a break-down, or anything of that kind?—A. That is correct, yes. That is one reason why they would be there.

Q. We might stop at that point and enquire why it would be necessary to have various amplifiers in case of emergency?—A. As I understand it, the Associated Broadcast Company are committed to provide music to subscribers for certain periods of the day, and it is quite possible, due to some failure or another of an amplifier, that might make it inoperative, and in order to fulfil their contract, they would have to have stand-by equipment put in in case that one went bad.

Q. Yes. Special equipment for that particular job to enable that particular kind of work to be done?—A. I wouldn't say there is anything special about it. There is—

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Q. Well, I don't mean to say anything of special design.

Mr. FOX : Well, let him finish his answer.

Mr. MANNING : Very well. I am sorry I interrupted ?—A. There is nothing special about the equipment so actually used. It is standard practice in this business.

HIS LORDSHIP : The whole reason being that there must not be any cessation of sound, if that can be prevented ?—A. That is correct, my Lord.

Q. And if one amplifier fails, either wholly or partially, failed to function, then you must have another one to substitute immediately ?—A. That is correct.

Q. So there will be no cessation of whatever entertainment is being sent out to its subscribers ?—A. That is correct.

Mr. MANNING : And has that equipment anything to do with making the system flexible enough to answer customer's requests ?—A. I don't understand.

Q. Well, supposing a customer does not want the program scheduled but wants a special number performed not in sequence of the program as laid out, has this system anything to do with the facilitating of that sort of operation ?—A. Except in the case of having the request number pre-set if you like, or pre-located on the turn-table, I cannot see that it would have anything to do with the customer having the request filled. If the customer makes a request for the particular record, the operator may put it on the turn-table and have that turn-table rotate to go into the line or into the amplifiers at the time that the program which is on at present is stopped.

Q. Yes. Well, I think perhaps your attention was not directed to what was said by Mr. Raymond, that there are programs, of course, scheduled for the whole day, that the hours and times of playing may be different and then he said that sometimes customers ask for a special number, which would not be in the sequence. Now, I suggest to you that this particular equipment is designed in part at least to facilitate compliance with requests like that.

HIS LORDSHIP : Supposing Mr. Manning celebrated his birthday at the " Brass Rail," and wanted to have them play " Happy Birthday to You." Could that be done ?—A. I think the Associated Broadcast Company could arrange it, all right. They certainly have facilities there for doing that.

Mr. MANNING : You could switch quickly from one record-player or transcription-player to another ?—A. Yes.

HIS LORDSHIP : I hope you don't mind my having used that illustration.

Mr. MANNING : Not at all, my Lord.

Q. Then, it would be fair to say that all the equipment in the A.B.C. Studios are of the same character as is ordinarily found in radio broadcasting studios, isn't it ?—A. I would say that radio broadcasting studios use phonograph equipment, if that is what you mean.

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Q. Well, they use the same type of equipment, of this class?—*A.* Yes, they use the type of equipment of that class and other classes as well.

Q. Oh, of course, they have got other kinds of equipment also, because they project their waves over the air. They will have a different kind of amplification, won't they?—*A.* Not necessarily so. They might use a higher class of equipment than the Associated Broadcast Company.

Q. They do not use a higher class, did you say?—*A.* They could and they do.

Q. I am just about to approach another branch of the cross-examination my Lord. I see it is almost 1 o'clock. 10

HIS LORDSHIP: Well, I suppose it might be disturbing if you had to go over five minutes, and then pick up again.

Mr. MANNING: Oh, no, it would not, my Lord.

HIS LORDSHIP: Well, we will go till 1.00 o'clock.

Mr. MANNING: Now, do you find in any standard radio, gramophone or phonograph, these particular devices of push button switches for the selection of different tables?—*A.* If a customer who buys a radio-phonograph combination desires to connect on speakers for a different arrangement, you would have to supply something like that.

Q. No, that was not my question, and I do not think you appreciate it. 20 I asked you if you found in standard types of phonographs or gramophones which are put out by your company and many others, these special devices of push-button switches for quick selection of one or more play back tables?—*A.* Those, you don't. You don't find them on the average radio combination.

Q. Do you find them on any combination? Is there more than one table on any ordinary radio combination?

Mr. FOX: What do you mean by "ordinary"?

Mr. MANNING: Any standard.

Mr. FOX: What do you mean by "standard"? 30

Mr. MANNING: I mean those sold to the public.

Mr. FOX: Do you mean in a cabinet.

Mr. MANNING: Yes, in a cabinet. I will accept your terminology. Do you find more than one play-back table in any cabinet form?—*A.* Yes.

Q. What form?—*A.* The R.C.A. Victor have a unit which has two turn-tables in it.

Q. Which model is that?—*A.* I don't recall the model, but it has two speakers, and two playing surfaces.

Q. When was that model brought out?—*A.* I don't know exactly when it was brought out. I have become familiar with it within the last 40 two and a half years.

Q. As a matter of fact, the 45 r.p.m. records for public consumption have only been on the market two or three years, have they not?—*A.* That is correct.

Q. Well, do you find in the ordinary gramophone or phonograph a patch panel for connecting jacks?—*A.* They are not found in those instruments, no.

Q. Are they found in any of those instruments?—A. No, because they do not require the flexibility.

HIS LORDSHIP: You are speaking of the instruments sold to the public?

The WITNESS: That is correct, my Lord; the full cabinets.

Mr. MANNING: Well, let us follow this word "cabinet." There are or have been over, I suppose, ten years, devices sold to the public known as record-players. I suggest to you that those record-players are instruments sold as a record-player and are really of two types. There is one type which occupies a space somewhat smaller than this instrument Exhibit 15, when it is closed down. It is not the same shape, but roughly occupies the same area?—A. That is right.

Q. And it has a turn-table; it may not have a cover, and it has a sound-producing equipment right in the box?—A. That is correct.

Q. And it is plugged into the wall, and usually that type of record-player operates at a one time familiar speed of 78 r.p.m.?—A. It operates at various speeds now.

Q. They have adaptors now?

HIS LORDSHIP: Yes. It has an amplifier?—A. It has an amplifier.

20 Q. And it has a loud-speaker right in it?—A. That is correct.

Mr. MANNING: Then, there is another kind that has been spoken of as a record-player, which is a turn-table with a needle and a pick-up head and a tone arm, and the electro-magnetic apparatus in the tone-arm, which generates the current and the wiring from that instrument to a radio receiving set, that is also connected to the record-player?—A. That is correct.

Q. There are just those two types of record-players?—A. Oh, there are other types of record-players as well.

HIS LORDSHIP: Is the type first described also in a phonograph?—A. The first type, yes; it was classed as a phonograph.

Q. Well, what is called for in the trade?—A. Well, I am not too sure, my Lord, I am not too clear. I think the trade calls it a record-player.

Mr. MANNING: That is the customer trade-name?—A. If I were to ask for it myself, I would ask for a portable phonograph.

Q. A portable phonograph?

HIS LORDSHIP: Even though it be an electrical attachment?—A. Even though it be an electrical attachment, yes.

Q. You will be pleased to note that I am going to start a new branch in this subject. I am a little perplexed as a layman with the technical terms, but would I be correct in saying a decibel is a label by which a minute amount of electrical current is defined? It is descriptive of a minute amount of electrical current?—A. No, not necessarily. A decibel is descriptive of a ratio. It does not define a unit particularly; it is a ratio.

Q. A ratio between what things?—A. It is a ratio between—for instance, if you have a low voltage, or low current, or low energy in-put and you have

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a high energy out-put, by establishing the fact that the terminations are equal, then you can say the increase is so many decibels.

Q. Putting it another way, it is so much per cent. ?—*A.* Well, it is a logarithmic ratio.

Q. Is it a difference in voltage ?—*A.* Yes.

Q. And it is a logarithmic ratio ?—*A.* Yes.

Q. In other words, it is the degree in which the current is stepped up in logarithmic terms ?—*A.* Yes.

Q. Oh, I see. Well, I wanted to be sure I understood something about it. Now, in this installation which you have, and which, as I take it you wanted us to accept as a gramophone installation of the Associated Broadcasting Studio, combined with the installations in the " Brass Rail " and the " Famous Door " and the Westminster Hotel, there is, of course, an essential and indispensable ingredient on the line to the Bell Telephone Company ?—*A.* I wouldn't say it is indispensable. 10

Q. Well, it is, in these circumstances, an ingredient without which the performance could not take place in the halls ?—*A.* Well, it would be possible for the Associated Broadcasting company to run their own lines.

Q. Oh, I agree with that, but as the thing is now—— ?—*A.* As it stands right at present it is necessary. 20

Q. And there might be some substitution, of course ?

HIS LORDSHIP : If you could get municipal authority.

Mr. MANNING : If you could get municipal authority and he makes the necessary investments ?—*A.* Correct.

Q. Now, in the immediate use of the Bell Telephone Company lines, do I understand that it is necessary that, in order to step down the current which is developed in the playing heads of the tone arm of the various record-players, it is at any rate necessary to control it to some maximum intensity before it goes into the Bell Telephone wires ?—*A.* It is limited only by the maximum. 30

Q. Yes, I understand. Now, as the current leaves the tone arm in the studio, is it stepped up at all in the studio ?—*A.* Yes, it is stepped up.

Q. And then, what happens after it is stepped up ? Is it stepped down again, or controlled to a maximum voltage, or intensity ?—*A.* It either is delivered to the line at the level that is permissible or it is reduced to a level that is permissible.

Q. Well, is there more than one agency that does that ? Does the amplifier bring it up and some controlling energy keep it down to the maximum level ?—*A.* If the amplifier we design to make use of the minute amount of energy in the head and to deliver the proper power—enough on the line, it would not be necessary to add anything. 40

Q. Or to subtract anything ?—*A.* Or to subtract anything.

Q. Now, is there, in the A.B.C. studio, any device which has a governor to prevent the delivery of electricity to the height delivered by the Bell Telephone Company ?—*A.* They have controls in the amplifiers.

Q. Now, doesn't the operator in the studio have to pay attention to that volume control, sitting and watching some gauges to make sure that

the current does not get out of hand? Isn't that one of the functions of the operators? —A. The operator, in the first instance, in the initial stages, would set up a program which would have maximum peaks permitted by the Bell Telephone Company.

Q. Now, as I understand it some of the evidence given, not in this hearing but at an earlier stage, there is in the studio a monitor loud-speaker set up. There are two loud-speakers, aren't there?—A. There is one to my knowledge. I am not sure if there are more or not, but I saw one.

10 Q. Now, I suggest to you the purpose of this loud-speaker is to enable the operator in the studio to assure himself that volume control is not out of hand; in other words, to maintain such an auricular control over the feeding in of the current as will assure that the Bell Telephone line is not overloaded?—A. The monitor, speaking of itself, would not have very much bearing on the control.

Q. Would it not?—A. No.

Q. Well, how does the operator in the studio, in wanting to control the amplifier in the studio to the proper volume of output, do it?—A. They generally have a visual indicator.

20 Q. Oh, I don't want you to think I am attempting to replace your description of it, but I am suggesting it may be something like an ammeter, or something like that?—A. It is an ammeter, the hand of which indicates when the level has been approached.

Q. And then what does the operator in the studio do to keep it from getting out of hand?—A. Well, usually he controls the initial set-up and once it is set up, it will not be necessary to change it again.

Q. Well, are there any variabilities to the current fed into the studio by some sort or other, which would affect that?—A. No. The only variations you would get which would affect him would be variations in the program which is comprised on the record.

30 Q. Do I understand this, then, if, for example on the program the record indicated there was produced there a lower volume of sound, that might cause the electrical current coming from the tone arm to get out of hand and exceed the limits tolerable on the Bell Telephone system?—A. On the initial set-up, the operator would observe the peak and step up to that so that he would not get an overload.

Q. He would have to observe the peak and make it compare with the ammeter so that he would not get an overload?—A. Yes.

40 Q. It might be, however, whatever the recording practice had been, it might vary from the recording practice on some previous record and therefore might require an adjustment of the amplifier output?—A. Usually, in controlled records it is necessary that they be held within certain limits. In other words, they use compressor circuits in their recording instruments, which eliminate it.

Q. In other words that possible comparable effect has been taken care of before the transcription leaves the A.B.C. studio?—A. To some degree.

HIS LORDSHIP: The maximum has been stepped up?—A. Yes.

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Mr. MANNING: In other words, that would not apply if you got one of the transcriptions of the Columbia Company, but if you interpolated it into your program, you might have to make adjustments? It may be in the Columbia record but not what would be developed from one of these transcriptions?—A. I wouldn't say it would be necessary; it might be.

Q. And actually, if you were going to use one of the Columbia recordings, you would use a different type of needle from what you would use in using one of your so-called Muzak transcriptions?—A. A different type of needle?

Q. Yes. The same type of needle does not fit a 16-inch disc that is provided by Muzak, and the micro-groove recording of the Columbia system, does it?—A. The micro-groove record of the Columbia system has a needle of one mill diameter. In other words has a radius of one mill on the top and, on the standard practice records, such as are sold in record shops, they have a tip radius needle used to produce sound from those—that is, they have a three-thousandths of an inch radius.

Q. In other words, it is three times—well, is that the radius or the diameter?—A. That is the radius.

Q. So that the needle which is used on the Muzak recordings or transcriptions as they have been called—?—A. It has a radius of roughly three-thousandths of an inch.

Q. Whereas the needle required to get a proper result from one of the micro-groove recordings of the Columbia, for instance, would be one-thousandth?—A. It is a one mill needle.

Q. One of them is three times the diameter of the other?—A. The needle used by the Muzak has the same characteristics as the needle used in 78 r.p.m. ordinary records.

Q. That is the instrument here, Exhibit 15?—A. That is correct.

Q. But the needle on the micro-groove has a much finer point?—A. The needle on the micro-groove has a one mill radius.

Q. I don't know that that is of very much significance, but it does get us down to a thing I wanted to come back to, namely, the volume or control of the current that goes into the Bell Telephone wire. That, as you have explained, goes out at a very low intensity in order to prevent the induction of double sound on parallel wires?—A. That is correct.

Q. It is only in parallel wires that induction takes place?—A. Yes.

Q. Or approximately parallel wires. It doesn't take place in wires running transversely?—A. Not to the same extent, no.

Q. I probably learned some of these lessons at other times in listening to these lectures while attending University, and it is a very familiar problem, in the way of electrical communication?—A. That is right.

Q. And it could happen in telegraph systems?—A. Yes.

Q. But it would necessarily involve a greater amount of current, because it takes place only at intervals?—A. That is so.

Q. Then, you have said to us it would not be necessary, if there was direct wire communication from the Associated Broadcast studio to the several outlets—places where public performances are heard, to have any

amplifying off the wires leading out of the Associated Broadcast studio to the loud-speakers in these establishments where it will end and controlled, we will say, by the Associated Broadcasting Company, so that they did not have to record anybody else's communication requirements and therefore you could do with one amplifier, or one set of amplifiers depending on how many circuits you had in the studio ?—A. Yes.

10 Q. Now, I suggest this to you that, if you did rely upon that amplifier in the Associated Broadcasting studio, then the person at the receiving end would never be able to control the volume of sound which came out of the loud-speakers at his end ?—A. No, that is not true.

Q. Is it not true ?—A. It is not true.

Q. How would he achieve the result of cutting down sound if he did not have some kind of amplifying control at his end ?—A. He could either cut it off completely, or he could reduce it. He might cut it down altogether.

Q. Couldn't that be done by some kind of rheostat ?—A. It takes a form of step transformer or rheostat, or something like that.

Q. A step transformer, which I am not familiar with.—A. Well, a transformer is basically a primary and secondary wind.

20 Q. In other words, from the primary wind you induce the current into the secondary wind ?—A. Yes, that is right.

HIS LORDSHIP : What do you call that ?—A. A step transformer or tap transformer.

Mr. MANNING : And that means that the current that comes out of the output end of the transformer of that sort is not the same current that went into it at the intake end. It is an induced current, duplicating in its waves, if you like, and its variations of volume ; the variations that came in at the intake end, but it is an induced current ?—A. It is an induced current.

30 Q. And in that sense it is not the same current ?—A. Basically, I would say it was the same.

Q. However, we deal with very peculiar things in electrical formation, and there may be all kinds of discussion as to what they are ?

Mr. FOX : I don't think you let the witness answer, when he said it was not the same current.

HIS LORDSHIP : Are you referring to a reduced current in the variation of a step transformer ?

40 Mr. MANNING : No. A step transformer, my Lord, as I understand it (and the witness can check me if I am wrong) the current comes in and is sent through a coil to a certain number of outlets and that coil throws out an electromatic force, doesn't it ?—A. Yes.

Q. And the electromatic force revolves in the appropriate direction of either clockwise or counter-clockwise, depending on how it is wound ? A. It is induced into the secondary.

Q. And then the lines of force that come from that coil intercept the secondary coil, and by intercepting the secondary coil they induce the current in the secondary coil ?—A. That is correct.

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Q. And depending on the number of windings in the primary coil and secondary coil, you get variations in the characteristics of the current which come out of the secondary coil?—*A.* Variations in the characteristics of the voltage that you might get.

Q. Well, I am not competent, as an amateur, to say what the variations are, but it is of a different intensity, anyway?—*A.* Depending on the type of the winding of the transformer.

Q. But it synchronises with the current that comes in the primary coil, and it possesses the same relative variations in volume?—*A.* Yes.

Q. But of a lower intensity?—*A.* Not necessarily lower. 10

Q. Oh, not necessarily, but it might be?—*A.* It might be.

Q. So you may have a step transformer to control the volume of sound, and does the step transformer impose variable controls of volume of sound?—*A.* I have said a step transformer—a step transformer is a tap transformer whereby the primary wind can either change to other different impedences to the lines, to create a loss.

Q. But it is capable, though, of providing variable loss?—*A.* Definitely.

Q. By means of adjustments, by some sort of knob?—*A.* Types of primary windings of the transformer can be brought out through a switch and by merely operating the switch you can control the volume. 20

HIS LORDSHIP: That is in the sense of reducing it?—*A.* In the sense of reducing it.

Mr. MANNING: And that might be done also by rheostat control?—*A.* Yes, but if you do it by rheostat control, you upset the lines looking back into the other parts of the equipment.

Q. I see. You cause some feed-backs?—*A.* Well, it is not a feed-back, but you just upset the balance of the impedance.

Q. Well, that has got beyond my range. That is, at any rate, unless you have some such supplementary apparatus at the receiving end and you did rely upon the wires that were installed and controlled by the Associated Broadcasting Company, the person wanting to have amplification of the program at the receiving end would be wholly dominated by the volume control at the Associated Broadcasting studio?—*A.* That is correct. 30

Q. So that some kind of thing, assuming that the consumer wants to have some control, some kind of apparatus is necessary at the receiving end, which can be adjustable by the receiver?—*A.* That is correct.

Q. And I suggest that the apparatus could take the form of a mechanical apparatus, such as the opening or closing of a knob to reduce the sound automatically?—*A.* No, it would be manual, the same as the switch.

Q. In other words, some person would have to exercise his will power or his physical capacities at the receiving end, in order to achieve a changed result?—*A.* That is correct. 40

HIS LORDSHIP: There is no way you can increase the volume?—*A.* It cannot be increased, my Lord.

Mr. MANNING: Now, then, you have an amplifier at the receiving end?—*A.* There is an amplifier at the receiving end.

Q. Then, you could get a considerable step-up in volume ?—A. Depend- ing on the type of amplifier used.

Q. And if the amplifier possesses an adequate capacity, that would make a noise, but it would be a nuisance ?—A. That is correct.

Q. But you would have to achieve that result by a voluntary inter- vention of some person at the receiving end ?—A. To achieve which result ?

Q. Of getting the excessive volume ?—A. It could happen either at the end of the receiver—of the subscriber, or it could happen if something
10 went haywire at the other end, the broadcasting end.

Q. In other words, the transformer in the Associated Broadcast end might get out of hand so as to cause a breach of the conditions in the contract with the Bell Telephone Company ?—A. I wouldn't say that it could. It is within the realm of possibility it could, but they are controlled to a point where I doubt if it is possible.

Q. I see. Well, we are speculating, anyway, to some extent, and that is what the control room variation is for, in part, to prevent any such thing from happening ?—A. Well, I wouldn't say it was primarily that, no. It is primarily there to monitor the control operator there to change the
20 records to monitor the music and check for quality and to observe the visual indicator on the line. That is their function.

Q. Their function is to partly check the volume on the line ?—A. That is correct, yes.

Q. Now, only one other thing seems to me at the moment to require comment.

HIS LORDSHIP: Just a moment, Mr. Manning. The only reason he has to watch this at that visual indicator is because of the provision of the Bell Telephone contract ?—A. That is right. It is not the only one. For instance, if he has a breakdown, the operator is there and he can call
30 the service-man to get it going again, or switch over the amplifier, but that is one of the reasons for his being there.

Q. No, but, I say, that is the only reason he has for keeping an eye on the visual indicator, because of the necessity of keeping down the intensity of the electrical impulses that are sent over the Bell Telephone wire ?—A. That is the only reason he would watch the visual indicator.

Mr. MANNING: Then, there was one thing you said to my friend this morning—I don't know how much importance it has—but I wonder if we should not explore it a little further. If I followed you rightly, you said that the reproduction of whatever sounds are stored away in the record
40 takes place at the point at which the needle contacts the groove in the record ?—A. That is correct.

Q. Well, now, it all depends on what we mean by "reproduction" of course, doesn't it? But if you mean by reproduction the creating of audibility in the sound, that would be a correct statement ?

Mr. FOX: I don't want to interrupt my friend, but he made it perfectly clear and it is clear on the record that I made a distinction, a very

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fair one, between reproduction and audible reproduction, when I was examining the witness.

Mr. MANNING : Well, all right. I suppose, then, we can put anything that exists in the resemblance of the pick-up head, the tone arm, the amplifier and the loud-speaker—cut them all out now and if the reproduction takes place at the point of contact with the needle with the groove on the record, then, you don't need any of those other things?—A. Well, that is not necessarily true. The reproduction takes place there and if you were to take the average phonograph and disconnect all these auxiliaries except the playing head itself and the needle and leave the needle in there, if you 10 listened closely enough you would hear something is being reproduced there.

HIS LORDSHIP : I think you suggested a layman could reproduce sound with his finger only?—A. He could receive it, perhaps; not transmit it, my Lord.

Q. I just wanted to know what you meant by that. That would not be the kind of reproduction that would give sound to anybody. In other words, the audible reproduction in one of these electronic machines is simultaneous, to all intents and purposes, with the reproduction taking place in that way at the needle?—A. To all effects and purposes it is 20 a simultaneous acoustic reproduction.

Q. There is no time difference between them?—A. That is right.

Q. Limited only by the time it takes the electrical impulses to come?—
A. That is correct.

Mr. MANNING : Yes. At any rate, we have this. Is there any step down in the Associated Broadcasting studio of the current that comes from the playing head to the volume tolerable on the Bell Telephone line?—

A. I am not sure. I don't know that there is a step down of volume.

Q. There might or might not be?—A. There might or might not be.

Q. Now, whether there was or not might depend to some extent on the 30 intensity of the inscription of whatever is contained in the record?—
A. Well, no. If you base it on, take mechanical power, or vibration if you like, if you base the step down from that point, the rest would be all relative. In other words, any step down beyond that would be relatively level.

Q. Let me put it this way. Has the intensity of the mechanical agitation of the needle anything to do with the increased volume to greater than the delivery from the pick-up will increase?—A. Would not necessarily.

Q. Well, what controls it? Is there any characteristic in the record 40 which controls the intensity of the current different from the pick-up head?—A. Well, you must remember this is a recording groove. Its variations are from a sideways needle operating in a senuous groove, and the maximum displacement from the centre point of the needle will take place probably on the lower frequencies.

Q. Well, then, there is something else besides the lateral displacement of the needle.

HIS LORDSHIP: Are you suggesting to the witness that a slide trombone might create more electrical energy than perhaps a muted violin?

Mr. MANNING: I don't know. I am trying to find out from the witness, my Lord, because it is only relevant insofar as it has to do with volume.

HIS LORDSHIP: Well, the witness says there is something set to take care of the peak load.

Mr. MANNING: What is that?—A. Well, you set your volume control to take care of the peaks as indicated in your visual indicator. That is the function of the operator of the studio.

Q. Well, what I am trying to get at, perhaps very awkwardly, is this. I take it for granted there are some kinds of record that perhaps will produce an excessive amount of current in the pick-up, and I was trying to find out what characteristics a recording would have if it did that?—A. That is avoided definitely by the manufacturer of records. They do not manufacture things like that. In other words, they try to control it in order that it would be pleasing under any conditions. What we call dynamic, or any other passage, they control it so that it will be possible to produce it in a dynamic manner within acoustical range.

Q. We are all conscious of these distressing difficulties that produce distressing sounds?—A. Well, certainly, but the manufacturer of the record is not to blame for that.

Q. Well, it is within the capabilities of the instrument to produce those sounds?—A. Well, it is within the capabilities of some instruments to produce sounds of an undesirable nature.

Q. Now, just let us deal for a moment with this business of the amplifier at the receiver's end. It is in the evidence, I think, that the Associated Broadcasting Company has 190 subscribers. It will therefore have to have 190 amplifiers at the least, at the receiving end?—A. If the subscribers are separated and they use Bell Telephone lines, it will have to have 190.

Q. If 190 is correct?—A. That is right.

Q. Yes. There is only one other thing I wanted to ask you now, Mr. Black; it has to do with the characteristic forms of turn-table that were in use during the 1930's and 1940's. Am I correct in this, that the 33½ r.p.m. turn-table, the rugged job which you talked about in the A.B.C. studio, took quite a while to work out in order to get a sufficiently minute and accurate control of constant revolutions to make it a satisfactory vehicle for performing their recordings?—A. I think probably the people who develop the equipment of that nature were concerned more with the transference of motor assembly and shock; things which might be occasioned in the building in which the thing might be located. Those were the important details.

Q. Well, would it be correct to say that the long interval of time between the first introduction of the 33½ r.p.m. turn-table of broadcast studios and the time it became available for retail consumers has been in line to-day with getting over the details for satisfactory control of speed

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and the irritation and constancy of speed in the instrument?—*A.* No, that is not necessarily true. The thing that has held back the $33\frac{1}{3}$ recordings more than anything else is the fact that with the $33\frac{1}{3}$ recording you are limited to an 8 inch diameter because of the fact that—I am talking of a $33\frac{1}{3}$ —of the standard three-thousandth mill needle, because the whole sum and substance of fidelity is based on the principle of the linear inches that pass the needle in a given time, which is r.p.m.

Q. That is to say, you cannot have 100 linear inches pass in a period of time, and 120 in the same period following and have fidelity of reproduction?—*A.* If you run any closer to the spindle, you shorten 10 the longer distance of the groove.

Q. I am sorry. I cannot follow you as fast as you can talk, and that because I am an amateur?—*A.* If you shorten the length of both, or the linear inches in the groove of the $33\frac{1}{3}$, the variations in the wave form, if you like, on the record, tend to reduce the effect of high frequency. In other words, those high frequency passages, they are just non-existent, with the result it is not good fidelity, and that is what has limited the $33\frac{1}{3}$, and that is what is the determining point. The 16 inch, for instance, you have 8 inches from the centre of the record, and the last groove that is played on the outside, well, the 8 inches, you have got to have something 20 ahead of that. That is the main factor that developed the 16 inch record.

HIS LORDSHIP: The needle has to be 8 inches away from the spindle?—*A.* That is correct.

Q. In order to make the high frequency notes audible?—*A.* Well, as you understand, my Lord, the circumference decreases as the needle comes in. That is the outside distance of the groove—well, there has to be a certain number of lines or a certain number of linear inches pass the needle to obtain certain fidelity and if you come inside 8 inches on a 16 inch disc you lose fidelity, because there is not enough lines going past the needle in a given time. 30

Q. And you do not get the proper speed?—*A.* You do not get the proper frequency response.

Mr. MANNING: And has it something to do with the angle of incidence in the tone arm to the playing spot on the groove?—*A.* That has nothing to do with that particular problem. The angular position of the playing head to the lines passing underneath on the record create other problems in displacement.

Q. Well, you can get two different kinds of results, anyway with the 16 inch transcription and the one which revolves at $33\frac{1}{3}$ r.p.m. and the micro-groove recording which revolves at $33\frac{1}{3}$ r.p.m. I should say?—*A.* What 40 do you mean by revolves?

Q. Well, you have a very different form of presentation to the tone-arm in those two different types of records, haven't you?—*A.* The form is the same. The dimensions are the only things that are changed.

Q. And, of course, the size of the needle?—*A.* Well, I mean the size of the needle, by dimensions.

Q. But with the 16 inch transcription, as you have said quite clearly to us, I think it has come to be the label for the kind of record that are

used in broadcasting studios and studios such as the Associated Broadcasting; a descriptive term; a kind of recording material that can be put on one of these 16 inch discs and is nothing like as considerable as the amount that can be put on one of the micro-groove recordings of a smaller diameter?—A. Well, we must remember that 33½ 16 inch records were available long before micro-grooves ever came out.

Q. Oh, yes, for a different purpose?—A. Not necessarily—yes, for a different purpose, but they were part of the development of the long playing part as we know it now.

10 Q. Perhaps you and I don't agree on the meaning of "purpose." If you look at the purpose for which the sound is reproduced, let me put it that way, it might be described as a different purpose?—A. I wouldn't say that at all. My understanding of the whole thing is that the purpose is the same. It doesn't matter whether it be a 16 inch or a 7 inch. For instance, there is no reason at all why individuals like school teachers and school principals, and that sort of thing—they can buy 16 inch records. Why can't any individual?

Q. Do they?—A. They don't, because they just don't ask them.

20 Q. At any rate—I don't want to labour this at all. I am merely trying to draw your attention to this fact, that the 16 inch disc originated and was used, if I understand what has been said to us here, to all intents and purposes entirely within the broadcasting field and associated field, such as the field of this defendant company?—A. I think, if I may be allowed to say so, that what we know to-day as 10 and 12 inch discs is the result of an awful lot of work that the record people have put into them and because of that amount of work, we are all getting the result that we have to-day. If they find certain things necessary, they have to look at the record from the angle of the customer, how it is going to be used, where he is going to store it; what fidelity he can get on it and those things

30 were definitely instrumental in providing the 10 and 12 inch record to the customer.

Q. Yes. All right. Well, I haven't any further questions.

HIS LORDSHIP: Any re-examination?

Re-examined by Mr. Fox:

Q. I think it will be short, my Lord. Mr. Black, we have had a plethora of this distinction between 10 and 12 and 16 inch records, and I am afraid I am going to add to it. Is a book written by Haas and Packer, entitled, "Preparation and Use of Audio-Visual Aids," and published by Prentice H. Hall, a standard text-book in this field?—A. It is a recognised

40 text-book in the field of visual aid, yes.

Q. And I find at page 198 of that book at the bottom, this statement, "Besides being able to prepare your own records, it is possible to borrow "or buy a variety of commercially prepared records for class-room use," and then it goes on discussing over page 199 and on the top of page 200 is the heading, "Types of record and play-back equipment." At the bottom

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of the page 200 is, "Table of playing times for record size, r.p.m. grooves "per inch," and then it gives the tables which I would like you to look at and tell me whether on reference both to 10 and 12 inch on the one hand, and 16 inch on the other, as being among those records which you can buy commercially ?

Mr. MANNING : Well now, is that evidence ?

Mr. FOX : It is a text-book.

HIS LORDSHIP : Yes, but insofar as it deals with the availability of commercial records, isn't that a pure question of fact ?

Mr. FOX : My Lord, I have some law on that. That text-book in the field is receivable in evidence, if your Lordship would like to look at the case. 10

HIS LORDSHIP : Well, I would like to see the case.

Mr. MANNING : My submission is that it is even further afield than the catalogue which we referred to a day or two ago.

Mr. FOX : And if your Lordship would like to look at the *East London Railway Company v. The Conservators of the River Thames*, in 90 Law Times at 347, that is as to their receivability in evidence. Now, as to the right of an expert witness to consult text-books and quote from them, your Lordship would perhaps like to look at *Nelson v. Bridgeport*.

HIS LORDSHIP : Oh, I have not any doubt about the right of a witness to say "that opinion is one that I adopt, I being a specialist in the same field ; I make that my opinion." But here you are not dealing with a professional opinion now. You are dealing with a pure question of fact, namely, the availability commercially of records of a certain dimension, which is quite a different thing from the opinion of an expert. 20

Mr. FOX : I am attempting to prove by this that they are available commercially. I am attempting to prove that in a standard text-book it says that they are.

Mr. MANNING : And a standard text-book published in and with respect to the United States of America. 30

HIS LORDSHIP : Oh, I do not think, Mr. Fox, that I could be easily persuaded that that would be evidence of that fact. I quite agree with you on the question of an opinion expressed, but not with respect to a question of fact.

Mr. FOX : Then, perhaps, I will re-phrase the question this way, my Lord.

Q. Do you agree—

Mr. MANNING : Now, that is leading.

HIS LORDSHIP : "Do you agree or not agree," give him his choice.

Mr. FOX : Let us put it this way. We find in this text-book, under the heading records mentioned of 10, 12 and 16 inch discs. As an expert in this field, is it or is it not in your opinion that it is correct to include 10, 12 and 16 inch discs all in the broad generic term, "records" ?—A. Yes, it is. 40

Q. That is all, thank you. Oh, one moment, please. My friend asked you whether it was the same instrument that makes the sound heard in the Westminster Hotel as the instrument in the studio, and you answered,

I believe, "No." Now, I would like to ask you to direct your mind to the totality of the instrumentalities existing between the A.B.C. studio and the Westminster Hotel, and tell me whether or not the instrumentalities that make the sound in the Westminster Hotel form a part of that totality or not?—*A.* I do not recall that I said "No" as a matter of fact, but the apparatus in the Westminster Hotel having been connected to the lines, are definitely a part of the total equipment.

HIS LORDSHIP : I do not think the witness answered "No" to that.

10 *Mr. FOX* : Oh, I am sorry, my Lord. I thought he did. If he did not, then, my question is unnecessary.

HIS LORDSHIP : The device for making these sounds audible is different in each place?—*A.* Yes, my Lord, that is right.

Q. But the devices that reproduce the sound that is heard simultaneously in these three places is located where?—*A.* That is located at the studio, my Lord.

Q. The device that reproduces the sound is located in the studio?—*A.* Yes, that is right.

Q. And part of the device that makes that reproduction audible is located, we will say, in the Westminster Hotel?—*A.* That is right.

20 *Mr. FOX* : Now, we had a little question about going on to Joe Seller's room to see a gramophone, and I believe I asked what you would expect to find, and you said that would depend as to what equipment you would find. Now, what would be your reaction if you had gone to Joe Seller's room and had seen an instrumentality such as this in the A.B.C. studio? Would you have been surprised or would you just accept it as a matter of course?—*A.* No, I would not be surprised.

Q. You would just take it as a matter of course?—*A.* Yes.

30 *Mr. FOX* : Now, one further question please. We had some discussion about contracts and buildings of various kinds, and my friend asked you if you had ever seen a gramophone in all likelihood in one place. At this time I am not going to suggest what answer you might make. At any rate, as part of those gramophones, what about the location of a loud-speaker or loud-speakers?—*A.* They could be anywhere.

Q. What about those that you have seen?—*A.* Those that I have seen have been located in different areas, different rooms, different sections. The question was put to me in different buildings. Well, the only one I can recall at the moment was the Sunnybrook Hospital.

Q. Never mind about different buildings. What about putting one out in the garden?—*A.* You can put it anywhere you like.

40 *Q.* And if Mr. Low, taking this expensive Q.U.8 instrument of his, runs a loud-speaker from the terminals existing on that instrument out into his garden so that his guests may enjoy music *al fresco*, is that or is that not a gramophone?—*A.* It is a gramophone.

HIS LORDSHIP : I think, in fairness to Mr. Low, I think the reproduction through a loud-speaker offended his æsthetic sense.

Mr. FOX : No, I think what he said was that it was the reproduction of Mozart's K.587 that offended his susceptibilities.

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Mr. MANNING : On those questions my friend has just asked, I do submit that is a question of law. It is not a question for this witness.

HIS LORDSHIP : Well, he is speaking as an expert who deals with the assembly of component parts, but I do not have to adopt his opinion.

Mr. MANNING : Oh, I appreciate that, my Lord. I am only directing attention to it. I think perhaps it should be in the opinion of this witness.

HIS LORDSHIP : Well, that is all he is expressing. Isn't it just as you are asking for the opinion of the Court ? He is speaking as an expert who assembles these component parts. I will take it for what it is worth.

Mr. FOX : Just before the noon adjournment, Mr. Black, in answer 10 to a question from my friend discussing one of these record players as containing a type having an amplifier and a loud-speaker in a cabinet, and there was, I believe—my friend pointed to Exhibit I5 and said something about this size, substantially what would you call it, and your answer was that you would call it a portable phonograph. Now, what would you call the usual table model phonograph or gramophone with electric wires from the outside of the cabinet leading into a plug in the wall ?—A. I would call it a portable phonograph.

Q. You would call anything a portable phonograph, if it were not, let us say, a piece of furniture like a console model ?—A. Anything 20 a person can pick up and move around in the house or outside the house.

Q. Something you could carry in your arms without having any help ? Now, as to the free will or otherwise of the owner of the Westminster Hotel or the "Brass Rail" to control whether they will or not have the program or the sounds emitted from this system in his premises, has he any means of controlling whether the program, whether the sounds are emitted or not ? Can he turn it off ?—A. He can turn it off.

Q. He can turn it on or off at will ?—A. That is right.

Q. That is all, thank you.

Witness excused.

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tion.

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Evidence of W. E. Hodges.

WILLIAM EDWARD HODGES, sworn.

Examined by Mr. Fox :

Q. Mr. Hodges, first of all tell me whether or not you are a graduate of any recognised university ?—A. Yes, I am.

Q. And may I lead—of the University of Toronto ?—A. Yes, that is quite correct.

Q. In the year 1943 ?—A. Originally.

Q. With what degree ?—A. Bachelor of Applied Science.

40

Q. And following your graduation, I presume you have taken post-graduate studies?—*A.* Yes.

Q. Please tell us?—*A.* In vocal engineering with the degree of Master of Applied Science.

Q. What year was that?—*A.* That was in 1947.

Q. Are you a member of the Professional Engineers Society, or Association?—*A.* Yes, I am, of Ontario. I might add—

HIS LORDSHIP: Did you take your Master's degree at Toronto, as well?—*A.* Yes, your Lordship.

10 Mr. FOX: What is your occupation to-day?—*A.* I am a consulting engineer.

HIS LORDSHIP: Then there was another qualification you asked about.

Mr. FOX: A member of the Professional Engineers' Society of Ontario. And you carry on the practice of a consulting engineer?—*A.* Yes.

Q. In what field?—*A.* Specialty on electricity and acoustics.

Q. Now, will you tell me chronologically, if you will, any positions or appointments you have held either in a working or a consulting capacity?—*A.* Well, in the consulting capacity, some of the previous ones that are
20 not too important, the ones I presently hold are, I would think, in that I advised the Royal Canadian Air Force Division on problems dealing with acoustics and electricity and hearing, of course, which is the base of the same. I am consultant to the Department of Veterans' Affairs attached to the Sunnybrook Hospital in Toronto, as a specialist in electricity, acoustics and audiometry.

HIS LORDSHIP: Did you say your speciality was electricity and acoustics?—*A.* Yes, your Lordship.

Mr. FOX: What about Defence Research Medical Laboratories?—*A.* Yes, I was going to come to that. In addition, I am consultant to the
30 Defence Research Board of Canada Division of Medical Research. In addition to that, I am associated with the Department of National Health, the Welfare Division of Aviation Medicine. I hold some position as a consultant in audiometry. Kind of hard to remember all these things.

Q. Well, I suppose I might be permitted to say, what about St. Michael's Hospital?—*A.* Oh, yes, recently I have been appointed to the task of developing essential apparatus for St. Michael's Hospital in audiometry as a branch of oto-laryngology.

Q. In the Department of Oto-Laryngology?—*A.* Of St. Michael's. In addition to that I hold a research fellowship in the Department of
40 Oto-Laryngology in the University of Toronto.

HIS LORDSHIP: If you keep on you will soon be a professor?—*A.* Thank you, sir.

Mr. FOX: He probably believes he can make more money as an expert witness, my Lord. I say that as an inside member of the staff of the University, my Lord?—*A.* You are quite right, sir.

Q. Now, in the course of your studies and your work and your consulting practice, what instrumentalities, if any did you have occasion

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to use that might be of interest to the matters in discussion in this case ?
—*A.* Well, I would think that since “phonograph” and “gramophone” are synonymous and are of interest to all members here, I have had considerable experience in the selection of the type of instrumentalities which go into such a gramophone or phonograph.

Q. And you do use, as I understand your answer, you do use these sound reproducing devices we have been talking about in testing hearing and so on ?—*A.* That is quite right, Mr. Fox.

Q. And I may clear up one point now. Looking at Exhibit 23, I think it is—

HIS LORDSHIP : Mr. Hodges, did you say you had considerable experience in the selection of the type of instrumentality and the construction of phonographs or gramophones ?—*A.* Yes, my Lord.

Mr. FOX : I show you Exhibit No. 23, Mr. Hodges. Will you tell me what that is ?—*A.* Well, in the simple language that everyone seems to be accustomed to, to date, it is a record of the flat type, containing, I presume a continuous or sinuous track or groove from one end to the other, outside to inside. It has a label in the centre marked “Electrical Transcription.”

Q. The typewritten description in the centre of “Masked Articulation Test,” I would like you to explain to us, but before doing so, did you cause this record to be made ?—*A.* I was associated with the people who required its existence in that it constitutes the audiomat test or test of hearing.

Q. Well, you know of your own personal knowledge the reason for the somewhat extraordinary sounds emitted from an instrument upon the playing of this record ?—*A.* Yes. If the Court had time, I could give you a detailed explanation for its existence.

Q. Well, I am quite sure the Court would not want to go into that. But perhaps a short description, if I remind you that when I first put this record on Exhibit 15, it commenced with a few clearly audible words and then there was a high rasping continuous note under which music by the rasping tone there seemed to be a continuance of a speaker's voice. Your Lordship I do not think would hear that aspect of it, but I think Counsel did ; that the voice went on but with this high pitched constant note went on as a masking of the voice.

HIS LORDSHIP : You would have to be closer to the machine to hear those.

Mr. FOX : You would have to be closer to hear the notes. Is that a fair statement of what this record does ?—*A.* That is quite accurate, Mr. Fox. I may add that the machine it was played on here in this Courtroom is not of such a calibre as to bring forth the quality of the speech or sounds of the speech.

Q. The purpose of it being some very erudite method of test, I suppose, in your audiometric laboratory ?—*A.* That is quite right, as well as in clinics of hospitals where such goes on.

Q. Now, you told us you were familiar with all the instrumentalities that go into building one of these things called a gramophone

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or a phonograph. Have you ever built one yourself?—*A.* I have never constructed one. I have assembled the parts.

Q. And I think you are sufficient of an expert to tell us, what is your definition of a gramophone?—*A.* I would think a gramophone is any instrument by which the acoustic reproduction of mechanical variations correspond to—I am just trying to choose my words—the original acoustic production as engraved on the flat surface of a disc in a sinuous track, which, when caused to rotate or move at a velocity which corresponds to the velocity at which the original disc was caused to move, will bring
10 about all, in mechanical, electrical mechanical, or acoustical—I had a second mechanical in there deliberately, mechanical in any electrical mechanical system.

HIS LORDSHIP: Wait, now. Are those two words electrical mechanical?—*A.* Yes, the mechanical electrical mechanical. That is a system of one end to the other—and if “electrical” is not necessary, it can be left out—any such system to bring about said acoustic production.

HIS LORDSHIP: I am just wondering if that did not become a little too involved to read quite properly, and perhaps Mr. Reporter might read it back to the witness and to us. He may like to correct his grammar.
20 I think if one strips this down to the bare essentials it is understandable, Mr. Fox, because I have it in my notes here, and the witness will tell me if I get the sense. In his opinion, a gramophone is any instrument by which acoustic reproduction of mechanical variations corresponding to the original acoustic production as engraved on the flat surface of the disc in a sinuous track which when caused to rotate or move at a velocity corresponding to the velocity at which the original disc was caused to move, will bring about by any mechanical, electrical mechanical or acoustical system said acoustic production.

The *WITNESS:* Yes, I believe that is quite correct, your Lordship.

Q. Does that express the sense?—*A.* If the terminology of the words
30 are not confusing to you; it is quite clear to me.

Mr. FOX: Well, reduced to short language, you would not quarrel with this description. The definition one was——

Mr. MANNING: Oh, now, please don't lead.

Mr. FOX: No, I am not going to lead. I am going to ask him whether he would or would not. This man is an expert.

HIS LORDSHIP: No. I can see no objection to that. He does not have to accept it if he does not think it is right.

Mr. FOX: An instrument for reproducing sound to transmit to the
40 ear mechanical vibrations of a stylus in contact with a sinuous groove in moving the recording. Would you accept or reject that definition of a gramophone?—*A.* Would you be so kind as to read it again for me?

Q. I will let you read it yourself. That is from the Encyclopedia Britannica, my Lord?—*A.* It sounds perfectly right, but I just want to check it. Yes, Mr. Fox, I would agree with that.

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Q. That, in other words, is a somewhat short definition and leaves out some of the more particularized parts of the definition which you gave to us?—*A.* Yes, that is quite right.

Q. Now, I am going to read you a passage from the Encyclopedia Britannica, 14th Edition, Volume 10, page 620, which is included within the article under the heading "Gramophone," and I want you to tell me whether this passage has any relation to the matters we have been discussing in this Court room in this action. In the same volume on page 620 about the middle of the page there appears a heading, "Electrical Reproduction," followed by this in the letterpress :

" If the sound box of a gramophone is removed and replaced
" by a device which generates a fluctuating voltage, instantaneous
" values which are proportional to those of the air pressures
" originally impressed on the record recording microphone, it is
" possible to obtain a telephonic version of the original performance
" The output from the pick-up device can be passed through an
" amplifier to one or more loud-speakers ; hence, almost any
" desired volume may be obtained and electrical groove circuits
" introduced if required for any purpose."

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A. That is perfectly correct, and could exist.

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Q. Does that bear any relation to the instrumentalities we have been discussing in this Courtroom?—*A.* I would certainly say "yes."

Q. Well, to what particular ones?—*A.* Well to the phonograph or such apparatus as the Associated Broadcast Corporation uses in carrying on its business.

Q. Let me understand. The passage I have just read to you is referable to the instrumentalities of the Associated Broadcasting Company?—

A. That is absolutely correct.

Q. Does it or does it not describe those instrumentalities in character, not in particular?—*A.* In general character, yes.

30

Q. Thank you. Your Lordship will find that at page 620 of the second volume in the exact middle of the page.

HIS LORDSHIP : And just for the purposes of my notes again, what page is the definition of a gramophone ?

Mr. FOX : The definition is at page 616. If your Lordship knows the method of paging used by the Britannica, the A, B, C, D for the page, the definition occurs at page 616B and the part on electrical reproduction is at 620D. Now, we have got the definition of a gramophone and I want you to define for me a phonograph?—*A.* Well, if you would like me to go through the same set of words, I will try to do so, as, in my estimation, they are identical.

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Q. That is all I wanted. And a gramophone?—*A.* I would think it would come under the same definition.

Mr. MANNING : Never mind thinking.

The WITNESS : It will come under the same definition.

Mr. MANNING : Do you know what a graphophone is ?

Mr. FOX : Do you know what a graphophone is—I will even take the question from my friend to show how agreeable I am to it. Do you know what a graphophone is?—*A.* I am sorry, I thought you two were discussing it between yourselves.

HIS LORDSHIP : I am not surprised at that.

The WITNESS : As far as I know, I have only seen one in my life and that was in the United States.

Mr. FOX : If I show you Exhibit No. 32, which has on it the words “Columbia Graphophone Company,” what would you expect to do with the disc inside the envelope on Exhibit 32?—*A.* I would expect to—

HIS LORDSHIP : By the way, what is the title of that?—*A.* It is, “Come on and play with me..”

Q. And what is on the other side?

Mr. FOX : The one that you referred to earlier, “You ain’t heard nothing yet,” by Al Jolson.

HIS LORDSHIP : I would take it counsel does not refer to the titles when they ask the witness that question.

Mr. FOX : No, but your Lordship will notice the frequency with which I refer to this exhibit. What would you expect to do with that thing, Mr. Hodges?—*A.* Well, that is rather a difficult question, Mr. Fox.

Q. Well, say if you were an average person and not in the more rarified realm in which you and I live?—*A.* I would expect, if had any desire to listen to what sounds might be brought forth by means of a phonograph or a gramophone, if I had one at my disposal.

HIS LORDSHIP : Depending on the extent to which your curiosity would be aroused by the titles?—*A.* Yes, your Lordship.

Mr. FOX : In other words, it is a gramophone record, is it?—*A.* Yes, it is, Mr. Fox.

Q. Now, did you tell me you had built any of these instrumentalities, or merely assembled them?—*A.* I thought I chose the word “assembled.”

Q. Where did you get the parts to assemble?—*A.* They were ordered or purchased. I must take one example of two or three. My time is too valuable to spend building things. I either direct some one to order the parts which I feel are most applicable to the job, or—

Q. All right. That was done under your direction. Where were they obtained from?—*A.* Depending on the business relationships, they would be bought from other jobbers, retail houses or through the manufacturers of the products.

Q. And you have on occasion bought them from retail dealers in this city, or where?—

Mr. MANNING : He did not say retail.

HIS LORDSHIP : Oh yes, he said retail and jobbers.

The WITNESS : They do not generally buy things unless someone directs them to.

Mr. FOX : I understood you to say that you bought or directed that some of these instrumentalities be bought at retail?—*A.* Yes.

Q. Would you mind naming any of the houses from which they were purchased?—*A.* Locally, I presume, you would like?

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Q. Oh yes?—*A.* Atlas Radio Corporation on King Street West; I believe from Engineering Sound on Melinda Street; Dominion Sound on Victoria Street; from two other houses earlier mentioned in this hearing, the Alpha Aracon and the Wholesale Radio Company Limited, or whatever they are. I am afraid I don't know that phraseology, and any other house that has parts which were available.

Q. What about the R.C.A. Victor?—*A.* Yes; recently I have requested information regarding sound producing and recording apparatus available through the R.C.A. Victor Company, of which I have an intention, I might add, to purchase, if its quality is of sufficient character to warrant it. 10

Q. Now, when you have these instrumentalities all assembled into a gramophone or a phonograph, what does it look like?—*A.* Well, that is a very difficult thing to describe, Mr. Fox. It may consist of many components, arranged in various fashions.

Q. Is it like Exhibit 15?—*A.* Not necessarily, in any way.

Q. It could be?—*A.* It could be if you wanted to arrange them.

Q. Well, what do you usually do?—*A.* I am afraid I don't understand your question.

Q. Well, what do you do; string them along a tape, or put them along the floor, or build them into one compact unit?—*A.* They are assembled 20 in the most convenient fashion to operate and for appearance sake, generally.

Q. Do you put them in a cabinet?—*A.* Not necessarily in one cabinet.

Q. Do you separate them?—*A.* Very frequently.

Q. Separate them all over the lot?—*A.* Yes, they are all relatively different in location.

Q. When you put these instrumentalities into operation, Mr. Hodges you do so with the desire, I presume, to have a performance of the music or speech, as the case may be, that is impressed upon the record?—*A.* That is quite right.

Q. In other words, you want an audible reproduction? Now, note 30 I say "audible reproduction"?—*A.* Well, there are only four other sensory organs that we can proceed with, so we will assume audible is the one.

Q. Now, at what point in the instrumentality do you get the audible reproduction?—*A.* Would you be kind enough to say that question again?

Q. At, or from what point in the instrumentalities and for this purpose I am going to ask you to look back at our old friend, Exhibit No. 24, the sketch. From what point in those instrumentalities do you get the audible reproduction of sound? At what point does it become audible?—*A.* You mean practically audible?

Q. Oh, yes. Let us deal in practical things?—*A.* At the loud-speaker. 40

Q. Now is there, or is there not, as an expert, any difference between reproduction and audible reproduction?—*A.* Yes. You can have anything reproduced, but unless it produces a sensory stimulus—you must add the adjective.

Q. Yes. Unless it becomes capable of being sensorially perceived, then it is only a reproduction?—*A.* Yes.

Q. Now, at what point in those instrumentalities does the reproduction or recreation of the original performance take place?—A. At the point of contact with the needle with the moving record groove.

Q. At that point we have already heard, there are certain mechanical vibrations set up, which are transmuted into electrical energy and again back into mechanical and so produce an audible reproduction?—A. That is correct.

10 Q. An audible reproduction. I want to get this quite plain for the record. Is there one reproduction or more than one reproduction by the instrumentality?—A. In a phonograph?

Q. In the instrumentality shown in Exhibit No. 24, and that will cover everything?—A. Just one.

Q. That is, you have the reproduction at the contact point of the needle and the groove, and that reproduction becomes audible at the loud-speaker end?—A. Yes.

Q. Now, would you mind, just for the record, clearing up one point for us and telling us the difference, if there is any, between an amplifier and an audio amplifier?—A. Well, the adjective "audio" merely pertains to the frequencies with which the amplifier will transmit most efficiently.

20 Q. In other words, what we have been shortly calling the amplifier is in more correct language, an audio amplifier?—A. I would feel that would be worth while to say that.

HIS LORDSHIP: Something which amplifies so that it can be perceived by the sense of hearing?—A. The variations which correspond to that which may be perceived by the sensory organ.

Q. To make the frequencies perceptible by the sense of hearing. Is that it?—A. Since there has been a great deal of difficulty with words, particularly in this hearing, I would like to go over that again, if your Lordship would permit.

30 Q. Would you say that the instrument, audio amplifier, makes the frequencies perceptible by the sense of hearing?—A. The amplifier, your Lordship, does not. It only is accomplished by means of the loud-speaker or loud-speakers or transcondenser at that point.

Q. The amplifier——?—A. Is the conveyance for the variations which are frequencies, which correspond to those emanating from an attached loud-speaker.

Mr. FOX: Now, let us have this perfectly clear so there will be no misunderstanding. There is no sound emanating from an audio amplifier?—A. That is quite right if we limit that to electrical.

40 Q. Now, in the instrumentality shown in Exhibit No. 24, whether you call No. 7 and No. 9 amplifiers or audio amplifiers, do either one of them emit any sound?—A. Neither.

Q. No. The sound is emitted from loud-speaker No. 8. Is that correct?—A. Yes. I believe my eyes when I see it here. It was 8.

Q. Now, taking those instrumentalities, Mr. Hodges, and you have heard them described as to location and you will recall other instrumentalities, 1 to 7, and in the A.B.C. studio connected to wires 7A, to

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instrumentalities 8 and 9 which are in the "Brass Rail," the "Famous Door" and the Westminster Hotel. Now, let us take the "Brass Rail" as typical of all three. When the proprietor of the "Brass Rail" switches on his loud-speaker No. 8 so that it is in comparative position, in other words, it is emitting musical sounds, what part of the instrumentalities Nos. 1 to 7 is he making use of? I mean 1 to 9, of course?—A. He is making use of the amplifying—no, I am sorry.

Q. In order to get sound out of the loud-speaker No. 8 by bringing it into play, what part of all the instrumentalities Nos. 1 to 9, is he using? —A. The instrumentalities of a gramophone. 10

Q. No, I said what part of it.

HIS LORDSHIP: What numbered parts is he making use of?—
A. Do you want me to record all these numbers? You have heard 1 is the motor—

Mr. FOX: No, no. Please don't describe them. I say, what part is he making use of? All of them or only specific numbers?

HIS LORDSHIP: In order to get sound out of loud-speaker No. 8? —A. He is utilising all the parts from 1 to 9.

HIS LORDSHIP: Are you turning to another subject now, Mr. Fox?

Mr. FOX: I have finished with this witness, my Lord. 20

HIS LORDSHIP: Cross-examination?

Mr. MANNING: No question, my Lord.

Witness excused.

Mr. SANKEY: That is the defence, my Lord.

HIS LORDSHIP: Are you calling any reply, Mr. Manning?

Mr. MANNING: No, my Lord.

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Reasons for Judgment of Schroeder, J.

Judgment Rendered 29th January 1951.

SCHROEDER, J.: The Plaintiff is a company which carries on in 30
Canada the business of acquiring copyrights of musical works or the
performing rights therein, and which deals with or in the issue or grant of
licenses for the performance in Canada of such works in which copyright
subsists. It is, accordingly, affected and bound by the provisions of the
Copyright Act, R.S.C., 1927, chapter 32 as amended by chapter 8 of the
Statutes of Canada, 1931, chapter 18 of the Statutes of Canada, 1935,
chapter 28 of the Statutes of Canada, 1936, and chapter 27 of the Statutes
of Canada, 1938, and more particularly by the provisions of Section 10,
10A and 10B as the same appear in the Office Consolidation of The Copyright
Act under the caption "Performing Rights Societies." 40

As owner in the year 1949 of the performing rights in the copyrighted musical works entitled "Moon Glow," "Sophisticated Lady," "April Showers," "Ol' Man River," "Who," and "Make Believe," the Plaintiff alleges that the Defendant, Associated Broadcasting Company Limited, hereinafter referred to as the A.B.C. Company, the Defendant H. Reibstein as owner and operator of a tavern or cocktail bar known as the Famous Door Tavern, the Defendant Beecher Dennis as owner and operator of a similar establishment known as the Brass Rail and Westminster Hotel Limited as the owner and operator of a place of entertainment of like nature, all carrying on business in the City of Toronto, did on the 8th and 9th day of April, 1949, infringe the Plaintiff's said copyrights by performing or causing to be performed in public over loud-speakers installed in the premises of the Defendants, other than the A.B.C. Company, the musical works hereinbefore mentioned, or some of them, without the consent of the Plaintiff, or that they authorised such performance without the Plaintiff's consent.

The circumstances in which the alleged infringement is said to have taken place were as follows:—The A.B.C. Company carries on a business in the City of Toronto which involves the furnishing of musical programs to its three co-Defendants and 187 other subscribers in Toronto, pursuant to written contracts entered into with its patrons and which provide for payment of a stipulated monthly fee for such services. In connection with its operations it maintains a central control room in downtown Toronto in which has been installed a mechanical contrivance which is or resembles in all its essential characteristics, although on a larger and more elaborate scale, an electric phonograph or gramophone. This apparatus will be described in greater detail later, but for the present purpose it is sufficient to say that it consists in part of four turn-tables which are capable of playing records or electrical transcriptions and by means of switching devices any one of the four turn-tables can be quickly brought into operation.

Under an agreement with the Bell Telephone Company the A.B.C. Company has the right to use the wiring system of the Telephone Company for the purpose of conducting electrical impulses originating in its control room to the premises of its various customers, where, by means of an amplifier and a series of loud-speakers, the mechanical vibrations originating in the control room at the point of contact of the needle with the sinuous groove in the record revolving upon the particular turn-table then in use, are converted into sound. Thus the patrons of the establishments conducted by the Defendant, other than the Defendant the A.B.C. Company, can enjoy a combination of liquid refreshment and music consisting either of the immortal classics of the grand old masters of the past or the productions of a more recent period dignified by such titles as "Sophisticated Lady" and "You Ain't Heard Nothing Yet."

No question is raised in this action as to the Plaintiff's ownership of that portion of the copyright in each of the said musical works which is claimed by it. It has been established that the Plaintiff did not consent to

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the use of the said musical works and that none of the Defendants has paid any fees, charges or royalties to the Plaintiff for such purpose. There is no dispute as to the manner in which the alleged infringements occurred or as to the date, places and times of their performance or the authorisation of such performances by the Defendants.

The Plaintiff claims—

1. A declaration that it is the owner of that part of the copyright in the said musical works "Moon Glow," "Sophisticated Lady," "April Showers," "Ol' Man River," "Who" and "Make Believe" which consists of the sole right to perform the same in public throughout the Dominion of Canada. 10

2. A declaration that the Defendants and each of them have infringed the Plaintiff's said copyright in the said musical works as hereinbefore set forth by the performance thereof or by authorising the performance thereof in public without the consent of the Plaintiff for the private profit of the said Defendants and each of them.

3. An injunction restraining the said Defendants, their and each of their agents, servants and employees from infringing the Plaintiff's copyright in the said musical works "Moon Glow," "Sophisticated Lady," "April Showers," "Ol' Man River," "Who" and "Make Believe" by the performance of the same or any substantial part thereof in public by means of the said device without the consent of the Plaintiff. 20

4. Damages.

5. Such part of the profits which the Defendants have severally made. They also ask for a direction that the necessary accounts be taken and enquiries had, together with such further and such other relief as the nature of the case may require.

The Defendants plead that the equipment owned or used by them in the acoustic reproduction of recorded sound vibrations is a gramophone within the meaning of subsection 6 (a) of Section 10 (b) of The Copyright Amendment Act, 1938, being Chapter 8 of the Statutes of Canada, 1931, as amended, and that there has, therefore, been no infringement of copyright by the Defendants, or any of them, by reason of the public performance of musical works in Canada by means of such equipment. 30

If this plea should not be sustained, then clearly the Defendants, other than the A.B.C. Company, have infringed the Plaintiff's copyright in question herein by performing one or more of the said musical works in public and the A.B.C. Company has authorised such performances.

I deem it unnecessary, therefore, to discuss the provisions of the Copyright Act bearing upon this particular phase of the case at bar. The sole question which presents itself for determination is whether or not the 40

Defendants have brought themselves within the terms of Section 10B, subsection (6) (a) of the Statute, which reads :

10 “ In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same.

“ In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection. 1938, c. 27, s. 4.”

20 In the earlier stages of the trial Plaintiff's counsel endeavoured to draw a distinction between a gramophone and a phonograph, contending that the former was an instrument which employed purely mechanical means of acoustic reproduction, while the latter made use of electrical or electronic devices, although both performed the same function. Later, however, and quite properly, this contention was withdrawn and counsel conceded that the terms “ gramophone ” and “ phonograph ” could be used interchangeably.

30 It is stated by high authority that there can be no doubt that reference may properly be made to dictionaries to ascertain not only the meaning of a word but also the use to which the thing (if it be a thing) denoted by the word is commonly put : *Coco-Cola Company of Canada Limited v. Pepsi-Cola Company of Canada Limited*, 1942 All E.R., p. 615 at p. 617. In the shorter Oxford Dictionary, 2nd Edition, the word “ gramophone ” is defined as—

40 “ An instrument for recording and reproducing vocal instrumental and other sounds ; especially a reproducing instrument consisting essentially of a revolving turntable capable of carrying discs on which are impressed, in a spiral track, wave forms corresponding to sound vibrations, to reproduce which a stylus attached to an acoustic device or electric system travels along the track.”

It is suggested that the word was apparently formed by an inversion of “ phonogram.”

Encyclopedia Britannica, 14th Edition, volume 10, at page 616, contains the following definition of “ gramophone ”—

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“ An instrument for reproducing sound by transmitting to
“ the air the mechanical vibrations of a stylus in contact with
“ a sinuous groove in a moving record. In a wider sense the
“ term might be applied to any instrument for the recording or
“ subsequent reproduction of sound.”

In Volume 17 of the Encyclopedia Britannica at page 776 the word
“ phonograph ” is defined in almost identical terms. It is interesting to
note that Edison described his invention, which was patented in the year
1878, as a “ phonograph,” while Berliner referred to his improved model
of this invention, which was patented in the year 1887, as a “ gramo- 10
phone.” At still another stage the name “ graphophone ” was introduced.
More recently when phonographs and radios were combined the instrument
was described as a radio-phonograph combination. The same combination
is called a “ radiogram ” in England. Another development was the
record player which had all the component parts of a phonograph except
the loud-speaker. It was and is possible to make a connection with the
loud-speaker of a radio by means of wires running from the playing head
of the record player, and when so connected the two machines combine
all the elements of a phonograph or gramophone. For an extended dis-
cussion of the history and origin of these various words, reference may be 20
made to the judgment of Parker, J., In The Matter of an Application by
the Gramophone Company Limited to register “ Gramophone ” as a trade
mark. This case is reported in (1910) 2 Ch. p. 428 or 27 R.P.C. 689 and
particular reference is made to p. 690 of the latter report. Parker, J.,
declined to register the word “ gramophone ” as a trade mark and his
judgment was sustained on appeal.

Efforts were made by some of the witnesses to suggest that the species
of record played on the A.B.C. Company’s turntables were not gramophone
or phonograph records in the ordinary sense but were known in the trade 30
as electrical transcriptions. When all the evidence on this point is carefully
sifted, it appears that the only essential difference between an electrical
transcription and a record sold for domestic use is that the former is
sixteen inches in diameter and the latter only ten or twelve inches. Modern
domestic record players or phonographs have turntables which revolve
at three speeds, namely $33\frac{1}{3}$, 45 or 78 revolutions per minute, each of which
may be selected by operating a control lever. The turntables employed
by the A.B.C. Company in its operations revolve at two controllable speeds,
 $33\frac{1}{3}$ revolutions per minute or 78 revolutions per minute. Electrical
transcriptions can be played on the ordinary modern phonograph provided 40
that the turntable is of the proper dimensions to take a sixteen-inch disk
and any domestic record can be played on the transcription turntables of
the A.B.C. Company. In the trade, turn-tables such as those installed
in the A.B.C. Company’s control room are distinguished by the name of
“ transmission turn-tables.” In my view, however, nothing turns on the
use of labels which are attached to the various types of instruments or
records with which we are concerned in the case at bar.

The Plaintiff's witness William Thornton Charles Dowding, a recording engineer employed by the R.C.A. Victor Company, was asked on cross-examination to compare the earlier type of gramophone, the spindle of which was revolved by a clockwork type of motor and which employed purely mechanical means of sound reproduction, with the improved type of instrument which utilized electrical aids, and his testimony on this point may be summarised as follows :—

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(1) The earlier invention had a spindle which was operated by a clockwork type of motor, whereas the later model was equipped with an electric motor which turned the spindle.

(2) Both instruments had a flat round turn-table which was connected with the spindle and a flat record could be placed on each of them.

(3) Both instruments made use of a playing needle which was mounted in a playing head.

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(4) The playing head in both contrivances was carried by a suspension arm but in the suspension arm of the earlier instrument a diaphragm was employed while in the newer type of instrument a magnetic coil of the electrical type was adopted (a device similar to the one to be found in a telephone receiver).

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(5) In the mechanical type of gramophone the sound vibrations were carried into a horn or sound box which served the purpose of the present day loud-speaker and were emitted to the air as an acoustic reproduction of the vibrations which occurred when the needle came into contact with the sinuous groove on the record. In the electrically operated and electrically equipped gramophone, the original vibrations so caused were transmuted by the action of the magnetic coil into electrical impulses which were carried along wires running through the suspension arm into an amplifier and continued along wires to a loud-speaker. At this point the electrical impulses generated as stated, were transmuted back into mechanical vibrations and, after coming into contact with a membrane, were emitted into the air from the loud-speaker as mechanical vibrations which produced sound.

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The witness Dowding examined the control room of the A.B.C. Company as well as the premises of the other Defendants and the equipment installed therein. During his cross-examination he was shown a sketch which was produced by counsel for the Defendants and filed as Exhibit 24. This sketch shows in diagrammatic form the various instrumentalities which compose the equipment of the Defendant A.B.C. Company located in part on its premises and in part on the premises of its customers. A copy of this sketch is attached to these reasons for judgment for ready reference as Schedule "A." (See Volume of Exhibits No. 24) The figures shown on the sketch have been numbered and represent the following instrumentalities respectively:—

1. Motor.

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2. Turn-table.
- 2a. Spindle of motor operating the turntable.
3. Stylus or needle.
4. Playing head holding the needle and having a magnetic pick-up, that is, a coil in a magnetic field.
5. Suspension arm.
6. Electrical connecting wires from the coil in the playing head leading to,
7. An amplifier. The amplifier is connected by electrical wires to,
- 7a. Electrical connecting wires of varying length from the amplifier. The two wavy lines between the parts numbered 8 and 9 also represent electrical connecting wires of varying length between the amplifier 9 and the loud-speaker(s) 8.
8. Loud speaker.
9. Amplifier interposed in advance of loud speaker 8.

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It may be stated that the instrumentalities numbered 1 to 7a, inclusive, are located on the premises of the A.B.C. Company, 7a representing the telephone wires which are used as a means of conduction. The remaining instrumentalities are located on the premises of the Defendants, other than the A.B.C. Company. It should be added that in the control room there are four turntables which are connected with gear designed to enable the operator in the control room to disengage one turntable and engage another without causing any appreciable interruption in the programme. Jacks and patch panels are also installed to enable the rapid introduction into service of another amplifier as a substitute for one which may have become defective. All the expert witnesses agree that the instrumentalities of which the A.B.C. Company's system is composed, saving and excepting such added equipment as the jacks, patch panels, and other switching devices and an additional amplifier and additional loudspeakers (of which there are at least five in use in each establishment and located at various points in the lounges), are the same instrumentalities as those which form the component parts of a phonograph. Both the defendants' expert witnesses Delbert Beverley Black and William Edward Hodges are highly qualified in their particular fields and I accept their testimony wherever there is a material variance between it and the testimony of the Plaintiff's witness Dowding whose training and experience would not entitle his opinion to nearly as much weight as should be attached to the evidence of Black and Hodges. Both Black and Hodges assert that the instrumentalities located in the studios of the A.B.C. Company or the component parts of any gramophone or phonograph will function whether the same are enclosed in a cabinet or not. The witness Black defines a system as "a group of components which may be put together in any form to obtain a certain result." He states that the equipment of the A.B.C. Company, both that

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part thereof which is located in its control room and the part thereof which is located in the premises of the other Defendants, constitutes a system. He states further that any radio receiving set is a system as is a phonograph or gramophone; that they all form a system designed to produce acoustic sounds.

It is true that amplifier 9 and loud-speaker 8 can be controlled at will by the various subscribers to the A.B.C. Company's service on their own premises, but when loud-speaker 8 is switched on, then without a doubt all the other instrumentalities numbered 1 to 9 are brought into play. It is
 10 futile to contend that the performance, with which we are concerned in this case, is produced by means of an instrument or series of instruments located on the premises of the three Defendants other than the A.B.C. Company, and represented by the figures 8 and 9 on the sketch, Exhibit 24. If the loud-speaker is severed from instrumentalities numbered 1 to 9, then it is plain that no sound would be emitted from the loud-speakers, except such sound as would originate in the hand microphones which are connected with the loud-speakers and used either for the purpose of paging customers or making more audible instrumental or vocal music which originates on the premises as the result of a live performance. It need
 20 hardly be stated, of course, that there are dimensional differences between the ordinary domestic gramophone and the more ruggedly constructed instrument installed in the control room of the Defendant the A.B.C. Company. In all essential details, however, both operate on precisely the same principles. If it were not necessary to conduct a low current over the Bell Telephone wires so as not to interfere by electrical induction with the contemporaneous use of other parallel wires by other customers of the Bell Telephone Company it would not be necessary to use more than one amplifier in the system.

The Plaintiff maintains that the public performance of which it
 30 complains is not a performance by means of any gramophone and that the Defendants are therefore not exonerated from the payment of fees, charges or royalties by virtue of the provisions of sub-section (6) (a) of Section 10B. It is argued on the Plaintiff's behalf that the word "gramophone" must be given a restricted meaning and interpreted in the sense in which it was used in the year 1938 when the amending subsection was enacted. The Plaintiff would restrict the performance which relieves the owners or users of gramophones from payment of fees or charges to the Plaintiff, to the performance by means of a gramophone, all the instrumentalities composing which are contained in a single cabinet and in one room.

40 The witness Black, who is the Sound System Engineering Laboratory Supervisor of the Stromberg-Carlson Company in Toronto, has made installations in schools and other institutions where a centrally located turn-table was employed and which, through the medium of wires connected to loud-speakers in the various classrooms, could initiate sound waves which could be heard simultaneously in all the classrooms equipped to receive and amplify the same. In Sunnybrook Hospital situated in Leaside, Ontario, a similar system has been set up with connections to outlets not

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only to other portions of the same building, but to other buildings in the group of buildings comprising the hospital. Any sound vibrations originating in the central control room can be heard at any of these outlets co-instantaneously.

For some years prior to the year 1938, telephone wires were utilised as a means of conduction to make possible what have been described as “coast to coast hook-ups” so that a radio broadcast which was initiated on the Atlantic coast could be heard with perfect clarity on the Pacific seaboard. Prior to that same year, hotels in various parts of Canada, by means of a master radio receiving set located in a control room, with the aid of wires extended to loudspeakers in the bedrooms of the hotel and such larger rooms as the dining-room thereof, transmitted the same radio program to many portions of the hotel. An instance of this can be seen in the case of *Canadian Performing Right Soc. v. Ford Hotel* (1935) 2 D.L.R. p. 391. Another example of the employment of this principle of sound transmission is to be found in the Massachusetts case of *Ray Noble v. 160 Commonwealth Avenue Incorporated*, reported in *Copyright Decisions 1935-1937*, Library of Congress of the United States, p. 210; also in 34 U.S. Patent Quarterly, p. 105. This case was decided in the year 1937. For some years prior to the year 1938 it was well known that a loudspeaker could be connected with a radio receiving set or a phonograph so as to enable music to be heard in more remote portions of a private house. All these facts must be kept in mind when one considers the Plaintiff’s contention that interpretation of the word “gramophone” in the amending subsection in question herein is to be restricted within the narrow compass previously indicated.

In Craies on Statute Law, 3rd Edition, at p. 78, the following rule of statutory construction is mentioned—

“The rule that the language used by the Legislature must be construed in its natural and ordinary sense requires some explanation. The sense must be that which the words used ordinarily bore at the time when the statute was passed.”

The learned author proceeds to quote the words of Lord Esher, M.R., in *Clerical, &c. Assurance Co. v. Carter* (1889) 22 Q.B.D. 444, 448—

“There has been a long discussion of various puzzling matter in relation to the provisions of the Income Tax Acts, but, after all, we must construe the words of Schedule D according to the ordinary canon of construction; that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced.”

In Odgers on The Construction of Deeds and Statutes, p. 174, the rule is stated as follows:—

“Words are taken to be used in the sense they bore at the time the statute was passed.”

After stating the rule the learned author states what was quoted by Lord Esher in *The Longford* (1889) 14 P.D. 34 and quoted by Collins, M.R., in *The Burns* (1907) P.D. p. 137, as follows:—

“ The first point to be borne in mind is that the Act (6 & 7 Will. 4, a private Act) must be construed as if one were interpreting it the day after it was passed The word ‘ action ’ mentioned in the section was not applicable when the Act was passed to the procedure of the Admiralty Court. Admiralty actions were then called ‘ suits ’ or ‘ causes ’ ; moreover the Admiralty Court was not called and was not one of His Majesty’s Courts of Law.”

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This general rule, of course, is subject to very many exceptions, particularly if an interpretation made in strict accordance therewith would lead to a manifest absurdity. A further relevant rule of statutory construction is set forth in Maxwell on Interpretation of Statutes, 9th Edition at p. 55, in these terms:—

“ The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view.”

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It is quite unthinkable that Parliament in enacting subsection (6) (a) of Section 10B could have intended to exonerate from payment of fees or charges, a performance by means of an antiquated outmoded type of gramophone, but not a performance by means of the most modern instrument of that genus embodying all the latest improvements and refinements.

Adverting again to the submission of the plaintiff that the musical compositions with respect to which it possessed the performing rights were performed by means of an instrument known or described as a loud-speaker, would it not be manifestly absurd to suppose that Parliament intended to permit fees or charges to be collected in respect of performances by means of an instrument not capable by itself of producing sound ? Furthermore, if the loud-speakers in the lounges of the establishments conducted by the Defendants, other than the A.B.C. Company, were connected by means of wires to a self-contained radio receiving set in the office of the establishment, could it be successfully contended that these combined instrumentalities were not a radio receiving set within the meaning of the subsection so as to enjoy the immunity which the same affords ?

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To carry the matter one step further, let us envisage the case of a factory owner whose employees have demanded as one of life’s amenities the privilege of enjoying music while they work. The employer could purchase a gramophone or phonograph, together with a quantity of records, and hire a girl to operate it. Obviously the performance by means of the phonograph or gramophone would, in such circumstances, enjoy exemption under the provisions of the subsection. If, however, his plant was a large one and occupied three floors of a building and the workers on one of the other

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floors hearing the strains of music floating from the first floor, requested the factory owner to extend a similar privilege to them, he could, of course, purchase another phonograph and have it operated on the upper floor or floors, in which case the performance on such floors would again enjoy exemption under the terms of subsection (6) (a). If one were to suppose that the factory owner, with a view to saving expense, enlarged the sound producing capacity of the first instrument by running wires to loud-speakers located on the other floors, can it be seriously contended that in this case the performance on such floors would not enjoy relief from the burden of paying fees or charges to the owners of the copyright in musical compositions played on the gramophone? Let it be supposed that the employer is approached by a person engaged in a business similar to that carried on by the A.B.C. Company who undertakes to operate a centrally located gramophone on the factory premises and supply the records and a trained operator. In such circumstances can it be properly contended that the performance thus provided is not covered by the exempting provisions of subsection (6) (a)? If not, then it seems to me that there is no substantial difference between the performance of the musical compositions on the factory premises or from a centrally located control room some distance away from the factory owned and controlled by the person who engages in the business of providing musical performances in the manner indicated

As an instance of a further absurdity to which the narrow construction contended for will lead, one can conceive of the case of a restaurant keeper who, in the upstairs portion of the premises in which he carries on his business, keeps a combination radio-phonograph which is connected by means of wires to a loud-speaker located downstairs in the restaurant which makes audible to people in the restaurant programs originating either in the radio portion of the instrument or in the phonograph portion thereof. If the plaintiff's contention is sound, then only those programs which originate in the radio receiving set are exonerated by subsections (6) (a) but not those which originate in the phonograph and the restaurant keeper finds himself the possessor of an instrument which is half slave and half free. The Defendant the A.B.C. Company is in precisely this position inasmuch as it has a radio receiving set in its control room and radio programs of general interest are often transmitted over its leased wire system to the customers who subscribe to the service provided by it.

Section 10 of The Interpretation Act, Chapter 1, Revised Statutes of Canada, 1927, reads as follows :—

“The law shall be considered as always speaking, and
“ whenever any matter or thing is expressed in the present tense,
“ the same shall be applied to the circumstances as they arise, so
“ that effect may be given to each Act spirit, true intent and
“ meaning.”

In the 9th Edition of Maxwell the author deals with the proposition involved in the extension of the language of a statute to new things and at page 82 puts it thus :

“ Except in some cases where the principle of excessive
 “ strict construction has been applied, the language of a statute
 “ is generally extended to new things which were not known and
 “ could not have been contemplated by the Legislature when it
 “ was passed. This occurs when the Act deals with a genus, and
 “ the thing which afterwards comes into existence is a species
 “ of it.”

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The author cites many cases in support of this proposition and reference
 is made to the case of *Attorney-General v. Edison Telephone Company*,
 10 6 Q.B.D. 244 as illustrating the principle. In the latter case it was held
 that the telephone was a “ telegraph ” within the meaning of the Telegram
 Acts 1863 and 1869, though not invented or contemplated in 1869 so that
 the monopoly which under the Statute had been granted to the Post Master
 General of England covering the transmission of telegraph messages was
 extended to the transmission of messages by telephone. At p. 256
 Stephen, J., in his reasons for judgment stated :—

“ It is difficult to suppose that the legislature intended to
 “ grant a monopoly so liable to be defeated, or that its language
 “ was meant to be so construed as to be limited to the then state
 20 “ of, perhaps, the most progressive of all sciences.”

It should be borne in mind that the provisions of the statute relating
 to performing rights societies are regulatory and for that reason the following
 rule of construction stated in Maxwell on Interpretation of Statutes,
 9th Edition, at p. 20, is not without significance in this case :—

“ Where alternative constructions are equally open that
 “ alternative is to be chosen which will be consistent with the
 “ smooth working of the system which the statute purports to be
 “ regulating ; and that alternative is to be rejected which will
 “ introduce uncertainty, friction or confusion into the working
 30 “ of the system.”

In support of this thesis the learned author cites the judgment of the
 Privy Council in *Shannon Realities v. St. Michael* (1924) A.C. 185, quoting
 from the judgment of Lord Shaw at p. 192.

Subsection (6) (a) first came before the Courts for consideration in the
 year 1942 in the case of *Canadian Performing Right Society Limited v.*
Raymond Vigneux, Arthur P. Vigneux et al, reported in Exchequer Court
 Reports, 1942, at p. 129. This case arose out of the renting of an electric
 gramophone, popularly known as a “ juke box,” by the owner thereof to
 40 who, by depositing a coin in a slot, could operate an automatic selecting
 arm which would choose a particular record and the instrument would then
 be set in operation, giving forth a clamorous cacophony which sometimes
 passed for music. The owners of the gramophone not only supplied the
 instrument but supplied records from time to time and under their agree-
 ment with the restaurateur they were entitled to a payment of \$10.00 per

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week, the lessee or owner of the premises being entitled to retain any surplus. The learned President of the Exchequer Court, while holding that the instrument in question was a gramophone, as was apparently conceded by all parties, held that the owner of the same as well as the lessee thereof were not the owners or users of a gramophone giving public performances in the sense contemplated by the Copyright Act and the interpretation which he rendered was controlled by what that learned Judge deemed to be the purpose or scope of the amendment. This is set forth at p. 136 of the judgment of the learned late President of the Exchequer Court :

“ I am satisfied that the idea prompting the enactment of
“ ss. 6 (a) was to obviate the collection of any fees or royalties
“ from the user of gramophones, by which means were performed
“ musical works which were the subject of copyright, in the cases
“ where the user was in a small and rather inconsequential way,
“ and where any direct or incidental profit from such user was
“ small, if any at all. Again, this may be inferred from the
“ concluding words of ss. 6 (a) because the Copyright Appeal
“ Board in fixing the amount to be collected from gramophone
“ manufacturers, if any, was directed to take into consideration, 20
“ ‘ all expenses of collection and other outlays, if any, saved or
“ ‘ savable by or on behalf of the owner of the copyright or
“ ‘ performing right concerned or his agents, in consequence of
“ ‘ the provisions of this subsection.’ And no doubt there would
“ be a great saving in the cost of the collection of the fees and
“ royalties suggested by ss. 6 (a), from a few gramophone manu-
“ facturers, as compared with the cost of the collection of any
“ fees or royalties likely to be approved and certified by the
“ Copyright Appeal Board and payable by this numerous class of
“ ‘ owners or users’ which I have suggested, and who would be 30
“ widely scattered about the country. That it was for the relief
“ of that numerous class ss 6 (a) was enacted seems to me to be
“ fairly plain, and I think that may fairly be assumed from the
“ language of the subsection itself.”

And it further appears from his reasons on p. 137, which I quote :

“ The conclusion which I have reached is that the Defendants
“ do not fall within the class protected by ss. (6) (a) of sec. 10B.
“ They are not I think the ‘ owner or user ’ of a gramophone
“ giving public performances in the sense contemplated by that
“ statutory provision. They are virtually partners in a distinct 40
“ class of business, in a venture of publicly performing musical
“ works purely for profit, for a fee in the form of a coin or coins
“ deposited in the gramophone by the person desiring the
“ performance of certain musical works, and presumably for the
“ gratification of that person. The whole scheme is entirely one
“ for profit making, something apart from the restaurant business

10 “ itself, or the ownership of the gramophone, one contributes the
 “ gramophone and the records and services the same, and the
 “ other contributes the premises, and they invite such of the
 “ public as desire the performance of musical works to deposit
 “ a certain coin in the gramophone, and this automatically causes
 “ the gramophone to perform musical works for the person who
 “ has paid a fee in the form of coins of a certain denomination.
 “ This is not I think what was contemplated by ss. 6 (a) of sec. 10B.
 “ In the case before me it would seem inequitable and unjust if
 “ the Defendants could do as they are doing, with impunity, using
 “ the Plaintiff’s copyright without licence or compensation,
 “ something which is entirely against the whole purpose and spirit
 “ of the Copyright Act, something which might affect the interests
 “ not only of Canadian subjects but those of foreign countries,
 “ under the provisions of the Berne Convention.”

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20 On appeal to the Supreme Court of Canada this judgment was sustained
 with some slight variation which is not here material ; see 1943 S.C.R. at
 p. 348. Sir Lyman Duff, Chief Justice of Canada, agreed with that portion
 of the judgment of Maclean, J., expressing his view as to the scope or object
 of the amendment, as will be seen by reference to pages 356 and 357 of the
 reasons for judgment of the learned Chief Justice of Canada. The
 Defendants appealed to His Majesty in Council and the appeal was allowed
 and the action dismissed ; see 1945 A.C. p. 118.

30 In the Privy Council their Lordships took the view that the words of
 the subsection were clear enough to deprive the Society of its rights against
 the Defendants in the action and pointed out that it provided by way of
 compensation for the payment of an appropriate sum payable “ in advance ”
 which “ apparently meant in advance of any public performance and
 “ therefore payable whether or not the public performance did in fact take
 “ place.”

It was urged before their Lordships, as it is urged by counsel on behalf
 of the Plaintiff in the case at bar, that no charges or fees had been fixed by
 the Copyright Appeal Board for payment by the manufacturers of gramophones
 and, accordingly, no payment having been made, the performance
 was an infringement of the Society’s copyright. Dealing with this point,
 their Lordships stated at p. 121 :—

40 “ . . . the statutory right to perform which the subsection
 “ confers is in no way conditional on payment of the charges which
 “ the subsection enacts are to be payable by broadcasting stations
 “ or gramophone manufacturers. Indeed, such a condition would,
 “ far from relieving the owners of receiving sets or gramophones
 “ from uncertainties, only add to their doubts and perplexity. The
 “ exoneration of owners or users of receiving sets and gramophones
 “ from all payments in respect of public performances of musical
 “ compositions by means of those instruments in the specified
 “ circumstances is absolute, unqualified and unconditional, and,

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“ in their Lordship’s opinion, must necessarily carry with it the
“ consequence that as from the date of the coming into operation
“ of the subsection, such a public performance was a lawful act
“ and no infringement of copyright.”

This reasoning, in my view, effectively disposes of the Plaintiff’s contention arising from the fact that the Defendant, the A.B.C. Company, purchased from several dealers the component parts of their instrumentalities which were then assembled, with the result that there was no identifiable manufacturer from whom the collection of fees, charges or royalties could be made even if the Copyright Appeal Board had executed the duty assigned 10 to it by the statute and that consequently the Defendants are not exonerated by the provisions of the amending subsection. This, it seems to me, is *nihil ad rem.*

I do not overlook the fact that in the reasons for judgment given by Lord Russell of Killowen in the Vigneux case at p. 123 it was stated :

“ Their Lordships are unable to accept the view of the
“ President (accepted by Sir Lyman Duff and Davis, J.) that
“ Raes and Vigneux were carrying on ‘ a distinct class of business,
“ ‘ a venture of publicly performing musical works purely for
“ ‘ profit.’ They can see no foundation on which such a view can 20
“ be based. As stated above, Raes hired a machine which they
“ thought would attract custom to their restaurant. Vigneux
“ supplied the machine in the ordinary course of their business, at
“ a fixed rental ; they had no interest beyond that. To hold, on
“ those materials, that ‘ they are virtually partners in a distinct
“ ‘ class of business,’ and to decide the case on the ground, cannot,
“ in their Lordships’ opinion, be justified.”

As, however, Vigneux brothers were, in their Lordships’ view, entitled to the protection of the subsection as they contended, this latter dictum would seem to be obiter and related to a matter, at least as far as one may 30 gather from the report of the case, which was quite outside the scope of the defence presented and was never argued.

During the course of his argument, counsel for the Plaintiff contended with great vigour that Parliament was in effect depriving the Plaintiff of a proprietary right to which it was entitled by law and that subsection (6) (a) must, therefore, be strictly construed. He referred to a passage in the judgment of Lord Wright, M.R., in *Jennings v. Stephens* (1936) 1 All E.R. 409 at p. 415, from which I quote :

“ The same is true of musical compositions and of lectures.
“ It is the duty of the court to protect the rights of authors, 40
“ composers and lecturers, according to a fair construction of the
“ statute.”

In this connection it is interesting to observe what Sir Lyman Duff, Chief Justice of Canada, had to say about the enactment of the legislation designed to regulate the business of Performing Right Societies. In the

Vigneux Case, 1943 S.C.R. at p. 353, Sir Lyman Duff commented as follows :

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10 “ Under this plan the dealer in performing rights has his sole
“ right to perform any particular musical composition in public
“ qualified by a statutory licence vested in everybody who pays
“ or tenders to the dealer a fee, charge or royalty which has been
“ fixed by the Copyright Appeal Board and notified in the Canada
“ Gazette. That seems like a revolutionary change, but it is
“ evident that the legislature realised in 1931 that this business
“ in which the dealers were engaged is a business affected with a
“ public interest ; and it was felt to be unfair and unjust that these
“ dealers should possess the power so to control such performing
“ rights as to enable them to exact from people purchasing
“ gramophone records and sheets of music and radio receiving sets
“ such tolls as it might please them to exact. It is of the first
“ importance, in my opinion, to take notice of this recognition by
“ the legislature of the fact that these dealers in performing rights,
“ which rights are the creature of statute, are engaged in a trade
20 “ which is affected with a public interest and may, therefore,
“ conformably to a universally accepted canon, be properly
“ subjected to public regulation. It is not out of place here to call
“ attention to an observation of Lord Justice Lindley in
“ *Hanfataengl v. Empire Palace* (1894) 3 Ch. 109, at 128 :

30 “ ‘ Copyright, like patent right, is a monopoly restraining
“ ‘ the public from doing that which, apart from the monopoly,
“ ‘ it would be perfectly lawful for them to do. The monopoly
“ ‘ is itself right and just, and is granted for the purpose of
“ ‘ preventing persons from unfairly availing themselves of
“ ‘ the work of others, whether that work be scientific, literary,
“ ‘ or artistic. The protection of authors, whether of inven-
“ ‘ tions, works of art or of literary compositions, is the
“ ‘ object to be attained by all patent and copyright laws.
“ ‘ The Acts are to be construed with reference to this
“ ‘ purpose. On the other hand, care must always be taken
“ ‘ not to allow them to be made instruments of oppression
“ ‘ and extortion.’

“ This passage expressed the *raison d’être* of the enactment under
“ consideration.”

40 The Chief Justice of Canada also expressed the opinion that the wording
of subsection (6) (a) was clear and this opinion was shared by Lord Russell
of Killowan ; see 1945 A.C. at p. 121.

The statute was designed as much for the protection of the public as
for the protection of copyright owners and calls for a fair construction—
fair not only from the standpoint of the copyright owner but also from the
standpoint of the public. The judgment of the Privy Council in the *Vigneux*
case strengthens the view that the fact that the A.B.C. Company directly

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and the other Defendants indirectly performed for profit, is not an answer. Adopting the principle that the sole guide to the interpretation of the statute is the statute itself the conclusion seems to me to be inescapable that Parliament covered all the exceptions which it intended when it referred to performances “in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made.”

The Copyright Act deals broadly with the product of the mind of a copyright owner with relation to (a) copies of the work, and, (b) performance thereof. In my view altogether too much emphasis is laid by the Plaintiff on the location of the instrumentalities by reason of which the performance is achieved. I feel constrained to hold on all the evidence that, notwithstanding the separation of the component instrumentalities of the A.B.C. Company, it was at the time and place in question providing a public performance “by means of a gramophone” and the same can be said of its co-defendants. In my judgment the location of the instrumentality by which the performance is produced is completely immaterial, provided that it occurs in a place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made. It follows that under the statute there is an unconditional exoneration of all the Defendants from payment of any fees, charges or royalties to the Plaintiff and that the performances of which the Plaintiff complains were lawful and did not constitute infringements of the plaintiff’s copyright. 10 20

For the reasons stated, the Plaintiff’s action fails and I direct that judgment be entered dismissing its action with costs payable to the Defendants forthwith after taxation thereof.

No. 19.
Order of
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1951.

No. 19.
Order of Schroeder, J.

IN THE SUPREME COURT OF ONTARIO.

The Honourable Mr. Justice SCHROEDER.

30

Monday the 29th day of January, 1951.

Between

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF
CANADA, LIMITED Plaintiff

and

ASSOCIATED BROADCASTING COMPANY LIMITED, H. REIBSTEIN,
BEECHER DENNIS and WESTMINSTER HOTEL LIMITED ... Defendants.

This action coming on for trial on the 8th, 9th, 10th, 11th, 12th, 15th, 16th and 17th days of January at the Sittings holden at Toronto for the trial of actions without a jury, in the presence of Counsel for all parties, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by Counsel aforesaid, the Court was pleased to direct this action to stand over for judgment and the same coming on now for judgment.

In the
Supreme
Court of
Ontario.

No. 19.
Order of
Schroeder,
J., 29th
January,
1951—
continued.

1. THIS COURT DOTH ORDER AND ADJUDGE that this action be and the same is hereby dismissed with costs to be paid by the Plaintiff to the
10 Defendants forthwith after taxation thereof ;

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the moneys paid into Court by the Defendant Associated Broadcasting Company Limited pursuant to the order made herein by the Honourable Mr. Justice Urquhart on the 9th day of June, 1949, be forthwith paid out of Court to the said Defendant.

Judgment signed this 15th day of February, 1951.

“ CHAS. W. SMYTH,”
Registrar S.C.O.



20

No. 20.
Notice of Appeal.

In the
Court of
Appeal of
Ontario.

No. 20.
Notice of
Appeal,
3rd
February,
1951.

IN THE SUPREME COURT OF ONTARIO.

Between

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF
CANADA, LIMITED (Plaintiff) *Appellant*

and

ASSOCIATED BROADCASTING COMPANY LIMITED, H. REIBSTEIN,
BEECHER DENNIS and WESTMINSTER HOTEL LIMITED
(Defendants) *Respondents.*

TAKE NOTICE that the Appellant appeals to the Court of Appeal
from the Judgment pronounced by the Honourable Mr. Justice Schroeder
30 on the 29th day of January, 1951 and asks that the said Judgment be set
aside and that judgment be entered for the Appellant in the terms of the
prayer in the Appellant's statement of claim with costs on the following
grounds, namely :—

In the
Court of
Appeal of
Ontario.

No. 20.
Notice of
Appeal,
3rd
February,
1951—
continued.

1. That the learned trial judge erred :—

(a) In receiving and acting upon opinion evidence as to the nature of the instrumentalities together operating in the premises of all the Respondents and by reason thereof in finding that they constituted a “ gramophone.”

(b) In disregarding the common and accepted terminology applied to devices for the reproduction of sound from records known as gramophones and holding that the word “ gramophone ” can be and is comprehensive of instrumentalities not known by any such description. 10

(c) In holding that the meaning of the word “ gramophone ” need not be determined in the sense in which gramophones existed and were known to exist in the year 1938 at the time of the enactment of Section 10B (6) (a) of the Copyright Act by 1938, chapter 27, Section 4.

(d) In construing the word “ gramophone ” appearing in the said Section 10B (6) (a) otherwise than in its ordinary and natural meaning and in a sense comprehensive of instrumentalities which have never been recognised as and are not a “ gramophone.”

(e) In holding that the instrumentalities in question in this 20 action not being in unitary, self-contained parcels can together constitute a “ gramophone.”

(f) In failing to give effect to the purpose and object of the provisions of the said Section 10B (6) (a).

(g) In holding that the absence of a manufacturer of the instrumentalities employed by the Respondents was not a circumstance preventing such instrumentalities from being a “ gramophone ” within the meaning of the said Section 10B (6) (a).

(h) In failing to give effect to the rule of strict construction in respect of exemptions cutting down the proprietary right of the Appellant to perform in public the works in question in this 30 action.

(i) In holding that the performances by the instrumentalities in question in this action which produced or were capable of producing similar sounds simultaneously at 191 different localities, constituted one public performance by one instrument known as a gramophone, whereas in law they constituted or might constitute 191 separate performances by instrumentalities none of which constitute “ gramophone.”

(j) In holding that, even if the instrument giving rise to 40 performance in the control room of the Respondent Associated Broadcasting Company Limited was a gramophone and thereby exempt under the provisions of Section 10B (6)(a), the performances in the premises of the three remaining Respondents were thereby exempted.

(k) In holding that the rules of construction above set forth are to be disregarded because they lead to an absurdity.

(l) In classifying the transcription turn-tables employed by the Respondent Associated Broadcasting Company Limited as "gramophones."

2.—And on the further grounds that the learned trial Judge should have held :—

10 (a) That the performances in the respective premises known as the Brass Rail, the Famous Door and the Town and Country Room of the Westminster Hotel were separate and distinct performances in public, each of which was achieved by means other than a gramophone.

(b) That the sounds heard in the said respective premises were not sounds produced by a gramophone.

(c) That the public performance of those sounds at the said several three locations constituted an infringement of copyright of the Appellant.

20 (d) That the Respondent Associated Broadcasting Company Limited having authorised the said infringements was liable with the remaining Respondents for infringement of the Appellants' copyright and that accordingly the Appellant was entitled to an injunction, the profits of the several performances in question and damages to be determined on a reference, and the costs of the action.

Dated this 3rd day of February, 1951.

MANNING, MORTIMER & KENNEDY,
67 Yonge Street, Toronto, 1,
Solicitors for the Appellant.

30 To Messrs. Borden, Elliot, Kelley, Palmer & Sankey,
25 King Street West,
Toronto, 1,
Solicitors for the Respondents.

No. 21.

Reasons for Judgment.

Judgment rendered 5th March, 1952.

ROACH, J.A. : This is an Appeal by the Plaintiff from the Judgment pronounced by the Honourable Mr. Justice Schroeder dated the 29th day of January, 1951, by which Judgment this action was dismissed with costs (reported in (1951) O.R. 101 and noted in (1951) O.W.N. 133).

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Court of
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—
No. 20.
Notice of
Appeal.
3rd
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continued.

No. 21.
Reasons for
Judgment
5th March,
1952.

In the
Court of
Appeal of
Ontario.

No. 21.
Reasons for
Judgment
5th March,
1952—
continued.

At all times material to the action the Plaintiff was the owner of that part of the copyright in the musical works known as "Moon Glow," "Sophisticated Lady," "April Showers," "Ol' Man River," "Who" and "Make Believe," which consists in the sole right to perform the same or any substantial part thereof in public throughout the Dominion of Canada.

The Defendant Associated Broadcasting Company Limited, hereinafter called A.B.C., carries on the business of providing, for valuable consideration musical programmes to subscribers for its service by means of mechanical and electrical instrumentalities, which will be described in reasonable 10 detail later.

The Defendant Reibstein is the licensee and operator of a tavern or cocktail bar known as the Famous Door Tavern. The Defendant Dennis is the licensee and operator of a similar establishment known as the Brass Rail. The Defendant Westminster Hotel Limited is the licensee and operator of a similar place of entertainment known as the Town and Country Room in the Westminster Hotel. Each of those Defendants is a subscriber to the services provided by A.B.C. In their respective premises are a number of loud-speakers through which musical programmes originating in the studio of A.B.C. are broadcast for the intended pleasure of their 20 patrons.

On the 8th and 9th days of April, 1949, the musical works hereinbefore named, or some of them, were performed without the consent of the Plaintiff in the premises of the Defendants other than A.B.C. by the instrumentalities hereinbefore referred to, and the Plaintiff alleged that the Defendants thereby infringed its copyright in these works.

The Defendants alleged that the instrumentalities constituted a gramophone within the meaning of sub-section (6) (a) of Section 10B of The Copyright Amendment Act, 1931, being Ch. 8 of the Statutes of Canada, 1931, as amended, and accordingly that they had not infringed any copyright 30 by the public performance of musical works in Canada by means of such equipment.

The learned trial Judge gave effect to the Defendants' contention and directed that Judgment be entered dismissing the action with costs.

It is said that this is a test case and that there are upwards of 190 subscribers for the services rendered by A.B.C. in the same manner and by the same means by which such services were provided to the Defendants in this action other than A.B.C.

Section 10B (6) (a) of the Statute is as follows :

" In respect of public performance by means of any radio 40
" receiving set or gramophone in any place other than a theatre
" which is ordinarily and regularly used for entertainments to which
" an admission charge is made, no fees, charges or royalties shall
" be collectable from the owner or user of the radio receiving set
" or gramophone, but the Copyright Appeal Board shall, so far as
" possible, provide for the collection in advance from radio

authorising and contributing to their performance in public, and the other Defendants by performing them in public without the consent of the Plaintiff for their private profit.

In the Court of Appeal of Ontario.

(3) The Plaintiff is also entitled to an injunction restraining the Defendants, their and each of their agents, servants and employees from infringing the Plaintiff's copyright in the said musical works by the performance of the same or any substantial part thereof in public by means of the devices hereinbefore described.

No. 21. Reasons for Judgment 5th March, 1952 continued.

10 Since this is a test case and, as I understand it, the Plaintiff is much more interested in a ruling as to its legal position in respect of public performances of musical compositions in which it is the owner of the performing right by the devices used by the Defendants, I would award only nominal damages and I would assess them at the sum of \$75.00. If the Appellant is not content to accept that sum, then it may have, at its own risk as to costs, a reference to the master at Toronto to determine the damages.

The Appellant should have its costs of the trial and of this Appeal.

HOPE, J.A. : I agree.

20 BOWLBY, J.A. : I agree.

No. 22.
Order.

No. 22. Order 5th March, 1952.

IN THE SUPREME COURT OF ONTARIO. (ROACH, HOPE, BOWLBY, JJ.)

Wednesday, the 5th day of March, 1952.

Between

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED Plaintiff

and

30 ASSOCIATED BROADCASTING COMPANY LIMITED, H. REIBSTEIN, BEECHER DENNIS and WESTMINSTER HOTEL LIMITED ... Defendants.

UPON MOTION made on the 5th, 6th, 7th and 8th days of June, 1951, unto this Court by Counsel on behalf of the Plaintiff by way of appeal from the judgment pronounced herein by the Honourable Mr. Justice

In the
Court of
Appeal of
Ontario.

No. 22.
Order
5th March,
1952—
continued.

Schroeder on the 29th day of January, 1951, IN THE PRESENCE OF counsel for the Defendants and UPON HEARING READ the notice of appeal, the pleadings and evidence adduced by the parties and the said judgment, dated the 29th day of January, 1951, AND UPON HEARING what was alleged by counsel aforesaid and judgment upon the motion having been reserved unto this day.

1. THIS COURT DOTH ORDER that the said judgment dated the 29th day of January, 1951, be and the same is hereby varied by striking out paragraphs 1 and 2 thereof and substituting the following subparagraphs 1 to 6 inclusive, and as varied be as follows :—

10

“ 1.—THIS COURT DOTH DECLARE that the Plaintiff is the
“ owner of that part of the copyright in the musical works
“ ‘ MOONGLOW,’ ‘ SOPHISTICATED LADY,’ ‘ APRIL SHOWERS,’ ‘ OL’
“ ‘ MAN RIVER,’ ‘ WHO ’ and ‘ MAKE BELIEVE ’ which consists of
“ the sole right to perform the same or any substantial part
“ thereof in public throughout the Dominion of Canada and doth
“ order and adjudge the same accordingly.

“ 2.—THIS COURT DOTH FURTHER DECLARE that the
“ Defendant Associated Broadcasting Company Limited has
“ infringed the Plaintiff’s copyright in the said musical works by 20
“ authorising the performance in public of the said musical works
“ ‘ MOONGLOW,’ ‘ SOPHISTICATED LADY,’ ‘ APRIL SHOWERS,’ ‘ OL’
“ ‘ MAN RIVER,’ ‘ WHO ’ and ‘ MAKE BELIEVE ’ without the consent
“ of the Plaintiff and doth order and adjudge the same accordingly.

“ 3.—THIS COURT DOTH FURTHER DECLARE that the
“ Defendants Reibstein Dennis and Westminster Hotel Limited
“ and each of them have infringed the Appellant’s copyright in the
“ said musical works ‘ MOONGLOW,’ ‘ SOPHISTICATED LADY,’
“ ‘ APRIL SHOWERS,’ ‘ OL’ ‘ MAN RIVER,’ ‘ WHO ’ and ‘ MAKE
“ BELIEVE ’ by performing or causing one or more of the said 30
“ works to be performed in public without the consent of the
“ Plaintiff for their private profit and doth order and adjudge the
“ same accordingly.

“ 4.—THIS COURT DOTH FURTHER ORDER that the Defendants
“ and each of them, their and each of their agents, servants and
“ employees be forever restrained from infringing the Plaintiff’s
“ copyright in the said musical works ‘ MOONGLOW,’ ‘ SOPHISTIC-
“ ATED LADY,’ ‘ APRIL SHOWERS,’ ‘ OL’ ‘ MAN RIVER,’ ‘ WHO ’ and
“ ‘ MAKE BELIEVE ’ by the performance or causing or authorising
“ the performance of the same or any substantial part thereof 40
“ in public by means of the turn-tables and accessory equipment
“ contained in the premises of the Defendant Associated Broad-
“ casting Company Limited, the connecting wires leading there-
“ from to the devices contained in the premises occupied by the

“ broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this sub-section and shall fix the amount of the same. In so doing, the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this sub-section.”

In the Court of Appeal of Ontario.

No. 21.
Reasons for Judgment
5th March, 1952—

continued.

10 The equipment with which we are here concerned can best be described by the drawing, which was filed as Exhibit 24, and a verbal description of its component parts as shown and numbered on that drawing.

Part No. 1 is an electric motor.

No. 2 is a turn-table.

No. 2a is a spindle of the motor operating the turn-table.

No. 3 is a stylus or needle.

No. 4 is a playing head holding the needle and having a magnetic pick-up, that is, a coil in a magnetic field.

No. 5 is a suspension arm.

20 No. 6 are electrical connecting wires from the coil in the playing head leading to an amplifier which is No. 7.

No. 7a are electrical connecting wires.

No. 9 is an amplifier.

No. 8 is a loudspeaker connected with the amplifier (No. 9) by electrical wires.

The instrumentalities numbered 1 to 7 inclusive are located in the studio of A.B.C. and are under the sole control of A.B.C., its servants or agents.

30 Instrumentalities numbered 9 and 8 are located in the premises of each of the other Defendants and are under their control. They are owned by A.B.C. and were installed in the premises of the other Defendants by A.B.C. pursuant to its contract with those other Defendants.

Instrumentalities numbered 7a are wires of the Bell Telephone Company of Canada running between the building in which A.B.C. has its studio and the building in which the other Defendants carry on their respective businesses.

40 That drawing is not quite complete. Inserted between No. 7 and No. 7a is a step transformer. This is made necessary by the fact that in order to prevent electrical induction interfering with parallel wires of the Bell Telephone system serving other customers only a low current is transmitted over the wires shown as the 7a on the drawing.

The drawing shows only one turn-table. In fact there are four turn-tables connected by gears so that the operator in the studio of A.B.C. may disengage one turn-table and engage another without any appreciable interruption of the programme.

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The equipment in the premises of each of the Defendants other than A.B.C. may be disconnected from the balance of the equipment by the operation of a switch, not shown in the drawing, so that at any given time, one or more subscribers and the patrons in his or their premises may be hearing a musical programme originating in the studio of A.B.C. and other subscribers and their patrons may not. If all the subscribers leave the instrumentalities which are located in their premises connected with the balance of the system, they all hear the same programme. By throwing out that switch, any subscriber may use parts numbered 8 and 9 together with microphones to make more audible programmes originating in his 10 own premises.

The contracts between A.B.C. and the other Defendants are all similar in form. They are headed "Arrangement for 'Music by Muzak' service."

By these contracts A.B.C. agrees to supply to the subscriber "Music by Muzak" programme service to the localities therein described between the opening and closing hours of the subscribers' establishment. As part of the Muzak Service A.B.C. agrees to install and keep in operating condition for the reception of Muzak Programmes in the subscribers' premises certain equipment specified in the contract.

This system is operated as follows:—An employee of A.B.C. places 20 a record or disc on turn-table No. 2. That turn-table is then made to revolve by the power of the motor No. 1. The stylus or needle No. 3 is placed in contact with the sinuous groove in the record and transmits to the playing head, No. 4, sound waves identical with those which impressed the record when it was made. Those sound waves are converted into electrical impulses in the playing head by the action of the magnetic coil and are carried along the wires No. 6 to the amplifier No. 7.

At that point, all the operations in the studio of A.B.C. end. The electrical impulses leave the amplifier No. 7 and are transmitted over the Bell Telephone wires to the premises of the subscriber. The step trans- 30 former—not shown in the sketch—increases the force of those electrical impulses and they are carried to the No. 9 and thence to the loud-speaker No. 8 where they are transmitted back into sound vibrations and emitted into the air as an acoustic reproduction of the musical work contained in the record.

I do not think there can be any doubt that by the operations of all those instrumentalities the same result is accomplished as is accomplished by the operation of a gramophone but that does not make the sum total of all these instrumentalities a gramophone.

All the Defendants joined in one statement of defence. Paragraph 3 40 thereof is, in part, as follows:—

"The equipment owned or used by the Defendants in the
"acoustic reproduction of recorded sound vibrations is a gramo-
"phone within the meaning of subsection (6) (a) of Section 10B
"of the Copyright Amendment Act, 1931, being chapter 8 of the
"Statutes of Canada, 1931, as amended. . . ."

That pleading could be interpreted as an allegation either—

(a) that the equipment in the premises of A.B.C., the wires of the Bell Telephone Company extending from its premises to the premises of each of the other Defendants and the equipment in the premises of each of those other Defendants constituted a single gramophone, in which event there were three separate gramophones: or

(b) the sum total of all the equipment constituted one only gramophone.

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continued.

10 It is perfectly plain that—indeed it was not argued to the contrary—there were not three separate gramophones for the obvious reason, apart from all other considerations, that one record cannot be in use on three gramophones at the same time.

It was argued, however, and the learned trial judge so found, that the sum total of all the equipment constituted one single gramophone. I cannot accept that argument and I do not agree with that finding. In my opinion, it is not a gramophone at least within the meaning of subsec. (6) (a) of Sec. 10B.

20 Let us look at the history of that legislation. That history was reviewed by Duff, C.J., in *Vigneux v. Canadian Performing Right Society Ltd.* (1943) S.C.R. 348, and by their Lordships in the Privy Council in the same case (1945) A.C. 108. It is convenient to refer to the reasons of Duff, C.J. He there points out that the Copyright Act was enacted in 1921 and by it the sole right of public performance of, inter alia, musical works became a statutory right vested in the owners of the copyright. Dealing with subsequent amendments to the Act, Duff, C.J., said:—

30 “Seven years after the Act of 1921 came into force the legislature realised that in respect of performing rights a radical change in the statute was necessary. Societies associations and companies had become active in the business of acquiring such rights. . . . The legislature evidently became aware of the necessity of regulating the exercise of the power acquired by such societies (I shall refer to them as dealers in performing rights) to control the public performance of such musical and dramatico-musical works. Legislation was enacted first in 1931, which was subsequently amended in 1936 and in 1938. It is necessary to call attention to Section 3 of the statute of 1938:

40 “ ‘The Copyright Amendment Act, 1931, as amended by chapter twenty-eight of the statutes of 1936 by this Act, shall be read and construed with, and as part of, the Copyright Act.’

“The plan which the legislature adopted was this: Associations (dealers in performing rights, that is to say) are to file at the copyright office lists of all dramatico-musical and musical works in current use in respect of which the dealer has the right to grant licenses or to charge fees for performances, and to

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“ file statements on or before the first of November in each year
“ of all charges or royalties which such dealer proposed during
“ the next ensuing calendar year to collect in compensation for
“ the issue or grant of licenses in respect of the performance of
“ such works.

“ There was set up a Copyright Appeal Board whose duty it
“ is to consider these proposed charges and to make such alterations
“ in the statements as may seem just and transmit the statements
“ so altered or revised, or unaltered, as the case may be, to the
“ Minister certified as approved statements. The statements so 10
“ certified are published in the Canada Gazette; and the fees,
“ charges or royalties which the performing rights dealer may
“ collect in respect of the issue of licenses during the ensuing
“ calendar year. The Act provides that no dealer shall have any
“ right of action or have any right to enforce any civil or summary
“ remedy for the infringement of the performing rights in any of its
“ works against any person who has tendered or paid to such dealer
“ the fees, charges or royalties that have been approved.”

It may be unnecessary because it is so obvious, but it nevertheless may
be helpful to here remind ourselves that under the plan thus adopted by 20
the legislature, the person who desired to reproduce in public a musical
work contained on a gramophone record, and the performing right to which
was vested in the society, would be required before he could use that record
for such public performance to pay or at least tender the fee as fixed by
the Copyright Appeal Board. To play that record either in public or for
his own private pleasure, he would have to use a reproducing device which
would include a gramophone. If he used a reproducing device for that
purpose, whether it be a gramophone or any other reproducing equipment,
of necessity he had at the same time to use the record. The one without the
other could accomplish nothing. 30

Continuing now to quote from the judgment of Duff, C.J. :

“ Under this plan the dealer in performing rights has his sole
“ right to perform any particular musical composition in public
“ qualified by a statutory license vested in everybody who pays
“ or tenders to the dealer a fee, charge or royalty which has been
“ fixed by the Copyright Appeal Board and notified in the Canada
“ Gazette. That seems like a revolutionary change, but it is
“ evident that the legislature realised in 1931 that this business
“ in which the dealers were engaged is a business affected with 40
“ a public interest; and it was felt to be unfair and unjust that
“ these dealers should possess the power so to control such
“ performing rights as to enable them to exact from people
“ purchasing *gramophone records* and sheets of music and radio
“ receivings sets such tolls as it might please them to exact. . . .

“ It was considered, however, that under the plan as originally
“ devised, the purchasers of *gramophone records* and the possessors

10 “ of wireless receiving sets were still placed in a position in which
 “ they ought not to be placed. The decisions as to the meaning
 “ of ‘ public performance ’ had made it unsafe for the owner of a
 “ gramophone or of gramophone records who carried on, for
 “ example, a tea shop, to use the gramophone *for playing the*
 “ *records* in her shop, or to permit her customers to use it. She
 “ might be entitled to do so, or she might not. The answer to the
 “ question would depend upon a variety of considerations, whether,
 “ for example, the gramophone manufacturer possessed authority
 “ to authorise the public performance of the records, whether she
 “ had derived such authority through the purchase of records, and
 “ so on ; and these considerations, of course, she would be quite
 “ incapable herself of passing upon. The legislature, no doubt,
 “ thought that a law which made it necessary for the purchasers
 “ of gramophone records to consult a lawyer to ascertain whether
 “ or not they could safely play their records in such circum-
 “ stances, was not satisfactory and was not in harmony with the
 “ general spirit of the copyright law, as explained by Lindley, L.J.”
 20 (referred to earlier in the judgment) “ and, accordingly, special
 “ provision was made dealing with the owners of gramophones
 “ and wireless receiving sets and the use of these instruments in
 “ places ‘ other than a theatre which is ordinarily and regularly
 “ ‘ used for entertainments to which an admission charge is made.’
 “ It was declared (subsection 6 (a)) explicitly that such persons
 “ should not be called upon to pay any fee, charge or royalty in such
 “ circumstances and the duty was imposed upon the Copyright
 “ Appeal Board to make provision for fees, charges and royalties
 “ appropriate to this situation. I confess I find no difficulty
 “ whatever in reading the language of this enactment. It declares
 30 “ in unqualified terms that no fee, charge or royalty is to be
 “ exacted from the owner of a gramophone record (*sic*) or radio
 “ receiving set in the circumstances specified, and compensation
 “ is provided in the duty imposed upon the Board to make such
 “ provision as appears to be appropriate and possible in the
 “ circumstances. . . .

40 “ The result is that in respect of such fees, charges and
 “ royalties, which, apart from subsection 6 (a), *would be exigible*
 “ *from the owners of records and receiving sets*, the dealer gets the
 “ benefit of the provisions of subsection 6 (a) which invests the
 “ Copyright Appeal Board with the authority and the duty to make
 “ provision, so far as may be possible, for substituted charges
 “ which are to be collected from the radio broadcasting stations
 “ or gramophone manufacturers and which are to be appropriate
 “ to the conditions created by the enactments of subsection 6 (a) ;
 “ . . . ”

The *italics* in the above extract are mine. .

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continued.

Now, it surely is perfectly plain that the Legislature had in mind, and was legislating to protect, by exonerating from the payment of fees, the persons who, without such legislation, would be liable for the payment of fees to the performing rights societies. Who were those persons? They were not those who merely owned a gramophone. Possession of a gramophone without any records would mean nothing. They were the persons who had control, either as owners or otherwise, of records, and also a gramophone over which they also had control either as owners or otherwise, and who might use the gramophone and thereby use the records for the public performance of musical works contained in the records. Those persons would be “ the owners or users ” of gramophones. 10

I cannot conceive of any person *using*—a gramophone unless he has control of, not only the gramophone, the whole of it, but also the record on which it is operating. Neither A.B.C., on the one hand, nor its co-defendants, on the other, have that degree of control over the equipment that is inherent in the user of a gramophone. A.B.C. has no control over the equipment in the premises of its subscribers, A.B.C., through its servants or agents, could set in operation the equipment on its premises, but unless and until the subscriber connected up the equipment on his premises with the balance of the system there would be no reproduction of any sound, except perhaps a reproduction in the studio of A.B.C., and that would not be a public performance. The subscribers have no physical control over the records and no say in their selection. 20

Here you have equipment, part of which is independently controlled by one party, another part of which is independently controlled by another, and in between is still a third part, namely, the Bell Telephone wires, which is in control of neither (although A.B.C. is entitled to the use of them), but is actually in control of the Bell Telephone Company. To call the sum total of that equipment a gramophone, to my mind, is to distort the meaning of the word. 30

To my mind it is inconceivable that Parliament by this legislation, intended that it should apply to equipment one end of which might stand on the shore of the Atlantic and be under the control of one person, and the other stand on the Pacific coast and be in control of a second person, and the wires by which they are connected spread across the whole width of the Dominion and be in control of still a third person, and, in addition to that, to have it apply to that sum total of equipment plus an offshoot that might lead as far north and as far south as there are telephone wires.

It is to no purpose to say that the subscribers by their respective contracts with A.B.C., waived control over the equipment in the A.B.C. studio, including the records. 40

Neither can it be said that A.B.C. was the agent of the other Defendants. It was not their agent. It was an independent contractor.

Section 10B (6) (a) deals with public performances by means of any radio receiving set or gramophone in places other than a theatre, etc. Let us look for a moment at the mechanisms and technique employed in each instance.

There cannot be any performance of a musical composition by radio unless and until a radio receiving set picks up the radio waves which are created and transmitted by the broadcasting station and translates them into audible sound waves.

A scientific explanation of the technique of radio broadcasting and reception is contained in the Judgment of Mr. Justice Brandels in *Buck v. Jewell-la-Salle Realty Co.* (1931) 283 U.S. 191. It is recorded in the Judgment of MacKinnon, J. in *Canadian Performing Right Society v. Ford Hotel* (1935) 2 D.L.R. 391 :—

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Court of
Appeal of
Ontario.

No. 21.
Reasons for
Judgment
5th March,
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continued.

10 “ All sound consists of waves of relatively low frequencies
“ which ordinarily pass through the air and are locally audible.
“ Thus music played at a distant broadcasting studio is not
“ directly heard at the receiving set. In the microphone of the
“ radio transmitter the sound waves are used to modulate electrical
“ currents of relatively high frequencies which are broadcast
“ through an entirely different medium, conventionally known as
“ the ‘ ether.’ These radio waves are not audible. In the
“ receiving set they are rectified ; that is, converted into direct
20 “ currents which actuate the loud-speaker to produce again in the
“ air sound waves of audible frequencies. The modulation of
“ the radio waves in the transmitting apparatus, by the audible
“ sound waves is comparable to the manner in which the wax
“ phonograph record is impressed by these same waves through
“ the medium of a recording stylus. The transmitted radio
“ waves require a receiving set for their detection and translation
“ into audible sound waves, just as the record requires another
“ mechanism for the reproduction of the recorded composition.
30 “ In neither case is the original programme heard ; and, in the
“ former, complicated electrical instrumentalities are necessary
“ for its adequate reception and distribution.”

No one would suggest that when a person is using a radio receiving set for the performance of a recorded musical composition which is broadcast from a broadcasting station, he is using the equipment which is located in the broadcasting station. That equipment is in use, but the person using it is the owner of the broadcasting station.

Neither can it be said that the owner of the receiving set and the owner of the broadcasting station together are jointly using the sum total of all the equipment.

Now let us turn to the equipment in the case at bar.

40 It was argued that once the subscriber throws in the switch which connects the equipment in his premises with the equipment in the studios of A.B.C. and thereby causes a programme originating in those studios to be heard in his premises, he and A.B.C. together are using the whole equipment to perform that programme in public. I cannot accept that argument. The subscriber is getting the benefit of the use to which A.B.C. is putting the equipment over which it has control but he is not using that

In the
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continued.

equipment. He uses that which A.B.C. produces, but he does not use the equipment by which it is produced. A.B.C. delivers a commodity to the premises of the subscriber. In the form in which it is delivered it is of no value to the subscriber. The subscriber, in turn accepts it and converts it into a commodity which is of value to him by using equipment over which he alone has control. In this respect the subscriber and the owner of the radio receiving set are in identical positions. Their legal positions, however, differ. Parliament has exonerated the latter, but not the former, from the payment of fees or royalties.

A.B.C. and the owners of broadcasting stations are in identical positions. 10
It is common knowledge that radio broadcasting stations broadcast musical programmes from discs or records. It is inconceivable that Parliament would impose upon the broadcasting stations the obligations of paying fees or royalties where the medium of transmission is the ether and exonerate a person, firm or corporation in the position of A.B.C. which uses electrical wires for that purpose; and, in my opinion, Parliament did not provide such exoneration.

When Parliament, in 1938, amended the statute by adding Section 10B (6) (a), it did not thereby extinguish fees or royalties which were and are the reasonable entitlement of composers and authors. The burden 20
of direct payment was merely shifted from the users of gramophones where that instrumentality was used for public performance, to the manufacturers.

It is obvious, therefore, that "gramophone" as it appears in Section 10B (6) (a) must mean the same kind of gramophone as was contemplated in the expression "gramophone manufacturer." When we speak of gramophone manufacturers, we think of persons engaged in the business of manufacturing gramophones as completed units for sale to the public. No manufacturer ever manufactured the totality of devices that are here in question. As counsel for the Appellant said, no factory 30
in the world could hold the totality of those instrumentalities in their completed form. No manufacturer of gramophones ever manufactured as a complete unit, a gramophone that had 600 to 700 loud-speakers, more than 190 amplifiers and switches that would enable 190 different persons to shut off the sound as each of them might choose without interfering with the user thereof by the others.

Since the only issue in this Appeal is whether or not the totality of the equipment is a gramophone, within the meaning of the statute, holding as I do that it is not, it follows that this Appeal must be allowed. The Appellant is entitled to Judgment declaring: 40

(1) That the Plaintiff is the owner of that part of the copyright in the musical works hereinbefore identified which consists of the sole right to perform the same in public throughout the Dominion of Canada.

(2) That the Defendants and each of them have infringed the Plaintiff's said copyright in those musical works—A.B.C. by

“ several Defendants Reibstein, Dennis and Westminster Hotel Limited and the said devices in question in this action and doth order and adjudge the same accordingly. ”

In the Court of Appeal of Ontario.

“ 5.—THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do recover from the Defendants damages in the sum of \$75.00.

No. 22.
Order
5th March,
1952—
continued.

“ 6.—THIS COURT DOTH FURTHER ORDER that the Defendants do pay to the Plaintiff its costs of this action forthwith after taxation thereof.”

10 2. AND THIS COURT DOTH FURTHER ORDER that the Defendants do pay to the Plaintiff its costs of this appeal forthwith after taxation thereof.

No. 23.
Order Allowing Leave to Appeal.

In the Privy Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 21st day of October, 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRIVY SEAL.
MR. PEAKE.

SIR WALTER MONCKTON.
MR. ECCLES.

No. 23.
Order allowing Leave to Appeal, 21st October, 1952.

20 WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 6th day of October, 1952 in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October, 1909, there was referred unto this Committee a humble petition of (1) Associated Broadcasting Company Limited (2) H. Reibstein (3) Beecher Dennis (4) Westminster Hotel Limited in the matter of an Appeal from the Court of Appeal for Ontario between the Petitioners Appellants and Composers Authors and Publishers Association of Canada Limited Respondent setting forth (amongst other matters) : that the Petitioners were Defendants in an action instituted in the Supreme Court of Ontario on the 14th April, 1949, in which was claimed a declaration

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In the
Privy
Council.

No. 23.
Order
allowing
Leave to
Appeal.
21st
October,
1952—
continued.

that the Respondent was the owner of that part of the copyright in six specified musical works which consisted in the sole right to perform the same in public throughout Canada a declaration that such copyright had been infringed by the Petitioners and each of them an injunction and other relief: that the Petitioners pleaded in defence that if they had performed the said musical works in public they were exonerated from all liability in respect of such performance by reason of the provisions of Section 10B (6) (a) of the Copyright Amendment Act being Section 4 of Chapter 27 of the Statutes of Canada 1938: that on the 29th January, 1951, Judgment was given dismissing the action: that the Respondent appealed to the Court of Appeal for Ontario which on the 5th March, 1952, reversed the Judgment of the Supreme Court and gave Judgment for the relief claimed and for \$75 by way of nominal damages: that the evidence at the trial established that apparatus consisting of turn-table playing head wires amplifiers and loud-speakers had been set up as complete units and such apparatus in its completed and assembled form was regarded in the trade as constituting a gramophone: that the apparatus owned and used by the 1st Petitioner for the performance in public of musical works consists of the same components used in the same sequence as the components of the above described apparatus and is used for the same purpose: that the only material difference is to be found in one component of the 1st Petitioner's apparatus, namely in the wire leading to the loud-speaker which has been increased in length: that the issue to be determined is whether the 1st Petitioner's apparatus constitutes a gramophone within the meaning of Section 10B (6) (a) of the Copyright Amendment Act: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the Court of Appeal for Ontario dated the 5th March, 1952, and for such further and other Order as to your Majesty in Council may appear fit:

“THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Court of Appeal for Ontario dated the 5th day of March, 1952, upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

“AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

In the
Privy
Council.

No. 23.
Order
allowing
Leave to
Appeal.
21st
October,
1952 --
continued.

No. 24.

Order Amending Order Allowing Leave to Appeal.

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AT THE COURT AT BUCKINGHAM PALACE.

The 15th day of December, 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.
LORD PRIVY SEAL.

VISCOUNT SWINTON.
SIR ALAN LASCELLES.

No. 24.
Order
amending
Order
allowing
Leave to
Appeal,
15th
December,
1952.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 2nd day of December, 1952, in the words following, viz. :—

20 “ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of (1) Associated Broadcasting Company Limited (2) H. Reibstein (3) Beecher Dennis (4) Westminster Hotel Limited in the matter of an Appeal from the Court of Appeal for Ontario between the Petitioners' Appellants and Composers Authors and Publishers Association of Canada Limited Respondents setting forth (amongst other matters): that the Petitioners were Defendants in an action instituted in the Supreme Court of Ontario on the 14th April, 1949 in which were claimed certain declarations an injunction and other relief: that on the 29th January 30 1951 Judgment was given dismissing the action: that the Respondent appealed to the Court of Appeal for Ontario which on the 5th March 1952 reversed the Judgment of the Supreme Court and gave Judgment for the relief claimed: that the Petitioners petitioned Your Majesty in Council for special leave to appeal and prayed that the certified transcript of the proceedings produced on the hearing of the Petition might be used upon the hearing of the Appeal: that on the 6th October 1952 the Lords of the Judicial Committee of the Privy Council presented

In the
Privy
Council.

No. 24.
Order
amending
Order
allowing
Leave to
Appeal,
15th
December,
1952—
continued.

to Your Majesty a Report advising that leave ought to be given to the Petitioners to enter and prosecute their Appeal: that the Report contained the following last paragraph: 'And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal': that on the 21st October 1952 Your Majesty made an Order in Council which recited the report of the Judicial Committee and ordered that the same be punctually observed obeyed and carried into execution: that in fact no certified or other transcript of the proceedings was produced at the hearing of the Petition and in consequence both the Prayer of the Petition and the last paragraph of the Report which was recited in the Order in Council of the 21st October were in error: And humbly praying Your Majesty in Council that the Order in Council dated the 21st October 1952 may be amended by the deletion therefrom of the last paragraph of the Report and the substitution therefor of the following words: 'And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same.' :

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and the Solicitors for the Respondents having consented in writing to the Prayer thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that Your Majesty's Order in Council of the 21st day of October 1952 ought to be amended by the deletion therefrom of the last paragraph of the Report of the Lords of the Committee and the substitution therefor of the following words: 'And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same.'"

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

In the Privy Council.

No. 21 of 1953.

ON APPEAL FROM THE COURT OF APPEAL OF
ONTARIO.

BETWEEN

ASSOCIATED BROADCASTING
COMPANY LIMITED, H. REIBSTEIN,
BEECHER DENNIS and WEST-
MINSTER HOTEL LIMITED

Appellants

AND

COMPOSERS, AUTHORS and
PUBLISHERS ASSOCIATION
OF CANADA LIMITED ... *Respondent.*

RECORD OF PROCEEDINGS

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