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WOOSTER *v.* SIMONSON and another.

Circuit Court, S. D. New York.

June 6, 1883.

1. PATENT LAW—INFRINGEMENT—MEASURE OF DAMAGES—RULE ALLOWING LICENSE FEE.

Following the general rule in giving damages for the infringement of a patent, to allow the amount accustomed to be charged by the patentee as a license, such established license is, nevertheless, not the correct measure of damages in a case where only one of several claims of a patent was appropriated by the infringer.

2. SAME.

The rule cannot be applied without qualification, and where less than the whole invention has been infringed, evidence must be given to show the nature of the part appropriated.

Exceptions to Report of Master.

Betts, Atterbury & Betts, for complainant.

Wetmore, Jenner & Thompson, for defendants.

WALLACE, J. The master has reported as damages the sum complainant has been accustomed to charge as a license fee for the use of his invention, while the proofs show that only one claim, the second, of the six claims of the patent has been infringed by defendant. Although several of the six claims may be for substantially the same invention, others are for different combinations. It must be held that the established license fee for the use of the entire invention secured by the six claims of the patent is not the correct measure of damages where the defendant has not infringed all the claims. The proofs show what damages the complainant would have sustained if the defendant, instead of appropriating a part of the invention, had appropriated the whole of it.

When damages are sought by a patentee against an infringer, his inquiry, as in all other cases where a plaintiff's right of property has been invaded, is what is the value of the right, and the extent of the injury. If the injury amounts to a deprivation or appropriation of the entire right of property in a patent, the value of the patent is the measure of damages. An established license fee is competent and satisfactory evidence of the value of a patent-right, because the price which it commands between those who sell and purchase it is the best criterion of value. When a patentee uses his monopoly by selling to

others the privilege of using it, the law deems him completely indemnified if an infringer is required to pay him the sum which he has himself fixed as the value of the privilege.

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Obviously, however, the value of the entire property in an invention, as of the right to use the whole invention, does not furnish a criterion of the value of a part, or of the right to use a part, in the absence of evidence to show the relative difference in value between the part and the whole. Accordingly it has been held that, when an established license fee may be the measure-of damages against an infringer, in favor of a patentee, the rule cannot be applied without qualification, and when the use by the infringer has been a limited one, for a short time, it is erroneous to charge him with the whole license fee. *Seymour* v. *McCormick,* 16 How. 480-490; *Birdsall* v. *Coolidge,* 93 U. S. 64.

Although the patent secures to the patentee the whole invention as described and claimed, the several claims may secure him against quite different and distinct appropriations of his property. Where less than the whole invention has been infringed, evidence must be given to show the nature of the part appropriated.

The fourth exception is sustained. The other exceptions are without merit. The case is referred back to the master, with liberty to the complainant to reopen his proofs.