

66,1932

In the Privy Council.

No. 18 of 1932

ON APPEAL FROM THE APPELLATE  
DIVISION OF THE SUPREME COURT OF  
ONTARIO.

UNIVERSITY OF LONDON  
W.C.1.  
29 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

FLORENCE A. DEEKS - - - - - Plaintiff (*Appellant*) 44936

AND

H. G. WELLS, THE MACMILLAN COMPANY INC.,  
THE MACMILLAN COMPANY OF CANADA  
LIMITED, GEORGE NEWNES LIMITED, CASSELL  
AND COMPANY LIMITED - - - - - Defendants (*Respondents*).

CASE OF THE APPELLANT.

1. This is an Appeal from the judgment of the Second Appellate Division of the Supreme Court of Ontario pronounced on the 26th day of August, 1931. The Court was composed of the Honourable Chief Justice Latchford, Justices Riddell, Orde, and Masten. RECORD. p. 379.

2. By the said judgment the Court of Appeal affirmed the judgment of the Honourable Mr. Justice Raney in the Supreme Court of Ontario given on the 27th day of September, 1930, and dismissed the Plaintiff's (Appellant's) appeal. p. 366.

3. The action was commenced by a Writ of Summons issued 14th October, 1925. By this action the Appellant claims an injunction restraining the respondents from publishing, selling or otherwise disposing of the book or publication known as "The Outline of History" purporting to have been written by the respondent H. G. Wells, containing a reproduction in whole or in part, without the Appellant's consent, of the Appellant's unpublished but copyrighted literary composition, or work, known as "The Web," and for damages for infringement of her proprietary rights and copyright therein. p. 60, l. 25.

4. 3rd September, 1927, the Respondents were served with the Writ of Summons, and later in the year they were provided with the "particulars" of the case and copies of the "Comparisons between 'The Web' and 'The Outline of History.'" p. 463.

- RECORD.  
p. 21, l. 34. 5. On the 15th October, 1928, Examinations for Discovery were taken in Toronto of Florence A. Deeks, and on the 13th February, 1929, of Hugh S. Eayrs—then President of the MacMillan Company of Canada; and on 18th June, 1929, Examinations for Discovery were taken in London, England, of H. G. Wells, Sir Frank Newnes (George Newnes, Ltd.), and Frederick Newstead (Cassell & Co., Ltd.).
- p. 193.  
p. 318.  
p. 338.
- p. 15, l. 1. 6. Evidence on commission was taken in New York on the 4th January, 1929, and in London, England, on the 18th, 19th and 21st June, and the 9th and 11th July, 1929.
- p. 366. 7. The trial took place in the Supreme Court of Ontario before the 10 Honourable Mr. Justice Raney, 30th May and 2nd, 4th, 5th, 6th June, and the argument was presented 12th September, 1930.
- p. 367. The judgment was given 27th September, 1930, and by this judgment the action was dismissed.
- p. 376, l. 7. 8. It appears that the learned Trial Judge in his reasons for judgment made admissions which support my claims, but he came to the conclusion that the Respondents had made no improper use of "The Web" manuscript.
- p. 42, l. 41. 9. The writing of "The Web" was begun in 1913 or 1914 when I received from a publisher in Toronto a piece of paper on which were written about four or five subjects for a short book, I lost the paper and attempted 20 to select one of the subjects from memory. Thus I chose "Woman's Share in Canada's Development" and began to work.
- p. 43, l. 4. The attempt to locate women in Canada carried me back to Europe, and thence to Asia whence they had come. Finally I decided to go back to the "beginning," get a short history of the world and insert into it woman's work and influence.
- p. 43, l. 15. The only short History of the World that I could find was an old one (1898 edition) written by Duruy about 1850, but before I could accomplish my purpose I had to write a short history of the world in my own way. The basic theme of this short history was "Man's struggle for Social Values" 30 including primarily woman's share in that struggle.
- p. 43, l. 10. As I worked along, I gathered subjects from "the beginning" down to "to-day," but in so doing I omitted many subjects essential to an outline of history and my work lacked historical perspective.
- p. 44, l. 5. I undertook to arrange this compilation of subjects in chronological order in all countries throughout the ages. Thus was developed a plan, which
- p. 44, l. 8. I built up into a narrative with information gathered from various sources.
10. This work was, in fact, an original short history of the world—an outline of history—written as a romance. It bore the sub-title of "The World's Romance," and it was characterized by such original features 40 as basic theme, compilation of subjects, language, mistakes, sentence-structure, sequence order of details, emphasis and proportion.

This was a peculiar literary composition upon which I had spent much time and labour. With the work completed up to this point I procured an interim copyright, 28th June, 1916, and later I had the work typewritten. The manuscript was not ready for publication, but it was sufficiently advanced to submit to a publisher for an opinion as to its possibilities for successful revision and publication.

RECORD.

p. 44, l. 25.

p. 44, l. 42.

11. I then wrote to several publishing houses for permission to quote from specified books in their lists, and, accordingly, I wrote to the MacMillan Company of Canada, Ltd., for permission to use the material I had gathered from Greene's "Short History of the English People" upon which I had drawn rather heavily.

p. 45, l. 1.

p. 45, l. 12.

12. Every publishing company gave the permission except the MacMillan Company, whose editor, Mr. Saul, answered my letter about a month later, "I think perhaps it would be best if you would drop down to the office some time with your manuscript and let me have a look at it. Of course you are quite aware that if your book was very much like Greene's 'Short History of the English People' our English house would probably not sanction its publication."

p. 45, l. 26.

13. On 8th August, 1918, I took the purple copy of "The Web" to the office of the MacMillan Co. of Canada and handed it to Mr. Saul. It was perfectly clean. Mr. Saul looked through it, and I left it with him to find out if MacMillan & Co., Ltd., of London would allow me to use their Greene's "Short History of the English People," and also for an opinion as to the possibilities of the work for successful revision and publication.

p. 46, l. 7.

p. 50, l. 22.

p. 46, l. 8.

p. 46, l. 30.

p. 63, l. 35.

p. 46, l. 34.

For this I understood that it would be necessary to send "The Web" to MacMillan & Co., Ltd., of London. Moreover, I understood that the MacMillan Co. of Canada published little or nothing of importance outside of Canadian school books, and that all other manuscripts of any importance were sent to MacMillan & Co., Ltd. of London. "The Web" was a long manuscript of at least 260,000 words, and if it was of any importance it would, therefore, be sent to MacMillan & Co., Ltd. of London.

p. 28, l. 23.

14. The evidence shows that the MacMillan Company of Canada did not print a great many books in Canada; and Mr. Saul stated that upon receiving this manuscript he read it "that day or the next day," and "saw that it was more or less of a general history which had an appeal to the public" and that "if a book of that kind was to be published and to have a large general circulation somebody else would have to be the author." He also considered "The Web" so favourable for revision into a school book that he discussed this matter with various persons with a view to having it published for school purposes.

p. 279, l. 20.

p. 277, l. 31.

p. 275, l. 31.

p. 278, l. 46.

p. 275, l. 39.

p. 276, l. 13.

MacMillan & Company Limited, London were large publishers of books for general reading, they held the copyright of Greene's "Short History of the English People," and they had a great reputation as publishers of school books. They testified that, "Certainly, if they (somebody) were going to publish a book which contained considerable

p. 45, l. 36.

p. 259, l. 46.

p. 258, l. 35.

RECORD. extracts from a book of which we owned the copyright here we should expect to be consulted first.”

p. 260, l. 28. Moreover MacMillan & Co., Ltd., London, controlled the MacMillan Company of Canada, Ltd., and The MacMillan Company Inc. of New York—not in the sense that the three businesses were under one management but in the sense that the profits of the three businesses went substantially to the same people through MacMillan & Company, Ltd., of London.

15. The Appellant's submission is that enough has been proved in this case to fully vindicate her claim that :—

p. 397. (1) “The Web” manuscript was placed in the custody of the MacMillan Company of Canada, Ltd., 8th August, 1918, and was returned April, 1919.

p. 85, l. 3. (2) The MacMillan Company of Canada, Ltd., put forward a false record of this manuscript.

p. 83, l. 21.  
p. 84, l. 32.  
p. 397. (3) During the period that this manuscript was in the custody of the MacMillan Company of Canada it was put to an illegal use.

p. 50, l. 26.  
p. 195, l. 28. (4) During this same period Mr. H. G. Wells planned and wrote “The Outline of History.”

Exhibit 6. (5) Substantial portions of “The Web” are incorporated in “The Outline of History” as is shown by similarities with regard to :—

(a) The plans.

(b) The opening chapters.

(c) Various passages which appear in “The Outline of History” as colourable alterations of “The Web.”

(d) Phrasal identities and similarities.

(e) Mistakes.

(f) Accumulation of similarities.

(g) Sources—used for both works.

(h) Early draft writings of passages taken from Mr. Wells' “manu- 30 script notes.”

(i) Choice and sequence order of details.

(j) Emphasis and proportion given to certain topics.

(6) All this was done in violation of the Appellant's proprietary rights and copyright and at the cost to her of severe sacrifice and injury.

16. The Appellant now relies, upon the hearing of this Appeal, amongst other matters upon the matters herein set forth.

(1) “THE WEB” MANUSCRIPT WAS PLACED IN THE CUSTODY OF THE MACMILLAN COMPANY OF CANADA, LTD., 8TH AUGUST, 1918, AND WAS RETURNED APRIL 1919.

p. 275, l. 24.  
p. 277, l. 31. 17. The evidence shows that Mr. Saul, after receiving the manuscript, read it “that day or the next day”; that he then took it out of the

MacMillan Company's office home with him and that no entry was made in the Record Book of this fact. Mr. Saul stated that he read the manuscript a second time and that he then saw it for the last time in his recollection, and it was clean.

p. 277, l. 40.  
p. 278, l. 13.  
p. 277, l. 39.  
p. 278, l. 34.  
p. 278, l. 44.  
p. 281, l. 36.

18. The manuscript now drops completely out of sight in Canada for a period of about eight months. My submission is that there is sufficient evidence to show that the manuscript was now sent to MacMillan & Co., Ltd., London, that in England the manuscript found its way into the hands of the author of "The Outline of History," and that through no other channel could the manuscript have come into the hands of Mr. Wells.

p. 279, l. 46.  
p. 26, l. 21.  
p. 26, l. 37.  
p. 257, l. 30.  
p. 258, l. 12.  
p. 260, l. 19.  
p. 260, l. 28.  
p. 264, l. 17.  
p. 266, l. 21.  
p. 267, l. 9.  
p. 267, l. 3.  
p. 437, ll. 11-18.  
p. 23, l. 30 to  
p. 25, l. 20.  
p. 41, l. 30.

19. MacMillan & Company, Ltd., London, testified that that company had not received the manuscript because the receipt of it was not entered in their record book of manuscripts.

p. 255, l. 20.  
p. 264, l. 24.  
p. 257, l. 17.

Under cross-examination, however, it came out that only manuscripts received for publication were entered there; and when the question was asked, "Supposing anything was submitted to you to say whether you objected to something contained in it as infringing your copyright would you enter it in that book?" the answer was, "No, certainly not."

p. 266, l. 21.

20. The evidence of MacMillan & Company, Ltd., London, shows further that a manuscript could be taken out of that office by any member of the firm, or it could be sent to a reader, and there is no evidence to show that any entry of this would be made in the Record Book of Manuscripts.

p. 260, l. 43.

Sir Richard Gregory was the educational adviser of MacMillan & Co., Ltd., of London. "The Web" was an educational book, a history of the world, and it was written as a romance, and the English MacMillans at times followed the procedure of sending certain manuscripts to outside readers specially qualified to pass upon their possibilities. Mr. Wells was an outstanding writer of romance capable of estimating the contents of this work and he was, moreover, an old friend of Sir Richard Gregory and an old client of MacMillan & Co., Ltd., to whom his writings and his projects were well known. And it is a notable fact that in 1925 when Mr. Wells was notified that legal action was being taken against him for using "The Web" in writing "The Outline," he drew up for his solicitor a "Memorandum of the Case of The Web" in which he placed the onus of proving his innocence upon the MacMillan reader or representative.

p. 267, l. 3.

p. 260, l. 43.

p. 267, l. 8.

p. 257, l. 30.

p. 193, l. 45.

21. The Memorandum says: "Either the claim is a genuine but silly claim, or it is a blackmailing claim based on a faked manuscript. In the former case the resemblance of the manuscript and 'The Outline' will be due to a common obvious idea and to the use of common sources which should be easy to establish. In the latter, the manuscript has been extensively altered since it was in the hands of MacMillan and Company.

p. 437.

RECORD. This should be provable by the reader or readers of MacMillan and Company to whom it was submitted in 1918. Our case will be that 'The Web' has been rewritten to substantiate this claim since the appearance of 'The Outline.' In either case Messrs. MacMillan must substantiate that the manuscript never left the hands of their representatives in the period during which their responsibility lasted and could not have been seen by Mr. Wells."

p. 194, l. 38. When Mr. Wells was asked in cross-examination "Supposing it had left their hands it would not necessarily have implicated you?" he replied, "No, but I suppose they can show——. These are fine points."

p. 47, l. 30. 22. Meanwhile, as months passed by, I had received no word about 10 the manuscript, but I reasoned that it would take considerable time to send it to England and have it read and returned, and as I was anxious to obtain the opinion for which I had asked I resolved not to hurry them. However, after they had held the manuscript over five months I wrote to Mr. Saul, 13th January 1919.

p. 48, l. 6. I did not receive a reply until 31st January 1919 when Mr. Saul wrote that he was leaving the MacMillan Company of Canada and was just cleaning up everything, and he ended by saying "I am leaving the manuscript here at your disposal and if you will inform the MacMillan Company what you wish done with it your wishes will be carried out."

This letter was a disappointment. It gave no answer to the question of copyright infringement and it was evasive with regard to an opinion as to its possibilities for revision and publication. Moreover, if Mr. Saul was cleaning up all his affairs, my submission is that he would have returned the manuscript if it had been there.

p. 278, l. 34. Under cross-examination Mr. Saul admitted that at the time of writing he had no knowledge that the manuscript was there in the MacMillan Company's office. He wrote "simply to let Miss Deeks know that the next time she came there she could not see me but to see my successor."

p. 62, l. 8. After receiving Mr. Saul's letter, to the best of my knowledge I wrote 30 the MacMillan Co. of Canada, but there is no further word of the manuscript until 26th March, 1919. The Record Book has an entry that Miss Deeks' manuscript came into the office 26th March, 1919. It is entered under the title of "The Dawn", which is the title of the first chapter of "The Web." This is the first evidence of the manuscript being seen in Canada since Mr. Saul took it out of the office in August 1918, and read it a second time.

p. 48, l. 33. The next day, 27th March, 1919, Mr. Liston, Mr. Saul's successor, wrote me a long letter criticizing "The Web" as impossible for revision and publication but saying nothing about the use of Greene's "Short History of the English People." He advised me to write along other lines and even 40 suggested the title "Love and War." He closed by saying "Now set about your short, crisp-pamphlet, Love and War, &c. . . ."

p. 50, l. 1. As arranged on the telephone I called at the office of the MacMillan Co. of Canada early in April, and Mr. Liston gave me "The Web" manuscript wrapped. I brought it away, but the Record Book has no entry of this return of the manuscript.

p. 50, l. 8.  
p. 94, l. 33.  
p. 397.

(2) THE MACMILLAN CO. OF CANADA PUT FORWARD A FALSE  
RECORD OF THIS MANUSCRIPT.

RECORD.

25. As Mr. Liston advised, I wrote the pamphlet "Love and War" and submitted it to the MacMillan Company of Canada along with an undated letter of apology for not having it typewritten, and for having it written on poor paper. This letter identifies the manuscript "Love and War."

p. 95, l. 39.

p. 96, l. 30.

10 Mr. Liston replied, and accordingly I called at the office of the MacMillan Co. of Canada, received back the manuscript "Love and War," and signed a receipt for its return, 15th July 1919, on the back of my letter.

p. 96, l. 42.

The Record Book has no entry of either the receipt or the return of this manuscript.

p. 397.

The learned Trial Judge remarked that "unless this was — it would almost seem as if these entries in the book and this letter were all designed to lend mystery to these transactions."

p. 97, l. 24.

26. Indeed, of the facts relevant to the plaintiff and her manuscripts, the Record Book has two entries correct and two false, and four are omitted altogether.

20 (3) DURING THE PERIOD THE MANUSCRIPT WAS IN THE CUSTODY OF THE  
MACMILLAN CO. OF CANADA IT WAS PUT TO AN ILLEGAL USE.

27. The evidence shows that when Mr. Saul last saw "The Web" manuscript it was *clean*. When I received it back it bore marks of hard and protracted usage; and pages which had the corners turned down are, in cases, the very ones that have passages which contain scientific evidence of the literary dependence of "The Outline of History" on "The Web." This used and worn condition of the manuscript was accepted by the defence without question.

p. 281, l. 36.

p. 50, l. 26.

p. 46, l. 30.

p. 87-81, l. 1.

30 28. I had given "The Web" manuscript to the MacMillan Co. of Canada for the purpose of obtaining from MacMillan & Co., Ltd., London, an opinion with regard to copyright infringement. This opinion was never given, and this purpose was, therefore, never fulfilled; but the condition of the manuscript gives direct evidence that the manuscript had been used for some other purpose.

p. 45, l. 4.

p. 45, l. 16.

29. I submit that the MacMillan Company of Canada was under obligation to tell what they did with the manuscript and what use was made of it during the time it was in their custody.

40 30. Chief Justice Latchford (agreed with by Justice Masten) in dismissing the appeal says: "To hold the contrary is to accept as true her contention that the MacMillan Company of Canada parted at some time with the possession of the manuscript copy of 'The Web' . . . or communicated its purport to some one who in turn enabled Mr. Wells so to copy or adapt it as to deprive her of her proprietary rights and infringe in Canada the interim copyright she had registered. The evidence is

p. 391, l. 12.

RECORD. convincing that the Canadian MacMillan Company did not at any time part with Miss Deeks' manuscript but that it remained in the Company's vault until demanded, when it was promptly returned to the author."

p. 382, l. 10. 31. Justice Riddell states, quoting from Copinger on Copyright, that :  
 " 'The author of a literary composition which he commits to paper belonging to himself has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself or for others. If he lends a copy to another his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it or publish it he has a right to enforce that undertaking.' 10  
 I think that in the present case, the plaintiff is in that position, that the manuscript having been placed in the hands of the company in Toronto for a specific purpose only, any use by them of it for any purpose was a breach of their implied undertaking and that any one whosoever who made use of it for such other purpose was in law equally liable to an action."  
 "Wells had no right to make any use whatever of the MS. and if he did so and damage accrued to the plaintiff from such use she has a right of action against him."

(4) DURING THIS SAME PERIOD H. G. WELLS PLANNED AND WROTE  
 "THE OUTLINE OF HISTORY." 20

32. Another statement in Mr. Wells' memorandum is that a history of the origin of "The Outline" can no doubt be made up from his letter files. Here he is basing his defence upon this feature, but when his letters are examined it is found that the dates of the origin of "The Outline" fit precisely my charges.

p. 236, l. 38. 33. We find that shortly after "The Web" manuscript had dropped out of sight in Canada, August 1918, Mr. Wells has on hand a written history of mankind, and he is consulting various persons as to the feasibility of writing such a history. In August he told Sir Frank Newnes that he had at that time a written history of mankind, and asked if his firm would entertain the question of publishing it. When asked "Did you understand from him that the whole of it had been written?" Sir Frank Newnes replied, "Practically. I will not say the whole of it, but very nearly . . ."  
 p. 318, l. 11. And as to the plan? "It was going to be a history of the world from the very earliest beginnings, and all countries of the world right through the ages."

p. 231, l. 29. 34. This is corroborated by Mr. Wells' testimony that "The form of 'The Outline' only became clear in my mind in 1918 as a book that I had to undertake," and his admission that "I should think I had it in hand as early as August or September." 40

p. 195, l. 20. 35. About 20th October, 1918, Mr. Wells wrote to Mr. Brett, President of the MacMillan Company Inc. New York.—"I have been writing very little. But there is an idea I have in hand that I wish I could talk over with you. We think here that the children all over the world ought to learn



the history of mankind, and I believe that it is up to me to plan to write the first school history of mankind. What do you think of the project?" RECORD.

In the latter part of October, 1918, Mr. Wells was actually at work upon "The Outline of History."

36. 31st October, Sir Richard Gregory, educational adviser to MacMillan & Co., Ltd., London, wrote to Mr. Wells from "The Publishing Office, MacMillan & Co., Ltd., London," giving him assistance, or collaborating with him, in the work of the first chapter of "The Outline of History." In this letter Sir Richard Gregory gave Mr. Wells information which he incorporated into this first chapter. p. 267, l. 37.  
p. 407, l. 23.

37. 8th November, 1918, Mr. Brett, of The MacMillan Co., Inc., of New York, replied to Mr. Wells:—There is no doubt in my mind that your plan for the book on the history of mankind is a very feasible one—I think the book should be written and I earnestly hope that you will undertake it for a valuable and constantly increasing public must be found, it seems to me, for a book of this character." p. 408.

38. 13th November, 1918, Sir Frank Newnes wrote to Mr. Wells about his proposed history of mankind, and Mr. Wells testified that by this time he was fully embarked upon writing "The Outline." p. 409, l. 25.  
p. 196, l. 40.

39. 19th November Mr. Wells wrote to Sir Frederick MacMillan, President of MacMillan & Co., Ltd., London, offering him the new book. Sir Richard Gregory testified that this letter was brought to his notice as educational adviser of MacMillan & Co., Ltd., and he came to the conclusion that Mr. Wells' new book was not suitable as a school book. p. 410.  
p. 268, l. 17.

40. Three days later, 22nd November, Sir Frederick MacMillan replied to Mr. Wells briefly declining his offer. p. 410, l. 24.

41. 20th December, 1918, Mr. Brett of the MacMillan Co. Inc., New York, wrote to Mr. Wells accepting the book and enclosing a suggested contract for the publication of the History of Mankind—which specifically established for the MacMillan Co. Inc., New York, the exclusive right of producing and publishing the work in book form in the English language and throughout the world. p. 413-416.

42. Mr. Wells was now writing at a prodigious pace.

February 5th, 1919. Sir Frank Newnes wrote to him, "When I last saw you you informed me that you would soon have about 50,000 words ready for me to see." p. 418, l. 1.  
p. 239, l. 41.

Mr. Wells was asked to what stage his work had progressed at this time and he replied "I should think 50,000 or 60,000 words probably existed." p. 236, l. 32.

40 February 11th, 1919, Mr. Grierson (George Newnes, Limited) wrote to Mr. Wells, "I think Sir Frank said that your manuscript would run to about 250,000 words." To this number of words Mr. Wells assented, "Yes." p. 418, l. 30.  
p. 240, l. 8,  
p. 240, l. 14.

About February 25th, 1919, Mr. Wells wrote to Mr. Brett of New York, "About *The Undying Fire* which will have reached you by this time . . . . p. 439, l. 1.

RECORD. Don't be afraid of *The Outline of History*. It will be a fine thing. I have got, I suppose, nearly half way through it."

p. 240, l. 3. Mr. Wells testified that this would be about 125,000 words. Hence  
 p. 240, l. 24. from 5th to 25th February, Mr. Wells would have written about 65,000  
 p. 240, l. 3. words. When asked, "Do you think it possible that you could have  
 written 50,000 or 60,000 words in three weeks?" he replied, "No I should  
 not think so. I should think it existed before that time."

43. About one month after I had received back "The Web" manuscript, Mr. Wells dispatched to his publisher, George Newnes, Ltd. the first draft of his entire work.

p. 420, l. 17. 7th May, 1919, he wrote to Sir Frank Newnes "You will get in four or five days time a special copy of "The Outline of History." It has not been looked at by anyone but Sir Ray Lankester and possibly it has a certain amount of matter that will have to be corrected when the historians begin to advise."

p. 420, l. 20. 44. Mr. Wells next gave copies of his work to experts for criticism—  
 p. 241. Prof. Gilbert Murray, Prof. Ernest Barker, Sir Harry Johnston, Sir Ray  
 p. 249. Lankester and Sir Richard Gregory. All these names, except that of Sir  
 p. 432, l. 24. Richard Gregory, Educational Adviser of MacMillan & Co., Ltd., London, appear on the title-page of "The Outline of History."

p. 424, l. 13. 45. 14th August, 1919, an agreement was made between Mr. Wells and the George Newnes Company, Ltd., for the publication of "The Outline of History" in pamphlet form—or fortnightly parts.

p. 453. 31st October, 1919, a new agreement was made between Mr. Wells and the MacMillan Company, Inc., New York, for the publication of "The Outline of History" in book form in Canada and the United States of America. In November 1919 the George Newnes Co., Ltd., began the publication of the fortnightly parts.

p. 432. 14th January, 1920, an agreement was made between Mr. Wells and Cassell & Co., Ltd., London, for the publication of "The Outline of History" in volume form in the United Kingdom of Great Britain and Ireland and its colonies and dependencies, except Canada.

September 1920 Cassell & Co., Ltd., published the work in one volume, December, 1920, the MacMillan Co., Inc., of New York, published it in two volumes.

p. 51, l. 20. 46. While the production of "The Outline of History" was thus in  
 p. 57, l. 36. progress I had again taken up the revision of "The Web" in 1920. This was nearing completion when I saw in the Toronto "Saturday Night," 16th December, 1920, a review of "The Outline of History," written by H. G. Wells and published by The MacMillan Co., Inc., New York. This review so impressed me that I obtained a copy of "The Outline of History," and I found that its preface might be applied to "The Web" except for portions on helpers and sources.

47. I then undertook to make a critical literary comparison of "The Web" and "The Outline of History," and in this examination I found

similarities so cogent and so numerous that I concluded "The Web" had been used for the composition of "The Outline of History." RECORD.

(5) SUBSTANTIAL PORTIONS OF "THE WEB" MANUSCRIPT WERE INCORPORATED INTO "THE OUTLINE OF HISTORY."

48. The learned Trial Judge stated that "At the trial the plaintiff called three literary men as expert witnesses"—William A. Irwin, Lawrence J. Burpee, and George S. Brett—"These gentlemen are men of excellent standing in the Canadian literary world and undoubtedly qualify as experts in their respective fields." p. 368, l. 36.

10 It might be said rather "in the literary worlds of Canada, Great Britain and the United States of America. Professor Irwin had then entered upon the position of full professor in the University of Chicago in the department of Oriental Languages and Literature of which Professor Breasted is chairman. Professor Brett is head of the department of Philosophy in the University of Toronto, and as co-editor of Encyclopædia Britannica, Oxonian, and author of "The Government of Man" and "History of Psychology"—a standard work—is well known in Great Britain, and even internationally. Mr. Burpee, as editor and historian, past president of the Canadian Authors' Association and the Canadian Historical Association, and as fellow and honorary secretary and member of the Council of the Royal Society of Canada, is well known outside of Canada. p. 375, l. 16.

20 Justice Riddell says of these experts, that he does "not in the least question their ability, experience and honesty."

49. These experts testified that "The Outline of History" showed numerous and indubitable evidences of dependence upon "The Web." Their arguments and conclusions have never yet been answered.

50. The learned Trial Judge stated also that "The defendants were not, I think, called upon to offer any evidence to rebut Prof. Irwin's fantastic hypotheses, but Mr. Wells and the MacMillan Company of Toronto preferred to offer evidence." p. 376, l. 1.

30 Yet, at the trial Prof. Underhill was called by the MacMillan Co. of Canada, Ltd., and by the MacMillan Co. Inc. of New York to offer evidence; but he confessed himself incompetent to deal with the task and he admitted that Prof. Irwin could speak with more authority than he himself could. For example:— p. 290.

He testified: "I have explained again and again that I know nothing about Phœnician history, I do not know whether the parallel is suggestive or not." Counsel then stated: "I am not asking you about a question of history at all but a question of similarity of language," to which the witness replied, "There is similarity of language. This is on Phœnician history and I do not know whether it is significant or not." p. 311, l. 17.

40 He was asked, "Have you anything to say about the period of which Mr. Irwin spoke. He can speak of it with more authority than you can?" He answered "Yes." Another question, "And also he knows the subject better because you have not put any time on it?" Answer: "Yes, I guess p. 307, l. 10. p. 307, l. 12.

RECORD. that is right.' And ". . . historians who know their business do not  
p. 317, l. 30. call him Charles V. of Spain do they?" Answer: "I have forgotten at  
the moment just what the details were of his connection with Spain."

51. It is not necessary to quote here all the similarities which constitute evidence of the literary dependence of "The Outline of History" upon "The Web," but without abandoning any of them I propose, upon the hearing of this appeal, to rely in the main for the scientific evidence on the similarities stated in paragraphs 52-63 hereof as establishing against the respondents proof that "The Web" manuscript was used in the composition of "The Outline of History."

10

52. These similarities will show that "The Outline of History" contains virtually the very vital portions of "The Web"—the very portions which comprised its real value, and which in "The Outline of History" produced a result similar to the result produced by "The Web."

These similarities are shown, for example, as follows,—with regard to,—

53.

## (5a) THE PLANS OF THE TWO WORKS.

p. 456. It may be stated briefly that both "The Web" and "The Outline  
p. 104, l. 24. of History" have the same plan—making all allowances for differences—  
and this in the face of the combined authority of the best works in the field 20  
and more particularly of works which Mr. Wells claims as his sources.

p. 104, l. 38. Virtually both write from the same view point and adopt the same  
theme or purpose (as distinct from their ostensible topic). Both use a  
sketch of history on which to hang, or by which to expound, a particular  
theme, and that theme is man's struggle for social values. Within this  
again both have a common emphasis: both point from history the wicked-  
ness of war. In one aspect of this social interest the two works diverge:  
"The Web" stresses feminism to exaggeration; Mr. Wells, in the main,  
omits it.

Both begin with the universe and then take up the development of life 30  
upon the earth and the evolution of mankind. From this point both trace  
the story of mankind in one consecutive narrative passing through the  
prehistoric period, the ancient world, the Middle Ages, and Modern times  
down to "to-day," and then both take an outlook into the future and  
advocate a unification of the world under a federal world government.

The agreement of these plans is frequently followed into peculiarities  
amounting to errors. In the narrative both deal with virtually the same  
subjects although they differ in treatment, and both omit the same subjects.  
p. 210, l. 13. With regard to omissions, Mr. Wells' Counsel stated that "These are  
similarities; omissions are similarities as much as commissions." Regarding 40  
p. 207, l. 36. the plan Mr. Wells, under cross-examination, admitted that "I should  
say there are a great number of ways" in which it could be written.

54.

## (5B) THE OPENING CHAPTERS.

Ex. 6. In these chapters, allowing for a few comments, we find that with but  
p. 1. one exception, the totality of ideas in the two works is identical. Even more  
important is the detail of presentation of these ideas. Here are found

close detailed, even verbal and phrasal identities in such numbers as to raise RECORD.  
the question of the identification of authority.

In "The Web" this chapter consists of material taken from Duruy's General History of the World plus original features.

Mr. Wells testifies that he did not use, nor even know, Duruy. Yet,— p. 226, l. 9.

In "The Outline" the opening chapter contains material which in "The Web" was taken from Duruy plus its own original features; at several points it agrees with "The Web" as against Duruy.

As for *similarity of language* this chapter of "The Outline" contains  
10 a number of "The Web's" verbal passages—either identical or colourably altered; and these passages in "The Web" were either original or taken from Duruy.

For example:—

"The Web."

1. In the beginning.
2. there floated.
3. immensity of space.
4. a speck.
5. comparatively.
- 20 6. prodigious.
7. nebulæ.
8. concentrated into a focus of heat and light.
9. threw off.
10. masses of matter.
11. which became planets.
12. (which) revolve in the orbit of the sun.
13. Multi-millions of stars.
- 30 14. The planets are Mercury, Mars, Venus, the earth, Neptune, Saturn, Uranus and Jupiter.
15. The earth was a tiny fragment of the sun.
16. The earth—became . . . a solid crust.
17. The earth—land, covered with waters and enveloping it was the air.
- 40 18. Life teamed throughout the earth, the sea and the air.

"The Outline."

1. Vast ages ago.
2. a spinning globe.
3. vastness of space.
4. a mere speck.
5. as it seems to us.
6. though vast.
7. nebulæ.
8. concentrated into a compact centre of heat and light.
9. threw off.
10. mass of matter.
11. which became planets.
12. (which) circle about it (the sun).
13. stars—millions of miles.
14. our earth and (other) planets—Mercury, Venus, Mars, Jupiter, Saturn, Uranus, and Neptune.
15. a fragment flew off from it (the sun) which became our earth.
16. The world is a solid . . . crust.
17. Its (the earth's) surface is rough, in the hollows is water, about it is air.
18. It is in . . . the earth . . . the sea and the air—that life is found.

- RECORD. *In the astronomy of this chapter* both present the old La Place theory  
 p. 107, l. 41. of the origin of the solar system, whereas at the time of writing, this theory  
 was superseded by the theories of both Chamberlin and Jean.
- p. 113, l. 25. Further, for this chapter the only authorities referred to as Mr. Wells'  
 p. 114, l. 1. possible sources are the Encyclopædia Britannica, Professor Burrell's (should  
 be Barrell's) Yale lecture, and Sir Richard Gregory's Vault of Heaven. Yet  
 in this chapter "The Outline" agrees with "The Web" instead of with  
 these sources.
- Ex. 6, p. 1. Again, *the early draft writings of portions of this chapter* of "The Outline"  
 resemble "The Web" more closely than does the published text. 10
- The similarities in the opening chapters of "The Web" and "The  
 Outline" have in no way been questioned or accounted for by the defence.
- p. 369, l. 42. Moreover, they have been admitted by the learned Trial Judge. He  
 p. 37, l. 9. states that "True . . . Mr. Wells did not use Duruy, and . . .  
 there appears to be plain evidence of the influence of Duruy in the opening  
 chapter of 'The Outline of History,' . . . and the fact is that the  
 p. 369, l. 38. significant phrases 'concentrated into a focus of heat and light' and  
 p. 369, l. 38. 'masses of cosmic matter' were lifted bodily by Miss Deeks from Duruy's  
 'General History of the World,' and . . . these phrases Professor  
 Irwin selects from 'The Web' for his parallel columns." 20
- Justice Raney says: "If I were to accept Professor Irwin's evidence  
 and argument there would only remain for my consideration the legal  
 p. 374, l. 40. questions involved in the piracy of a non-copyrighted manuscript." He  
 then rejects Professor Irwin's evidence and arguments in general statements.

55.

(5C) VARIOUS PASSAGES WHICH APPEAR IN "THE OUTLINE OF HISTORY"  
 AS COLOURABLE ALTERATIONS OF PASSAGES IN "THE WEB."

As an *example where Duruy was not used as a source* for "The Web" we refer to page 2, sec. 7 and page 3, sec. 1 of Exhibit 6. This is the passage on sticks, stones, &c. 30

The striking thing here is *the close identity of ideas*, at certain points their *identity of order* and even in some cases *identity of wording*.

- p. 117, l. 31. Here also *the question is one of sources*. "The Web" used Christie's  
 "Advance of Woman" and also a passage in Robinson's essay on "The  
 History of History" quoted in Thomas's "Source Book of Social Origins."  
 Robinson in turn has quoted from Sir Ray Lankester's "Kingdom of  
 Man." "The Web's" sources then are Christie, Robinson and Lankester.  
 It has leaned heavily on them, some of Lankester's words coming through  
 this double citation with accurate production. Beyond these sources is  
 "The Web's" original touch. 40

- p. 117, l. 39. Mr. Wells declared no sources. But (as shown by the text) the  
 resemblances of the two works are not due to a common use of Robinson  
 p. 117, l. 46. or Lankester, and it may reasonably be assumed that Mr. Wells did not  
 use Christie.

Another *example in which Duruy was used as a source* of "The Web" is given on page 11, sec. 3, and page 12, sec. 1, of Exhibit 6. This is the passage on Phœnician Shipping.

The corner of the page of "The Web" manuscript on which this passage occurs was turned down while in the custody of the Macmillan Co. of Canada.

In "The Web" this passage on Phœnician Shipping consists of material taken from Duruy's History of the World, and Chambers's Encyclopædia (old edition), plus original features (phraseology and mistake).

10 In "The Outline" this passage contains the substance of the material which in "The Web" was drawn from Duruy and Chambers' plus its own original features. Here also "The Web" and "The Outline" may be said to agree as against Duruy.

These two passages contain striking similarities with regard to the *collection and arrangement of facts, verbal identities and colourable alterations, mistakes and unusual features.*

For these similarities no possible explanation has been found except that of dependence upon "The Web."

20 There are other examples of this type of similarity but it is not necessary to recount them here.

56.

(5D) *Phrasal Identities and Similarities.*

The "Comparison" shows over 200 verbal similarities—clauses and phrases—which appear in "The Web" and "The Outline of History." In both works these similarities, with probably three or four exceptions, are applied to the same subjects and to the same point of time. Of these over 200 verbal similarities about 100 are identical in wording, and of these p. 182, l. 23. about 25 were original in "The Web." Some of these have as many as 8 or 9 consecutive words. The remaining over 100 verbal similarities have the language colourably altered in "The Outline of History," but not one 30 of these have we been able to trace to any source cited by Mr. Wells.

Moreover, the two works contain four long quotations identical in wording which "The Web" had copied verbatim from Greene's "Short History" in dealing with the Stuart period. In fact, "The Web" here contains a succession of seven passages taken from Greene and colourably altered, and this succession of passages appears in "The Outline" again colourably altered. For this period Mr. Wells claims to have followed *Innis*, but not one of these passages appears in *Innis*.

40 The learned Trial Judge states that "the absence of identical paragraphs or sentences, or even of phrases, only goes to establish she (the plaintiff) says, the care that was taken by the pirate to conceal the source of his ideas and language. . . . The only phrase that I recall that p. 368, l. 32. p. 375, l. 9. appears both in Mr. Wells' book and in Miss Deeks' manuscript are the words 'The little expedition.'"

In this respect His Lordship, Justice Riddell, selects a passage from p. 386, l. 29. the Columbus section, in which the language of "The Web" and "The

RECORD. Outline " is identical (Web = " of the fact that he had discovered a great new world." Outline = " of the fact that he had discovered a new continent.") His Lordship then argues that " the language of the latest work on the discovery of America differs but little from that of ' The Web ' and ' The Outline,' " but he does not mention the name of the work, the date of its publication nor the difference in its language.

p. 387, l. 3.

p. 391, l. 41. Justice Orde sets up two tests of copying which he says would satisfy him—" passage language " and " unexplained error." I submit that both these tests were fully met, but His Lordship then generalized that such examples as were presented " fall far short of what is necessary in my judgment." Wherein they fall short he does not say. 10

57.

(5E) MISTAKES.

As to mistakes, or textual errors, " The Comparison of ' The Web ' and ' The Outline of History,' " Exhibit 6, sets forth several examples of the same mistake occurring in the two works. These mistakes were original in " The Web."

Justice Riddell quotes a significant passage (Web = " believing he had touched the shores of India he called the islands the West Indies." Outline = " he had—found—it was thought, India. The islands were therefore 20 called the West Indies).

Here both " The Web " and " The Outline " state that the islands were called the West Indies *because it was believed or thought that Columbus had touched or found India* (on his first voyage).

As against this the Encyclopaedia Britannica (Mr. Wells' authority) says: *because Columbus hoped that through these islands he had found a new route to India*; and the Encyclopaedia of Names (His Lordship's authority) says: *because they had been found by sailing westward*.

p. 218, l. 38. With regard to the mistake of calling the Emperor Charles V—Charles V of Spain instead of Charles I of Spain, Mr. Wells was questioned: " I think 30 you referred to the Emperor Charles V . . . Professor Barker's note is " *Charles V was Charles V as Emperor and not of Spain. He was Charles I of Spain.*"

p. 223, l. 34. " The question is whether you still think it is curious he added that note?" Mr. Wells replied: " Possibly I have made a slip, a very natural slip of calling Charles V Charles V before he was actually Charles V, or of making him Charles V of Spain instead of the Emperor Charles V."

Q. With regard to your helpers, do you know at all how they worked, whether they collected the material, or notes, or anything of that kind?—

A. No, my helpers were merely—the vulgar phrase is that they vetted the 40 book; they read it for errors and for anything that they regarded as want of proportion or omission, and then they advised me in the matter.

These may suffice as examples of mistakes.



Justice Orde says, "If it were found that certain passages in the two works were couched in the same language or that there were unexplained errors in both, these facts, coupled with the coincidences in time and other circumstances as to the possession of the plaintiff's manuscript by one of the defendant companies might have constituted evidence so convincing as to justify a finding that the defendant Wells had used the plaintiff's work, notwithstanding his own denial."

RECORD.

10 Further, Justice Riddell, like the learned Trial Judge, I submit, overlooks the cogent and significant similarities in such passages as the "opening chapter," the "sticks and stones" passage and the "Phoenician Fleets," and he bases his judgment on the "Aspasia" passage which the appellant's witness presented as possessing evidence, not conclusive, but merely corroborative of the conclusive evidence in the other passages.

With regard to this Aspasia passage His Lordship, I submit, falls into the error of claiming that it contains "about the most striking illustrations of similarity of language, common inclusions and common mistakes" and of making other erroneous statements with regard to the evidence here given. p. 134, l. 40.

58.

20

## (5F) ACCUMULATION OF SIMILARITIES.

The learned Judges appear to have overlooked the accumulation of very many similarities—the sequence of ideas and language. The plaintiff's expert witness testified that "The cumulative effect of the whole is overwhelming to my mind . . . and compels one to the conclusion that some one of those who were engaged in preparing material, at some stage, for 'The Outline' must have had access to the manuscript entitled 'The Web.'"

p. 162, l. 10.

59.

## (5G) SOURCES—USED BY BOTH WORKS.

30 Mr. Wells, in his "Memorandum," states that "the resemblances of the manuscript to the *Outline* will be due to a common obvious idea and to the use of common sources.

p. 437, l. 7.

The evidence, however, establishes the fact that the authors of "The Web" and "The Outline" *did not use common sources*. The lists of sources cited for "The Web" and "The Outline" contain only three names common to both—Mason, Taylor and Greene.

p. 66, l. 32.

p. 67, l. 16.

Mr. Wells cites over 250 authorities and sources not used for "The Web," but expert examination has found in these no material which could be the source of the passages in "The Outline" which resemble corresponding passages in "The Web."

40 Justice Riddell says: "It is made a matter of suspicion that Wells does not follow the terminology of the authorities he says he consulted." The submission is that Mr. Wells, instead of following the terminology of the authorities and sources which he implies he consulted, follows in various cases the terminology of "The Web."

p. 289, l. 10.

RECORD.

60.

## (5H) EARLY DRAFT WRITINGS OF PASSAGES TAKEN FROM MR. WELLS' "MANUSCRIPT NOTES."

Exhibit 11.

Mr. Wells sent to Canada a package of notes, or rather of typewritten and handwritten portions of the manuscript of "The Outline of History." Upon examination, these portions were found in general to be the same text as was "The Outline." Among them, however, were a few of the more early draft writings, and in these we found passages which resemble the corresponding passages in "The Web" more closely than does the published text of "The Outline."

10

61.

(5I) CHOICE AND SEQUENCE ORDER OF DETAILS.  
(5J) EMPHASIS AND PROPORTION.

Throughout the two entire works are found passages which contain a similar or identical choice of details, and arranged in a similar or identical order.

The same may be said with regard to examples of emphasis and proportion—showing that both works give undue emphasis and space to various even insignificant topics, while leaving unmentioned subjects of singular importance.

20

62. Up to this time Mr. Wells' work had been in the main imaginative, but here he had suddenly entered a new and highly technical field. He was emphatic in his testimony that he employed no hack writers, no one to gather material or help to plan or produce the work. He did everything himself without any help except that of his wife, who helped "in typing and re-typing the drafts of the various chapters as they have been revised and amended, in checking references, finding suitable quotations, hunting up illustrations, and keeping in order the whole mass of material for this history."

p. 237, l. 28.

p. 200, l. 16.

p. 201, l. 42.

Preface.

Justice Riddell states that:—

30

p. 381, l. 21.

"The plaintiff, admittedly, must rely upon proof of plagiarism in the work complained of, and the practical impossibility of advantage being taken of the plaintiff's manuscript in any other way than is charged.

"It must be said that if these two propositions were established by evidence the argument would be very strong, if not—especially in view of the somewhat unsatisfactory evidence of Saul—irresistable."

The Appellant now humbly submits that there is sufficient evidence to establish these two propositions.

(6) ALL THIS WAS DONE IN VIOLATION OF THE APPELLANT'S PROPRIETARY RIGHTS AND COPYRIGHT, AND AT THE COST TO HER OF SEVERE SACRIFICE AND INJURY. RECORD.

63. The MacMillan Company of Canada without giving good reason retained "The Web" manuscript for eight months. This delay in returning the manuscript enabled Mr. Wells to forestall me, and when later I had my revision complete and offered it to leading publishers in the United States they refused it publication on the ground that it was too much like "The Outline of History." p. 52, l. 6.

10 64. The Reasons for Judgment both of the Court of Appeal and of the learned Trial Judge are of considerable length and do not lend themselves to any short statement *en resumé*. It is humbly submitted that in both courts the learned Judges have fallen into errors.

They appear to have overlooked—in the direct evidence—the cogent and significant features of the direct testimony; and in the scientific evidence—the features, in the testimony, which constitute evidence of the literary dependence of "The Outline of History" upon "The Web." In both evidences they have made erroneous statements with regard to those portions of the evidence which they did employ.

20 65. On the 6th October, 1930, an appeal was filed against the judgment of the Honourable Mr. Justice Raney to the Appellate Division. p. 377.

With the adverse judgment of the learned Trial Judge upon his effort Mr. R. S. Robertson, K.C., finally declined to argue the appeal, and under the circumstances I decided to present the argument in person.

My argument was written, but after reading a few pages I was obliged to fall back upon extempore argument and consequently much that I intended to say was left unsaid.

The hearing of the Appeal took place 15th (half day) 16th and 17th May, 1931. The Judgments were given 26th August, 1931.

30 By these Judgments the Appellate Division affirmed the Judgment of the Honourable Mr. Justice Raney and dismissed the plaintiffs' (appellants') Appeal.

66. 29th October, 1931, an order was obtained for an appeal to His Majesty in Council. p. 393.

40 67. The Appellant humbly submits that upon the grounds hereinbefore set forth and upon all other grounds disclosed by the evidence of this action the respondents ought to comply with the Appellant's claims as set forth in the Statement of Claim, paragraph 12, and she submits accordingly that the judgment of the Supreme Court of Ontario (Appellate Division) should be reversed.

## REASONS.

1. Because the evidence establishes that "The Web" manuscript was an original and copyrighted work.

2. Because the evidence establishes that "The Web" manuscript was in the custody of The MacMillan Company of Canada, Ltd., about eight months, 8th August, 1918—April, 1919.
3. Because the evidence establishes that during this period of eight months the manuscript was out of the office of The MacMillan Company of Canada, Ltd.
4. Because the evidence establishes that during this period of eight months the manuscript was put to an illegal use.
5. Because the evidence establishes that The MacMillan Company of Canada, Ltd., did not tell what they did with the manuscript and what use was made of it during the period of eight months that their responsibility lasted. 10
6. Because the evidence establishes that The MacMillan Company of Canada, Ltd., put forward a false record of this manuscript.
7. Because the evidence establishes that in no way, except through the MacMillan Company of Canada was it possible for the manuscript to come into the hands of the author of "The Outline of History."
8. Because the evidence establishes that during the period of eight months that the manuscript was out of the office of The MacMillan Company of Canada, Ltd. Mr. H. G. Wells planned and wrote "The Outline of History." 20
9. Because the evidence establishes that, in the similarities of the two works, expert testimony produced cogent and significant features which constitute scientific evidence of the literary dependence of "The Outline of History" upon "The Web."
10. Because the evidence establishes that the arguments and conclusions of this scientific evidence have in no way been successfully answered by the Defence.
11. Because the evidence establishes that "The Outline of History" 30 was published and disposed of by The MacMillan Company of Canada, Ltd., and The MacMillan Company Inc.
12. Because the evidence establishes that all this was done in violation of the Appellant's Proprietary Rights and Copyright and at the cost to her of severe sacrifice and injury.
13. Because, on the facts of the case and the law applicable thereto, it is submitted that the respondents ought to satisfy the claims of the Appellant.
14. Because the Judgments of the Courts below are wrong and ought to be reversed. 40

FLORENCE A. DEEKS.

In the Privy Council.

No. 18 of 1932.

*On Appeal from the Appellate Division of the  
Supreme Court of Ontario.*

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BETWEEN

FLORENCE A. DEEKS

*(Plaintiff) Appellant*

AND

H. G. WELLS, THE MACMILLAN COMPAN  
INC., THE MACMILLAN COMPANY O  
CANADA LIMITED, GEORGE NEWNE  
LIMITED, CASSELL & COMPANY LIMITE

*(Defendants) Respondents.*

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CASE OF THE APPELLANT.

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FLORENCE A. DEEKS,  
*Appellant in person.*