

BETWEEN:

ALLOY STEEL AND METALS }
COMPANY }

PLAINTIFF;

AND

A-1 STEEL AND IRON FOUNDRY }
LTD. }

DEFENDANT.

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Apr. 22, 23,
24, 27, 28
1964
Jan. 29

Patents—Infringement—Validity—Patent Act, R.S.C. 1952, c. 203, ss. 48 and 63(1)—Onus of proving invalidity—Combination patent—Obviousness—Novelty—Prior user—When evidence to establish prior user to be carefully scrutinized.

This is an action for infringement of the plaintiff's rights under Canadian Letters Patent No. 536,662 of which it is the owner. The defence is a denial of infringement and an attack on the validity of the patent based on allegations of obviousness and lack of novelty. The invention in issue relates to a slushing scraper or materials handling bucket used to handle a wide range of materials generally in mines and excavations and on grading and construction work.

Held: That the onus of proving the invalidity of a Canadian Patent lies on the party attacking it and is not an easy one to discharge.

2. That the fact that many of the elements in the claims are old has no bearing on the question whether the combination is old or obvious and the fact that the development of scrapers extended over a long period and went through a process of evolution does not prove that the making of the plaintiff's slusher scraper was obvious.
3. That the question whether an alleged invention is obvious is a question of fact and exclusively a matter for the Court.
4. That the whole history of the development of the plaintiff's slusher scraper, with its visits to mines, its discussions, the drawing of models, the experiments made and the resulting achievement show skill and imagination and a large measure of inventive ingenuity, and the contention that the development could have been made by a mechanic is wholly unjustified.
5. That it is well established that the Court should carefully scrutinize evidence seeking to destroy a useful patent on the ground that there has been a prior user of the invention for which it was granted.
6. That the attack on the validity of the plaintiff's patent on the ground of prior user fails because the prior user sought to be established by the defendant was not of a public nature in the sense that it had become available to the public as is required by s. 63(1) of the *Patent Act*, and because the defendant's scraper was not a prior user in any event since it did not and could not perform the purpose which the plaintiff's slusher scraper was able to serve.
7. That the evidence is conclusive that the defendant deliberately copied the plaintiff's slusher scraper and then made changes in it and the defendant, therefore, has infringed the plaintiff's rights under the patent in suit, such changes as were made by the defendant not being such as to alter the fact of infringement.

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ACTION for infringement of a patent.

The action was tried by the Honourable Mr. Justice Cameron at Vancouver.

C. C. I. Merritt for plaintiff.

H. C. W. Saunders for defendant.

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

CAMERON J. now (January 29, 1964) delivered the following judgment:

This is an action for infringement of the plaintiff's rights under Canadian Letters Patent No. 536,662, dated February 5, 1957, issued to Paul R. Francis, the inventor of the invention claimed therein, and assigned by him to the plaintiff.

The plaintiff is a company incorporated under the laws of the State of California in the United States of America and has its head office at Los Angeles in the said state. The defendant is a corporation incorporated under the laws of the Province of British Columbia and has its head office at Vancouver in the said province.

The defendant attacks the validity of the plaintiff's patent and denies that it has infringed the plaintiff's rights under it.

The specification states that the invention has to do with a slushing scraper such as is usually operated by a line and which may be used to handle a wide range of materials under various working conditions. The specification then states:

It is a general object of the present invention to provide a slushing scraper having simple, effective, replaceable wear taking parts that are dependable and durable, and which are so mounted as to be easily and quickly removed for repair or replacement.

and it describes slushing scrapers as follows:

Slushing scrapers or material handling buckets are commonly operated by drag lines and are used generally where material is to be handled, as, for instance, in mines, excavations, on grading and construction work, etc. The usual slushing scraper is dragged or operated through bodies of material or in trough-like grooves or channels with the result that there is a marked tendency for the corners, that is, the lower forward portions of the scraper, to wear excessively.

The other objects of the invention are stated as follows:

It is a general object of this invention to provide a scraper or bucket-like structure with replaceable or renewable blades at the wear taking

parts or points, which blades effectively protect the basic structure or body of the scraper at the lower forward portions, where maximum wear usually occurs.

Another object of this invention is to provide a scraper construction of the general character referred to having a simple, effective, dependable blade construction with mounting means that securely retain the blades and which can be operated easily and quickly when it is desired to replace or renew the blades.

Another object of the invention is to provide blades separate from the body so that the blades can be made of a tough, wear resistant material, while the body, not being subjected to as much wear as the blades, can be made of a softer, less wear resistant, and cheaper material.

The consistory clause of the specification describes the invention as follows:

The structure in which the invention is incorporated involves, generally, a body with a bottom, back and sides. A rear line connection is provided at the back or rear of the body and a forward line connection is provided at the front of the body. The forward line connection is in the nature of a yoke with a head at its forward end and with arms that diverge from the head and have their outer ends connected to the sides of the body. The yoke is sectional, being divided through the head, and an insert in the form of a plate is connected between the head sections, the head sections and plate being secured together by bolts. The plate has a forwardly projecting apertured part that carried a pin that holds a shackle. The rear or outer ends of the yoke arms are joined to the sides of the body where bosses occur. The bosses have channels with inwardly converging walls and extension of the arms are wedge-shaped and fit into the channels. Bolts connect the sides and the extensions of the arms and where these parts are connected inwardly projecting anchor lugs on the extensions of the arms engage in openings in the sides of the body and relieve the bolts of shearing strain.

The invention provides blades at the forward working or wear-taking parts of the body. In the preferred form I provide one or more centre blades at the leading edge portion of the bottom and corner blades continuing from the ends of the center blade or blades as the case may be. The corner blades extend up at the forward portions of the sides of the body where these parts join the bottom. The blades have forwardly converging digging parts and rear shank portions that are channeled and receive the forwardly projecting portions of the body. Each blade is held by a tongue projecting rearwardly therefrom into a recess in the body where it is held by a key, the ends of which are accessible through openings in the body. A feature of the construction is the formation of each corner blade and the manner in which it is related to the body parts so that the body is effectively protected and so that the blade affords a forwardly projecting tip or wear taking part about which the bucket may be rocked. The configuration or extent of the tip may be varied to meet various working conditions.

Evidence for the plaintiff was given by Mr. Paul R. Francis, the plaintiff's president and general manager and the inventor of the invention in suit, and Mr. John M. McKean, the plaintiff's manager of mining sales, and for the defendant by Mr. Stewart V. McDonald, a practical

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engineer in the defendant's employ and one of its directors, Mr. Charles H. Watters, a pattern maker in the defendant's employ, Mr. Lovick P. Young, a metallurgist in the defendant's employ and the supervisor of its foundry and general production, Mr. John A. C. Ross, a mining engineer, and Mr. Thomas R. I'Anson, the defendant's president.

Mr. Francis gave a detailed review of the development of the plaintiff's scrapers of various types. It had made scrapers of what is called the hoe type up to about 1945 when it abandoned their production and then began the production of what is called the bucket type. A drawing, dated February 13, 1946, showed the germ of the idea which developed into the first assembly of a cast scraper produced by the plaintiff, as shown by a drawing, dated May 20, 1956, filed as Exhibit 17. This scraper, to which further reference will be made later, was known as a drag scraper and was sold as the Pacific Drag Scraper. It was not satisfactory, as will be shown later, and Mr. Francis then designed a scraper known as the Slusher Scraper for which a patent was obtained, first in the United States and then in Canada. As stated, the plaintiff is now the owner of the Canadian patent by virtue of an assignment to it by Mr. Francis.

A photograph showing the plaintiff's slusher scraper was filed as Exhibit 3. It shows the parts of the flusher scraper, the harness, the bucket, the left and right side cutters (blades), a front support, blades, keeper pins, shackle and back-haul lugs. The front view of the scraper in its in-haul digging position shows the bottom, the side, the back and the top or lifter plate. The rear view shows the in-haul dragging position and the front view its out-haul or back-haul position.

After the plaintiff had produced its slusher scraper it had substantial commercial success. Mr. Francis stated that the plaintiff produced approximately 50 per cent of the slusher buckets used in mines, excluding coal mines and confined to hard rock mines. It had sold about 500 of its scrapers in Canada and thousands of them in the United States. It had sold its scrapers in Cyprus and in Morocco in North Africa.

There is no doubt about the utility of the plaintiff's invention. This was admitted by Mr. Ross who stated that the scraper was a considerable advance over previous designs.

As already stated the defendant's defence to the action consisted of attacks on the validity of the plaintiff's patent and denial of the charge of infringement.

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In its particulars of objection to the validity of the plaintiff's patent the defendant pleaded lack of novelty in the invention, lack of what it called subject matter in it and ambiguity in the specification.

It is established by a long line of decisions by the President of this Court that the onus of proving the invalidity of a Canadian patent lies on the party attacking it. Section 48 of the *Patent Act* provides for its *prima facie* validity as follows:

48. Every patent granted under this Act shall be issued under the signature of the Commissioner and the Seal of the Patent Office; the patent shall bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid and avail the grantee and its legal representatives for the term mentioned therein

The effect of this statutory provision for validity was first referred to by the President in *The King v. Uhlemann Optical Company*¹. Since then he has referred to it in several cases, particulars of which were given in *The McPhar Engineering Company of Canada Ltd. v. Sharpe Instruments Limited et al.*² His latest reference to it was in *Lovell Manufacturing Company and Maxwell Limited v. Beatty Bros. Limited*³. It is now established law that the onus of proving that a patent is invalid which rests on the party attacking it is not an easy one to discharge. It can be discharged only by evidence that is credible and substantial enough to satisfy the Court that the patent is invalid.

The defendant did not attempt to show that there is any ambiguity in the specification or the claims in suit. He confined his attacks to the charges that the patent is invalid for lack of subject matter and lack of novelty in the invention for which it was granted.

In support of the plea that the alleged invention did not at the date thereof constitute proper subject matter for the grant of a valid patent counsel for the defendant contended that all the changes that the plaintiff had made in its scraper could easily have been made by a mechanic. He relied on the evidence of Mr. Francis that the elements in the claims

¹ [1950] Ex. C.R. 152 at 161

² (1960) 21 Fox Pat. C. 1 at 27.

³ (1963) 23 Fox Pat. C. 112 at 137.

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were individually not new and that the majority of them represented old, well tried practices, and the evidence of Mr. Ross that the matter of buckets showed a long process of evolution, and the patents filed by him showing that all the buckets referred to in them were members of the same family. He submitted that anyone, who was familiar with buckets or the scrapers that were on the market prior to February, 1951, the date of the application for the plaintiff's patent could take the Ingersoll Rand publication on "Modern Methods for Scraper Mucking and Loading", filed as Exhibit 4, and find in it all the general essentials of the claims in suit. His submission, put simply, was that the scraper described in the plaintiff's patent was merely a development of the existing models that were available on the market and that any mechanic suitably trained with a knowledge of the requirements of mines could have produced the plaintiff's slusher scraper and that, consequently, as he put it, there was a lack of subject matter in the invention in suit.

There is no substance in counsel's submission. The fact that many of the elements in the claims were old has no bearing on the question whether the combination was old or whether it was obvious. And the fact that the development of scrapers extended over a long period and went through a process of evolution does not prove that the making of the plaintiff's slusher scraper was obvious. In this connection, I refer to the admonition expressed by Fletcher Moulton L.J. in *British Westinghouse Electric and Manufacturing Ltd. v. Braulik*¹ where he said:

I confess that I view with suspicion arguments to the effect that a new combination, bringing with it new and important consequences in the shape of practical machines, is not an invention, because, when it has been established, it is easy to show how it might be arrived at by starting from something known and taking a series of apparently easy steps. This *ex post facto* analysis of inventions is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law.

This statement was approved by Lord Russell of Killowen in the House of Lords in *Non-Drip Measure Corp., Ltd. v. Strangers, Ltd., et al.*² And in the same case he said, also at page 142:

Nothing is easier than to say, after the event, that the thing was obvious and involved no invention.

¹ (1910) 27 R.P.C. 209 at 230.

² (1943) 60 R.P.C. 135 at 142.

And Lord MacMillan said, at page 143:

It might be said *ex post facto* of many useful and meritorious inventions that they are obvious. So they are after they have been invented.

Moreover, the plea of obviousness of the invention in suit is frequently the last resort of the infringer.

The question whether an alleged invention was obvious is a question of fact and exclusively a matter for the Court.

The plaintiff's bucket type mining scraper with its cutting blades forward of the sides of the bucket and designed to pivot around the blades as the fulcrum point as it moved from its digging position to its carrying position and on its back-haul position was, although no part of it was new, a new patentable combination. It could work in any kind of ore, had digging, loading and carrying power, ensuring speedy digging into the ores, and it was designed to save wear and tear.

The contention that the designing of such a scraper was obvious should be summarily rejected. The changes in the design from the drag scraper, to which I shall later refer, to the slusher scraper covered by the patent, with its resulting change of character of the scraper was not obvious. It is not necessary, under the circumstances, to refer to the details of the changes that were made. The whole history of the development of the plaintiff's slusher scraper, with its visits to mines, its discussions, the drawing of models, the experiments made, and the resulting achievement showed skill and imagination and a large measure of inventive ingenuity. The contention that the development could all have been made by a mechanic was wholly unjustified.

The defendant has failed to prove that the plaintiff's invention was obvious. Indeed, the evidence is overwhelming that it was not obvious. Consequently, the attack on the validity of the patent for lack of inventive ingenuity fails.

The defendant's attempt to invalidate the plaintiff's patent for lack of novelty in the invention for which it was granted requires more consideration than its contention that the invention was obvious. In the course of the trial counsel for the defendant filed several patents for the purpose of showing that various elements in the invention defined in the claims in suit were old, but he did not attempt to put forward any of the patents as a prior publication of the

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invention. It was not anticipated by any of the inventions defined in the said patents.

Counsel sought to prove that there had been a prior user of the invention by the defendant and that this made the plaintiff's patent invalid for lack of novelty in the invention. He frankly admitted that this contention was the defendant's principal defence to the action.

In order to succeed in this defence the defendant had to prove that its alleged prior user came within the ambit of section 63(1) of the *Patent Act*, R.S.C. 1952, Chapter 203, which provides as follows:

63. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been used by some other person, unless it is established either that,

(a) before the date of the application for the patent such other person had disclosed or used the invention in such manner that it had become available to the public, . . .

It was admitted that the application for the plaintiff's patent was made in February, 1951. Consequently, it was incumbent on the defendant to prove that the prior user on which it relied was made by it prior to that date and made in such manner that it had become available to the public.

It is well established that the Court should carefully scrutinize evidence seeking to destroy a useful patent on the ground that there had been a prior user of the invention for which it was granted. This salutary caution was expressed by Ashbury J. in *Boyce v. Morris Motors Ltd.*¹ in the following terms:

When a patent, especially one of a simple character has proved a commercial success, evidence of alleged prior user requires and ought to receive very careful scrutiny.

Counsel for the defendant contended that early in 1948 the defendant had produced in its shop a scraper, or bucket, that amounted to a prior user of the plaintiff's invention and that in 1948 and 1949 it had produced in its foundry and sold between six and a dozen of such scrapers.

In support of this contention counsel relied on a drawing or tracing made by Mr. McDonald, filed as Exhibit A. This was made in January, 1951, but Mr. McDonald put the date

¹ (1927) 44 R.P.C. 105 at 135.

of May 15, 1946, on it. I summarize his evidence relating to this drawing or tracing. It was of the first type of slusher buckets made by the defendant. He took it from one of the first type of buckets "we have in the shop". He made the drawing "off the old bucket itself" to show the type of bucket that the defendant started with. It was a drawing of the first bucket that the defendant produced. Mr. McDonald explained his reason for putting the date of May 15, 1946, on the drawing, although he had made it in January, 1951, by saying that Mr. I'Anson, the defendant's president, had asked him to get out a drawing of the first bucket made by the defendant for his use on his forthcoming examination for discovery in this action, which took place on March 6, 1959, and that when he made the drawing he put the date of May 15, 1946, on it as the date on which, according to his memory, the defendant first commenced to make the pattern for the bucket of the type referred to. He admitted that anyone looking at Exhibit A would think that the drawing had been made on the date it bore and was in existence then. On his cross-examination, he admitted that there was no record of any buckets having been produced by the defendant in 1946 or 1947. He also stated that an old sample of the plaintiff's Pacific Scraper had been sent in to the defendant from the Gardiner-Denver Company "in about 1947 I think, or '46 or '47, it was early", and that the defendant used it and "made a pattern off that bucket with certain modifications". It is clear from this evidence that Mr. McDonald's date of May 15, 1946, was wrong and it would be a fair inference that the "old bucket" from which he said he made Exhibit A was made after the defendant had received the "old sample" of the plaintiff's Pacific Scraper. On his cross-examination, Mr. McDonald was shown photographs, subsequently filed as Exhibits 28A, 28B and 28C, showing two of the defendant's scrapers and said that Exhibit A represented the smaller one. Exhibit 28A shows front views of the defendant's two scrapers, the larger one representing the scraper said to infringe the patent and the smaller one representing the scraper alleged to be the prior user of the invention, and Exhibit 28B shows rear views of the two scrapers.

Counsel also relied, as he said, above all, on the admission of the plaintiff. He had in mind the statement of Mr. Francis on his examination for discovery, which he read

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into the record. When Mr. Francis was shown Exhibit A he stated that the drawing was of a previous model made by the defendant, but "not the one we are making presently" and not the same as the one described in the patent. Later, on his examination for discovery, he said that the plaintiff first made scrapers similar to the design of Exhibit A somewhere about 1945. This was an approximation. At the trial he gave more precise information about the date and said that the first assembly of a cast scraper made by the plaintiff was made according to a drawing, filed as Exhibit 17 and dated May 20, 1946. This scraper went into production soon afterwards. The defendant sold the first one "along about in June of 1946". This was known as a "drag scraper". A brochure describing it was printed in January of 1947, which was filed as Exhibit 18. This scraper was known as the Pacific Drag Scraper. It would be reasonable to infer that the "old sample" of the plaintiff's Pacific Scraper to which Mr. McDonald referred was of the type produced by the plaintiff in June of 1946 and advertised in its brochure of January, 1947.

Basically on this evidence counsel for the defendant contended that the evidence disclosed that the scraper of which Exhibit A was said to be a drawing, was on the market in the United States in 1947 and in Canada in 1948, that it embodied all the essential features of the plaintiff's slushing scraper, any differences being unsubstantial. It was submitted that the defendant had in its shop an old worn out sample of a scraper of a model formerly produced by the plaintiff, that it had produced and sold scrapers of that type in Canada, that this amounted to a prior user by the defendant of the invention in suit and that, consequently, the plaintiff's patent is invalid.

In my opinion, there is no support for the attack on the validity of the plaintiff's patent on the ground taken by counsel.

There are two reasons for this conclusion. Section 63(1) of the Act clearly requires that if a prior user of an invention is to invalidate a patent it must be of a public nature in the sense that it had become available to the public. The evidence does not meet this requirement. Even if it should be conceded that the defendant's first scraper was copied from the plaintiff's scraper of the first type produced by it, according to the drawing filed as Exhibit 17 and dated

May 20, 1946, a sample of which was acquired by the defendant, as stated by Mr. McDonald, there is no credible evidence of any sales of such scraper prior to February, 1951, or of any use of it prior to such date in such manner that it had become available to the public. The evidence adduced on behalf of the defendant's contention was not of the kind that would warrant the invalidation of the plaintiff's patent.

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There is a stronger reason for rejecting counsel's contention. It was established that the defendant's small scraper, of which Exhibit A was said to be a drawing and which was shown in Exhibits 28A and 28B, was not in fact a prior user of the plaintiff's invention in any sense of the term. It did not, and could not, perform the purpose which the plaintiff's slusher scraper was able to serve. Mr. Francis stated that soon after the plaintiff's drag scraper came into production complaints came in that it could not do what was intended for it. The main defect in it was that it did not gather in and move the load of broken ore. The scraper was "sledding", meaning thereby that it did not start to gather its load of ore but slid over it. In order to overcome this defect Mr. Francis rebuilt the side cutters and blades. This was an improvement but complaints continued to come in about several matters, such as the welding, bolts coming loose and difficulties in replacing the blades. Finally, the plaintiff brought out a completely revised and redesigned scraper and found that it could control the digging of the ore and taking the load and carrying it when and where desired. The new scraper was a commercial success. In February, 1951, the plaintiff applied for a patent for its new scraper and it was issued in due course. The drag scraper did not work and the plaintiff ceased producing it. Mr. McKean confirmed the evidence given by Mr. Francis. He found that it was practically impossible for the plaintiff's drag scraper to get a full load because of its gliding over the top of the ore instead of cutting into it. Mr. Francis then designed the scraper which was subsequently patented. Mr. McKean said that if the change had not been made the plaintiff would have been out of the scraper business. He was shown the photographs, filed as Exhibits 28A, 28B and 28C, and said that the small scraper shown on Exhibits 28A and 28B would run into the same trouble that the plaintiff ran into with its drag scraper. He was

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asked to compare the small scraper with the plaintiff's drag scraper and said that, while there were some differences, he found that there was no difference in principle between them. The defendant's small scraper was "our old drag design". It is significant that Mr. McKean was not cross-examined on the matters referred to.

I accept the evidence of Mr. Francis and Mr. McKean and find, without hesitation, that the defendant's small scraper was not in any sense an anticipation of the plaintiff's invention. It could not reasonably be said that its use by the defendant, if there was any, was a prior user of the invention in suit. The defendant has therefore failed in its attempt to invalidate the plaintiff's patent for failure of novelty in the invention for which it was granted.

It follows that all the factors necessary for a valid patent are present. In the terms frequently used by the President of this Court the necessary attributes of patentability, namely, novelty, utility and inventive ingenuity, are present in the invention in suit. I find, therefore, that as between the parties the claims in suit are valid.

This leaves only the issue of infringement. In my opinion, the evidence clearly established that the defendant infringed the plaintiff's rights under its patent. The large scraper which it manufactured, as shown on Exhibits 28A, 28B and 28C, was a straight copy of the plaintiff's Slusher Scraper with some differences, such as in the ribbing at the back, in thickness and material, in the mode of the attachment of the blade, in the design of the corner blade and in the design of the arms of the yoke. But these differences were not sufficient to distinguish it from the patented scraper.

There was evidence that the defendant copied the plaintiff's machine and its brochures and had access to the plaintiff's information about its machine. The Court is not concerned with what the defendant did prior to the issue of the plaintiff's patent, on February 5, 1957, but it is clear that the defendant manufactured its large scraper in 1958. A comparison between the scraper shown in Exhibit 3, the plaintiff's scraper, and the larger scraper shown in Exhibits 28A, 28B and 28C, the defendant's large scraper called Ianco, shows a striking similarity in shape. As counsel for the plaintiff put it, "To the eye they are alike as two peas. Of course they are: They are copied." Mr. Ross was unable to make any distinctions between the two scrapers except

some mechanical ones. Mr. McKean said he could not see any difference in principle between the two scrapers. The only differences were differences in detail. Mr. McKean gave evidence that he had seen the defendant's large scraper on several occasions but the Court is not concerned with what he saw on any occasion prior to the date of the patent. But his evidence of what he saw early in May of 1958, in the mine of the Consolidated Dennison Mining Company at Elliott Lake is important. There he saw two large Ianco Scrapers made by the defendant. They had just arrived. Mr. McKean said that he would have taken them for the plaintiff's scrapers until he walked up close enough to see the mode of attachment of the side cutters and blades. I accept Mr. McKean's evidence. In my opinion, the evidence is conclusive that the defendant deliberately copied the plaintiff's Slusher Scraper and then made some changes in it. I find, therefore, that the defendant did infringe the plaintiff's rights under the patent in suit. The differences it made did not alter the fact of infringement.

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It was agreed between the parties that if the plaintiff's action should be upheld there would be the usual reference as to damages.

There will, therefore, be judgment in favour of the plaintiff for the relief sought by it except that as to damages, if the parties are not able to reach an agreement as to its amount, there will be a reference to the Registrar or a Deputy Registrar of this Court to determine the amount of such damages or profits, as the plaintiff may elect, and judgment for the amount found on such reference. The plaintiff will, of course, be entitled to costs to be taxed in the usual way.

Judgment accordingly.