BETWEEN: 1937

ARCHIBALD STEVENSON .....PLAINTIFF; Sept. 23 & 24.

AND 1938

HALSTEAD F. CROOK, ET AL. .....DEFENDANTS. Sept. 17.

Copyright—Infringement of copyright—Copyright in bridge tallies—"Ideal Bridge Tally"—"Practical Tally"—Original work—Knowledge, skill and labour—Injunction

The action is one for infringement and conversion of copyright in an original work produced by the plaintiff and published under the title of *Ideal Bridge Tally* or *Ideal Bridge Scorer,* and registered pursuant to the Copyright Act, R.S.C., 1927, c. 32. Copies of these tallies were sold to the public through several commercial agencies including Drug Agencies Ltd., a Vancouver, B C , business concern, with which defendant was associated as salesman for 18 months and in which capacity he sold the plaintiff's *Ideal Bridge Tally* to dealers in Western Canada.

Defendant, after severing his connection with Drug Agencies Ltd, commenced manufacturing and selling the *Practical Bridge Tally,* under the name of The Practical Bridge Tally Company, of which concern he is sole proprietor

The Court found that those tallies sold by defendants were copied from plaintiff's work

Held: That the plaintiff's work is an original plan, arrangement, compilation or combination of material, for a particular purpose or use, produced by his own skill and labour, and plaintiff is entitled to copyright therein.

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ACTION by plaintiff alleging infringement and conversion of infringing copies by defendant in bridge tallies, copyright in which plaintiff claims to own.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Edmonton, Alberta.

J. D. Adam for plaintiff.

F. A. Ford and *Gifford Main* for defendants.

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

THE PRESIDENT, now (September 17, 1938) delivered the following judgment:

This is an action for infringement and conversion of copyright in what is claimed to be an original work produced by the plaintiff. It consists of sheets of letter press in sets or volumes, published under the title of "Ideal Bridge Tally" or "Ideal Bridge Scorer," and was duly registered as copyrighted pursuant to the provisions of the Copyright Act, in May, 1929. The copyrighted work, for use in the card game of Bridge, for 2, 3, 4, 5, 6 and 7 sets of tables, and for seven rounds of play, provides for such an arrangement of partners, opponents and tables, as will avoid duplication of partners and almost wholly the duplication of opponents.

I do not propose venturing upon a description of all the arrangements provided by the Ideal Bridge Tally, for partners, opponents and tables. That would consume an unnecessary amount of time and space and would probably lead to confusion and not clarity. For the purpose of illustrating the nature and purpose of the plaintiff's Bridge Tally, I propose attempting a partial explanation or description of the arrangement of players and tables designed by him for a set of five tables of Bridge.

In the production of the copyrighted work the plaintiff by means of two tables, which he designates as Tables A and B, provides for the grouping of partners, and the grouping of partners against their opponents. In Table A, in a set of five tables, that is ten couples, the grouping of partners is as follows:

1	Plays	2	4	6	8	10	12	14
3	"	4	6	8	10	12	14	16
5	"	6	8	10	12	14	16	18
7	"	8	10	12	14	16	18	20
9	"	10	12	14	16	18	20	2
11	"	12	14	16	18	20	2	4
13	"	14	16	18	20	2	4	6
15	"	16	18	20	2	4	6	8
17	"	18	20	2	4	6	8	10
19	"	20	2	4	6	8	10	12

Here the odd numbers play with the even numbers, commencing with the low numbers and working downwards, so that No. 1 plays first with No. 2, then with numbers 4, 6, 8, 10, 12 and 14, and so on; in the six-table set the grouping is reversed and commences with the high numbers. It is conceded that this grouping is a simple one but essential to ensure that each player will play but once with every other player, as a partner.

Then having arrived at the grouping of partners set out in Table A, the plaintiff in Table B groups the partners and opponents at the different tables at which they are to play, in such a manner that the sitting partners at any table do not meet any two opponents more than twice in the seven rounds. Table B is as follows:

No. 1	No. 2	No. 3	No. 4	No. 5
1 - 2	3 - 4	9 - 10	7 - 8	5 - 6
19 - 20	17 - 18	11 - 12	13 - 14	15 - 16
3 - 12	1 - 10	13 - 2	5 - 14	19 - 8
11 - 20	15 - 4	7 - 16	17 - 6	9 - 18
3 - 6	11 - 14	5 - 8	19 - 2	1 - 4
7 - 10	13 - 16	17 - 20	15 - 18	9 - 12
1 - 12	9 - 20	17 - 8	3 - 14	15 - 6
7 - 18	5 - 16	19 - 10	13 - 4	11 - 2
5 - 10	17 - 2	9 - 14	19 - 4	1 - 6
13 - 18	7 - 12	15 - 20	11 - 16	3 - 8
1 - 14	13 - 6	9 - 2	3 - 16	11 - 4
17 - 10	15 - 8	19 - 12	5 - 18	7 - 20
15 - 2	19 - 6	1 - 8	3 - 10	7 - 14
17 - 4	13 - 20	5 - 12	9 - 16	11 - 18

The allocation of opponents, and the selection of the tables at which they are to play, as shown by this Table, is said to be the vital thing in the arrangement of players provided by the Ideal Bridge Tally, but, I was informed, there

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are many other possible combinations of players and tables. There is also Table C which shows how the Table B groupings actually work out in the several rounds of play throughout a game, but the tracing of that would be quite a lengthy and complicated matter and would not be particularly helpful. I should, however, point out that after arranging the partners as in Table A the plaintiff altered the order of the rounds of play in his published Bridge Tallies by taking the fifth round in Table A and making that his second round, and making the second round his third round, the sixth round his fourth round, the third round his fifth round, the seventh round his sixth round, and the fourth round his seventh round. This is made clear by reference to Table A where player No. 1 is to play with No. 10 in the fifth round, but in the transposition which I have just explained No. 1 now plays with No. 10 at table No. 2, in the second round, and as seen in Table B. Now this arbitrary transposition of the rounds of play shown in Table A, namely, making the fifth round the second round, and so on, was not based on any rule or system, but, very strange to say, the defendants' Practical Bridge Tally follows precisely this altered arrangement of rounds: and the plaintiff claims that it would hardly be possible for the defendants to have struck upon this particular arrangement of players, tables and rounds, by trial and error or otherwise, out of the many possible arrangements or combinations, without having deliberately copied the Ideal Bridge Tally, for a set of five tables. And this the plaintiff claims the defendants did.

The plaintiff's copyrighted Bridge Tally, the result or product of Tables A and B, for a set of five tables, is represented by the Bridge Tally reproduced below, provided for player No. 1, in what is called a mixed game—ladies and gentlemen. I should perhaps mention that copyright is not claimed for Tables A and B but only for the published Bridge Tallies illustrated by the following Tally.

Ideal Bridge Tally
Gent. No. 1

Name .....

Play at Table No.	With Partner No.	Score
1	2	.....
2	10	.....
5	4	.....
1	12	.....
5	6	.....
1	14	.....
3	8	.....

Total .....

This Tally shows the tables at which Player No. 1 will play and his partners, his first partner being No. 2, his first table being No. 1. The corresponding form of Tally is provided for each of the other 19 players, the Tallies of the even numbered players being printed on coloured cards, but that is immaterial. Now that illustrates the Ideal Bridge Tally for which copyright is claimed, and of which infringement and conversion is alleged. According to the arrangement of players and tables shown in the above Ideal Tally, provided for a set of five tables, no one player will play with another partner as a partner more than once, and that arrangement will avoid the meeting of the same opponents more than twice, in seven rounds. I might point out once again that in the second round, according to the Ideal Bridge Tally just above reproduced, No. 1 plays with No. 10 in the second round, due to the fact that round No. 5 in Table A has been made round No. 2 in the plaintiff's copyrighted Bridge Tally, just as I earlier explained, and which arbitrary departure from the arrangement in Table A the defendants, in their Practical Bridge Tally, follow.

The plaintiff claims that the production of his Ideal Bridge Tally required a great deal of time and labour on his part, and of this I entertain no doubt; he also claims that no one else had ever produced such a work, and so far as I can see, that contention is also established. The infringement alleged is that of reproducing and publishing the work in question, or a substantial part thereof, and particularly those Ideal Bridge Tallies provided for 2, 3,

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4, 5 and 6 sets of tables. The defendants' Tallies make provision for only six rounds of play whereas that of the plaintiff contemplates seven rounds, but that distinction is immaterial.

The plaintiff, after registration of his copyright in the work in question, issued copies of his Bridge Tally to the public through several commercial agencies including Drug Agencies Ltd., a concern carrying on business at Vancouver, B.C., and with which concern the defendant Crook was associated as a salesman for some eighteen months; and in such capacity he sold the plaintiff's Ideal Bridge Tally to dealers in the Western Provinces of Canada. On the termination of his association with Drug Agencies Ltd., Crook commenced manufacturing and selling the Practical Bridge Tally, under the name of The Practical Bridge Tally Company, of which concern he is the sole proprietor, and it is now claimed that the Practical Bridge Tally is a reproduction and copy of the plaintiff's Ideal Bridge Tally. The material for the Practical Bridge Tally was prepared by a Mr. Stuchberry at the instance of the defendant Crook, the former then being in the service of the Practical Bridge Tally Company. It is clear from the evidence that each and every Tally card, or set of Tally cards, of the Practical Bridge Tally, provided for 2, 3, 4, 5 and 6 tables of Bridge respectively, are exactly the same as the corresponding Tally cards produced by the Ideal Bridge Tally, except that the former provides for six rounds of play only while the latter provides for seven rounds. The plaintiff claims that the defendants, by Stuchberry, actually copied the Ideal Bridge Tally. On the other hand, it is the contention of the defendants that the Practical Bridge Tally was the independent and original work of Stuchberry, and entirely the product of his own efforts. If this contention of the defendants be true in point of fact then I do not think it could be held that the defendants have infringed the plaintiff's work, even if the work of each be precisely the same. It is important therefore that the evidence bearing upon this particular issue be considered carefully.

Repeating what has already been stated, the defendant Crook, while an employee of Drug Agencies Ltd., sold to dealers the Ideal Bridge Tallies. When this employment ceased he proceeded to produce and sell the Practical

Bridge Tally, utilizing the services of Stuchberry to prepare the material for such Tallies. And it also appears that Crook, when instructing Stuchberry to prepare such material, placed in the hands of the latter a three-table Ideal Bridge Tally. I propose quoting from certain of the evidence of the defendant Crook, given on cross-examination, the questions and answers being as follows:

Q Mr. Crook, you were in the employ of Drug Agencies Limited for some 18 months or more; is that correct?

A. No, not exactly.

Q. You were in its employ over 12 months at least?

A From June, 1934, until the middle of January, 1935. I was actually in their employ for that period of time.

Q. And thereafter as salesman?

A After that I was entirely on my own initiative; I represented their lines and sold their goods on a commission basis

Q And, during that time, you continuously carried the Ideal Tally, a sample of it anyway?

A Yes, up until the end of 1935.

Q. And you exhibited it to the trade and made sales in a wholesale way?

A. Yes.

Q Did it ever occur to you, after you had severed your connection with Drug Agencies Limited, that there was anything unethical in your bringing out a new Bridge Tally?

A. No, sir. That never occurred to me at all.

Q. Although the Practical Tally which you brought out was substantially the same in its general get-up?

A. The tally I brought out is entirely different apart from the back of it

Q. The printing and colouring is different but it consists of sets showing a combination of players from two up to six tables?

A. That is right

Q. You heard the evidence of the plaintiff this morning that he has compared your sets with his?

A Yes

Q. And that he finds in each case that they are exactly the same in so far as the numerical arrangement throughout is concerned?

A. Yes, I understand they are

Q You do not dispute that?

A No, but we did not know that at the time. That was discovered later when we were first threatened with proceedings

Q You admit now that each one of your tally cards in all of your five sets corresponds exactly figure for figure with the Ideal corresponding set?

A I believe they do.

Q Now you say your employee, your associate, Mr. Stuchberry, did work you out a system exactly similar to the Ideal System?

A. Not particularly the Ideal; there are the following systems: The Ideal, Meet em All, Play one Play All, Every Player your Partner.

Q You were at that time aware that a system was required?

A Not particularly, not necessarily.

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Q. You stated in evidence that you asked your friend, Mr. Stuchberry, to figure out a system for you?

A. I realized the importance of having some kind of a system printed on the back.

Q It was almost necessary that there be a system for figuring?

A. Yes, exactly.

Q. At the time you instructed Mr. Stuchberry to figure that out, did you supply him with any material to work on?

A. I gave him an Ideal Mixed 3-table set and told him to work me out a new system.

Q But you did not furnish him with any sort of tables or principles of operation or methods of computation?

A. No, sir; I did not think that was necessary.

Q. You advised Stuchberry, of course, that you had been selling these Ideal sets?

A. Yes.

Q. And you gave him one set that you had on hand?

A. Yes, and told him I had ceased selling them.

Stuchberry gave evidence at the trial on behalf of the defendants and he admitted that the Ideal and the Practical Bridge Tallies were identical but he claims that the latter was entirely his own work and produced without any reference to the plaintiff's work. I shall quote but briefly from his evidence, and that is the following:

Q. Mr. Stuchberry, you admit the full authorship of the system of computation copied into the Practical?

A. Yes, that is my work alone.

Q. On June 25th you replied to a letter received from Mr. Wilson dated June 19th?

A. Yes.

Q In your letter to Mr. Wilson you stated that the writer (meaning yourself) personally figured out the numerical part of the tallies?

A Yes.

Q. But you said up to that you had never seen an Ideal Tally?

A. Yes, but that letter was not written under oath. I made a stipulation. It was written without prejudice and since then I have admitted having seen a three-table set. That letter was written without prejudice and without authority.

The letter to which reference is here made was one from Stuchberry to the plaintiff's solicitor (Wilson), in June, 1936, and in it he stated:

We can assure you that there is no intentional infringement of copyright as the writer personally figured out the numerical part of the Tallies and never saw an Ideal Tally till this morning.

The evidence continues:

Q. You say it was written without prejudice and without authority; does that mean without the authority of Mr. Crook?

A. Yes

Q Did you make this statement without his authority, namely, that you personally did figure out the numerical part of the tallies?

A. That is correct.

Q Do you admit also that each and every individual card of the Practical Tally agrees exactly figure for figure with the corresponding card in the Ideal?

A I know that now to be a fact. In spite of the fact that it makes me appear untruthful I still maintain I made up the figures for the Practical Bridge Tally.

Q Do you admit now that it is the case that each and every individual card in the Practical, in each one of the sets, 2, 3, 4, 5 and 6 table, corresponds exactly in numerical order or arrangement with the corresponding card in the respective sets of the Ideal?

A I do admit that with the exception that we have only 6 hands, not seven

The evidence of Stuchberry falls far short of convincing me that he did not copy or imitate the plaintiff's work. I cannot accept his denial of having copied substantially the plaintiff's work. I do not believe it to be possible that he could so quickly and easily as he pretends, produce by trial and error, a Bridge Tally with an arrangement of players and tables so similar to that of the plaintiff's without having before him the plaintiff's work, when he prepared the Practical Bridge Tally, and which I think, he closely imitated. He did have in his possession the Ideal Bridge Tally for a set of three tables but in his letter to Wilson he denies ever having seen, up to June, 1936, an Ideal Bridge Tally, and no satisfactory explanation of that denial was attempted. Upon the evidence I feel compelled to hold that Stuchberry copied the plaintiff's work.

Now, is the plaintiff's work the subject of copyright? I am of the opinion that it is, and that it falls within the statutory definition of "literary work," which includes "maps, charts, plans, tables and compilations." The production of the Ideal Bridge Tally I am satisfied involved a great deal of original work, and was the product of the plaintiff's prolonged labour. The plaintiff therefore had the exclusive right of multiplying copies of the same. The Copyright Act does not purport to give a monopoly in ideas but only to the particular forms, or media, for reproducing or communicating ideas. As stated in one text book, copyright is not conferred in the ideas formulated, or expressed, in writings, but in the writings themselves, that is, in the expression of such ideas. Works that are original in subject-matter and treatment present no difficulties, but in the case of works which consist of subject-matter that is not original, or is only partially original, and where the claim to copyright is based upon the mental

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labour involved in the compilation of selected information, difficult questions of fact may arise for consideration. Lord Halsbury, in *Walter* v. *Lane* (1), considered the author of a directory to be the canvasser who writes down the names and addresses of the persons who live in a particular street, and he said in that case:

> I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice.

In the compilation, for example, of a directory there has been at least the minimum of thought involved in the classification and arrangement of the material there found. It is the product of the labour, skill and capital of one man which must not be appropriated by another. To secure copyright for this product it is necessary that labour and skill should be expended sufficiently to impart to the product some quality or character which the elements or raw material did not possess. In the case under consideration the amount of patient labour involved in the production of the plaintiff's Ideal Bridge Tally must have been very considerable, occupying several months the plaintiff stated, and that I can quite believe. This work expresses one way, perhaps but one of many other possible ways, of arranging players and tables, so as to avoid the duplication of partners and opponents as already explained. And no one seems to have produced the same Bridge Tally before, though something partially of the same nature had been published before.

In the case of *Macmillan* v. *Cooper* (2), Lord Atkinson, delivering the judgment of the Judicial Committee of the Privy Council, refers approvingly to the judgment of Mr. Justice Story in the case of *Emerson* v. *Davies,* decided in the Supreme Court of the United States (3). The plaintiff in that case had compiled and published a book entitled "The North American Arithmetic," described as containing Elementary Lessons by Frederick H. Amson, the purpose and object of the publication being to teach children the elements of arithmetic. The complaint was that the

(1) (1900) A C 539 at 545
(2) (1924) 40 T L R 186 at 188
(3) (1845) 3 Story's U S Rep. 768 at 778.

defendants on a date named had without the plaintiff's consent exposed for sale and sold 50 copies of the plaintiff's said work, purporting to have been composed by the defendant Davies, and had subsequently sold 1,000 copies of the same. The main defence was that the book, copies of which were sold by the defendants, was composed by themselves, and that neither it nor any part of it was copied, adopted, or taken from the plaintiff's book or any part thereof. At page 778 of the report Mr. Justice Story expressed himself thus:

> The book of the plaintiff is, in my judgment, new and original, in the sense in which those words are to be understood in cases of copyright. The question is not, whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before . . . he is entitled to a copyright . . It is true, that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials, but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations, or combinations; for these are strictly his own . . . In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout

Mr. Justice Story used this further language which Lord Atkinson thought singularly applicable to the case he was discussing, and which language I think is very applicable to the case I am now considering (p. 797):

> I have bestowed a good deal of reflection upon this case; and, at last, I feel constrained to say, that I am unable to divest myself of the impression that, in point of fact, the defendant, Davies, had before him, when he composed his own work, the work of the plaintiff, and that he made it his model and imitated it closely in his title or section of Addition, and in a great measure, in that of Subtraction also.

Lord Atkinson, in the *Macmillan* case, after referring to this American case, and after quoting just as I have done from the judgment of Mr. Justice Story, said (p. 188):

> This decision is, of course, not binding on this tribunal; but it is, in the opinion of the Board, sound, able, convincing and helpful. It brings out clearly the distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and learning to those materials; which product, though

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it may be neither novel or ingenious, is the claimant's original work in that it is originated by him, emanates from him, and is not copied.

It was by confounding the materials with the product that Mr. Upjohn endeavoured to sustain the argument that if the appellants obtain copyright in their book any reprint of North's translation would be an infringement of it under section 8 of the Act of 1911

The question of the existence of copyright in an anthology entitled "The Golden Treasury of Songs and Lyrics" was raised in the case of *Macmillan* v. *Suresh Chunder Deb* (1), and which case is referred to at length in *Macmillan* v. *Cooper* (*supra*). There Sir Arthur Wilson expressed himself as follows concerning the matter of the existence of copyright in the anthology (p. 188):

> And first I have to consider whether there is copyright in a selection. There has not, so far as I know, been any actual decision upon this question But upon principle I think it clear that such a right does exist; and there is authority to that effect as weighty as anything short of actual decision can be.

He then proceeds to state the law, as he conceived it to be, dealing with the existence of copyright in such a work as the anthology there in question, in the following words (p. 189):

> In the case of works not original in the proper sense of the terms, but composed of, or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from anyone else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Vice-Chancellor Hall, in *Hogg* v. *Scott* (L.R. 18 Eq, 444 at p. 458), "the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

Sir Arthur Wilson then points out that this principle applies to maps, guide books, street directories, dictionaries, to compilations of scientific work and other subjects and considers that it applies to a selection of poems. He then gives the reason why it applies to Mr. Palgrave's "Golden Treasury" in the following words (p. 189):

> Such a selection as Mr. Palgrave has made obviously requires extensive reading, careful study and comparison, and the exercise of taste and judgment in selection. It is open to anyone who pleases to go through a like course of reading, and by the exercise of his own taste and judgment to make a selection for himself. But if he spares himself this trouble and adopts Mr. Palgrave's selection he offends against the principle.

The above quotations from the judgments in the American and Indian cases mentioned, extracted from the report

(1) (1890) Ind. L.R. 17 Cal. 951.

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of the case of *Macmillan* v. *Cooper* (1) are, I think, applicable to the case before me, but, I might add, that the claim to copyright in the work of the plaintiff here appears to me to rest on even stronger ground than in either the American or the Indian case. I think it has been shown that the plaintiff's work is an original plan, arrangement, compilation or combination of material, for a particular purpose or use, produced by his own skill and labour, and I think he is entitled to copyright therein. The defendants, I think, have copied or imitated the plaintiff's work. It is hardly conceivable that Stuchberry could have produced precisely the plaintiff's Ideal Bridge Tally, without having made use of the latter, that is, substantially copying it. It is conceivable that in some cases two persons working independently with a common end in view, might arrive at the same result, or substantially the same result, but it is too much to ask one to find that this occurred in this case. The true principle applicable to the case is, as was stated in one of the cases referred to, that the defendants are not at liberty to use or avail themselves of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or in other words, his property.

The plaintiff therefore succeeds and is entitled to the relief claimed, and his costs of the action. The plaintiff asks for nominal damages only and the determination of that I reserve until the settlement of the minutes of judgment.

Judgment accordingly.