

Case No. 4,830a. FISK ET AL. V. WEST BRADLEY & CARY MANUF'G CO.  
[19 O. G. 545.]

Circuit Court, S. D. New York.

April 29, 1880.

PATENTS—BILL TAKEN PRO CONFESSO—PROOF OF DAMAGE—NOMINAL DAMAGES—COSTS.

1. Where a bill is taken pro confesso and the case referred to a master to ascertain the complainants' damages and the defendants' profits arising from infringement of a patent, and the complainants fail to make satisfactory proof thereof before the master, he can report only nominal damages against the defendants.
2. In such case, if the complainants except to the master's report and their exceptions are overruled by the court, they will be allowed costs to and including the interlocutory decree; but the defendants will be allowed costs thereafter, the one to be set off against the other to the extent of its amount, and the excess to be recovered of the party against whom it exists.

Master's report: This case does not come to the master after a final hearing upon pleadings and proofs, but upon a decree entered under an order taking the bill pro confesso. The decree therefore does not inform the master precisely in what the infringement consists or what particular suspender-ends made and sold by the defendant come within the reference to ascertain the damages sustained by the plaintiffs or the profits made by the defendant. The plaintiffs have produced before the master three several exhibits, marked, respectively, "C," "F," and "Y," alleged to have been purchased from the defendant, and which they claim infringe the patents upon which this suit is brought, and for the manufacture and sale of which and others like them damages are claimed. The infringement is denied by the defendant. Experts have been examined before the master upon this point, and, as is usual in such cases, differ in opinion. It is not deemed necessary by the master to determine this question of difference, for in the view of the case taken by him it is immaterial. The complainants have been unable to show satisfactorily what number of suspender-ends like Exhibits C, Y, and F the defendant has made and sold, and hence no information is furnished upon which any estimate can be made either of the profits, if any, made by the defendant or of any damages sustained by the complainants. The master is compelled, therefore, to report that the complainants are entitled to recover but the nominal damages of six cents.

W. A. Coursen, for plaintiffs.

M. B. Andrus, for defendant.

BLATCHFORD, Circuit Judge. I see no sufficient grounds for interfering with the report of the master in this case, and the plaintiffs' exceptions to the report are overruled.

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The plaintiffs are entitled to the costs of the cause to and including the interlocutory decree, and the defendant is entitled to recover its costs from and after such decree, the one bill to be set off against the other and the difference to be recovered by the party against whom it exists.