

cost, such complete units as are manufactured by the Ohio company. Schedule of such cost to be furnished to the Canadian company as soon as possible in each case. It is, of course, understood above costs to include overhead."

The whole difficulty is as to the ascertainment of what is to be allowed as "overhead," and how this is to be ascertained.

Shortly after the making of the agreement, a schedule of prices, supposed to be cost prices within the meaning of the agreement, was supplied. No complaint was made as to this list, and, during the almost two years in which the agreement remained current, goods were shipped and paid for upon the footing of this price-list.

For a full understanding of the relation of the parties, it should be also mentioned that the reason for the sale of goods at cost was the payment by the Canadian company of a royalty upon each machine purchased.

It is now alleged that the list price was in excess of the actual cost price, and this action is brought to secure a refund of the excess. The learned Referee has found in the plaintiffs' favour, awarding \$18,959.92. From this award, the appeal is taken.

It is common ground that there is no way of ascertaining with mathematical accuracy, or perhaps even with substantial accuracy, what the actual cost, including overhead, is, of the different individual articles supplied.

The American company established at its factory a system of cost-cards, for the purpose of its guidance in its own business affairs. The items entered upon these cost-cards consisted, first, of the actual material entering into the individual article; secondly, of the productive labour expended upon that particular article; and, thirdly, there was added a sum arbitrarily fixed, supposed to cover the overhead charges. It is common ground that these cards do not accurately state the proper amount for overhead charges, and I think it may be taken for granted that, while the amount inserted on this card as representing the cost of material is substantially accurate, the amount entered as representing productive labour is quite erroneous.

The amount inserted in the price-lists furnished, and carried into the invoices, in no case corresponds with the amount inserted in the cost-cards, and this was well known to both parties. An investigation was made for the purpose of fixing the amount upon which duty had to be paid by the Canadian company; and,