

1937
 Dec. 20.
 1939
 March 1.

BETWEEN :

DOMINION MANUFACTURERS }
 LIMITED } PLAINTIFF;

AND

ELECTROLIER MANUFACTUR- }
 ING COMPANY LIMITED } DEFENDANT.

Patent—Infringement—Inquiry as to damages—Referee’s report finding amount—Sales by infringer—Loss of profit on actual sales—Royalty—Evidence that customers would not have purchased plaintiff’s patented article—Contention of defendant that plaintiff entitled to nominal damages only—Appeal from report of Referee dismissed.

In an action for infringement of a patent relating to coffin handles it was held that plaintiff’s patent was valid and infringed by the defendant. See (1933) Ex. C.R. 141 and (1934) S.C.R. 436.

An inquiry as to the damages suffered by the plaintiff was ordered, the Registrar of this Court being appointed Referee. By his report the Referee found that the plaintiff would have made a total profit of \$17,078.41 had it made the sales which the defendant made of the patented article; that the damages should be estimated on a royalty basis for the unauthorized sale of every one of the infringing articles sold, and that each sale was to be considered as an invasion of the right of the patentee; that 10 per cent of the total profit which the plaintiff would have made would be a fair compensation for the use of the plaintiff’s invention by the defendant.

The defendant appealed and contended that the plaintiff was entitled to nominal damages only; that the plaintiff had only a portion of the total trade in coffin handles in Canada, and that if the defendant’s customers had not bought their requirements of coffin handles from the defendant they would not have bought from the plaintiff.

Held: That the Referee had assessed the damages on a right principle and in a manner consistent with the evidence before him, and the allowance made in respect to each one of the infringing articles, was not excessive. (*Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1911) 28 R.P.C. 157, followed).

APPEAL from the Report of the Referee appointed to ascertain the damages recoverable by the plaintiff from

the defendant under a judgment obtained by the plaintiff against the defendant in an action for infringement of a patent relating to coffin handles.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

W. L. Scott, K.C. for plaintiff.

O. M. Biggar, K.C. for defendant.

The facts and questions of law raised are stated in the reasons for judgment of the learned President and in the Report of the Referee.

THE PRESIDENT, now (March 1, 1939) delivered the following judgment:

This is an appeal asserted by the defendant from the Report of the Registrar acting as Referee in the matter of the assessment of damages for infringement of a patent owned by the plaintiff, which, in an infringement action, was found to have been valid and to have been infringed by the defendant. The patent related to coffin handles.

At the opening of the reference proceedings before the Registrar the plaintiff claimed damages in the sum of \$29,757.44 on the ground of loss of profits on sales made by the defendant, which, it was claimed, would have been made by the plaintiff, had the defendant not made the infringing sales, and damages in the sum of \$46,330.82 for loss sustained by the plaintiff by being forced to reduce its prices to its customers, in order to meet the prices at which the defendant was selling the infringing article, but the latter item of damage was subsequently abandoned, and we are therefore concerned only with the first mentioned item of damage. The Registrar in his Report reviewed the evidence, the basis of the claim for damages, the contentions advanced by counsel for the respective parties, and he has stated them, and the reasons for the conclusion which he reached, with such great care and lucidity, that I am relieved of the necessity of any lengthy discussion of the facts, and other features of the case.

The Registrar found, and it is not in dispute, that the defendant sold 1,665 dozens of the infringing article, and 28,389 sets of the same. The distinction between a "dozen" and a "set" I need not pause to explain. He found that the average profit per dozen made by the plaintiff was

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\$1.42 $\frac{1}{2}$, and that the average profit per set was .518 cents, giving a total profit of \$17,078.41 that would have been made by the plaintiff had it made the sales which the defendant made, of the patented article. I have no reason for doubting the substantial accuracy of these figures.

The Registrar was of the opinion that the evidence, on the whole, was of such a character that he would not be justified in estimating damages upon the loss of profits to the plaintiff owing to the infringing sales made by the defendant, and that this was not a case for estimating damages upon the basis of the plaintiff's loss of profits by reason of loss of sales. His view was that this was a case where the damages should be estimated on a royalty basis, for the unauthorized sale of every one of the infringing articles sold, and that each sale was to be considered as an invasion of the right of the patentee, and he found that 10 per cent of the total profit which the plaintiff would have made, as earlier mentioned, namely, \$1,707.84, would be a fair compensation for the use of the plaintiff's invention by the defendant.

The grounds advanced by Mr. Biggar in support of the appeal were that the plaintiff was entitled to nominal damages only; that anything beyond nominal damages must be clearly established by the evidence; that the plaintiff had only a portion of the total trade in coffin handles in Canada; and that if the defendant's customers had not bought their requirements of coffin handles from the defendant they would not have bought them from the plaintiff. Substantially, those were the reasons put forward by Mr. Biggar in asking for a reduction in the amount of damages found by the Registrar. The same grounds were advanced by the appellants in the case of *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1), a case to which I propose referring at some length.

The patent involved in that case was a "penny-in-the-slot," or prepayment, gas meter. The number of meters sold by the defendant infringer was 19,000, of which 14,000 were the subject of evidence addressed to show that the persons who bought those from the defendant would not, if they had not found what they wanted there, have gone to the plaintiff for them. Eve J., on appeal from the

Master, ruled out the 14,000 altogether. In respect of the balance, 5,000 meters, it was contended by counsel, that the plaintiff had failed to show that the said 5,000 purchases of gas meters would have come to the plaintiff, and therefore there was no evidence of damage. Eve J. found that the Master had rightly held that the profit on the whole meter was the proper factor to take in calculating the profit on the meters, but having regard to all the circumstances of the case, including the defendant's position in the market, he held that the 5,000 meters ought to be reduced to 3,500, an arbitrary reduction of three-tenths. The case then went to the Court of Appeal. The Court consisted of Cozens-Hardy M.R. and Lord Justices Fletcher Moulten and Buckley, and that Court refused to allow the appeal. The judgement of the Court of Appeal in this case no doubt influenced the Registrar in reaching the conclusion set forth in his report. The members of the Court apparently were of the view that the Court below was more favourable to the defendant, the infringer, than they would have been had either of them heard the matters at issue in the first instance. They all seem to have been doubtful as to whether the learned Judge in the Court below was right in excluding from his consideration the 14,000 meters, as to which it was said that particular purchases from the defendant would not have gone to the plaintiff, but probably would have gone to somebody else. I wish to refer particularly to the reasons for judgment of Fletcher Moulten L.J.—one who had a large experience in patent cases—because, I think, he deals with the matter of damage in patent cases in a very practical and convincing manner. I feel justified in quoting from that judgment at some length because it contains a very full discussion of the principal points in controversy here. He said:

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The defendants seek to diminish the damages by a variety of affidavits intended to show that the particular purchasers for whom they manufactured these infringements were customers who would not have purchased from the plaintiffs if they had not purchased from them. I am not for a moment going to say that evidence of that kind may not be relevant, but the argument based upon it was, that where a plaintiff proves the sale of infringing instruments by the defendants he does not establish any right to damages unless he shows how many of those particular instruments would have been purchased from him if the defendant had not sold them; and the counsel for the defendants were bold enough to say that in this case of infringement on a large scale there ought to be only nominal damages

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The defendants have set up here—the burden of proof is on them—that there is this secondary rule of law, that where a defendant has sold infringing articles the plaintiff can only recover damages in respect of those which he can show would have been bought from him, if the defendant had not infringed. In my opinion there is no such secondary rule. I am quite aware that a good practical method of arriving at a fair estimate of the wrong done may, in some cases, be by forming a conception of how many sales of a particular article would have been made by the plaintiff, and then giving him the full manufacturing profit for that proportion, but there is no rule of law which requires the Court to do that in all circumstances, and there are innumerable cases in which such a rule of law would be quite inapplicable. I put some of those cases in argument to the learned counsel for the appellants. Take this case,—An invention for improvements in engines comes out. According to the proposition of law contended for by the defendants every man who is manufacturing engines could with impunity, so far as damages are concerned, apply this invention to all the engines he had on order, because as they were on order *ex concessis* those orders could not have gone to the plaintiffs. Another case I suggested was this—the case of a person who has a patent for the totality of an instrument. All of us remember when the telephone came out. There was a fundamental patent for the telephone which left telephones in the hands of one company for the whole period of that patent. Supposing a person invented an improvement upon that patent and that the telephone company applied it to all its instruments. Could it then turn round and say: “We make these instruments ourselves; therefore you would not have had the making of them and could not have put your invention on the market in rivalry to ours, for you could not have made it without our licence”; or “We buy these instruments from so and so, and under no circumstances should we have bought them from you, and therefore we can take your invention and not be liable for damages.” There are still more obvious cases. Persons may deliberately combine to manufacture surreptitiously and to sell to other persons, the whole object being not to go to the plaintiff, and not to become purchasers from him. Not one of those manufactured articles would have been purchased from, or manufactured by, the plaintiff, because the very object of the wrongful acts was to avoid that. Could it be suggested that this might be done with impunity? There may be cases, again, where a man manufactures and sells at a price so low that the patentee would unquestionably not have sold at the price, and does damage to the patentee all the greater because the price is so unreasonably low. According to the contention, that there is a fixed rule of law that you can only recover in respect of those articles which you can prove would have come from you, all those things could be done with impunity. . . . In the assessment of damages every instrument that is manufactured or sold, which infringes the rights of the patentee, is a wrong to him, and I do not think that there is any case, nor do I think that there is any rule of law which says that the patentee is not entitled to recover in respect of each one of those wrongs. The mode of assessing damages, which I admit is sometimes very convenient, whereby you calculate how many of the orders the plaintiff probably would have got, and then take the full manufacturing profit on each article, and multiply the two together, does not contradict what I have said. You may estimate the damage by taking the whole of the infringing articles, and making an allowance in respect of each one, or you may consider how many he would have sold, and

make a full allowance in regard to those. They are both, in proper cases, reasonable methods of ascertaining what he has lost. The latter is certainly only a rough practical method which in some cases may be efficient. It rests on no theoretical basis, because in the eye of the law each article is a wrong.

He then proceeds to discuss the assessment of damages in the case of sales of infringing articles where the patentee has granted a licence to use the invention at a certain figure, and he expresses the view that in the case where a patentee has not granted a licence, and there does not exist a quoted figure for a licence, damages might be estimated in a way analogous to that where a licence was granted. He said:

There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price—in other words, where he grants licences at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The Court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the Courts consider that every single one of the infringements was a wrong, and that it is fair—where the facts of the case allow the Court to get at the damages in that way—to allow pecuniary damages in respect of every one of them. I am inclined to think that the Court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the Court to consider what would have been the price which—although no price was actually quoted—could have reasonably been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure. But I am not going to say a word which will tie down future judges and prevent them from exercising their judgment, as best they can in all the circumstances of the case, so as to arrive at that which the plaintiff has lost by reason of the defendant doing certain acts wrongfully instead of either abstaining from doing them, or getting permission to do them rightfully. All I say is that there is no such rule of law as that which has been contended for by the defendants here. In the present case, therefore, I think that the learned Judge went too far in wholly refusing to consider the 14,000 infringing instruments, which were sold to regular customers of the defendants. If such a principle existed then you could infringe with impunity if you only sold to relations or settled customers.

In the case of *Watson, Laidlow & Co. Ltd. v. Pott et al.* (1), Lord Shaw said that it was probably a mistake

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in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles. They are, he said, the practical working rules which have seemed helpful to judges in arriving at a true estimate of the compensation which ought to be awarded against an infringer to a patentee. And, in the same case, Lord Shaw expressed himself as being in entire accord with the principle laid down by Lord Moulton in the *Meters* case, and he said that each infringement was an actionable wrong, and although committed in a range of business or territory which the patentee may not have reached, he was entitled to hire or royalty for each unauthorized use, and he was of the opinion that a royalty was an excellent key to unlock the difficulty in such cases.

The finding of the Registrar, I think, is well within one of the working rules laid down by Fletcher Moulton L.J. and Lord Shaw that might be applied in a case of this kind. He estimated the damage by taking the whole of the infringing articles, and making an allowance in respect of each one, and that allowance I cannot say is excessive. I think the Registrar adopted the safest and best way of estimating the damage in this case.

The plaintiff entered a cross-appeal against the limitation of the costs of the plaintiff on the reference to \$300, on the ground that the damages claimed by the plaintiff on the reference were excessive, and, I think, they were absurdly excessive. I am not at all sure but that I would have refused the plaintiff any costs whatever had I been in the place of the Registrar, but I do not now propose to disturb the Registrar's conclusion upon the point. Perhaps the penalty fixed by the Registrar was ample.

My conclusion is that both appeals must be dismissed, but, as the defendant's appeal was the major question argued before me, I think the plaintiff is entitled to costs and that I fix at \$125.

Judgment accordingly.

Following is the Report of Arnold W. Duclos, K.C., Registrar of the Exchequer Court of Canada, the Referee herein:—

Counsel for the plaintiff on opening his argument restated his claim as follows:

Damages for loss of profits on sales made by the defendant, to wit: 28,389 sets and 1,665½ dozens.

It was argued by counsel for plaintiff that the evidence established that the plaintiff would have made at least 60% of the sales made by defendant; that it was entitled to judgment against defendant for the profits shown it would have realized on the defendant's sales which the plaintiff would have made. It was at first contended that, as plaintiff and defendant were the only corporations dealing in the patented handles in Canada, if defendant had not been in the market, it (plaintiff) would have made all the sales made by defendant, in addition to the sales made by it. This I understood to be later modified, and that it now claimed the profits lost on at most, 60% of defendant's sales.

It was further argued, in the alternative, that should I find that less than 60% would have been made by the plaintiff then I should allow a certain sum, by way of royalty on the difference between 60% and the number found by me, as well as on the 40%. I was then asked to allow as "royalty" a figure representing one-half of the profit.

Counsel for defendant contended that the plaintiff was not entitled to any damages, or, at most, only nominal damages; that, as the sales made by the defendant could not be said to have been made by reason of the handles sold by it incorporating the invention covered by plaintiff's patent, there were no damages by reason of the infringement. This reasoning also applied to the matter of "royalty."

On the law to be applied, I would refer to the decision of the Supreme Court of Canada in the case of *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. et al* (1), recently given, and to the remarks made by this Court and by myself in my report in the same case. I do not intend to repeat here what was said in that case. As stated by Terrell, 8th edition, pages 437 and 438, the plaintiff "should be restored by monetary compensation to the position which he would have occupied but for the *wrongful* acts of the defendant provided always that such loss as he proves is the natural and direct consequence of the defendant's acts." The onus is upon the plaintiff of proving his damage, but, as stated in Terrell, "the burden is greatly lightened by the readiness of the Court to infer that the wrongful invasion of the patentee's monopoly

(1) (1936) Ex. C.R. 1; (1937) S.C.R. 36.

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will in the ordinary course of events cause damage to him." I do not think it will be questioned that one way of assessing the damages suffered by plaintiff is to allow it an amount equal to the profit it would have made on the defendant's sales, if proved it would have made them, and granting a royalty as damages on such sales as plaintiff would not have made.

The rules as to allowing plaintiff full profits it would have made on sales of the defendant which it, plaintiff, would have made, and that of giving a royalty by way of damages in other cases, are in effect simply means suggested by which a Court can arrive at the amount which will be, on all the evidence, a fair and reasonable compensation to plaintiff for loss sustained by it by reason of the defendant's infringement. Courts however are not bound or in any way obliged to follow either of these rules. See Fletcher Moulton, L.J. in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1). The giving of a royalty as damages is resorted to in the cases where the patentee fails to prove he would have made the sales made by the defendant (infringer) and where the owner of the patent, instead of manufacturing himself, grants licences to others to use the invention covered by the patent. Instead of taking his full profits he thus shares it with others.

In order to fix "royalty" the Court must take into consideration the market, the cost of manufacturing and selling, and allow to the licensee a reasonable profit, and then give to the owner of the patent a proportion of such profits as royalty based upon the value of the use of the invention by and to the defendant.

As to the defendant's contention that this was a case where at most only nominal damages should be given, I cannot agree. The plaintiff is the owner of a patent found by the courts to be a valid patent, which has been infringed by the defendant, and which action of the defendant makes it liable in damages. However, the value of the invention to create a public demand is material and is to be considered in fixing the amount of damages.

As said in some of the cases each sale of the infringing article is a tort. To permit a defendant after about four

(1) (1911) 28 R.P.C. 163, line 41 & p. 164.

years of infringing to go free, merely upon its saying or even proving that it could have easily avoided infringement, or that the incorporating of the invention in its handles had no sales appeal, would practically render illusory the monopoly granted.

The plaintiff has suffered some damage, the manner of measuring the said damage is, I think, clear, and it then becomes a matter of proof, a question of fact to be found on the evidence.

It is admittedly impossible in these cases to arrive at the amount of the damages with mathematical exactitude, no two cases are exactly similar, and each case presents new difficulties. As said by Lord Shaw in *Watson, Laidlaw & Co. Ltd. v. Pott, Cassels & Williamson* (1), "restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe." The absence of proper proof or the difficulty of making an exact calculation is no reason for a court to refuse judgment. I may be compelled to act as a jury and as such to allow such damages as I consider, on the evidence, a fair and reasonable compensation for any loss suffered by the plaintiff from the illegal acts of the defendant.

Would any of the sales made by the defendant have been made by the plaintiff? Many questions arise here, such as, for instance, the length of time defendant had been in business, were the sales actually made of coffin handles so made by reason of the handles being manufactured in accordance with the patent, or would the defendant have made the sales notwithstanding; what induced the purchasers to buy, was it style and price alone, was it friendship towards defendant.

(Having referred to the evidence adduced the learned Referee continued.)

From an analysis of exhibit 14 one finds that the companies represented by the last seven witnesses were purchasers from the defendant to the extent of about 45% of the total sales made by the defendant during the 1929 to 1933 period, which is a fair representation of the purchasing public, and their evidence is not contradicted. The plaintiff offered no rebuttal whatever.

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It is never an easy matter, in patent cases, to say with absolute certainty what proportion of the defendant's sales would have been made by the plaintiff. The argument that the plaintiff would have sold the patented handle if the defendant had not done so because they were the only ones selling the patented handle is unfounded in fact, and is not substantiated by the evidence. There was a substantial importation from the United States at competitive prices, as well as serious competition by Canadian firms other than the defendant. I think it is beyond any doubt that the patented assembling device or invention, if it had utility at all, such utility is only to the manufacturer, as an easier and quicker method of assembling, but that it has no sales value, if indeed, on the evidence it was not a decided objection. Other companies did very well with different handles and when the defendant changed over to the rivet assemblage the latter was received on the market as well, if not better, than the patented handles. There was no loss of sales and practically no difference in the cost of manufacture. There is no doubt, from exhibits 14 and 15, that the plaintiff, as well as the defendant, sold to the same persons, in some instances. The total volume of business of the plaintiff company was practically constant all through the depression, and in 1933, the year in which the infringement ceased in April, the plaintiff's sales of handles dropped by over \$20,000 from the previous year; seven of the witnesses heard, customers of the defendant, who represented about 45% in value of the total sales of defendant in question herein, swore that the assembly covered by the patent in suit was never considered, was not an inducement to buy, and that the only factor was style, appearance and price. The fact that the plaintiff and defendant alone sold the patented handle is not enough to presume that the plaintiff would have made all the sales in question, and not cogent enough evidence to justify a judgment for damages.

Besides this, it must not be overlooked that the defendant had been in the market since 1913, and that it did not suddenly come into being for the purpose of doing business in this line and making use of another man's monopoly. I am satisfied that when the defendant adopted the style of handle it did, about 1929, it was not aware that the same was protected, and so no punitive damages

should be allowed. Moreover, the witnesses heard for the plaintiff were all officers or employees of the plaintiff, whereas, on behalf of the defendant, besides its officers and employees, there were eight absolutely independent men in no way connected with the defendant company and whose evidence, I believe, was freely and truthfully given and without bias or partiality, and was in the main a simple statement of facts known to them personally. Mr. McDowell's evidence goes no further than the facts to be gathered from exhibits 14, 15 and 21, and the question of sales can be decided by a study of exhibits 14 and 15 and the evidence of Kert, and the eight outside witnesses, Girard's evidence was principally useful on that part of the claim which has been abandoned. If anything it supports the conclusion that price was the only factor.

I am therefore of opinion, on the evidence as a whole, that the plaintiff has failed to prove its case on this point and that the plaintiff has not lost any sales by reason of the defendant's selling coffin handles which infringed the plaintiff's patent or were sold by reason of incorporating the invention protected by such patent, and I am satisfied that this is not a case for basing damages upon the plaintiff's loss of profits by reason of loss of sales. A claim for loss of profits can only be allowed when clearly proved, but as no one can take another's property without compensating the owner, I think this is a case for royalty. Having arrived at this conclusion it becomes unnecessary to go into the matter of what would have been the plaintiff's profit on such sales, but may I say I found the evidence on this point also unsatisfactory and inconclusive. Profits are "adopted," what they "expected to make," they are in effect estimates. In calculating the profits the plaintiff neglected to take into account the efforts of the defendant in making the sales in question and nothing is deducted for selling costs or for bad debts.

I have therefore decided that justice will be done between the parties by allowing the plaintiff a fair royalty on all sales made by the defendant of the patented handle, as compensation to it for any damages suffered by reason of the infringement.

The evidence as to what royalty should be allowed is far from satisfactory, if indeed it can be said that there is any, and I was on the point of asking for evidence on this point

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but the hearing lasted so long that I decided not to increase the costs, and to do the best I could on the evidence before me.

I have already stated how I think the amount of royalty is to be fixed, and in this case I am of opinion, on the evidence, that the means of fastening the arms to the plate, which is the invention, is no factor in the selling of the coffin handles, and this fact must be considered in fixing the amount.

Exhibit 21 gives the profit the plaintiff claims it would have made on each unit (dozen or sets) and also the number of units, from which I can get the profit per unit. I am not forgetting that this document gives more units than the number as to which infringement is claimed, and that the plaintiff has neglected to consider the selling cost, but as I am using the information on this document solely to arrive at an average profit per unit, it will suit my purpose. The total number of dozens sold (Ex. 21) is $2,002\frac{5}{12}$ and the total number of sets is 27,016. The total profit from the sale of dozens is \$2,854.68 and the total profit from the sale of sets is \$19,199.72. Dividing the total dozens into the total profit on the same will give me an average profit per dozen, namely, \$1.42 $\frac{1}{2}$ and doing the same for the sets gives me an average profit per set of .518 cent. The number of dozens sold by the defendant for which a claim is made is 1,665.2 and multiplying this by the average profit per dozen, namely, \$1.42 $\frac{1}{2}$, gives a total profit on these sales of \$2,372.91. The number of sets sold by the defendant for which a claim is made is 28,389 and again multiplying this by the average profit per set, namely .518 cent, gives me a total profit on the sale of sets of \$14,705.50 or a total profit for both of \$17,078.41.

The question now is, what royalty is fair to allow to the plaintiff on sales representing such a profit, or what proportion of this profit would be fair to allow to the plaintiff as royalty on the said sales.

I do not consider myself bound by the above exact figures, but these calculations have been a great help to me in arriving at what I believe to be a proper royalty. This royalty I would fix at 10% of the above mentioned profit, namely, \$1,707.84, as a fair royalty under the circumstances in this case, and, acting as a jury, I find that

the said sum of \$1,707.84 is a fair compensation for the use by the defendant of the invention covered by the patent in suit.

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