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declaration that in the opinion of the Court the case is one in which it was proper to employ two counsel. Respondent to pay the costs of the appeal.

Solicitor, for the appellant, *E. E. Cleland.*

Solicitor, for the respondent, *Robert Homburg.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SHORT . . . . . APPELLANT;
PLAINTIFF,

AND

THE CITY BANK OF SYDNEY . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August* 19, 20, 21, 22.

Barton, O'Connor and Isaacs JJ.

Conversion—Assertion of claim to goods—Possession—Procuring breach of contract—Evidence.

A company offered to store all wheat consigned to it free of storage charges on condition that the wheat when sold should bear a net commission of 2½ per cent. and that the company should have eight months in which to sell the wheat unless the consignor instructed the company to sell earlier, and the company promised to make liberal advances on all consignments. All wheat when received by the company from the consignors was placed in one large stack which also included wheat belonging to the company, and when a sale was made by them wheat was taken indiscriminately from the stack. The company made advances to consignees upon the wheat received, borrowing the money from the defendant Bank and giving the Bank as security in respect

of each advance a certificate signed by their storeman stating that the company held a certain number of bags of wheat which they would deliver to the Bank's order on return of the certificates, and these certificates were indorsed by the company directing delivery to the order of the Bank.

The plaintiff consigned 7,000 bags of wheat to the company and received an advance of 14s. per bag upon it and it was dealt with by the company as above stated. Before the plaintiff received any intimation from the company that any of his wheat had been sold, he sold 6,000 bags of it through a grain broker, informed the Bank of the sale, and that he had given the broker an order for the wheat which he claimed to be his property absolutely, and asked the Bank to indorse that order for delivery upon the broker paying all charges. The Bank in reply stated that they held warrants from the company for wheat stored at various places which they had negotiated without knowledge of claims by third parties and that they could not recognize the plaintiff's claim. The plaintiff also informed the company of the sale by him and asked them to deliver the wheat to the broker, but the company replied that they could do nothing pending a meeting of their shareholders. The company was shortly afterwards ordered to be compulsorily wound up upon a petition which was presented before the last mentioned communications between the plaintiff and the Bank and the company. Subsequently all the wheat remaining in the store was sold by the liquidator by arrangement with the various consignors.

The plaintiff sued the Bank on one count for conversion of his wheat, and on another count for knowingly and wrongfully inducing the company to commit a breach of their contract with him. He was non-suited and a motion for a new trial was dismissed, the Full Court holding that there was no evidence to support either count.

Held, that the motion was properly dismissed.

Decision of the Supreme Court of New South Wales: *Short* v. *City Bank*, 12 S.R. (N.S.W.), 186, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by William Henry Short against the City Bank of Sydney. The declaration contained a count for conversion of 7,205 bags of wheat stored by the plaintiff at Darling Island railway shed, and certain documents representing the title of the plaintiff to the delivery of the wheat to him, and a count alleging that the defendants had knowingly and wrongfully induced the Farmers' and Settlers' Co-operative Society Limited (hereinafter called "the society") to refuse to deliver the wheat stored by the society on the plaintiff's behalf, and to break and refuse to fulfil their contract with him.

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The facts were shortly as follow :—The plaintiff was a miller and wheat buyer, and in the season 1906-1907, and again in the season 1907-1908 he consigned wheat to the society for storage at Darling Island. The terms on which the society received the wheat were set out in a circular issued by them and were as follow :—

"1. Wheat to be sent by farmers to the society, and stored chiefly at Darling Island, free of storage charges.

"2. Wheat, when sold, to bear a net commission of $2\frac{1}{2}$ per cent.

"3. On receipt of wheat from the farmer a statement is to be forwarded to him informing him of the grade. If objection is taken by the farmer the grading is to be checked by an outside expert.

"4. Each consignor to agree that the society shall have the option of selling each month one-eighth of each consignment. If this one-eighth is not sold the first month, the arrangement shall be cumulative, the society having the right to sell one-fourth in the second month, and so on, the whole parcel being sold in eight months.

"5. The foregoing arrangement shall not, of course, preclude the consignor from instructing the society to sell at any time, or giving the society a reserved price at which it can sell as opportunity offers.

"6. The General Manager, in deciding upon a price, from time to time shall, as much as possible, consult the Board, especially the members of the Board directly interested in the wheat industry.

"7. The society will arrange to have the advantage of special cables from London every week, setting out the actual condition of the market and the prospects of the future, as far as they can be gauged by the best authority. These will be available at all times for consignors, and reports will also be sent periodically, advising consignors of interesting matters connected with the wheat markets.

"8. Liberal advances will be made on all consignments, the advances to be based upon market rates ruling, and at bank rate of interest, viz., 5 per cent.

"9. Special Board meetings of directors interested in wheat

production shall be held, as often as practicable, to advise the management on all matters connected with this branch of the business. All bags should be distinctly branded with owners' brand and consigned to Darling Island when for storage, and to Darling Harbour when for prompt sale."

When wheat was received by the society at Darling Island it was first graded and then stored in a shed, wheat of fair average quality, or F. A. Q. wheat as it is called, being stored in one stack, and wheat of inferior quality in another. All wheat of similar quality, whether it belonged to the society or whether received on consignment, was stored in one stack, and as sales were made the necessary number of bags was taken from the stack without discrimination as to where they came from. In allocating the proceeds of a sale, the society acted entirely on their own discretion. The society were in the habit of making advances to consignors, the amount advanced in the season 1907-1908 being at the rate of 14s. a bag, and for the purpose of doing so the society obtained accommodation from the City Bank of Sydney. When the society made an advance to a consignor they drew a cheque on the Bank and, as security for the amount so drawn, warrants, as they were called, were forwarded to the Bank representing an equivalent amount of wheat calculated at the same rate per bag as the amount advanced to the consignor. The wheat stored at Darling Island was in the custody of a storeman named Terry, and what were called "warrants" were certificates in the following form:—

"This is to certify that we hold bags wheat to the order of the Farmers' and Settlers' Co-operative Society, Ltd., and will deliver same to their order on return of this warrant.

"F. E. Terry, Storeman."

When handed to the Bank these certificates bore an indorsement by the society directing delivery to be made to the order of the Bank, and were apparently regarded by the Bank as documents of title sufficient to pass the property in an equivalent number of bags of wheat. Towards the end of April 1908, however, the Bank began to doubt the sufficiency of these documents

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for that purpose, and they gave notice to the storeman at Darling Island that they claimed "the wheat."

During the first three months of 1908 the plaintiff consigned to the society upwards of 7,000 bags of wheat. He never at any time received any notification that any of it had been sold, and in May 1908 he sold 6,000 bags of it through another firm of grain brokers. On 9th May 1908 the plaintiff wrote to the Bank as follows:—

"*Re* Farmers' and Settlers' Association.

"We have to advise you that we hold on storage with this firm 7,100 bags wheat which is our property absolutely. Against this we have received an advance of about 14s. a bag and there is also due on delivery a charge of $2\frac{1}{2}$ per cent. and interest on advance at 6 per cent. We have sold this wheat and have handed Lindley Walker & Coy. an order for same; they will pay the advance *plus* debits as above and we shall be glad to know if the Bank will endorse the order for delivery as we are told that the Bank refuses to allow wheat to be delivered.

"We need hardly point out that our property cannot be estreated by any one and if the Bank refuses delivery we shall take the necessary action to enforce it."

On the same day he wrote to the society as follows:—

"We have sold the wheat held on storage by your Association and have handed Messrs. Lindley Walker & Co. an order on you for same. They will pay the charges and advance on same on delivery and we shall be glad to know if you intend declining delivery or will honor their order when presented."

On 13th May the Bank wrote to the plaintiff as follows:—

"We are in receipt of your letter of the 9th instant notifying a claim on 7,100 bags of wheat—stored in railway sheds, as your property. We hold from the Farmers' and Settlers' Society Ltd. warrants for wheat stored at various places, and we have negotiated these documents without notice or knowledge of any claim by third parties. We are therefore unable to recognize your claim, and suggest that you should communicate with the Farmers' and Settlers' Society Ltd."

On the same day the society wrote to the plaintiff as follows:—

"We beg to acknowledge receipt of yours of the 9th and to

inform you that we regret very much that we can do nothing in this matter pending the result of our meeting of shareholders on the 20th inst."

On 2nd May a petition for the compulsory liquidation of the society was presented, and on 19th May an order for compulsory liquidation was pronounced.

On 21st May the plaintiff again wrote to the Bank as follows :—

"Will you please note that we have over 7,000 bags wheat stored at Darling Island in the care of the Farmers' and Settlers' Association (now in liquidation), and that we have sold this to Gillespie Bros. & Coy. who now want delivery of a portion. Will you therefore hand Messrs. Gillespie Bros. & Coy. on our behalf an order for 3,000 bags and they will pay you in full for same at the rate of (4s. 9¼d.) per bushel. You will of course understand that this does not in any way prejudice our claim on the wheat as our property absolutely subject to the advance of (14s. per bag) and that we claim the difference between 14s. per bag and the actual amount paid you by Gillespie Bros. & Coy."

To this the Bank replied on 22nd May that they would consult the official liquidator of the society. Nothing, however, was done in regard to the proposed delivery of wheat to the plaintiff, and finally the whole of the wheat in the custody of the society, amounting then to 16,440 bags, was sold by the liquidator under an arrangement with the consignors and the plaintiff received from the liquidator in respect of his wheat the sum of £828.

The action was heard by *Pring* J., and the plaintiff was nonsuited. A motion by the plaintiff to set aside the nonsuit, and for a new trial, was dismissed by the Full Court, the Court holding that there was no evidence either of conversion or that the Bank induced or procured the breach of the society's contract with the plaintiff: *Short* v. *City Bank* (1).

From this decision the plaintiff now appealed to the High Court.

Campbell K.C., and *A. Thomson* (with them *N. G. Pilcher*), for the appellant. Although the society had the right during

(1) 12 S.R. (N.S.W.), 186.

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eight months to sell the appellant's wheat, the appellant had the right at any time before a sale of it was effected by the society to sell it and get delivery of it. It still remained the appellant's property. There is evidence that the society and the Bank acted in such a way as to practically give the Bank the dominion over the wheat, and the Bank acted as if they had that dominion. Terry, the storeman at Darling Island, acted in such a way that through him the Bank became in constructive possession of the wheat. His warrants or certificates were regarded by all parties as documents of title, and, although they were not documents of title, the Bank are estopped from saying that they were not. Terry was put in the position of agent for the Bank so that the Bank were in constructive possession of the wheat. It is not necessary, however, that there should be either actual or constructive possession in the defendant to found an action for conversion: *Wansbrough* v. *Maton* (1). There is evidence of a conversion by the Bank. They referred to *In re Farmers' and Settlers' Co-operative Society*; *City Bank of Sydney* v. *Barden* (2); *England* v. *Cowley* (3); *Clerk & Lindsell on Torts*, 5th ed., p. 253; *M'Combie* v. *Davies* (4). To establish the count for inducing or procuring the breach of the society's contract with the appellant it is only necessary for the appellant to show that to the Bank's knowledge there were certain contractual rights and duties existing between the appellant and the society, and that the Bank by their acts knowingly procured the breaking of those contractual rights of the society. The appellant when he sent his wheat to the society did not absolutely give up his rights to it, but he only gave the society the option of selling the wheat if he had not already sold it. The object of clause 4, giving the society a right to sell extending over eight months, was not to deprive the owner of his right to sell during that period, but to give the society a right to prevent the consignors keeping their wheat at the store for an unreasonable time. The sale which the appellant made of the wheat was not regarded by any of the parties as a breach of the contract. If the contract gave the society control of the wheat for the whole eight months,

(1) 4 A. & E., 884.
(2) 9 S.R. (N.S.W.), 41.
(3) L.R. 8 Ex., 126.
(4) 6 East, 538.

then the contract, being one largely for personal services, was put an end to by the liquidation: *Companies Act* 1899, secs. 91, 104 (*b*); *Quinn* v. *Leathem* (1). If the contractual relations between the appellant and the society or the liquidator gave the appellant a right to have certain wheat delivered to him, and the Bank by its action procured either the society or the liquidator to refuse to deliver up that wheat, then the Bank committed an actionable wrong. The Bank set up an excessive and wholly untenable claim in respect of the wheat. They claimed a lien over it for the whole of the general overdraft of the society. By so doing they procured the society to refuse to hand over the wheat to the appellant. If the reasonable result of the Bank's action was the breaking of the contract by the society, that amounts to procuring the breaking of the contract. They also referred to *Clerk and Lindsell on Torts*, 5th ed., pp. 18, 20; *Lumley* v. *Gye* (2); *National Phonograph Co. Ltd.* v. *Edison-Bell Consolidated Phonograph Co. Ltd.* (3); *Lord Halsbury's Laws of England*, vol. I., p. 235; *M'Call* v. *Australian Meat Co. Ltd.* (4).

Loxton K.C. and *Mann*, for the respondents, were not called upon.

Cur. adv. vult.

August 22.

BARTON J. read the following judgment:—

Though this case has been elaborately and exhaustively argued on behalf of the appellant, we did not think it necessary to hear counsel for the respondents in support of the judgment appealed from.

I am of opinion that the reasons given by their Honors of the Supreme Court are amply sufficient to sustain their conclusions, and I confess that I do not think I can usefully add to them.

A new point suggested itself during the argument, namely, whether under the agreement between the appellant and the Farmers' and Settlers' Co-operative Association the appellant retained during its currency the right to demand and obtain

(1) (1901) A.C., 495, at p. 510.
(2) 2 E. & B., 216.
(3) (1908) 1 Ch., 335.
(4) 19 W.R., 188.

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immediate and unconditional possession of the wheat. The further question then arose whether, if he had not retained that right, the liquidation had not *ipso facto* restored it to him, or whether he was not at any rate entitled then to put an end to the agreement and dispose of his wheat so as to give immediate possession to a purchaser.

I do not think it necessary to decide these questions in view of my agreement with the conclusion of the Supreme Court that there had not been any conversion on the part of the respondents so as to sustain the third count, nor any such inducing of the association to break its contract with the appellant as could have supported the fourth count.

In the result the appeal must be dismissed.

O'CONNOR J. I am entirely of the same opinion.

ISAACS J. read the following judgment:—

I agree that this appeal must fail.

As to the trover, the plaintiff is in a serious difficulty as to the very foundation of his right to recover. On the construction of his contract with the society he had no right to resume the possession of the wheat for eight months so long as the contract stood. For the consideration of free storage, and the other duties undertaken by the society, the plaintiff agreed to allow the society that period to dispose of his produce unless he shortened the time of sale. And as he had not on the assumption of an existing contract any right to have possession of the goods—at all events in the absence of any unauthorized dealing with them by the society, which is not suggested—it is plain his action must on that assumption fail: *Lord* v. *Price* (1).

But the company had been compulsorily ordered to be wound up, and this dates from May 2, 1908. The contract was one of a nature which in my opinion entitled the appellant to put an end to it when compulsory liquidation was ordered. The capital of the company, its yearly turn over, its opportunities, cable arrangements in connection with the London market, the personal experience and judgment of the persons controlling its operations,

(1) L.R. 9 Ex., 54.

the solvency of the company with respect to the receipt of money in payment for the wheat, were all obviously material elements inducing the making of the contract. This brings the case very much within the words of *Cockburn* C.J. in *British Waggon Co.* v. *Lea* (1). There, though the company went into liquidation, the Court held the respondent was not entitled to terminate a contract which involved the mere letting of waggons to him and keeping them in repair. But, said the learned L.C.J., on the authority of *Robson* v. *Drummond* (2) " where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service."

These observations would apply to the case of a contract like the present made by a company whose affairs were afterwards conducted by an official liquidator merely for the purpose of winding up, because the business personality, so to speak, of the company is for all practical purposes entirely different from that of the company while under the ordinary regime of its directors. The substance of the service would be different. Therefore the appellant could have put an end to the whole contract so far as it remained unperformed. If he did not, his trover count must fail for the reason stated. If he did his trover count might succeed, but, if there was no contract his fourth count for inducing the breach of contract must disappear.

The Supreme Court, expressly assuming that he retained the property in the wheat, and tacitly assuming his right to possession, thought there was no evidence of conversion by the defendant. They relied on *England* v. *Cowley* (3) which is a distinct authority. See also *Burroughes* v. *Bayne* (4). The appellant

(1) 5 Q.B.D., 149, at p. 153.
(2) 2 B. & Ad., 303.
(3) L.R. 8 Ex., 126.
(4) 5 H. & N., 296.

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sought to escape the doctrine of the first mentioned case by urging that there was evidence sufficient to go to the jury to establish an arrangement between the respondent, the society, and Terry, whereby Terry agreed to hold the wheat henceforth for the respondent. Had there been such evidence it would have been one step on the way (see *Turner* v. *New South Wales Mont de Pieté Deposit and Investment Co. Ltd* (1) where I dealt with the consequences of such an arrangement). But there is no such evidence. It is plain that the parties thought the signature of Terry, in his assumed capacity of warehouseman, was sufficient to secure the bank's right to realize on the goods when necessary by carrying on his responsibility to the Bank on endorsement of the certificate, and there is no scrap of evidence he ever did more. His character of storeman of the goods for the society remained unaltered, and it is not suggested that the society itself became bailee for the Bank, and so the Bank never had possession actual or constructive of the goods.

It was not really contended that an assertion of right by the Bank—apart from its actual or constructive possession—would amount to conversion. Such a position would be manifestly untenable.

There is yet another difficulty in the appellant's path on the trover count. I mean that the goods were not specific. There was a larger bulk of wheat at Darling Island, and the wheat claimed by the plaintiff was not identified or appropriated. The argument that the Bank had laid claim to all wheat held by the society at Darling Island, even though unrepresented by certificates advanced upon, has not sufficient basis in fact. The expressions referred to cannot reasonably bear that meaning, and trover lies only in respect of specific property: *Orton* v. *Butler* (2). On all grounds then the claim on trover fails.

Then as to the count for inducing the breach of contract. To sustain this at all, the former assumption of renunciation of the contract must be abandoned, or there was no contract to break. And if that be abandoned—then, though there was a contract, there was no breach, because the society was entitled on the construction of the contract to refuse delivery on Lindley Walker's

(1) 10 C.L.R., 539, at p. 559. (2) 5 B. & Ald., 652.

order or appellant's direction. That related to 6,000 bags, and the demand was consistent with a claim, notwithstanding the contract, to have that direction complied with. In fact that claim was insisted on at the bar. And what is decisive is this—that the balance, 1,205 bags, were not demanded, but were left on free storage, which is inconsistent with a termination of the contract as a whole—and a partial renunciation is impossible. But again there are other fatal flaws in the plaintiff's case.

Apart altogether from the question of justification, I see no evidence of the allegation that the defendant "knowingly induced or procured" any breach of the contract, assuming there was a breach.

The word "knowingly" is essential. In *Fosset* v. *Breer* (1) the word is "*sciens*." In *Blake* v. *Lanyon* (2), it is laid down it must be "after notice." So also in *Lumley* v. *Gye* (3). In *Bowen* v. *Hall* (4) *Brett* L.J., speaking for himself and *Selborne* L.C., says "with knowledge of the contract." In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5), *Bowen* L.J. says:—"Intentional procurement of a violation of individual rights, contractual or other." In *Quinn* v. *Leathem* (6) Lord *Macnaghten* had previously spoken of "a violation of legal right committed knowingly."

In *Glamorgan Coal Co.* v. *South Wales Miner's Federation* (7), *Romer* L.J. says:—"Knowingly procured another to break his contract"; and in the same case *Stirling* L.J., says (8):—"The federation wilfully and with notice of the contracts procured some men to break their contracts" and calls that an "interference with contractual relations." In the same case in the House of Lords: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (9), Lord *Halsbury* L.C., speaks of "An intentional breach of contractual rights." Lord *Macnaghten* says (10), that the federation "induced and procured a vast body of workmen, . . . to break their contracts of service, and thus . . . knowingly and intentionally inflicted pecuniary loss on the plaintiffs." Lord *James* says (11):—The defendants purposely procured an unlaw-

(1) (1673) 3 Keble, 59.
(2) 6 T.R., 221.
(3) 2 E. & B., 216.
(4) 6 Q.B.D., 333, at p. 337.
(5) 23 Q.B.D., 598, at p. 614.
(6) (1901) A.C., 495, at p. 510.
(7) (1903) 2 K.B., 545, at p. 573.
(8) (1903) 2 K.B., 545, at p. 576.
(9) (1905) A.C., 239, at p. 244.
(10) (1905) A.C., 239, at p. 245.
(11) (1905) A.C., 239, at p. 252.

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ful act to be committed." Lord *Lindley* says (1):—"The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in this concerted breach of a number of contracts," and (2) he speaks of the "intention to commit an unlawful act." In *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (3), *Collins* M.R. says :—"The defendants did knowingly and for their own ends induce the commission of an actionable wrong."

But to constitute that cause of action, the defendant must have induced or procured the doing of what he knew would be a breach of contract. A *bonâ fide* belief reasonably entertained that it was not a breach of contract would be fatal to the claim. If the defendant did not know of the existence of the contract, he could not induce its breach; if he reasonably believed it did not require a certain act to be performed, his inducing a party to the contract to do something inconsistent with it could not be regarded as an inducement or procurement knowingly to break the contract; if he believed on reasonable grounds that the contract had been rescinded, or performance waived, when in fact it had not, he could not be said to knowingly procure its breach. If this were not so, no man would be safe in the ordinary transactions of life, because he might find contrary to his knowledge or belief and expectation that some contract or enterprise he entered into was inconsistent with the contractual or other obligation of the party with whom he was agreeing or dealing. No doubt every man must be understood to intend the natural consequences of his acts; but that means having regard to the circumstances with which he is or is assumed to be acquainted. And the terms of an agreement and its true construction, for it may be very complicated, and the acts of the parties in relation to it are circumstances without knowledge of which reasonably brought home to the mind no man can be said to intend consequences regarding the breach of the agreement.

All that the Bank did here was to insist on what it believed to be its rights as between the society and itself, and it in no way counselled or induced or procured the society to break its

(1) (1905) A.C., 239, at p. 253. (2) (1905) A.C., 239, at p. 255.
(3) (1902) 2 K.B., 732, at p. 738.

agreement with Short. The Bank certainly made claims beyond its legal rights, but not by way of inducing or procuring the society to break any contract with its clients. There is nothing to support the notion that the Bank supposed what it demanded would involve any breach of the society's contractual obligation with Short. The directors in their interviews with the Bank never hinted at such a result. The Bank's claim was *alio intuitu*. I prefer to deal with this phase because if the Bank was coercing the society into conduct which the bank knew would be a breach of contract I should be in a difficulty to find a legal justification for it. Therefore I do not put my judgment on justification. The view of *Street* J. is, as I read it, in substance that which I have expressed. I see no possible ground for supporting either of the counts, and think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Links & Wragge*, Gunnedah, by *E. Pritchard Bassett & Co.*

Solicitors, for the respondents, *Leibius & Black.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WILLIAM THOMAS LEE . . . . APPELLANT;

AND

THE COMMISSIONER OF PATENTS . . RESPONDENT.

ON APPEAL FROM THE COMMISSIONER OF PATENTS.

Patent — Invention — Improvements in the manufacture of charcoal and in kilns therefor—Subject matter of patent— Working directions—Process and new art —Patents Act 1903-1909 (*No.* 21 *of* 1903—*No.* 17 *of* 1909), *secs.* 2, 7.

The appellant applied for a patent for a new method or process of burning charcoal. The manufacture of charcoal had always, from the earliest times