

BETWEEN :

KELLOGG COMPANY PLAINTIFF;

AND

HELEN L. KELLOGG DEFENDANT.

1941
Oct. 28 & 29.
1942
June 18.

Patents—Conflict action—Conflicting applications for patents—Action by plaintiff as assignee from one applicant against the assignee of the other applicant for a declaration that the plaintiff's assignor was the inventor.

In 1937 McKay and Penty filed an application in the Canadian Patent Office for a patent for a process for making a ready-to-eat cereal food product. In 1938 Mary M. Kellogg, as administratrix of the estate of John L. Kellogg Jr., deceased, filed an application in the Canadian Patent Office for the same invention.

The Commissioner of Patents declared a conflict between the applications, and plaintiff, as assignee of McKay and Penty, commenced an action in this court against defendant as owner of the invention of John L. Kellogg Jr., claiming *inter alia* a declaration that McKay and

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Penty and not John L. Kellogg Jr. were the inventors of the invention. Defendant alleged that John L. Kellogg Jr. was the inventor and counterclaimed for a declaration to that effect.

*Held:* That McKay and Penty had completed their invention by October, 1936, and that John L. Kellogg Jr. had not been proved to have made the same invention before that date.

2. That whether or not John L. Kellogg Jr. had the idea in mind, as was alleged, he had not reduced it to a definite and practical shape and he was not the inventor of the process.

ACTION brought before this Court under section 44 of the Patent Act for a declaration as to who, as between plaintiff's assignors and John L. Kellogg Jr., was the first inventor of the subject-matter of their applications for a patent, in respect of which the Commissioner of Patents had declared a conflict.

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

*O. M. Biggar, K.C.* and *R. S. Smart, K.C.* for plaintiff.

*S. M. Clark, K.C.* and *A. MacDonald* for defendant.

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

THE PRESIDENT, now (June 18, 1942) delivered the following judgment:

This is a proceeding taken under sec. 44, subs. 8, of the Patent Act and relates to conflicting claims in an application for a patent of invention made, on January 27, 1937, by Eugene H. McKay and William P. Penty, the inventors and assignors of the plaintiff company; and in an application for a patent of invention made, on February 25, 1938, by Mary M. Kellogg, administratrix of the estate of John L. Kellogg Jr., deceased, who, it is claimed, was the inventor of the invention described in the said application, and which invention by various assignments is claimed by the defendant herein. There would appear to be no doubt but that the two pending applications here in question are in conflict, and that they define and claim substantially the same invention.

The title given to the plaintiff's invention is "Prepared Food And Process Of Gun-Puffing The Same", and that given to the defendant's "Puffed Cereal Product And

Process Of Making Same". The processes defined in the conflicting applications for producing the desired product may be briefly described in the following manner: An appropriate quantity of corn grits (hulled and screened kernels of corn) are cooked, with a quantity of water, for about an hour and a half, in a rotary steam cooker at a predetermined steam pressure. The grits are then removed from the cooker and partially dried. The internal structure of the grits are then modified by what is termed "bumping", an operation in which the grits are passed between revolving rolls which slightly flattens each grit without reducing it to a flake. The flattened or bumped grits are then dried to a moisture content of about 12 per cent, and then allowed to temper or equalize for some twelve to eighteen hours, when they are subjected to a puffing operation by the usual method employed in making the so-called "gun-puffed" cereals, the instrumentality used for so doing being a container called "a gun". In the puffing operation a quantity of the dried and tempered grits is placed in the gun, and heat is applied thereto until the pressure within the gun reaches about 200 pounds per square inch, when the gun is opened and the pressure suddenly released. Under this action the grits explode or expand, and puff up, as they issue from the gun, producing the product which is described and claimed in the specification of each of the applicants. This brief description will afford a general idea of the method employed in producing the cereal food product produced under the inventions in question.

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Typical of the claims in issue are No. 1, in the application of McKay and Penty, which reads:

1. A process for making a ready-to-eat cereal food product, comprising cooking grain particles in moisture, thereafter heating the grain particles in a closed container until pressure develops therein and within the grain particles, and suddenly releasing the pressure in the container to cause the pressure within the grain particles to puff them

and No. 1 in the application of Mary M. Kellogg which reads:

1 Process of producing a puffed and ready-to-eat cereal product from maize which comprises cooking the maize with water; drying the cooked material to a moisture content of substantially 30-40%; subjecting the grains to mechanical pressure to alter the internal structure of the grain without reducing it to a flaked condition; drying the material to a moisture content of about 9% to 15%; and explosively puffing it.

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John L. Kellogg Jr., the defendant's inventor, (herein-  
 after called "Kellogg Jr.") was the son of John L. Kellogg  
 Sr., and was born in 1911. He entered the employ of the  
 Kellogg Company, in 1930, at Battle Creek, Michigan,  
 U.S.A. The head of the internationally known company  
 was W. K. Kellogg, the grandfather of Kellogg Jr., and  
 the father of John L. Kellogg, Sr. The latter had been  
 in the service of the Kellogg Company from 1908 until  
 1928, and within that period had occupied therein high  
 and responsible executive positions. After 1928 John L.  
 Kellogg Sr. appears to have carried on some business of  
 his own, in cereal products, I understand, at Chicago, and  
 Kellogg Jr. appears to have worked with his father from  
 an early age until 1930 when he became associated with  
 the Kellogg Company. In 1932 Kellogg Jr. was elected  
 a member of the Board of Directors of the Kellogg Com-  
 pany, and later a Vice-President of that Company. By  
 1935 he was in receipt of an annual salary of \$10,500. He  
 continued to fill such offices until June 1, 1935, when he  
 resigned therefrom, and also as a member of various execu-  
 tive committees of the Kellogg Company. Apparently he  
 remained on the pay roll of the Kellogg Sales Company,  
 a subsidiary of the Kellogg Company. His withdrawal  
 from the Kellogg Company in 1935 was due to the fact  
 that he suffered a concussion of the brain after a fall from  
 a horse. During the latter half of 1935 and the first half  
 of 1936, he was either in a sanitarium or otherwise seeking  
 a recovery from the effects of his serious accident. In  
 October of 1936 he returned to work, at the suggestion  
 of his grandfather, with the Kellogg Company, at first, I  
 think, with the Kellogg Sales Company. In any event on  
 or about October 15, 1936, he was assigned to service in  
 the Experimental Department of the Kellogg Company at  
 a salary of \$86.70 half-monthly, and there he remained  
 until the following December when he entirely severed all  
 connection with the Kellogg Company and became engaged  
 in some business of his own into which we need not enter.  
 He died somewhere in the State of Illinois in February,  
 1938, as the result of a self-inflicted wound. For obvious  
 reasons one may readily assume that the return of Kellogg  
 Jr., in 1936, to the service of the Kellogg Company after  
 his very serious illness would be a matter of profound  
 interest and pride to his grandfather, W. K. Kellogg. This

feeling no doubt would be sympathetically shared in by the departmental heads of the Kellogg Company, such as McKay, Superintendent, and Penty, General Foreman, of the Kellogg Company plant.

The Experimental Department of the Kellogg Company was, at the time material here, under the direction of McKay, and next under him and in actual charge of the operations of the Department was Penty. Penty was assisted by two persons named Swartz and Rochester, and on October 15, 1936, those three were joined by Kellogg Jr. The work of this Department was the carrying on of research and experimental work directed to improvements in the processing of food products, and the development of new cereal food products. The Department was assigned a particular room in the buildings of the Kellogg Company wherein to carry on its work, and only persons assigned for work in that Department had access thereto, though sometimes it was visited by executive officers of the Kellogg Company. The Department was equipped with cooking facilities, flaking rolls, shredding rolls, and generally with such machinery and equipment as was necessary or suitable for the conduct of any experimental work in which the Department was likely to engage. Penty testified that in June, 1936, at the instance of McKay, the Department began experimental work on gun-puffed cereal products, such as described and claimed in the conflicting applications here in issue. Penty testified: "We had been trying a corn similar to what we make our Corn Flakes from; but Mr. McKay suggested that we cook it without flavouring, just in water, and to treat it similar to what we did the rice, which we call bumping or flattening and changing the structure of the grain. We were trying that in two ways. One we called 'oven-puffed' with gas heat; and also prepared some for puffing in the gun". Penty explained the difference between "oven-puffed" and "gun-puffed" to be that in the former case the process was carried out at ordinary atmospheric pressure, and in the latter case under high pressure. On June 18 and 19, 1936, experiments were carried on with corn, cooked and prepared according to the directions of McKay, and a record was made of such experimental work. This prepared material was placed in a container called a "gun", the head thereof being closed tightly, and then

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a gas burner would be lighted under the gun. The gun would then rotate and when brought up to a high pressure the head thereof would be released and the contents would explode outwards into a cage, and this would expand the material that issued from the gun. Four ounces of the corn were first used in the gun, and then quantities up to a pound; but on account of the gun, which was of weak construction, leaking at the head, steam would escape from it, and sufficient pressure could not be obtained, and this would cause some of the material which came from the gun to char. The result was not satisfactory because while fifty per cent of the product was satisfactory yet the balance was charred and therefore unsuitable. This being reported to McKay he suggested that a gun known as "Big Husky" be used and one was acquired and delivered at the Experimental Department early in August of 1936. During August, September and early October this new gun was used for shooting raw grains of wheat and corn; to a small extent cooked corn, which had been partially flaked and bumped, and which had been puffed in a rotary gas popper, was used, but this was before Kellogg Jr. joined the Department.

The new gun was used for puffing on October 28, 1936, on which occasion Kellogg Jr. was present. The materials experimented with on this occasion were cooked corn, which had been partially flaked, puffed wheat, and also raw corn. Penty instructed Rochester and Kellogg Jr. to try these several materials in the new gun to see what results would be got from them. It was found that the corn material was not all coming from the gun, and what came out was in slugs or dry pieces. Samples of this were shown Penty by Kellogg Jr. and he enquired of Penty what had caused it to char and Penty thereupon explained to him that the flake was too thin for the high pressure of the gun and that this would cause the material to char, and he further remarked that a material of more body was required. Penty then informed Kellogg Jr. that plans would be laid out during the night for cooking some corn the next day, at different intervals of cooking, and that each cooking would be bumped in three different ways, "very slight, and a little more, and then a little more than that", but that the material should not be so thin as that used that day and which was then known to char. Swartz

and Rochester were instructed accordingly. On October 29, Swartz and Rochester proceeded to cook some corn in a rotary steam cooker, and this cooking continued for thirty minutes when a portion of it was taken out. The balance was cooked for another thirty minutes or altogether one hour when another portion was removed, and the balance was allowed to cook for an hour and twenty minutes altogether when it was removed; each portion as removed was later put through a drier. During these several steps or operations, Penty, Swartz, Rochester and Kellogg Jr. were present, Penty supervising the operations. After this the cooked material was put through a flaking mill for the purpose of changing the structure of the corn by slightly bumping or deforming it, the three different samples of cooked material being bumped or deformed in three different ways as already mentioned. This means merely the application of different degrees of roll pressure, but the flakes were not flattened out as much as those used the day before. In the end it was found that the sample that was cooked one hour gave the best results and this was nearest to the material experimented with in the previous June, which had been cooked for about the same time. The material was then dried down to a moisture content of about 12 per cent and then allowed to temper or equalize until the following day. The next day Penty directed Rochester and Kellogg Jr. to try the three different cooks so prepared in the gun, instructing them first to use raw grain (wheat) to heat the gun, and which would cause it to function more satisfactorily. Penty states that he went to lunch at 12 o'clock noon, as also did Rochester who was relieved by Swartz. The latter and Kellogg Jr. remained because it was thought undesirable to cease operations with the gun in the noon hour and thus allow it to cool off. When he returned he found on his desk in the Experimental Department a carton of the best of the material shot from the gun and he remarked to Kellogg Jr. on his return from lunch, "John, we have got something pretty good here", and Kellogg's response was, "Well, we shot that in the gun in the noon hour". Kellogg suggested that it be shown to McKay and this was done by Penty and Kellogg Jr. Penty explained to McKay that it had been shot by Swartz and Kellogg Jr. in the noon hour. McKay then suggested that it be shown

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to W. K. Kellogg and thereupon McKay, Penty and Kellogg Jr. went to the office of W. K. Kellogg. McKay remarked to W. K. Kellogg: "Look what John has made". W. K. Kellogg then asked who was to get the credit for that, and Penty remarked that Swartz and John had shot it in the gun in the noon hour, and Kellogg Jr. remarked that McKay and Penty had supervised the cooking of the corn and that he had done the work with the gun. Penty testified that on leaving the office of W. K. Kellogg he said to McKay that Kellogg Jr. did not make the material, that it was the same as had been made back in June, 1936, but satisfactory results were not then obtainable because the little gun leaked, but with the use of the new gun, and by doing practically the same thing as was done in June past, the improved results were obtained. Then, the same day, or shortly thereafter, Kellogg Jr. informed Penty that McKay had told him he could take a patent out in his name, and McKay had earlier expressed the same view to Penty. Penty agreed to this but testified that he said to Kellogg Jr. that if he took out the patent in his name it was to belong to the Kellogg Company. I had almost forgotten to add that Penty in cross-examination testified that McKay had said to him that: "We will let John take that out in his own name as the inventor. It will please John and encourage him in his experimental work". I have no doubt whatever that McKay made use of such words to Penty.

Following the understanding that Kellogg Jr. was to be allowed to apply for a patent in his name there was drawn up, on a printed form in use by the Kellogg Company, a document intituled "Invention Conception Data", the purpose of which is self-explanatory. In this document Kellogg Jr. is mentioned as the inventor of something which is not described but which clearly had reference to the invention here in question; the date of the conception of the said invention is given as October 28, 1936; the persons to whom disclosure of the invention was made are stated to be Penty and Swartz; and the date when the invention was first successfully practised is stated as being October 30, 1936, and in the Experimental Department of the Kellogg Company. It will be observed that all the dates therein mentioned are days on which experimental work was being carried on with the new grain puffing gun,



and all within fifteen days after Kellogg Jr. entered upon his work in the Experimental Department of the Kellogg Company. This document was signed by Kellogg Jr. as inventor, and his signature was witnessed by Penty, Rochester and Swartz. The preparation of this document would be a logical step once it was decided to allow Kellogg Jr. to take out a patent in his name, and apparently it was left in the possession of the Kellogg Company. It makes clear that the invention related to the experimental work being carried out under Penty at the direction of McKay, in the latter days of October. Another matter on which the defendant places some reliance is that McKay, on October 29, 1936, had made on a desk pad the notation: "John here, big day for John. Invented new corn puff, best we ever had". This notation of itself adds nothing to the facts already narrated; it is in effect merely a restatement of what McKay had already suggested should be done, that is, that in order to please "John" and encourage him in his experimental work he should be allowed to take out a patent in his own name. The notation on the pad does not and could not mean more than that, and if any greater weight were to be given it then McKay should have been called as a witness in this proceeding, or his evidence should have been procured in some way, to explain precisely what was meant by this notation. I should perhaps add that sometime in 1937 McKay severed his connection with the Kellogg Company and became the manager of the National Biscuit Company, whose plant was also located at Battle Creek, Michigan, and thereafter he seems to have kept aloof from this and all other proceedings having reference to this controversy.

It became apparent later in November that Kellogg Jr. had determined that he would not assign the invention under discussion to the Kellogg Company, which I have no doubt McKay and Penty believed he should and would do, and his grandfather apparently entertained the same expectation as that of McKay and Penty because he requested his son John L. Kellogg Sr. to ask Kellogg Jr. to do so. Early in December Kellogg Jr. severed his connection with the Kellogg Company, and on January 27, 1937, McKay and Penty, as joint inventors, applied for a patent in Canada, for the same invention, and this they assigned to the Kellogg Company. In an affidavit

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filed with the Commissioner of Patents, under s. 44 (5) of the Patent Act, Penty states that the invention described in this joint application was conceived on or about June 19, 1936, and that the invention was reduced to practice on the same day, and that a record was made of the experiments constituting the reduction to practice on the same day as the invention was conceived. The affidavit further states that "after the reduction to practice on June 19th, 1936, it was decided to carry out the process in a larger gun, which gun was obtained in the latter part of August, 1936, and further tests were made on various dates including particularly October 28th, 1936, October 30th, 1936, and November 11th, 1936". The fact that McKay and Penty applied for a patent in Canada when Kellogg Jr. refused to assign his invention to the Kellogg Company is but further evidence of what I think they always believed, namely, that in truth they were the real inventors of the invention in question, and this, notwithstanding the fact that they were willing, for the reasons already explained, though imprudent, to accord to Kellogg Jr. the distinction of being the inventor of the subject-matter here in conflict, but of course in the belief that the Kellogg Company would in any event become the assignee of such invention.

In so far as the events of 1936, as revealed in the evidence are concerned, I have no difficulty whatever in concluding as a question of fact, that as to priority of invention between McKay and Penty on the one hand, and Kellogg Jr. on the other hand, everything indubitably points to the former as being the first to make the invention here in question. I have not to decide whether or not the disclosure made by either constitutes invention. In this proceeding I am to assume there was invention on the part of both, in respect of the same subject-matter, and the sole question I have to decide is who was first in point of time to make the invention. I have considered all the evidence carefully and I cannot conceive of anything done by Kellogg Jr., in 1936, to warrant one in holding he made the invention here claimed for him. In fact, such a claim would seem to me to rest on the flimsiest sort of foundation. On the other hand, it appears to me rather clear that McKay and Penty had conceived the idea behind their invention in June of 1936. The container

or gun which they used at that time did not yield satisfactory results in the last step of their process, but they knew what it was they sought to accomplish by this step, and the mechanical means for effecting it. The obstacle which confronted them was soon overcome by the use of the new gun, which was on the market, one of which they caused to be acquired by the Kellogg Company, for the Experimental Department of the Kellogg Company; and with it they soon achieved production, with satisfactory results, of the thing they had earlier conceived. It is not necessary to say that their invention was conceived and reduced to practice in June, 1936, but at least this can be said of October, 1936. Everything that was done in June and on till the end of October, 1936, was at the suggestion and direction of McKay and Penty. At no time does it appear that Kellogg Jr. proffered any idea or suggestion calculated to promote the successful issue of the experimental work that McKay and Penty then had in hand. He only appeared on the scene on October 15, and he appears to have had nothing to do with the direction of the preparation of the material for shooting in the gun. His operation of the gun with Swartz, which they were directed to do, was purely a mechanical act, with an instrumentality purchased by the Kellogg Company to do the very thing that was done by it. It seems to me utterly untenable to say that this of itself was invention, or was an element contributed by Kellogg Jr. in making the invention. It might well have happened that Kellogg Jr. would have been off duty at the important lunch hour in question here and replaced by some other of the Experimental Department staff, and there would not seem to be any reason why any one else could not have achieved the same result with the same gun. I can conceive of no ground whatever for suggesting that anything Kellogg Jr. did had any of the elements of invention in it. The whole train of ideas put into motion in respect of the invention, even to the selection of the gun, were those of others. The fact that later Kellogg Jr. was to be allowed to apply for a patent in his name, or was to be treated as the inventor, cannot change these facts, and the reasons for permitting Kellogg Jr. to apply for a patent have, I think, been satisfactorily explained. McKay and Penty seemingly regarded

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it as of no importance who was to have the credit for the work they had successfully directed, so long as their employer had the benefit of the same.

It was contended that Kellogg Jr. conceived his invention in 1935. His father, John L. Kellogg Sr., testified at the hearing of this proceeding that while accompanying his son (Kellogg Jr.) in June, 1935, to a sanitarium following his accident, the son discussed with him the subject-matter described and claimed in the patent applications in question. This evidence is uncorroborated by any contemporary documentary evidence, and there is no evidence of any research or experimental work carried on by him at that time, which was directed to such an end. That sort of evidence cannot be allowed to weigh against the evidence adduced in support of the application of McKay and Penty. Kellogg Jr. may have had some vague idea of something comparable to that later demonstrated in a practical way by McKay and Penty, but that is not sufficient to support invention. The evidence of John L. Kellogg Sr. falls well within the principle laid down in the case of *The Permutit Company v. Borrowman* (1): "It is not enough for a man to say that an idea floated through his brain, he must at least reduce it to a definite and practical shape before he can be said to have invented a process". All that was claimed by Mr. Clark on behalf of Kellogg Jr. was that he had evolved the idea of his invention in 1935, but there is no evidence of an acceptable character that even that was done, and in any event there is no evidence that his idea was ever reduced to definite and practical shape in 1935. Such a suggestion seems altogether improbable when one takes into consideration his line of conduct in the last days of October, 1936, while working in the Experimental Department of the Kellogg Company, along with others. It is hardly conceivable that if he had in 1935 evolved any idea comparable to that which was then engaging the thought and attention of McKay and Penty, he would not have disclosed that idea or knowledge to those with whom he laboured, in the interests of his employer; but the fact is that he appears to have played the role of a silent and humble worker, and the only thing he apparently spoke about afterwards was that he had assisted in the opera-

(1) (1926) 43 R.P.C. 356.

tion of the gun. Then, some further evidence was introduced by the defendant to the effect that Kellogg Jr. had conceived his invention on December 7, 1935. It appears that sometime in November, 1936, Kellogg Jr. requested Penty, Swartz and Rochester to sign, as witnesses to the signature of Kellogg Jr., a copy of the original Invention Conception Data Sheet, to which I have earlier referred, and in which Kellogg Jr. was given a conception date of October 28, 1936. This copy, so presented by Kellogg Jr., the persons mentioned signed. I am satisfied upon the evidence that when they signed the same it either did not contain the date of December 7, 1935, as the date of conception, or if it did this new conception date was not called to their attention. Rochester stated he had no knowledge regarding any corn-puffing experimental work prior to June of 1936, and that he would not have signed the document if it had contained any such date, and that would seem both reasonable and probable. I am quite satisfied that Penty and Swartz were unaware at the time that a date of conception of December 7, 1935, was mentioned in this document and that their attention was not called to it, if it then were in the copy presented for their signature. It appears to me that this conception date was entered in this document by some one, at some time, in an effort to lay a foundation for the claim that Kellogg Jr. was entitled to priority over any claim that might be made for invention based on the work done in June or October of 1936 by McKay and Penty. There is no evidence whatever to support a conception date of December 7, 1935, by Kellogg Jr., and one cannot well avoid the suspicion of lack of good faith on the part of some one in procuring the signatures of Penty, Swartz and Rochester to this copy of the original Invention Conception Data Sheet. In view of all the facts and circumstances disclosed it would seem a very improbable thing for them knowingly to sign such a document intending it to be a copy of the original Invention Conception Data Sheet. Therefore, in my opinion, the contention that Kellogg Jr. conceived his invention in 1935 cannot be upheld.

Before concluding on this phase of the case I must refer briefly to the evidence of Miss Gibbons, a witness called on behalf of the plaintiff, and to which I should perhaps have referred earlier. Miss Gibbons, over a number of

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years, had acted as secretary to several of the executive officers of the Kellogg Company, including at one time Kellogg Jr. She appears to have had quite an intimate knowledge of the matters here in controversy. She was intimately acquainted with Kellogg Jr. before and after he met with his accident, and she attended to many of his personal affairs after he rejoined the Kellogg Company in October of 1936. From McKay and Penty she had become aware of their experimental work in June of 1936, and later, in connection with the subject-matter of this litigation; and Kellogg Jr., before leaving the company in December, 1936, spoke to her about his invention. As he was about to leave, or had left the Kellogg Company, she appears to have upbraided him for claiming this as his invention and in any event for refusing to make an assignment to the Kellogg Company. She testified: "I said, John, you can't do this, because you know it is not your invention. I said I know they have let you sign the Conception Data. And he said that they were willing to let him sign the Conception Data He said he knew it was not his invention". She testified that later, about a week before his death, he stated to her that "he was sorry he had not taken my advice", meaning, I understand, that he should have followed her advice in regard to the making of an assignment of the invention to the Kellogg Company. The evidence of Miss Gibbons impressed me very much and I have no hesitation in accepting her evidence without any qualification whatever. I think she understood clearly the genesis and development of the whole affair leading to this controversy, the reason why Kellogg Jr. was allowed to be treated as the inventor, and she, feeling strongly about the equities of the dispute that later arose about the assignment, felt free to speak with frankness to Kellogg Jr., whenever the subject became the matter of conversation between them.

From the foregoing it will appear that it is my opinion that McKay and Penty, and not the late Kellogg Jr., were in fact the first inventors of the subject-matter described and claimed in their application for a patent, and that is my finding. It is also my finding that the plaintiff is entitled to the issue of a patent as claimed by it in its statement of claim.

There remains one more matter to be mentioned. The plaintiff pleaded and contended that if it should be found here as a fact that Kellogg Jr. was the first inventor of the subject-matter of the patent application filed by Mary M. Kellogg, and which by assignment or otherwise came into the possession of the defendant, then such invention was made by Kellogg Jr. during and in the course of his employment with the plaintiff and when he was carrying out work which he was instructed to do on the plaintiff's behalf; that by virtue of his contract of employment and the circumstances under which such invention was made, Kellogg Jr. became and was a trustee of the invention for the plaintiff, which was and is entitled to the benefit of it; and that by reason of Kellogg Jr. being such a trustee he was unable to transfer any right, title or interest in the invention to any other party and that the plaintiff is now the owner of any invention covered by the application of Mary M. Kellogg. Inasmuch as I have found as a fact that McKay and Penty, and not Kellogg Jr., were the inventors of the subject-matter described and claimed in the patent application of Mary M. Kellogg, it becomes unnecessary for me to discuss this point. Had I felt obliged to find that Kellogg Jr. was the first inventor of the subject-matter described in the application claims here in conflict I may say I would have found no difficulty in sustaining the plea and contention of the plaintiff in respect of this point, and in granting it the relief claimed in this connection, in its statement of claim. The facts and circumstances disclosed in the present case are such that I would have followed readily the reasoning and decision of Farwell J. in *Triplex Safety Glass Co. Ltd. v. Scoria* (1), but which case I need not now pause to discuss.

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In the result the plaintiff succeeds upon the issue here standing for decision, and with costs.

Judgment accordingly.