

1936  
 \*May 27, 28,  
 29, 30,  
 \*Nov. 27.

COLONIAL FASTENER COMPANY, }  
 LTD., AND G. E. PRENTICE MANU- }  
 FACTURING COMPANY (DEFEND- }  
 ANTS) . . . . . } APPELLANTS;

AND

LIGHTNING FASTENER COMPANY, }  
 LTD. (PLAINTIFF) . . . . . } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Patent—Damages for infringement—Matters and items of damages—Sale of product of infringing machine—Invention for manufacturing stringers to be used in fasteners—Loss caused from sales of completed articles (fasteners) made from stringers made on infringing machines—Damages for loss of profit on sales lost—Damages by way of royalty—Damages for loss from reduction in sale price—Pleadings—Raising question of right under s. 47 (6) of Patent Act (R.S.C. 1927, c. 150) on assessment of damages after judgment, when facts relied on not pleaded and proved in the action for infringement.*

The sale of the product of an infringing machine is not too remote upon which to found a claim in damages, under s. 32 of the *Patent Act* (R.S.C. 1927, c. 150), by the owner of the patent of the machine infringed.

The object of the patented invention was to manufacture stringers to be used in fasteners.

*Held*: Plaintiff (owner of the patent) could not be properly compensated for infringement by reference only to the manufacturer's cost and sale price of the stringers and without regard to the cost and sale price of the completed articles (fasteners); the stringers were of importance only in their use in fasteners and what plaintiff lost was sales of fasteners; the principle set forth in *Meters Ld. v. Metropolitan Gas Meters Ld.*, 28 R.P.C. 157, should be applied; plaintiff was entitled to damages for loss sustained by reason of defendant's sales of fasteners from stringers made on infringing machines.

*Held*, further: On the evidence (and applying the "broad axe" referred to by Lord Shaw in *Watson v. Pott*, 31 R.P.C. 104), had defendant not sold such fasteners, plaintiff would have sold 60 per cent. of the number actually sold by defendant; and plaintiff was entitled by way of damages to the profit it would have made on what it would have sold as aforesaid. It was so entitled, even were it shown that in the period of infringement it did not manufacture stringers on its patented machine; it was deprived of the opportunity of using its patented machine to produce stringers for the said 60 per cent. As to the 40 per cent. of defendant's sales which plaintiff would not have made, plaintiff was entitled to damages by way of royalty (*Watson v. Pott*, 31 R.P.C. 104, at 120; *United Horse Shoe & Nail Co. v. Stewart*, 5 R.P.C. 260, at 267).

\*Present at the hearing:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ. Cannon J., through illness, took no part in the judgment.

Damages were awarded also for loss to plaintiff by reason of reduction by defendant in the sale price of such fasteners (forcing reduction by plaintiff) (*American Braided Wire Co. v. Thomson*, 7 R.P.C. 152); but not where plaintiff was the first to act, even were plaintiff induced to act by its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from defendant—a claim for damages in such a case was too remote.

In the interval between lapse of plaintiff's patent for non-payment of fees and publication of notice of application to restore it, defendant shipped into Canada fasteners (not taken into account in plaintiff's statement of damages) made in the United States on machines identical with machines held to constitute infringement of the patent. On an assessment of damages, after judgment had been given for plaintiff in an action for infringement, defendant claimed that by virtue of the operation of s. 47 (6) of the *Patent Act*, it obtained the right to use the invention in Canada. *Held*, that the facts should have been pleaded and proved in the patent action as a defence, and it was now too late to raise the question on the assessment of damages.

APPEAL by the defendants, and cross-appeal by the plaintiff, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), confirming, subject to a certain reduction in the amount of damages, the report of the Registrar of that Court (2) as to the damages which the plaintiff was entitled to recover from the defendants by reason of infringement of patent.

The action was for damages and other relief for alleged infringement of the plaintiff's patent, which was for machines and methods for producing straight and curved fastener stringers. By the judgment of the Exchequer Court of Canada (Maclean J. (3)), it was adjudged that the plaintiff's letters patent were valid, and infringed by the defendants; and (besides injunction, etc.) a reference was directed to the Registrar of the Court as to the damages recoverable by reason of the infringements, or as to the profits made by the defendants by reason of the infringements, as the plaintiff might elect before the Registrar. (The plaintiff subsequently elected to take damages.) This judgment was reversed by the judgment of the Supreme Court of Canada (4); but was restored by the judgment of the Judicial Committee of the Privy Council (5), subject to a variation that the declaration of validity made and the injunction and other relief granted be limited to certain claims.

(1) [1936] Ex. C.R. 1.

(3) [1932] Ex. C.R. 89.

(2) [1936] Ex. C.R. 1, at 12-38.

(4) [1933] Can. S.C.R. 363.

(5) (1934) 51 R.P.C. 349.

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.

By the report of the Registrar of the Exchequer Court of Canada as to damages (1), he recommended that judgment be rendered for the plaintiff in the sum of \$50,663.26. The report of the Registrar was confirmed by the judgment of Maclean J., President of the Exchequer Court of Canada (2), subject to the variation that the amount of damages which the plaintiff should recover be reduced by the sum of \$3,117.56 allowed by the Registrar as damage due to forced reduction in plaintiff's selling price.

The defendants appealed to the Supreme Court of Canada; and the plaintiff cross-appealed (against said disallowance of \$3,117.56, and for increased damages).

By the judgment of this Court, now reported, the defendants' appeal was dismissed with costs; the cross-appeal was allowed to the extent of the said sum of \$3,117.56, also with costs; the order of the President of the Exchequer Court in respect of the costs of the reference and of the costs of the appeals to him to stand.

*S. A. Hayden K.C.* and *James Woods Walker* for the appellants.

*O. M. Biggar K.C.* for the respondent.

The judgment of Rinfret, Crocket, Kerwin and Hudson JJ. (Cannon J., through illness, took no part in the judgment) was delivered by

KERWIN, J.—This is an appeal by the defendants and cross-appeal by the plaintiff from the judgment of the Exchequer Court (2) which, with one deduction, affirmed the report of the Registrar of that Court as to the damages suffered by the plaintiff by reason of the defendants' infringement of claims 1, 2, 3, 7, 8, 10 and 19 of the plaintiff's patent of invention. By an order of His Majesty in Council, approving the report of the Judicial Committee of the Privy Council, the original judgment of the Exchequer Court in this action (which had been reversed in this Court) was restored, subject to the variation that the declaration of validity made and injunction and other relief granted were limited to these claims.

The patent was for a new and useful improvement in a machine and method for producing fastener stringers.

(1) [1936] Ex. C.R. 1, at 12-38. (2) [1936] Ex. C.R. 1.

Claim 1 may be taken as representative of the machine claims held valid and is as follows:

A machine for making fasteners having means for feeding a tape step by step, means for feeding fastener members into position to be compressed on to said tape, and means for compressing the fastener members thereon.

Claim 19, dealing with the method, reads:

19. The method of making fasteners consisting in affixing jaw members in spaced groups on a continuous stringer in predetermined number and spacing, and cutting the stringer so that pairs of said groups co-operate in forming a fastener.

While the terminology used is not always exact throughout, it will be noted that the patent was granted for a machine and method for making fastener stringers. A fastener stringer consists of a row (of predetermined length) of metal elements fastened to the edge of a tape. Later the tape is cut between each row, two rows are connected by a sliding member, top and bottom stops are attached, and the other edge of each of the two lengths of tape is sewn to each side of an opening which is desired to be closed. The completed article is known as a fastener and its commercial importance lies in the uses to which it may be adapted. The patent is not on the fastener.

One of the defendants, G. E. Prentice Manufacturing Company, is a manufacturer of fasteners in the United States of America. It made stringers for some of these fasteners on machines of the type held in this action to be an infringement, and in 1927 commenced shipping its product to Canada. In 1930 it shipped to Canada three infringing machines and leased them to its co-defendant, Colonial Fastener Company, Limited. Since then the Prentice Company has continued to ship fasteners into Canada, but in greatly reduced quantities, and the Colonial Company has manufactured fastener stringers on the infringing machines leased by them from the Prentice Company and for which they paid the latter a rental, and a royalty based upon the sale of the total number of fasteners in which were incorporated the fastener stringers so made. No claim is made in this action against the Prentice Company in connection with any stringers that may have been made on similar machines in the United States and used in fasteners shipped by it into Canada.

After securing particulars of the number and output of the three infringing machines, the plaintiff elected to claim

1936

COLONIAL  
FASTENER  
CO. LTD.  
ET AL.

v.

LIGHTNING  
FASTENER  
CO. LTD.

—  
Kerwin J.  
—

1936  
 COLONIAL  
 FASTENER  
 Co. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 Co. LTD.  
 ———  
 Kerwin J.  
 ———

damages. The plaintiff has its head office at St. Catharines, Ontario, and has been manufacturing and selling fasteners since 1925. It claims that every sale by defendants of a completed fastener, the stringers for which had been made on the infringing machines, meant a loss to it for which it is entitled to compensation, while the defendants contend:

- (a) That by the law of Canada the sale of the product of an infringing machine is not a wrongful act and that it is too remote upon which to found a claim in damages;
- (b) That even if that be not so, the stringers are the only product and that the sale price of the completed fasteners should not be considered;
- (c) That in any event the plaintiff, in fact, would not have sold all the fasteners that the defendants did and, in law, is not entitled to claim damages for any proportion of the defendants' sales.

It appears convenient to dispose now of (a) and (b), leaving (c) for consideration later.

(a) Admittedly the law in England is quite clear that the sale of the product of an infringing machine entitles the owner of the patent to damages for such sale. *United Horse Shoe and Nail Co. v. Stewart* (1). But it is urged that in England the Patent Act does not define the extent of the patent monopoly or the acts constituting infringement: that these continue according to the common law and that by the grant, "Our subjects" are commanded "that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same." Emphasis is placed on the words "directly or indirectly" and it is pointed out that they do not appear in section 32 of the *Patent Act*, R.S.C. 1927, c. 150. Section 32 is as follows:

32. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought.

(1) (1888) 5 R.P.C. 260, at 267.

I cannot find any difference in meaning between that wording and the phraseology of the English form of grant. If the damages claimed are not too remote, the wrongdoers must, as in every case of tort, compensate the injured party for such damages as he may have suffered. In my view the sale of the product of an infringing machine is not too remote.

*Collette v. Lasnier* (1), cited by counsel for the defendants, has no application. In that case there was no allegation or proof that the plaintiff suffered any loss or damage. He claimed baldly that defendants had realized a profit over and above the profits that would have been made without using the patented machine and demanded that extra profit as his damages. The Superior Court of Quebec granted the plaintiff as damages what the Court deemed to be the amount of such extra profit and the Court of Appeal affirmed that award. In this Court the lack of evidence of any loss or damage suffered by the plaintiff was pointed out, but rather than send the case back for a new assessment, the Court fixed the sum of one hundred dollars as the amount which the plaintiff should recover. This decision is not contrary to the views I have expressed.

(b) As to this branch of the defendants' contention, it suffices to remark that when one bears in mind that the object of the patentee's invention was, as expressed in his claims and specifications, to manufacture stringers to be used in fasteners, the plaintiff could not properly be compensated by reference only to the manufacturer's cost and sale price of stringers and without regard to the cost and sale price of the completed article. As has been pointed out previously, the stringers are of importance only in their use in fasteners and what the plaintiff lost was sales of fasteners. The principle set forth in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (2) should be applied. There the Court of Appeal had to consider the amount of damages the plaintiff was entitled to where the defendant infringed plaintiff's patents, one of which related to a particular kind of cam and spindle for opening the gas valve in a prepayment gas meter, and the other of which was for a particular kind of crown wheel in a like meter. It had been shewn before the Master and Eve J., to whom an appeal had been taken, that

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.  
 ———  
 Kerwin J.

(1) (1886) 13 Can. S.C.R. 563

(2) (1911) 28 R.P.C. 157.

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.  
 —  
 Kerwin J.

the plaintiff would have sold many more meters but for the defendant's intervention, and it was, therefore, awarded 13s. 4d. for the loss of profit on each of such meters. The Court of Appeal confirmed the judgment and made it clear that they agreed with the Master and with Eve J. that the proper method of assessing the damages was to take the profit on the sale price of the meters and not merely to consider the parts upon which the plaintiff held patents. Adopting this principle, the defendants' contention fails.

One other general defence raised by the defendant G. E. Prentice Manufacturing Company may be mentioned. The patent had been allowed to lapse for non-payment of fees on April 5th, 1927, and notice of the application to restore it was not published until June 11th of the same year. During the interval the defendant G. E. Prentice Manufacturing Company shipped into Canada fasteners made in the United States on machines identical with the machines held to constitute infringements of the patent. That defendant continued to make similar shipments from time to time, and it was urged that by virtue of the operation of subs. 6 of s. 47 of the *Patent Act*, R.S.C. 1927, c. 150, the Company obtained the right to use the invention in Canada. Sub-section 6 is as follows:

6. In any case where a patent which has become void is restored and revived as aforesaid and during the period when such patent was void and before publication of notice of hearing on an application for its restoration and revival as aforesaid, any person has commenced lawfully to construct, manufacture, use or sell in Canada the invention covered by such patent, such person may continue to construct, manufacture, use or sell such invention in as full and ample a manner as if such patent had not been restored and revived.

None of the fasteners included in any of these shipments so made by the Company from the United States were taken into account in the plaintiff's statement of damages. Without dealing with the plaintiff's submission that this defendant cannot rely on the manufacture in the United States as giving it the right to manufacture in Canada, I agree with the Registrar and President of the Exchequer Court that the facts should have been pleaded and proved in the patent action as a defence, and that it is now too late to raise the question on the assessment of damages.

Before referring to the items in the plaintiff's statement of damages, it should be mentioned that included therein is a claim for loss in connection with stringers made by

defendants on two machines, or as they are called in the statement, "divided machines"; that is, instead of all the operations required to produce a stringer being on one machine the operations were divided between two machines. However, it is clear that what the Privy Council held the defendants had infringed was "the general mechanical idea of combining in this class of work all the necessary operations in one machine" (1), and not a method carried out by two machines. The plaintiff points to Claim 19 and to the following remarks of Lord Tomlin (2):

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.  
 —  
 Kerwin J.

There remains for consideration Claim 19. This is a method claim. It is said to be anticipated by Aaronson's Patent; but, even if the method is limited to fixing members on to stringers, the claim is for something which had never been done before, namely, producing stringers fitted with identical members so that a pair of stringers can co-operate to form a complete fastener. Their Lordships think that this is a novel claim with ample subject-matter and is valid and has been infringed.

But this language must not be divorced from the remainder of the judgment. This shows that the monopoly the plaintiff secured was on a machine of the type indicated; with means for producing the results mentioned,—but always on one machine (1). Read thus, Lord Tomlin's remarks as to Claim 19 are clear and unambiguous and the plaintiff's cross-appeal on this branch of the case fails.

Omitting all reference to the "divided machines" and the figures relating thereto used by the plaintiff in its statement, this summary so far as pertinent to the case at bar would now appear as follows:

(1) Loss due to sales made by defendant of fasteners made in Canada on machines calculated on the price actually obtained by the plaintiff.....	\$87,593 72
(2) Loss due to first cut in minimum price calculated on defendant's sales.....	15,161 32
(3) Loss due to second cut in minimum price calculated on defendant's sales...	5,042 44
(4) Loss due to elimination of 5c. flat charge calculated on fasteners over 7½" lengths sold by defendant .....	1,210 50
(5) Loss due to first cut in minimum price calculated on plaintiff's actual sales of fasteners up to 7½".....	26,632 55

(1) 51 R.P.C. 349, at 367.

(2) 51 R.P.C. 349, at 368.



<p>1936 COLONIAL FASTENER Co. LTD. ET AL. v. LIGHTNING FASTENER Co. LTD.</p>	<p>(6) Loss due to second reduction of minimum price calculated on plaintiff's actual sales of fasteners up to 7½"....</p> <p>(7) Loss due to elimination of 5c. per piece on plaintiff's actual sales of fasteners over 7½" .....</p>	<p>4,636 54</p> <p>4,081 95</p>
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Kerwin J.

Item 1. The defendants admitted making and selling 742,901 fasteners from stringers made on infringing machines. I have already pointed out that the plaintiff is entitled to damages for any loss it sustained by reason of these sales. The first problem is to determine whether the plaintiff would have made all these sales and even a cursory examination of the evidence would indicate that this is clearly a case where the broad axe referred to by Lord Shaw in *Watson v. Pott* (1) should be applied. I have read all the evidence and, without attempting to analyse it, which the Registrar has done with great ability and in detail, I cannot find that he omitted to take into consideration all proper elements and I agree with his conclusion, affirmed by the President, that the plaintiff would have sold sixty per cent. of the total number. It is contended that in the period during which infringement is shown the plaintiff did not manufacture stringers on its patented machine, but even if that were taken as proved, it does not operate in ease of the defendants. The plaintiff was deprived of the opportunity of using its patented machine to produce stringers for the 445,740 fasteners (i.e., 60 per cent. of 742,901), and, as I conclude it would have sold that number, it is entitled by way of damages to that profit on the sale of each of such fasteners that the evidence discloses. This disposes of defendants' contention (c) referred to above.

The Registrar found the plaintiff's loss of profit to be 10 cents per fastener. Not only did the defendants appeal, alleging that there was no basis upon which the allowance could be justified, but the plaintiff cross-appealed, alleging in turn that its calculation of its loss of profit was 11.79 cents per fastener; that the Registrar had found no fault with the correctness of its figures, and that the President, beyond adopting the Registrar's figure, had made no reference to the point. Even if the mathematical accuracy of

(1) (1914) 31 R.P.C. 104.

the plaintiff's statement of costs of manufacture be admitted, one must not lose sight of the contents of the plaintiff's letter to the Minister of Finance and of the methods of manufacture actually in use by it when its costs were compiled. These considerations serve to reduce the plaintiff's figures but at the same time leave them as a basis of computation. I might have adopted another figure, one probably a little lower in view of the matters mentioned, but I cannot say that there is sufficient to warrant interference with the Registrar's estimate, and the appeal and cross-appeal on this branch are dismissed.

As to the forty per cent. of the defendants' sales which the plaintiff would not have made, it is still entitled to damages by way of royalty. As Lord Watson points out in *United Horse Shoe and Nail Company v. Stewart* (1), "Every sale of goods manufactured, without licence, by patent machinery, is and must be treated as an illegal transaction in a question with the patentee." In *Watson v. Pott* (2), Lord Shaw said:

If with regard to the general trade which was done, or would have been done by the respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorized sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (3). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorized use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

Under this subdivision the plaintiff has been allowed a royalty of 1 cent per fastener, i.e., 1 cent  $\times$  40 per cent. of 742,901 or a total of \$2,971.60. Both parties have appealed as to this allowance, the plaintiff contending that it should be at least 2·3 cents per fastener, and the defendants contending that it was overly generous to the plaintiff.

(1) (1888) 5 R.P.C. 260, at 267. (2) (1914) 31 R.P.C. 104, at 120.

(3) (1911) 28 R.P.C. 157, at 163.

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.  
 —  
 Kerwin J.

I agree that the Registrar was correct in disregarding, on the one hand, the evidence that a departmental store had paid a royalty of 5 cents, as the fasteners there had been used on rather expensive articles; and in disregarding, on the other hand, the evidence of Mr. Prentice that in the United States he had granted licences and had been offered licences at the rate of  $\frac{2}{3}$  cent per fastener, as the purchasing power of the public is much greater in the United States than in Canada. The main contention on the part of the plaintiff is that the Registrar in that part of his report which appears at the top of p. 754 of the Appeal Case before this Court, erred in stating that the Colonial Fastener Company, Limited, had paid its co-defendant, G. E. Prentice Manufacturing Company, Limited, a royalty of \$12,737.02 on 742,901 fastener stringers. It would appear that the Registrar did err in that respect. It is undoubted that a royalty was paid, and, according to the evidence, it was fifteen per cent. of the gross sales price for the greater part of the time and ten per cent. for the remainder; but these percentages were of the gross sale price of the completed fasteners and not merely of fastener stringers.

Appendix I to the plaintiff's factum shows, with references to the pages where the evidence is to be found, that the total sum received from the sale of the fastener stringers, as mentioned by the Registrar, \$84,930.50, is practically correct. This figure is obtained from Appendix I by adding to the total under Column 3 under the heading "Unitary Machines" the sum of \$5,557.21, which appears opposite Period VI in the third column under the heading "Divided Machines." Although nothing is being allowed in connection with the product of these "divided machines," in this instance it is necessary to accept the plaintiff's calculations with reference to Period VI in order to arrive at the Registrar's total. In any event this does not prejudice either party. References are also given under column 5 in Appendix I to the evidence which indicates the amount of royalty paid according to defendants' own figures and this shows a total of \$17,194.33 or \$18,746.78, depending upon whether the total figures for Period VI are separated or kept intact. Adopting the former the rate of royalty per fastener would figure out to about 2-3 cents and not  $1\frac{1}{4}$  cents, which the Registrar's calculation showed.

It is suggested that, having estimated the royalty paid by the Colonial Company to the Prentice Company at  $1\frac{3}{4}$  cents per fastener, the Registrar unconsciously allowed this figure to be a guide to his final estimate that a fair royalty for the defendants to pay the plaintiff would be 1 cent per fastener. However, it must be remembered that, for the rental and royalty received by it from its co-defendant, the Prentice Company gave certain other services; and that while patentees may endeavour to impose all that the traffic will bear, in the instant case, the plaintiff, if it had adopted a system of licensing by demanding a royalty on each fastener, would have been obliged to set a figure in proportion to the sale price of a completed fastener. The rate adopted is one I would have accepted if the matter had come before me in the first instance.

In the result, therefore, the allowance of \$47,545.70 under Item I in the plaintiff's statement remains undisturbed.

The remaining items deal with alleged damages due to reductions at different times by the defendants in the sale price of fasteners. Such a claim, if made out, is valid. *American Braided Wire Co. v. Thomson* (1). The evidence, however, fully warrants the finding that, in connection with the first reduction, the plaintiff was the first to act. It is then contended that, granting this to be so, the plaintiff was induced to such a course by reason of its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from the defendants. This claim, however, is too remote and Items 2 and 5 must be disregarded.

The second reduction was first made by defendants and, as damages under the headings in plaintiff's statement referring thereto, the Registrar allowed the sum of \$3,117.56. The President disallowed this, as he considered that no "safe deduction can be made, in this case, from the fact that the defendants at any time sold their product at prices below that of the plaintiff, and which compelled the plaintiff to meet the reduction." After anxious consideration I have concluded that the plaintiff is entitled to something under this heading,—and not merely a nominal sum. After making every allowance for the effect of competition from

1936  
 COLONIAL  
 FASTENER  
 CO. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 CO. LTD.  
 —  
 Kerwin J.  
 —

(1) (1890) 7 R.P.C. 152.

1936  
 COLONIAL  
 FASTENER  
 Co. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 Co. LTD.

Kerwin J.

imported fasteners, it must be admitted that any domestic manufacturer was in a privileged position to fill quickly the requirements of customers. It is true that there was a third concern in Canada producing fasteners, but the Registrar has allowed for this and I think I cannot do better than quote his remarks:

On the whole, the United Carr Manufacturing Co. being in the same locality as plaintiff and the importations being lower in price, I have decided to divide the total losses to plaintiff in the ratio of 25 per cent; 37½ per cent and 37½ per cent, and would charge the defendants with 25 per cent of the losses.

Now the figures involved are those numbered 3, 4, 6 and 7 on pages 3 and 4 hereof, namely,

- (3) \$5042.44; (4) \$1210.50—\$6252.94 and  
 (6) \$4636.54; (7) \$4081.95—\$8718.49.

These must be divided into two; first, the losses based on defendant's sales, namely, Nos. 3 and 4, \$6252.94; and second, those based on plaintiff's own sales, namely, Nos. 6 and 7, \$8718.49, for the following reason:

In reference to losses from forced reductions based on defendant's sales the 25 per cent thereof to be charged against defendant must be taken on 60 per cent of the said sales, because it is only on 60 per cent of defendant's sales that plaintiff is entitled to get loss of profit; as on 40 per cent it is to be paid a royalty which is not affected by the reduction in prices. Now 60 per cent of \$6252.94 is \$3751.76 and 25 per cent of \$3751.76 is \$937.94, for which defendant is responsible regarding its own sales, and 25 per cent of \$8718.49 is \$2179.62 *re* plaintiff's sales, making a total of \$3117.56 which I find plaintiff is entitled to recover from the defendants as damages resulting from the said forced reduction in price.

I believe that the Registrar has correctly appreciated the evidence and has properly applied the relevant principles. I do not say that I would have necessarily divided the total losses to the plaintiff in the same proportions, but on the whole I think the sum allowed is fair and reasonable under all the circumstances and that it should stand. The plaintiff's cross-appeal in this connection should be allowed.

There remains for determination one claim not included in the itemized statement. Plaintiff's counsel described this as "the loss sustained by reason of the disturbance of the market consequent upon the defendants' intervention," and argued that in addition to the substantial sums claimed in the itemized statement, the plaintiff should receive a further large amount. The plaintiff company at the outset adopted a restrictive sales policy. It considered that in order to induce manufacturers of articles to which the fasteners might be attached, to experiment with something that was new and untried, a campaign of education and persuasion had first to be undertaken together with the offer of a special

inducement. That inducement was that the plaintiff would supply only certain manufacturers with fasteners to be applied to specified purposes. In this way it was considered that the Company would be able to persuade some manufacturers not merely to try the new experiment but also to push the sales of their own product, which, of course, would result in additional sales of fasteners. It was argued that the effect of the defendants' intervention was to disrupt this scheme and that the plaintiff found it necessary to follow the defendants' example and sell to any manufacturer. However, the fact must not be lost sight of that there was no patent on fasteners and that stringers for them could be made in different ways. Besides the defendants' competition there was considerable importation from other countries and I am satisfied upon the evidence that without the defendants' intervention the plaintiff would not have been able to continue the policy it adopted at the outset. One of its own witnesses stated that the policy was deemed to be a satisfactory one at the outset, while two independent witnesses called by the defendants considered that the policy was not workable at any time. The plaintiff has been allowed all the damages to which it is fairly entitled in order to place it in the position it would have occupied if defendants had not infringed. There is nothing upon which to base any such claim as is here advanced and the plaintiff's cross-appeal on this point fails.

The net result is that the appeal is dismissed *in toto* and the cross-appeal allowed to the extent of \$3,117.56. The Registrar recommended that the plaintiff be allowed the costs of the reference since it was entitled to damages and the defendants had contested each claim. That recommendation is adopted. Before the President the defendants succeeded in reducing the amount allowed by \$3,117.56; the plaintiff failed to secure any higher amount, and no order was made as to the costs of the appeals to the President. The plaintiff was obliged to appeal from that judgment in order to recover its position before the Registrar, and the appeal to this Court should, therefore, be dismissed with costs and the cross-appeal (to the extent indicated) allowed with costs. But, in view of the many matters on which the

1936  
 COLONIAL  
 FASTENER  
 Co. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 Co. LTD.  
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 Kerwin J.  
 ———

1936  
 COLONIAL  
 FASTENER  
 Co. LTD.  
 ET AL.  
 v.  
 LIGHTNING  
 FASTENER  
 Co. LTD.  
 —  
 Kerwin J.  
 —

plaintiff failed, the President's order as to the costs of the appeals to him might well stand.

*Appeal dismissed with costs.*

*Cross-appeal (to the extent indicated)  
 allowed with costs.*

Solicitors for the appellants: *McCarthy & McCarthy.*

Solicitor for the respondent: *Harold G. Fox.*

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