

The bill, which is sworn to, avers that Poulton became the sole owner of the entire operetta, and that complainant acquired his title. But even if the bill and proof did not show that complainant is clothed with the control of all the interests in the piece, it does show that he has acquired Poulton's interest, and that is enough to protect him against a wrong-doer.

I have discussed the case for the purposes of the motion for injunction mainly upon complainant's right to be protected in the name; but complainant insists that the defendant's piece is not in fact an original composition, but is an infringement upon the dialogue and dramatic arrangement of his operetta. This question, however, will be more appropriately considered at the final hearing, in the light of the proof as shall then appear.

The injunction is allowed as prayed.

SARONY v. EHRICH and others.

(Circuit Court, S. D. New York. June 24, 1886.)

1. COPYRIGHT—INFRINGEMENT—PRINTS—Rev. St. U. S. § 4965.

Under section 4965, Rev. St. U. S., relating to the infringement of copyrights, the actual infringing prints can alone be recovered, and when the prints are out of the possession and beyond the control of the infringer the proprietor of the copyright cannot recover of him their value in an action at law.

2. SAME—FORMER JUDGMENT—BAR TO RECOVERY.

Judgment entered in a former action against a lithograph company, by whom prints were printed for an infringer of a copyright, is a bar to further recovery by the proprietor of the copyright in an action against the infringer for the value of the prints.

At Law. Tried by the court.

This is an action to recover \$535, the value of 70,000 lithographic copies of a photograph of Oscar Wilde, copyrighted by the plaintiff. These copies were printed by the Burrow-Giles Lithographic Company for the defendants, and published and circulated by them. Prior to the commencement of this action they had all passed out of the possession of the defendants.

The defenses are: *First*. That under section 4965 of the United States Revised Statutes the actual infringing prints can alone be recovered. There is no provision of law by which the plaintiff can obtain judgment for their value. *Second*. That after the distribution by the defendants as aforesaid the plaintiff commenced an action against the lithographic company and recovered the money value of all copies printed and sold by it, including those in controversy.

The judgment entered in that action has been paid, and is a bar to a further recovery. Section 4965 is as follows:

"If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States."

Gurnsey Sackett and A. T. Gurlitz, for plaintiff.

Stine & Calman and D. Calman, for defendants.

COXE, J. The section in question must be strictly construed. *Backus v. Gould*, 7 How. 798. No authority has been cited to sustain the proposition that when the piratical prints are out of the possession and beyond the control of the infringer the proprietor of the copyright can recover of him their value in an action at law. It would require an exceedingly strained construction, almost a distortion of the act, to make it fit the present circumstances. It is no answer to say that the remedy provided by law is ineffective; that the wrong-doer may escape the consequences of his infringement; that the opportunity for redress diminishes in proportion to the success of the infringement, and ceases wholly when the wrong is fully consummated. These arguments might, with great propriety, be addressed to the law-making power, and congress could, perhaps, be induced to render effectual, by a few simple amendments, provisions which, in their present form, are so obviously defective and inadequate. With these considerations, however, the courts have nothing to do. They must deal with the law as it is, not as it ought to be. But even though the statute should be construed in accordance with the plaintiff's contention, it is not easy to see why the proposition advanced by the defendants, that he has already recovered the value from the lithographic company, and cannot, therefore, recover it again, is not well founded.

The defendants are entitled to judgment.

KELLER and others v. STOLZENBACH and others.

(Circuit Court, W. D. Pennsylvania. July 2, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—LACHES AS A BAR TO AN ACCOUNT FOR PROFITS.

To a bill to restrain infringement of a patent the defendants by plea set up a claim of right to use the patented apparatus in question, and the grounds thereof. The plaintiff having neglected for over two years to reply or set the plea down for hearing, the court, under equity rule 38, decreed that he was to be deemed to admit its truth and sufficiency, and that the bill be dismissed. The defendants were then suffered to continue to use the apparatus for nearly two years more, before a second (the present) suit was brought to restrain them. *Held*, that the court would not decree an account of profits, the defendants having acted under a *bona fide* claim of right, and there being on the other side acquiescence and inexcusable laches in seeking redress.

2. SAME—DAMAGES.

The proofs disclosing an established license fee of \$1,000, *held, further*, that the amount of such fee was a just measure of compensation for the infringement.

In Equity.

D. F. Patterson, for complainants.

Geo. H. Christy, for defendants.

ACHESON, J. If it be conceded that where a profit or saving is shown to have accrued to an infringer beyond the amount of the established license fee for the use of the patented machine, the patentee suing in equity for an account of profits is not ordinarily to be limited to such fee; and assuming that the evidence discloses with sufficient clearness the number of bushels of sand treated by the patented apparatus on the dredging-boat Wharton McKnight, and the amount of the savings to the defendants thereby effected,—it still remains to be considered whether the defendants are justly chargeable with profits, in view of the exceptional circumstances of this case.

In the first place, be it observed, the defendants were not wanton infringers. They acted under a *bona fide* claim of right to use the invention, based on the late partnership relations and dealings between the patentee, the plaintiff Keller, and the defendant Pfeil. It is true, the decision of the court has been adverse to that claim, (20 Fed. Rep. 47;) but the question of right was fairly debatable, and the proofs left the defendants' integrity untouched. And then, in the second place, the plaintiffs' demands may well be moderated by reason of the laches imputable to them. The history of the case is this: The patented apparatus was put on the Wharton McKnight in the spring of 1879. Very shortly thereafter Keller brought suit in this court against Pfeil and his associates to restrain its use. To the bill the defendants filed a plea setting up Pfeil's claim of right to use the apparatus, and the grounds thereof. The plaintiff failed to reply to the plea, and, for a period of more than two years, neglected to move