Apps. 25

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OUTLINE

OF THE

INFRINGEMENT OF PATENTS

FOR INVENTIONS, NOT DESIGNS,

BASED SOLELY ON THE OPINIONS OF THE SUPREME COURT OF THE UNITED STATES,

BY

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OF THE CLEVELAND BAR.

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PREFACE.

The aim hereof is to concisely present the doctrine that is settled by our final authority. It is substantially a summary of established points, from among the opinions severally set forth in my recent detail treatise on this subject — plus subsequent cases.

THOS. B. HALL.

Cleveland, O.,
April 20, 1895.

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OUTLINE

OF THE

INFRINGEMENT OF PATENTS.

"No question arising in any such [patent infringement] case, reviewable by this Court, can be regarded as finally settled, so as to establish the law for like cases, until it has been determined by this Court."—United States Supreme Court, 1888.

INFRINGEMENT OUTLINE.

INTRODUCTION.

Every patented invention consists of, and every patent infringement involves, certain means. But means may be either generic or specific; and the means that constitute a patented invention may be so generic as to comprise various kinds of specific means. Hence a patented invention may include a number of forms, each composed of detail means peculiar to itself; additionally to the form that is composed of the detail means described by the patent.

An infringement of a patented invention consists in making, using or selling within our country, during the term of the patent and without license thereunder, means that constitute a form of such invention. An infringement is unlawful provided the patent be valid as regards the infringed invention. An unlawful infringement is subject to a recovery of money.

Therefore in considering a matter of possible infringement of a given patented invention — by the making, using or selling of given means within our country during the term of the patent — one or more of four questions arise. The first question asks if the given means be unlicensed under the patent; the second question asks if the given means constitute a form of the given patented invention. Should both answers be affirmative, and thus show that an infringement is involved; then

the third question arises, asking if the patent be valid for such infringed invention. Should this answer be affirmative, and thus show that the infringement is unlawful; then the fourth question arises, asking what sum may be recovered for such infringement. This last answer completes the points to be determined, inasmuch as an injunction against the continuance of an unlawful infringement is regularly grantable in due court procedure.

These four questions give rise to the four subjects, under which the matter of patent infringement is herein outlined. The first subject treating of license under a patent, the second subject treating of the identity of a patented invention, the third subject treating of the validity of a patent, the fourth subject treating of the recovery for an unlawful infringement.

SUBJECT I.

LICENSE UNDER PATENT.

Analysis. The first one of the two questions presented in considering if a given patented invention be infringed — by the making, using or selling of given means within our country during the term of the patent — concerns the right of a license. This subject treats, first, of implied licenses; then, of interpretations of licenses; and finally, of licenses by certain parties.

License before Patent Application. The course taken by the inventor before filing his application for the patent, may have been such as to have given an implied license under the patent, for either one of three classes of means employing the patented invention.

The first class comprises means purchased from the inventor before the patent application. The second class comprises means made with the inventor's consent before the patent application; even though the inventor was then an employee of or a co-partner with such maker. The means of these first and second classes are impliedly licensed under the patent, to be used and sold throughout the latter's term.

The third class comprises means that are subject to the hereinafter described right, in a case where the inventor, as employee, made the invention, pertaining to the business of his employer — either under or not under an express agreement to give his services to such making, but not under an express agreement to give the

employer any right under the patent; provided the invention was at the employer's expense, and before the patent application, the inventor acquiesced in the employer then enjoying the invention. This entire proviso being the actual premise in each decided case, whether or not the same be essential where the inventor expressly agreed to give his services to the making of the invention. Said expense of the employer includes such matters as experiments of the inventor carried on during work hours, assistance rendered him on the invention by co-employees during work hours, and material of the employer consumed by the inventor on the invention. Said acquiescence of the inventor includes his knowledge before the patent application, that the employer was then enjoying the invention — making, using, selling the invented means, as the case may be — with a clear concurrence of the inventor in such enjoyment. The means of this third class are impliedly licensed under the patent; to permit the invention to be enjoyed by said employer party, the same as was constructively contemplated. This implied license continues throughout the patent term, even though said party may cease to be the inventor's employer; but no right greater than this license exists in favor of such party, irrespective of said employment continuing or ceasing — and even though the patent was granted to the inventor, with its expense solely borne by the employer.

License by Recovery. If a judgment for the recovery of damages in a patent infringement case, provide for any further enjoyment of certain infringing means in suit, and such judgment be satisfied; then said means are impliedly licensed under the patent for such further enjoyment. But if the judgment for recovery pertain

only to damages for the past, or be not satisfied so far as concerns any provision for the future; then such future enjoyment of said infringing means during the patent term, is not impliedly licensed by said recovery.

License in Sold Thing. The ordinary sale by the patent owner, of a thing embodying a patented invention of such patent, implies a license under the latter throughout its term, for said thing to be used and sold. If the seller own an interest in the patent, not at the time of the sale, but subsequently; then he is estopped from alleging infringement by said previously sold thing. If the owner of a patent on a process, sell a thing that is commonly used in the latter, without anything being said on this point; then there is no implied license to use said process with said sold thing — the use of the latter not necessarily involving the use of said process.

License of Repair. The ordinary sale by the patent owner, of a thing embodying a patented invention of such patent, implies a license under the latter throughout its term, for the owner of said thing to restore it, as it may require, to operative condition; the restoration being practically a repairing, in distinction from a substantial remaking. A mutilation of said thing by its owner, with purpose to destroy it, may be such as to forbid putting it in condition to resume its original service.

Temporary means may be replaced, when worn out, to preserve the normal life of the means, taken as a whole, that constitute the patented invention embodied in the sold thing. So that, where such invention comprises some means that require to be re-supplied to the remaining means — because used up in regular use, and to enable the patented means, as a whole, to accomplish the proper measure of their intended work — such re-

supply is impliedly licensed in an unqualified sale of the thing embodying said invention.

Duration of License. The terms of an express license may give a restricted right, touching means that constitute a form of a patented invention; so as to limit the use of said means by a purchaser from their licensed owner, to the time expressed in such license. If an express license state that it is for a given time, and make no provision for the possible death of the licensee; then in the event of his death before the end of said time, the license does not endure for the licensee's estate, but expires. If an express license does not state how long it is for, and both parties continue life; then it is for the remainder of the patent term, irrespective of it being an exclusive license or being a license in common.

Assignability of License. An express license that is assigned by the licensee to a third party, without ratification by the licenser, is of no avail to such assignee unless the license provide in terms for such transfer. An implied license to enjoy a patented invention, which license is transferred by the licensee to an assignee without ratification by the licenser, is of no avail to such assignee.

Annulment of License. An express license, oral or written, the language of which makes no provision for its termination, cannot be annulled by the sole act of either the licenser or the licensee; and can only be annulled either under their mutual agreement or by a judicial decree.

License by Sectional Owner. If means, constituting a form of a patented invention, be made and sold within territory less than our whole country, by a party that unrestrictedly owns the entire right of the patent for

such territory only; then said means may be taken and used or sold by the purchaser, within other territory of our country, owned solely by another sectional owner of the same patent, without the license of this latter sectional owner. And such means are lawfully free from the patent throughout our country.

License of Foreign Law. The law of a foreign country cannot affect a question of infringement under our law. So that, where a foreign law licenses a party to make, use and sell means, constituting a form of an invention patented in that country, which invention is also patented in our country; then if means, so made in such foreign country, be used or sold in our country during the term of and without license under our patent, the latter is thereby infringed.

SUBJECT II.

IDENTITY OF INVENTION.

Analysis. The remaining one of the two questions presented in considering if a given patented invention be infringed — by the making, using or selling of given means within our country during the term of the patent — concerns the identity of a patented invention, in distinction from either a described or a claimed invention. For, on the one hand, the entire means — the process, machine, manufacture or composition — that make up the subject of a patent, may contain any number of described and yet non-patented inventions. And, on the other hand, while a validly claimed invention cannot be other than all and only the patent-described means that are expressly or impliedly included by a claim; yet a validly patented invention may either be said claimed means or else be an equivalent thereof.

A patented invention may be of any degree of breadth. It may be so broad as to comprise many forms, each composed of detail means not described by the patent; or it may be so narrow as to be confined to the one form, composed of the detail means described by the patent. There are as many patented inventions as there are claims, of a patent. The identity of a given patented invention is established by four factors, which conjointly construe it, namely: The claim of the patent, the specification of the patent, the record of the patent application, the doctrine of equivalents. The present subject treats of these factors, severally, in order.

Claim of Patent. The office of a claim is that of a technical summary, following the specification of the patent; including expressly or impliedly all and only such specification means, as constitute the invention claimed by that claim. The distinction between whatever the patent expressly includes within its scope, and whatever it impliedly excludes therefrom, being effected by its claim or claims; and the latter legally constituting notice that the patent does not cover any invention which, though disclosed therein by drawing or description, is not secured by a claim. So that, notwithstanding the specification may fully describe certain means, or definitely express a certain meaning; yet neither such means nor such meaning is necessarily construed into any claim of the patent. For while the specification may aid in interpreting a claim, yet the legal sense of the latter cannot be contrary to what its own terms express; the language of the claim controlling as to the means included thereby, wherever such language is plain.

Hence the entire means that make up the subject of a patent, may embrace means described by the specification, that are not essential to some certain patentable invention contained in said entire means; but if any such non-essential means be included by a claim, said certain patentable invention is not covered by that claim. Thus all the means that are included by a claim, constitute the invention secured by the latter; and however trivial any one included means of a claim may seem, such means is a substantial part of the claimed invention. Because the words of a claim constitute the express terms — presented, allowed and closed

with, in the patent application procedure—that define the invention claimed thereby.

And as the language of a claim may be either general or special, a given claim may be either broad or narrow; while in either instance, the invention that is covered by such claim, is founded on the same detail means described by the specification. For general language of a claim may comprehend special means not described, as well as special means described, by the specification. So that a claim, while not enumerating the detail steps or things that the specification discloses; yet may be, in terms, for means that do a certain work substantially as set forth. Thus none of the mechanical devices of a specification may be named in a claim; but the language of the latter be for mechanism that perform a defined function substantially as set forth. In such case, the claim covers a principle of invention having forms additional to that composed by the specific means of the patent. The difference between such forms being an incident, not affecting the generically phrased means of the claim. The claimed principle, irrespective of any non-claimed incident, determining the identity of the claimed invention.

Specification of Patent. The office of the specification is to describe—either with or without the aid of drawings, forming a part of the specification—all and only the means that make up the subject of the patent, so that such subject may be understood by persons skilled in the art; said means, thereby, constituting a form of the patented invention or inventions. This description is, however, the foundation of every patented invention of the patent; as the means set forth by the

specification may contain any number of claimed inventions.

The degree of identity that a given claimed invention bears to the entire means described by the specification, is determined by the means that are included by the claim in question. The more means that are included by said claim, the more is the resemblance between such claimed invention and the entire specification means. The less means that are included, the less is such resemblance.

If a specification describe certain means merely as being desirable, then such non-essential means are not impliedly included in any claim thereunder. A claimed invention is impliedly for every use of which it is capable, although its specification does not mention such use. A claim does not impliedly include certain specification means, if the inclusion would cause the then claimed invention to attain an end different from that which its specification states to be its object. But the broad question — whether certain means which are expressed only in the specification, are or are not impliedly included in a given claim of a patent — is determined in view of the entire premises of the particular case, by the composite doctrine touching the patent claim, the patent specification and the patent application record, as set forth under the present subject.

Record of Patent Application. All papers relating to the application for a patent are of public record. They constitute a history of the entire proceedings — thus including official actions upon the patentability of presented claims, and amendments to the application. An official action may show that a claim, or a portion of the specification, as the same had once been presented,

had thereupon been rejected as being too broad; for instance, on the charge that its subject-matter was anticipated by certain reference to the prior state of the art. An application amendment may show that because of such official action, change had been made in the application; either by inserting narrower terms in the rejected claim or in the rejected portion of the specification, or else by canceling such claim or such portion of the specification.

Should the application record of a patent disclose any such official action and application amendment, touching a claimed invention; then the legal scope of the latter is correspondingly less than it otherwise might be. Every limitation of a patent that was introduced into the application, on account of a prior adverse official action, being construed against the patent, akin to a disclaimer.

The rule — that no claim of a patent is construed to be for an invention that was presented by the terms of any claim in the patent application, which application claim met with an adverse official decision and was thereupon canceled — is applicable; irrespective of the canceled application claim having defined an invention broader or narrower than the invention defined by the patent claim that was substituted for such canceled claim.

Doctrine of Equivalents. This doctrine is, that as concerns a question of infringement of a patent, a claimed means of the latter has its known equivalent in any other means known to do substantially the work of such claimed means, in substantially the way in which the latter does it. A patent claim impliedly covers all means, though neither expressed therein nor described in the patent specification, that perform essentially the function of the specification means embraced by said claim,

in essentially the manner in which such claimed means perform it. Any non-described means that is equivalent to a described means included by a patent claim, is within the scope of the latter, as truly as though it had been described in the specification and expressed in the claim; and this holds irrespective of there thus being an equivalent for only one or for every one of the means included by the claim.

The prior state of the art is the state of advancement that competent evidence shows to have been attained in the art, previously to the inventing of the specification means that are covered by the claim in question. Such competent evidence comprises matter that existed in our country; or that was set forth in either a patent or a printed publication of our or of a foreign country — as described on page 31. It does not comprise matter that existed in a foreign country, otherwise than as so set forth in either a patent or a printed publication.

The means that are described and generically claimed by a valid patent, may differ so widely from the prior state of the art, that subsequently invented means, described and specifically claimed by an independent valid patent, may constitute an infringing equivalent for said earlier means. Relatively to the validity of the claim on said subsequent means, the latter are substantially different from said earlier means; but relatively to the infringement of the claim on said earlier means, said subsequent means are substantially the same as said earlier means.

Hence in a case where one patent has a valid broad claim on the first invented means essential to a certain patentable principle, and another patent has a valid narrow claim on later means applying the same principle;

there the narrowly claimed means are an equivalent for the broadly claimed means, while the broadly claimed means are not an equivalent for the narrowly claimed means. The two means being recognized substitutes for one another, as regards the infringement of a claim covering a principle of invention applied by both means; but not being recognized substitutes for one another, as regards the infringement of a claim restricted to one of such two means as distinguished from the other.

Therefore while a first invention and a second invention may not be substantially the same as concerns a question of validly patentable merit of the second over the first, and hence, also, as concerns a question of right of the owner of the first to employ the second; yet they may be substantially the same as concerns a question of infringement of a claim on the first by the second. The matter under the present title refers solely to the infringement, and not to the validity, of a patented invention. So that all means are herein compared as being either substantially the same as or substantially different from one another, wholly in the sense of the doctrine of equivalents regarding a question of the infringement of a patented invention.

Whether given means are or are not substantially the same as the specification means that are comprehended by a certain claim, depends on the prior state of the art at the date of the inventing of such claimed means. The claim itself, the patent specification and the patent application record — three out of the four factors that establish the identity of a patented invention — mark out all limitations touching patent-described means that are claimed. But after said three factors have thus fulfilled their part, it rests with the fourth

factor — the doctrine of equivalents, as applied in view of the prior state of the art at the date of the inventing of the claimed means — to mark out all limitations touching means not described by the patent, that are the equivalents of said claimed means. By either including within or excluding from the range of recognized substitutes for such specification means as are claimed, any other means that do substantially the work of said claimed means — the doctrine of equivalents determines whether such other means are substantially the same as or substantially different from the claimed means; and, therefore, whether they are or are not covered by the patent claim in question.

Hence the doctrine of equivalents cannot affect the question as to what specification means are claimed; but when the given claim, the specification and the patent application record have answered this question — then the doctrine of equivalents fixes the scope of equivalents for any such means. So that the invention which is patented by the claim, may comprise means other than those set forth in the specification, for doing substantially the work done by the claimed means. Therefore while the patented invention always comprehends the claimed invention; yet it also comprehends every invention that is the equivalent of the claimed invention, in an infringement issue. Thus the patented invention may be broader than the claimed invention; the claim covering in addition to the claimed means, means that are different from but equivalent to such claimed means.

The degree of difference that may exist between any claimed means and their equivalent means, is determined by the patentable difference between such claimed means

and the prior state of the art. If this patentable difference be great, the difference between the claimed means and any equivalent means may be great. But if this patentable difference be only little, then the difference between the claimed means and any equivalent means can be but little. Hence if the general result that is accomplished by the claimed means, was not accomplished by the prior state of the art; then many kinds of means are respectively equivalents of the claimed means, that otherwise would not be such equivalents.

In a case where the same general result is accomplished on the part of each of two independent inventors, respectively, by means bearing a somewhat general resemblance to each other, and each inventor has a patent having all its claims valid, the following conclusion obtains, namely: If one of the two patentees first invented means, containing a patentable principle, and his patent have a claim that includes only the generic means essential to said principle, then the subsequently invented means of the other patentee, if recognized as working on said principle, are an equivalent for the claimed means of the first inventor; but if said two patentees together gradually invented their respective means, so that neither one first developed any form of means, containing a patentable principle on which the means of both work, then no claim of either one of the patents covers means that have their equivalent in the means of the other patent.

Although certain claimed means were the first that accomplished a valuable general result, yet no means are an equivalent thereof that do not accomplish such result in substantially the same way therewith. And while equivalent means always accomplish either the

same or else an analogous kind of result that is accomplished by the claimed means; yet they need not attain the same degree of result that the claimed means do. So, too, equivalent means may not only be constructed in a form other than that of the claimed means; but, also, may operate in a detail way other and better than that which the patent describes as being the operation of the claimed means. Nevertheless the substance of an equivalent can be successfully substituted for its corresponding means, in the claimed invention; and the substance of such corresponding means can be successfully substituted for said equivalent, in the infringing combination of means. But claimed means do not have their equivalent in means that resemble such claimed means less than they resemble the prior art.

Where a claim is for a certain combination of mechanical means, another combination of mechanical means is not an equivalent thereof if it omit a means of the claimed combination without any mechanical substitute; the function of the omitted means being fulfilled by manual work — or by a natural cause, such as the attraction of gravitation. Also where a claim is for a certain combination of means, another combination of means is not an equivalent thereof if it substitutes for one means of the claimed combination, a means that has a substantially different character and operation from the omitted means; even though such other combination of means be otherwise the duplicate of the claimed combination. But where a certain combination of means is the duplicate of a claimed combination of means, except for one means that is not the equivalent of the one omitted means of the claimed combination, as such two means are considered separately from their respec-

tive combinations; there, if in said combinations such two means, severally, attain substantially the same object in substantially the same manner, they are equivalents so far as concerns said combinations.

It may be important to consider the object, respectively, of the claimed means in question and of the alleged equivalent; in order to better understand the function of each, and the way in which such function is performed. But whatever given means are identical with or are equivalent to such claimed means, are the patented means in question; notwithstanding the same be applied to a use different from but analogous to the use to which said claimed means are applied in the patent, or for which they are stated in the patent to be intended. So, too, given means may be the equivalent of the claimed means in question, although not attaining all the objects had in view or attained by said claimed means — where the attainment of all such objects is not essential to the identity of said claimed means. But even though given means bear the same names as do the claimed means in question, yet they are not the equivalent thereof if they perform substantially a different function from that performed by such claimed means; or if they perform substantially the same function as that performed by said claimed means, but in substantially a different way therefrom.

A liberal legal construction is allowed to a claim on a pioneer invention; for instance, to a claim on the underlying invention that is embodied in the first machine capable of automatically accomplishing its general result. On account of the primary character of such an invention, which as a whole performs entirely new mechanical functions, a wide scope of equivalency obtains

for the claimed means; provided the latter — as conjointly construed by the claim, the specification and the patent application record — are only the generic means essential to the principle of invention productive of said result. Premising that the claim be for the combination of three main groups of mechanism in this first machine, such combination has its equivalent in a subsequently invented, and even validly patented, machine having three main groups of mechanism combined to accomplish said general result, and, respectively, performing the functions of the groups of the first machine in substantially their way; notwithstanding one group of the subsequent machine be more simple than, and each of the two other groups be differently constructed in detail from, the corresponding group of the first machine. For in view of the premises of the case, said mechanism of the subsequent machine — although not before known in a machine for accomplishing said general result of the first machine, but recognized in mechanics as a proper substitute for said mechanism of the first machine, to effect said general result — constitutes a known equivalent for the claimed means in question.

SUBJECT III.

VALIDITY OF PATENT.

Analysis. The single question presented in considering a matter wherein infringement of a patent claim is found, concerns the validity of the patent as regards said claim; for an infringement of a patent claim is unlawful only if such claim be valid. One fundamental principle throughout this question is that the means which are covered by a valid claim, must be invented, in distinction from merely being new, relatively to the prior state of the art; the qualification of invention being as requisite as the respective qualifications of novelty and usefulness. Because useful arts naturally develop under industrial requirement, and the law regularly looks for better results with the normal progress of new works; while an invention is required to project so far out from the expected line of advance in its art, as to evidence a faculty higher than what produces simply new and useful improvements — this faculty being called inventive genius. The present subject treats, respectively, of various tests touching validity, that a patent claim is subjected to; including several that are different species of the generic inquiry, whether the claimed means involved invention — and that, also, so overlap one another at certain points as to there be essentially the same test.

Suggestion about Invention. A claim is invalid if its means were not substantially originated by the per-

son that applied for the patent as inventor. Hence if a patentee first thought of the desirability of the qualities of the claimed means, but employed a person to devise said means having such qualities, then the patentee did not invent said means. On the other hand, if a patentee first thought of the principle of the claimed means, and in experimenting thereon adopted certain incidents suggested by an employee, then the patentee did invent said means. Also though a patentee obtained information and advice from books or from persons, he may nevertheless have invented the claimed means; especially where high scientific knowledge or fine mechanical skill was involved.

Date of Invention. The date of the making of a patented invention may extend back, not only to a practical test thereof, but, also, either to a description, oral or written, to a drawing or to a model, such that the invention could therefrom have been understood by persons skilled in the art. That is, the invention bears date of time when, as proved by competent evidence, its plan and means were arranged in the mind of the inventor, although not then embodied in working form.

Skill of the Art. A claim is invalid if it covers means developed merely by the perfection of workmanship that remedies a defect in a thing, avoids an injury thereto, strengthens it at a point of strain, aids its operation, increases its convenience, extends its use, lessens its expense or attains a desired end. For while invented means may possess one or more of these advantages or improvements; yet any means that have no other qualification than the foregoing, simply show what high degree of knowledge and execution may follow intelligent and constant practice in an art. So, too, mere skill of

the art may make new and useful means, by adapting old means to new circumstances, or by applying general knowledge to the attainment of a particular purpose.

But if claimed means have succeeded in producing a new and beneficial result that was previously desired, the same argues in favor of such means having been beyond the skill of the art; even though artisans of the craft may after seeing them, think that they could have devised them by art skill. Also notwithstanding the specification apparatus for carrying out a claimed process be old, and the sole matter in question be an improvement on a prior process, by omitting one means therefrom; yet the claim may be valid if its means be highly useful, and were discovered only after careful experiment and the exercise of great ingenuity. Also while the mechanism that is set forth in a patent on a process, may be wholly within the skill of the art; yet said process may be beyond such skill, and the claim thereon be valid.

Substitution of Material. A claim is invalid if it covers merely the substitution of one old material for another; without involving a new result, a new office or a new method of operation, on the part of the means in question. Because a mechanical means that is made of one material instead of another, and that performs in the same way the same function that it does without such substitution, is not thereby changed as regards any attribute affecting question of patentability. Hence a claim is invalid if it be for a substitution of material, whereby a thing is presented that is merely cheaper, stronger, superior, less bulky or requiring less repair; such improvements ensuing not from any patentable

qualification, but from the better adaptation of the substituted material for the end in view.

Degree. A claim is invalid if its means do in substantially the same way, that which the prior art has done without so good a result; such claimed means having simply carried forward an old idea. Because means that merely have either better construction, larger size, more usefulness, higher quality or greater value than the prior art had, do not possess any qualification that sustains a claim. They constitute improvements in degree, not in kind; and only the more thoroughly attain an old end by an old way.

Thus a claim is invalid if the claimed means and certain prior means be substantially alike; the difference being merely that the prior means were smaller than the claimed means, and intended only for work on a smaller and another article than the latter are intended for. So, too, notwithstanding claimed means, by being enlarged over prior means, be capable of a somewhat different manner of use from what was possible with the prior means, yet inventive genius may not have been involved in making such claimed means.

But a claim may be valid for a manufacture that has certain parts stronger than certain other parts, provided such manufacture presents a practical thing that was previously tried to be made, and was only produced at the end of a line of previous experiment and failure.

Analogous Use. A claim is invalid if it be for the bare application to a purpose that would occur to persons skilled in the art, of means that were old in use for another purpose; no new operation, office nor result following, that is different in kind, not merely degree, from what previously existed. Hence a claim is invalid for

merely applying old means to an object similar to what they had before been applied, notwithstanding an improvement be thereby made. Likewise a claim is invalid for old means merely transferred to a new but like field of work; where they perform substantially the same result in substantially the same manner that they did before the transfer.

Lawfully patented means are regularly subject to, and valid for, whatever new but analogous use they may prove to be qualified for, in either the same or a different art; irrespective of such use having or not having been previously thought of, and although the patent does not mention any such qualification.

But the adaptation, through new means or meritorious change, of old means to a substantially different field of work from their former field—particularly where said means thereby produce a new result or perform an essentially different function from what they previously did—may involve invention.

Legitimate Combination. A claim is invalid if it be for a combination of old means that is merely new and useful; the work done by the combination not being a unitary product caused by the co-operating action of said means, but being simply an aggregate of the respective individual results of such means. Therefore a combination of old means is not legitimate if the combination does not qualify the office of such means; the combination, as compared with the several means that accomplish the sum of its functions, neither performing a new function, modifying an old function nor performing the latter in a new way.

Under this doctrine a combination of old means is not legitimate even though such means accomplish a

better result when united than when separated, provided the means do only the same work in the same way in the two instances; each means operating independently, without involving either a new result or an old result by a new way, whether maintained apart or together. Neither is a combination of old means legitimate if the operation and result be accomplished by less than all of such means; the remaining means fulfilling no office in, and contributing nothing towards, the accomplishment of said result.

But a combination of means may be legitimate although every one of them had been previously used in one kind or another of the same class of means; provided the result of such combination be a single jointly-produced one, possessing some qualification that cannot be distinctively attributed to the individual work of some one of said means unaffected by its companion means.

A legitimate combination cannot be anticipated by finding different ones of its means, respectively, in different patents, publications or other competent evidence of the prior art; one of the combinations means being found in one prior source, another one of the combination means being found in another prior source, and so on throughout the entire number of the combination means. Because a legitimate combination can only be anticipated by a combination of means existing in the prior art, substantially the same as the combination of the claim in question.

Usefulness. A claim is invalid if it be construed to cover a certain result, or all means that attain a certain purpose; because a valid claim can be only for certain means that accomplish a given result, notwithstanding

the latter was first attained only by the means escribed by the patent in question. Thus while a claim is invalid if it be construed to cover a scientific fact first discovered, of great usefulness; yet it may be valid if it be for first invented means that utilize such fact. Likewise a claim is invalid if its legal construction be either for or for a use of a newly discovered natural agent, such as steam or electricity—or for a newly discovered power, property or use of a previously discovered natural agent; but a claim may be valid for means that seize, change or adapt either a newly or a previously discovered natural agent for use. This doctrine rests on the ground that every invention, however useful it may be, consists of invented means; and that a validly patented invention cannot be other than the described and claimed means, or else be the equivalent of such means.

But inasmuch as under the doctrine of equivalents, in the determination of the scope of a patented invention, useful means that constitute a broad invention, and that are broadly claimed, have a correspondingly broad range of equivalents — it follows that such means may be substituted by many detail kind of means not set forth by the patent; yet which are in view of the premises, construed by the doctrine of equivalents to be substantially the same means as the claimed means set forth by the patent. Thus where throughout the term of such a broad and valid patent, all other known specific means capable of accomplishing the general result that was first accomplished by the generically claimed means of the patent, prove to be the equivalents of said claimed means; there the patent is valid in covering all said

other known specific means, as constituting different forms of the one unusually useful invention in question.

If the means that are covered by a claim did not involve invention, the claim is invalid; regardless of the fact that such claimed means may have practically driven all other means of their class out of the market. For validly patented means must possess the merit of having been invented, notwithstanding they possess the merits of being both new and useful; also commercial success is not conclusive even of the increased usefulness of patented means over the prior state of art, because heavy sales may be due to business energy, effective advertising or large commissions. But if there be a doubt in view of the other premises in a case, as to the patented means in question having required inventive genius; then such doubt may be resolved in favor of the patented means, if said patented means by reason of their inherent merit, have generally superseded the means previously used for like purposes.

Notwithstanding an inventor at the time of filing his patent application, had never made nor operated means that attained the useful end in view; yet if his patent be such as to enable persons skilled in the art to make and use means that attain said end, it is not thereby invalid on the charge of its means not having constituted a useful invention.

Prior Knowledge or Use. The following will be understood throughout the present title, namely: (*a*) The patented invention consists of all and only the means that are covered by the patent claim in question, and an anticipation of such patented invention is an invalidation thereof; (*b*) the prior means are means that were known or used in our country before the date of the

foregoing defined invention; (*c*) any means that were merely known or used in a foreign country, but not in our country, are not comprehended.

If there were prior means of such character as could be an infringement of the patented invention, had they not existed until after the latter; then they were of such character as to be an invalidation of said invention. What infringes if later, anticipates when earlier. If one specimen of completed prior means like the patented invention, was known to several persons and was successful in use, such patented invention is invalid. It has been said that prior knowledge and successful use by one person, is sufficient to cause prior means like the patented invention, to invalidate the latter.

If completed and satisfactory prior means like the patented invention, were not subsequently altered, they invalidate the latter; even though they were then embraced in a combination of means that was not completed and satisfactory until after the date of said patented invention. Likewise notwithstanding prior means were not intended, and perhaps were not known, to possess the feature on which validity of the patented invention is based; yet if said prior means as regularly existing and used, did actually possess such feature, the patented invention is invalid. So, too, the patented invention is invalidated by prior like means that were successfully used, although somewhat imperfectly applied, or less perfect in construction and operation than said invention. Also the patented invention is invalidated by prior like means, concealed from view by other means of the thing in which they were embodied; where the character of such prior means was necessarily known to the workmen that made them, and their

concealed embodiment in the thing that used them was in accordance with their legitimate use.

The patented invention is invalidated by a single specimen of prior like means that was used only during a short period, and was then taken from the thing in which it was so used, and different means substituted therefor — and though during such short period said single specimen was used only at intervals, and thereafter was neither used nor duplicated for use; provided the use to which it was put, was an ordinary public use for ordinary service, that proved practical, and as successful as could reasonably be expected in view of the then existing art in which such specimen was used — the disuse being not due to any defect in said prior means.

Prior means must, however, not only shoulder the burden of proof, to invalidate the patented invention; but every reasonable doubt thereon must be resolved in favor of the latter. If prior means did not advance beyond unsuccessful and abandoned experiment, then there was not the certainty, in distinction from conjecture, that alone can invalidate the patented invention. Inasmuch as in order that prior means may be competent to invalidate the patented invention, they must have been so far perfected as to prove their actual usefulness; although they need not have accomplished their practical purpose so well as said invention.

The patented invention is not invalidated by reason of a prior patent application on prior means, which patent application was not prosecuted through to patent issue. For prior means that formed the subject-matter of a mere prior patent application, and which would otherwise not invalidate the patented invention, are not rendered by virtue of such patent application, competent

to invalidate said invention. But prior like means that worked perfectly in ordinary use, invalidate the patented invention; even though an allowed patent application for such prior means did not issue to patent.

A patented process is not invalidated by a like but accidental prior process, that was not understood as to its operation or result, and did not excite attention. Nor is a patented mechanism invalidated by a like but accidental operation of prior means, that was not within the principle of the latters' mechanical construction; the prior means not having been intended for such purpose, not showing that they were to be used in such way, and not really so used.

The patented invention is not invalidated by alleged prior like unpatented means, evidenced only by oral testimony, unless they are clearly proved beyond a reasonable doubt. Because, generally, the character of such testimony on such point is unsatisfactory; many valid and valuable patented inventions having been assailed by witnesses whose imagination or fabrication set up prior like means. Hence even though it be possible that an experimenter had crudely made prior means similar to the patented invention; yet if the latter was first made known to the world, and practically used, and met with extensive adoption, doubt is resolved in favor of its validity.

A slight difference between the prior state of the art and a patented invention, may cause the latter to attain great use and value, in view of which it is valid; previous failure having been turned into success by such invention, and the latter although constituting only the final step in a race for the desired end, yet winning as such final step.

Prior Foreign Knowledge or Use. A patent claim is not invalid because like means were merely known or used in a foreign country, without having been patented, or described in a printed publication, before the claimed means were invented by the patentee; provided the latter at the time of his patent application, believed that he was the first inventor.

Prior Patent or Printed Publication. The following will be understood throughout the present title, namely: (*a*) The prior patents or printed publications are either of our own or of a foreign country, made known to the world before the date of the invention that is covered by the patent claim in question; (*b*) said invention is invalidated by any such prior patent or printed publication that sets forth means substantially like the invention in question, sufficiently to be understood by persons skilled in the art; (*c*) a prior patent sets forth its means by disclosing them either exclusively in words or drawing or else conjointly in both —while a printed publication sets forth its means by describing them.

The same doctrine applies to means set forth in a prior patent or printed publication, that has been stated as applying to means comprehended under a prior knowledge or use, namely: what infringes if later, anticipates when earlier. Means that are set forth in a prior patent or printed publication constitute an invalidation of the patented invention in question, although all the advantages of the latter are not stated in such prior patent or printed publication; and, also, although the author was not aware of the value of said means for attaining the end of the patented invention in question, provided said means had such advantage or value.

The point is not whether, if certain of the means that are set forth in a prior patent or printed publication be omitted, persons skilled in the art could change the remaining means thereof so as to work in the manner and with the result of the patented invention in question; but the point is whether all that is essential to the patented invention in question, is set forth in a prior patent or printed publication. If the means that are set forth in the prior patent or printed publication have imperfections only of minor character, not affecting the substance of the patented invention in question; then they are not mere paper means, but real means—an invalidation of the patent claim in question, in view of their capacity to do successful practical work, aside from objections that would be remedied by the skill of the art.

If the patented invention in question constitute a process, the claim thereon is invalidated by a prior patent or printed publication that set forth the same process, although not as applied to the same subject, in terms, that the process of the claim in question is applied to; provided persons skilled in the art would understand that the subject to which the process of the prior patent or printed publication was applied, is the very subject that the patented process in question is applied to.

A patented invention that has proved to be a success, is not invalidated by a prior patent or printed publication that set forth means having likeness to important features thereof, provided the likeness does not include the cause that resulted in said success; and this holds even though skill of the art may in view of the patented invention in question, adapt said prior means, which before did not attain the kind of result that was first

accomplished by said invention, to accomplish somewhat of the result that gave the latter its success. Likewise a patented invention is not invalidated by means set forth in a prior patent or printed publication, which means, though previously unable to, could now by a slight modification, accomplish the office of the patented invention in question; provided the prior patent or printed publication was not sufficient to suggest such modification to persons skilled in the art, unless they were examining it for that purpose.

In Public Use or On Sale. A patent claim is invalid if the invention that it covers was, when completed and satisfactory, in public use or on sale in our country earlier than two years before the patent application, either with or without the inventor's consent. The qualification of either experiment or secrecy places a case outside of this doctrine. No kind of use or sale in a foreign country invalidates the claim.

Having reference solely to our country, one instance of the described use or one specimen of the invention invalidates the claim as effectually as could large numbers thereof; also the described use by only one person, even where knowledge of such use be limited to such one person, invalidates the claim as effectually as could use by large numbers of persons. An invention was completed and satisfactory although not then able to attain its end so thoroughly as under certain other conditions, and was in public use although then concealed from view by certain means with which it was used; provided it was then able to substantially attain its end, was also then used without experiment in intent or in fact, and its concealment from view was such as was normally incident to its intended use.

A patent claim is invalid if its means constituted a practically useful invention without the means that are covered by another claim of the same patent, and the patent application was filed more than two years after an ordinary public use in our country, for profit, of the means that are covered by the claim in question, although less than two years after a public use of the means that are covered by said other claim. But if the public use of the means that are covered by the claim in question was an experimental use, more than two years prior to the patent application, such a use would not invalidate said claim; not even though the product of such experimental use had been sold for profit, more than two years before the patent application. Because where the controlling intent of a public use, in this country earlier than two years before the patent application, of the means that are covered by said claim in question, was to gain profit therefrom, the claim is invalid. This doctrine is good even though as connected with such use, there occurred the inventing of the means that are covered by said other claim of the same patent; this latter invention having been made as an incident, subordinate to the principal purpose of business profit by the use of the earlier invention in question.

But a patent claim is not invalid on the charge of its means having been in public use in this country earlier than two years before the patent application, if said use was, in good faith and reasonable understanding, for the purpose of testing such means. This rule being applicable even though the use was not only in public but, also, by the public, the invention being maintained

under the inventor's control; and although such use was so successful and satisfactory that no change was thereafter made in the means in question.

Abandonment by Previous Patent. If an invention that is claimed by a patent, was disclosed in a previous patent of the same inventor, and could have been claimed therein, but was not; then such patented invention is invalid provided there was no legal reservation of right to claim it in the subsequent patent in question, the latter not being a reissue of the previous patent.

Notwithstanding the application for such second patent was filed before the issue of, or even before the filing of the application for, said first patent; yet if the entire means of said claim be inseparable from the means that constitute any patented invention of said first patent, such claim of the second patent is invalid. This being true even though the first patent contain a reservation of right, in terms, for said claim to be made in the second patent; because there cannot be a reservation of right, in law, to a broad claim in the second patent, for an invention that was included by a narrow claim of the first patent. The foregoing not being affected even though said claim of the second patent express a certain element or function of the invention, not expressed by any claim of the first patent.

But where an earlier patent of the same inventor was not issued until after the filing of his application for a later patent, a patented invention of the latter that was lawfully reserved from the earlier patent—such invention not being involved in any patented invention of the earlier patent—is not invalid because it was described in such earlier patent.

Sufficient Specification. There should be a degree of sufficiency in the specification of the patent in question, such that persons skilled in the art may be able to make and use the claimed invention, by following the description thereof. But it is not settled whether, in the absence of an intention on the part of the inventor to deceive the public, the fact that the specification has not said degree of sufficiency, does or does not constitute a valid defense against a suit for infringement of the patented invention.

A specification is not insufficient, on the charge that its description is not full enough to protect from injury the material treated by the process; provided such treatment, under qualification of the common knowledge of persons skilled in the art, would not be injurious to said material. Neither is a specification insufficient, on the charge that it does not describe the detail of certain of its means; provided persons skilled in the art can, from such specification, make said means in suitable detail. Nor is a specification insufficient because it does not describe the scientific theory of the claimed invention. And it is of no consequence if a specification does not describe a certain use or advantage of the claimed invention; as the latter is impliedly patented for all its possible uses and actual advantages, even though the inventor was not aware of them.

Amendment of Patent Application. A patent claim is invalid if its means be substantially different from the means that were presented to be patented by the original application for the patent; such patent-claimed means having been introduced into the patent application, subsequently to its filing, by an amendment. But a patent claim is not invalid because the original specifi-

cation of its patent was amended, or because a substitute specification was filed, in patent application procedure, provided the patent-claimed means include no addition to or variance from the means that were originally applied for.

A patent claim is not invalid because it was an amendment made by the attorney of the patent applicant, continuing to act after the latter's death — even though such attorney was not then acting under the regularly required written power of attorney — notwithstanding there was no new oath, by the administratrix; provided said attorney had sufficient authority in fact, and his amendment, covering lawful matter within the scope of the originally applied-for invention, was subsequently ratified by those in due position.

Joinder of Inventions. A patent is not void because a plurality of inventions are claimed therein; provided such inventions pertain to the same subject, or are allied in their working. Doubt as to validity on this point, is resolved in favor of the patent. Different combinations or sub-combinations of means, each such combination or sub-combination constituting a distinct invention, may be lawfully secured by the respective claims of a patent. A single claim may lawfully secure a certain process and, also, certain mechanism for carrying out such process.

Grant of Patent. Assuming that a written instrument assigned the invention described in a patent application, and requested the patent to be granted to such assignee, and that said assignment was on record before the patent was granted; then the legal title to the patent vests in said assignee, notwithstanding the patent was granted, in terms, to the assignor.

If the applicant for a patent died before it was granted, and the patent was granted, in terms, to him, his heirs or assigns, the patent is not therefore invalid; because, in law, the grant was in the alternative — to the applicant or to his heirs or to his assigns. And further, if before the grant of said patent, a party acquired equitable title thereto, the patent enures to his benefit, and is construed to be a grant to him as assignee, even though there was no recorded evidence of such contract, provided rights of third parties do not intervene.

Limitation by Previous Foreign Patent. The following will be understood throughout the present title, namely: (*a*) If the principal invention that is covered by a patent of a foreign country, be the principal invention that is covered by a subsequent patent of our country on behalf of the same inventor, the same invention is patented, respectively, by the two patents — this being true notwithstanding the foreign patent have its specification and drawings more detailed than our patent, and though the latter contain improvements that are not in the foreign patent; (*b*) an invention was previously patented in a foreign country, under the within doctrine, if the patent of our country therefor on behalf of the same inventor was granted subsequently to the foreign patent, notwithstanding the application for our patent was filed previously to the foreign patent; (*c*) an expiration of the term of the previous foreign patent is by lapse of time — and not by breach of a condition subsequent, under the foreign patent law; (*d*) a forfeiture of a part of the term of the previous foreign patent, is by non-observance of a condition subsequent — such as, failure of the foreign patentee to

comply with a requirement of the foreign law touching any working of the invention or any payment of either taxes or annuities.

A patent of our country, granted for an invention which has been previously patented in a foreign country on behalf of the same inventor, while never in force longer than our usual patent term of seventeen years, is subject to the following limitations, namely: (*a*) If the foreign patent was in force when our patent was granted, then our patent expires with the expiration of the term of the foreign patent, and is not limited in its life by the forfeiture of any portion of the term of the foreign patent — or by the termination of a certain period of the foreign patent, where the latter patent was extended and maintained continuously in force by the patentee, under a right subject to his option, provided for when our patent was applied for and granted; (*b*) if the foreign patent was not in force, being either expired or forfeited, when our patent was granted, then our patent was never in force; (*c*) our patent is never invalid because not bearing same date with the foreign patent.

Statutory Disclaimer. A statutory disclaimer can not lawfully substitute for an invention that is disclaimed thereby, an invention that is composed to any extent of means not described by the patent; notwithstanding the substitute invention — not claimed by the patent but claimed by the disclaimer — be narrower than the invention that was claimed by the patent, and that is disclaimed by the disclaimer. This position is maintained although the substitute invention consists jointly of generic means described and specific means not described, by the patent; said generic means having con-

stituted the disclaimed invention, and being represented in the patent drawings as provided with said specific means. Because under all premises, a disclaimer is invalid in so far as it claims means that are not described by the patent; even though such disclaimer describes said means as the patent drawings show them.

But if by reason of an honest mistake, a patent unlawfully claimed means, that are plainly distinctive from lawfully claimed means, a disclaimer of the unlawfully claimed means, filed without unreasonable delay, is valid in any one of the following instances, namely: (*a*) Where it cuts out such invention or inventions as may be more than one patent can lawfully cover; (*b*) where it expunges a claim or an independent portion of the specification; (*c*) where it narrows the breadth of a claim, or limits the field to which a claim refers.

A valid disclaimer saves the lawfully claimed means of a patent from becoming invalidated, by reason of being in the same patent with the unlawfully claimed means. And such lawfully claimed means are not invalidated because of the unlawfully claimed means, even though a proper disclaimer of the latter be not filed until after the commencement of suit for infringement of the lawfully claimed means; provided there was not an unreasonable delay in such filing. A disclaimer estops the patentee from contending that the disclaimed means constitute either an invention claimed by the patent, or an equivalent for such invention.

It has been held that a reissue patent is subject to the within doctrine of statutory disclaimer. It has, also, been held that a statutory disclaimer touching a reissue patent is invalid where it, by disclaiming all and only

the differences between the original patent and the reissue patent, practically effected an abandonment of the latter patent and a resumption of the former patent.

Reissue Patents. In so far as a reissue patent covers a broader invention than the original patent covered, it is invalid if either one of the following two points exists, namely: (*a*) If the original patent does not prove that said broader invention was tried to be covered by it; (*b*) if the application for the reissue patent was not made with due diligence.

Said first point exists where the means that compose said broader invention, were not described by the original patent in a way which evidenced that they were considered as constituting an invention, to be secured by the patent; notwithstanding said means were shown in the drawings of, and were described in the specification of, and might have been lawfully claimed by, such original patent. The patent application record is competent evidence to confirm proof of the original patent, to the effect that said broader invention was not sought to be protected therein.

Said second point — the application for the reissue patent not having been made with due diligence — exists where sufficiently speedy steps were not taken to ascertain if the original patent covered said broader invention, and to file the application for the reissue patent. The character of said broader invention as witnessed by a comparison between the original and reissue patents, as well as any employment of said broader invention by an unlicensed party during the interval between the grant of the original patent and the application for the reissue patent, may each be involved in determining what constituted sufficiently speedy steps. And

while in view of the foregoing premises, due diligence in making the application for the reissue patent varies with different cases — yet, generally, it is limited to some time less than two years after the grant of the original patent; so that only in a very unusual case can it extend to any time longer than said two years. And neither a patent solicitor's error that caused the original patent not to cover said broader invention, nor a legal counsel's error that caused the reissue patent not to be earlier applied for, constitutes an excuse for, or has any bearing on this point of, lack of due diligence.

A reissue patented invention, broader than what the original patent covered, is not invalid under the within doctrine; provided the original patent proves that said broader invention was tried to be covered by it, and the reissue patent application to correct such honest mistake of the original patent was made with due diligence, as these two points are herein construed.

SUBJECT IV.

RECOVERY FOR INFRINGEMENT.

Analysis. The single question presented in considering a matter wherein validity of an infringed patent claim is found, concerns the amount of a recovery for the infringement; inasmuch as an injunction against a continuance of such infringement is regularly grantable in court procedure. There are two forms of this recovery: one form involving an account of the profits of the infringement; the other form involving an assessment of the damages of the infringement.

Infringement profits comprise the pecuniary gains or savings that the infringement caused, in the sense hereinafter described, to the infringer. And the same are transferred from him to the party that owned the patent during the infringement, by the account incident to a proper suit in equity.

Infringement damages — that are actual, and are thus neither nominal nor exemplary — comprise the pecuniary loss that the infringement caused, in the sense hereinafter described, to the party that owned the patent during the infringement. And the same is returned to him from the infringer, either by the assessment incident to a proper suit in equity or by the assessment in an action at law. In such two procedures, one and the same doctrine obtains; and, also, exemplary damages may be awarded therein, to an amount not exceeding three times the actual damages.

A recovery, alike in equity or at law, is founded on the premise that the infringed invention is of worth, in law. In determining this legal worth — in an account of infringement profits, cases divide into two generic classes, namely: one class presenting, and the other class not presenting, means comparable with the infringed invention; while in an assessment of infringement damages, cases divide into the foregoing two classes, and into a third generic class, namely: one presenting an established license fee.

The legal worth of the infringed invention is as follows, namely: (*a*) In the first defined class, it is the actual worth of the infringed invention, less the actual worth of any means comparable therewith — that is, it is such relative worth of the patented means; (*b*) in the second defined class, it is the actual worth of the infringed invention — thus covering the absolute worth of the infringing means, solely due to said invention; (*c*) in the third defined class, it is the established license fee.

All means are comparable with the infringed invention, that were of any recognized value for doing substantially the work required by the infringer, and done by the infringed invention; provided they were known to the art in due time, and are to be considered as having been open to the infringer's use during the infringement. It is not settled whether means that were not known to the art until after the grant of the patent in suit, were or were not known in due time to be competent as comparable means.

Aside from such means as are plainly to be considered as having been open to the infringer's use during the infringement — if the owner of the patent in suit also

owned during the infringement, an unexpired earlier patent of our country not in suit; then the means described in such earlier patent are, for the purposes of said suit, to be considered as having been open to the infringer's use during the infringement. It has been referred to but not settled, whether means that are described in an unexpired patent of our country, earlier than the patent in suit, and owned by a third party during the infringement, are or are not to be considered as having been open to the infringer's use during the infringement.

The burden of proving all profits or damages of an infringement rests upon the patent owner; they must be shown to have been profits or damages due wholly to the infringement, in distinction from any other possible cause. A surrender of a patent in reissue proceedure is an extinguishment thereof by voluntary act of its owner, in distinction from an expiration thereof by lapse of time; and a patent that has been so surrendered subsequently to its infringement, cannot be à foundation for any infringement recovery. The infringed invention consists of all and only the specification means that are expressly or impliedly included by the infringed claim in question, or of any known equivalent of such claimed means. The present subject treats, first, of the profits of an infringement; and secondly, of the damages of an infringement.

Infringement Profits. If a court of equity acquire jurisdiction of an infringement of a patent — which can only be where there is a right for equitable relief, such as a right to an injunction against a continuance of the infringement; then said court will give certain relief additional to that for which it entertains jurisdiction

of the infringement, notwithstanding such additional relief constitutes a relief that would not be given if sought for alone. This additional relief includes a recovery of money from the infringer, the amount of which is determined by the same principle that a court of equity applies in a case where a trustee has wrongfully used the trust property for his own interest. Said recovery involving an account of the profits derived from the wrongful act, the infringement of a valid claim of the patent; which account can never be had in a court of law, as distinguished from a court of equity.

In the previously defined first generic class of cases — presenting means comparable with the infringed invention — the profits of the infringment include all and only the fruits borne to the infringer, by the advantage that the infringed invention had over any of the means comparable therewith. Such infringement profits are always less than the gains or savings that the infringing means effected for the infringer. It has been referred to but not settled, whether the within definition of infringment profits in this generic class of cases, applies solely to specific cases of use; or applies, also, to specific cases of manufacture and sale, of the infringed invention. But if the infringer used the infringing means, only in the sense that they were fitted to things made and sold by him; then his gains or savings caused thereby, constitute profits of use of the infringed invention as truly as though they had been caused by a use of the things to which the infringing means were fitted.

In the previously defined second generic class of cases — not presenting means comparable with the infringed invention — the profits of the infringment include the entire fruits borne to the infringer, by the

infringed invention. Such infringement profits are always equal to the gains or savings caused to the infringer, by the infringing means, wherever the infringed invention constituted the sole cause of the recognized value of such means. So that although the infringed invention was only a part of the infringing thing, yet if it was the sole cause of the latter doing the work for which it was at all valued; then in view of the premise that there were no means comparable with the infringed invention, all the gains or savings caused to the infringer by the infringing thing, are profits of the infringement.

The remaining matter under the present title, applies alike to cases that belong to either one of the foregoing two generic classes. Inasmuch as infringement profits include only the gains or the savings that are caused to the infringer, by the legal worth of the infringed invention; therefore such profits exclude either patentee's or manufacturer's profits on any patented means other than those that the infringed claim in question covers, and, also, exclude manufacturer's profits on any non-patented means—irrespective of whatever degree of relation may exist between such infringing and non-infringing means, even in a process or thing essentially composed of both. But notwithstanding the infringing means may have composed a so-called improvement, patented and owned by the infringer; yet if this alleged improvement contributed nothing to the recognized value of the infringing means, then the profits of the infringement are the same as though the infringing means had not composed said improvement.

The inquiry is, not as to the profits of the infringing business, but as to the profits of the infringement; that is, as to the gains or savings caused to the infringer, by

the legal worth of the infringed invention. So *no* matter how profitable the infringing business was, there are no infringement profits in such business profits unless the legal worth of the infringed invention contributed to the latter. And notwithstanding the infringing business resulted without net profits, yet if loss was prevented by reason of the legal worth of the infringed invention; then such prevention from loss was a saving, and constitutes profits of the infringement. Also, even though the infringing business resulted in net loss, yet if the latter was the less by reason of the legal worth of the infringed invention; then such prevention from greater loss was a saving, and constitutes profits of the infringement.

Loss that the infringer suffered by a certain act of the given infringement, is not deducted from gain or saving that he made by a certain other act of the given infringement. Thus any outlay incurred by the infringer on *account of experimental infringing means, does not* diminish the infringement profits resulting from practical infringing means; and any expense due to defective or abandoned infringing means, does not lessen the infringement profits derived from perfect or valued infringing means.

If the infringer made and sold things embodying the infringed invention, then the inquiry is as to the infringement profits on the sold things for which payment was received by the infringer. The profits of an infringement are in nowise proved by the business profits of a party that was manufacturing the same things, at the same time and for the same market, as was the infringer. Also, even though there was an established license fee, the infringement recovery in equity is not restricted

thereto; but includes the entire gains or savings that were caused to the infringer, by reason of the infringement — this position remaining even though the patent owner had never utilized said invention.

It has been held that interest paid on borrowed money which was invested in the infringing business, may be allowed in favor of the infringer. But it is not settled whether interest is or is not ever to be allowed in favor of the infringer, on his capital that was employed in the infringing business. It is, however, settled that interest is not allowed in favor of the infringer, on his plant and real estate that were used for non-infringing matters as well as for the infringing matter; where the evidence does not prove what profit the plant and real estate were to the infringing business, in distinction from the non-infringing business.

In estimating the cost of any infringing things made and sold by the infringer, the estimate includes the raw material, together with the services and expenses of manufacturing and marketing, incident to such things; these items to be distinguished from all cost incident to any non-infringing things that may, also, have been made or sold by the infringer. If the infringer was a seller of non-infringing, as well as infringing, things; then a proportionate share of the total expense of the sales of both classes of things is allowed in favor of the infringer, for the infringing things. If the infringer was a company, the account allows for what were truly officers' salaries, not so extraordinary as to be really dividends of the company. Interest on infringement profits regularly accrues only from the date of the submission of the account, confirmed by the court; particularly, where

the infringement was not marked by aggravative features, such as intentional unlawfulness.

In a suit that grants an account of infringement profits, the usual principal equitable relief — to which the account of the profits of the infringement is merely an incidental relief — is an injunction against a continuance of the infringement. Therefore if the term of an infringed patent has expired, without equity having acquired jurisdiction of the infringement; then an account of the profits of the latter can only be had, as an incidental relief to an unusual principal equitable relief. And if there be no sufficient ground for the latter, then an action at law, as distinguished from a suit in equity, for a recovery of the damages of the infringement, is the sole redress.

Infringement Damages. In the previously defined third generic class of cases — presenting an established license fee — said fee constitutes the basis for computing the actual damages of an infringement. So that the amount of such fee, together with interest thereon from the time when it would have been paid for a given licensed matter, measures the actual damages for a like but unlicensed matter. A consideration that was paid by a party to settle an alleged infringement, is not a criterion by which to ascertain the damages of an infringement by another party. For in order to constitute an established license fee, the following conditions must be satisfied, namely: The licenses must have been voluntary contracts, without fear of litigation for any past act, and such in number and time as to evidence their market value; the license fee must have been established before the infringement in suit, it must have been paid by a sufficient number of licensees to prove

general acquiescence therein, and it must have been substantially the same under like circumstances.

In either one of the two previously defined first and second generic classes of cases — not presenting an established license fee — competent evidence may prove the actual damages of the infringement. Such evidence embracing the worth, in law, of the infringed invention; and the pecuniary profits that the patent owner would have made by reason of such worth, if the infringement had not occurred. Only nominal damages being recovered where this evidence does not show that the infringed invention either accomplished an old work in a better way than did any means comparable therewith, or else accomplished a new work. Another instance of merely nominal damages, is that of a case where there was no license fee, no impairment of the patent owner's market and no actual damage of any kind — an unlawful infringement not necessarily involving loss to the patent owner, even assuming the infringed invention to be of worth, in law; pecuniary profits that result to the infringer, from such worth, having bearing upon the question of infringement damages, only where such profits would have been realized by the patent owner if the infringement had not taken place.

An instance of infringement damages being measured by the profits of the infringing business, is that of an exceptional case, where the infringed invention was the sole cause of all sales, and of all profits from sales, of the infringing things — and such sales and profits would have been made by the patent owner, in the absence of the infringement; there having been no means comparable with the infringed invention, and the patent owner having granted no license to make things embodying the lat-

ter— but his business facilities having been such as would have secured and supplied the limited market for said things, if said infringement had not occurred.

An instance of infringement damages being measured by the reduction in the selling price of the patent owner's things, is that of a case where he had granted no license to make things embodying the infringed invention, but made and sold things having said invention as their essential feature, and was able to have supplied the limited market therefor; and the infringer, by making and selling his infringing things, according to the arrangement of the patent owner's things, for the said market at a price below the established price of the patent owner, compelled the latter to reduce such established price in order to hold his trade. Such a reduction in the price of said things sold by the patent owner, constitutes damages of the infringement — said reduction having been caused, neither by any infringement of a party other than the infringer in suit, nor by the general business competition of the infringer in suit, but exclusively by reason of the infringement in suit; and such damages are recoverable solely by the patent owner, even though he had a partner in his said business.

No damages are recovered for an infringement where public notice of the patent was not duly given, by marking the patented thing as patented, together with the patent date — or when the patented thing does not permit such marking, by fixing to it or its inclosing package, a label containing the like notice; unless private notice of the patent and of its infringement was given by the patent owner to such infringer, and the latter thereafter continued the infringement. The burden of proving either said constructive or said actual notice, rests

upon the patent owner; and while reference has been made to, no opinion has been given, whether this law of notice applies in a case where the patent owner neither sold nor licensed the patented thing, but personally maintained an exclusive enjoyment thereof.

If an infringer's action was sufficiently aggravative, as, by bad faith, intentionally committing infringement when knowing the same to be unlawful, or causing needless injury to the patent owner; then the court awards exemplary damages, in its discretion, not exceeding three times the actual damages. And in the absence of such exceptional features, interest does not accrue on unliquidated actual damages—there being no established license fee.

Inasmuch as no damages are assessed that were caused by any reason other than the infringement, therefore, all further question touching any means is immaterial; regardless how closely infringing means may have been connected with non-infringing means, in operation or mechanism. A case may furnish proof of actual damages caused by the infringement, although there was no established license fee, and although the infringer made no business profits from the infringing business. A previous recovery of infringement damages touching a given thing, does not prevent a subsequent recovery on the latter; unless such previous recovery, as adjudged and paid, comprehended the entire past and future of said thing, within the patent term. Attorney's fees, incurred by the patent owner on account of an infringement, are not embraced in actual damages of the latter. State statutory limitation applies to the bringing of an action at law for an infringement.

REFERENCE TABLES.

[These tables represent the field of reference, from which the condensed views of the text have been gathered as settled law. All cases, except subsequently to 147 U. S. 322, are those that are singly considered at length, under like titles, in the detail treatise — Hall's Patent Infringement, 1893.]

SUBJECT I.

LICENSE UNDER PATENT.

License before Patent Application.

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License by Recovery.

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Birdsell v. Shaliol, 1884, 112 U. S. 485.

License in Sold Thing.

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SUBJECT II.

IDENTITY OF INVENTION.

Claim of Patent.

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SUBJECT III.

VALIDITY OF PATENT.

Suggestion about Invention.

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SUBJECT IV.

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INDEX.

[The four brief expressions herein used, will be understood as referring, respectively, to the corresponding subjects of the text, namely: *In re License*, referring to the question whether the given means be licensed under the patent in question; *in re Identity*, referring to the question whether the given means be, in law, the same as the patented invention in question; *in re Validity*, referring to the question whether the patented invention in question be valid; *in re Recovery*, referring to the question of the sum that may be recovered for the unlawful infringement in question.]

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