

formed this difficult task with as near an approach to accuracy as can be looked for under the circumstances. The last exception to be noticed is to the allowance of interest. The general rule is that interest should be allowed on royalties from the time those royalties ought to have been paid, in all cases where a royalty is the measure of the complainant's damages, the theory in such cases being that damages are liquidated at such time as the royalty would have been due, if the defendant had elected to purchase instead of to infringe the right to the use of the invention in suit, but that no interest is due on damages measured otherwise than by a royalty, because such damages are unliquidated until they are ascertained by an action. *Walk. Pat. § 571; Truck Co. v. Railroad Co., supra; Moury v. Whitney*, 14 Wall. 653. But the latter part of this rule is subject to exceptions, and in equity the allowance of interest appears to have been left largely to the discretion of the court. On reason, it is difficult to conceive why, where a patentee's loss is ascertained to have been incurred at a certain time, interest should not begin to run from that time, whether the loss was measured by a royalty or by other equally conclusive evidence of the fact. The verdict of a jury must include interest up to the day of its rendition; but a master, although restricted in his finding to actual damages, has frequently been allowed to fix the date from which interest shall be computed on the amount. The authorities on this question are not uniform, and the rule cannot be said to be definitely settled. So far the decisions have been made with reference to the merits of the particular case, and on consideration I have concluded to allow interest from the date of the interlocutory decree on such damages as shall be finally awarded to the complainant.

By closing the accounting at the end of the year 1878, and deducting from the number of infringing registers found by the master the number of them made after that year, and also those not affirmatively proved to have been made before that time, the remainder will be 555. A decree will therefore be entered for the complainant for \$555, with interest from the 21st of November, 1883; making the total amount of principal and interest \$705.13, with costs.

---

SCHUMACHER *et al.* v. WOGRAM *et al.*

(*Circuit Court, S. D. New York. May 25, 1888.*)

**COPYRIGHT—PICTURES—DESIGNS FOR TRADE-LABELS.**

Plaintiffs designed a picture, representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, and delivered to the librarian of congress a description of the picture by the title "Nosegay," and the librarian duly recorded the name of the picture. *Held*, that this was an attempted evasion of act Cong. June 18, 1874, § 3, providing that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizing them to be registered as trade-marks; and that plaintiffs' design could not be protected as a copyright.

In Equity. Motion for injunction.

A. T. Gurlitz, for plaintiffs.

W. B. Putney, for defendants.

WALLACE, J. The plaintiffs seek an injunction *pendente lite* to restrain infringement of their alleged copyright in a picture. It appears that the plaintiffs manufacture prints or labels, and sell them to dealers in cigars and other manufactured articles, to be affixed to cigar boxes or other articles. The plaintiffs, in making their prints, design a pictorial illustration in colors, cut an impression of it upon lithographic stones, and print copies. In the present case they designed a picture representing a young woman holding a bouquet of flowers, and took proceedings under the statute to copyright the picture. They delivered at the office of the librarian of congress a description of the picture by the title "Nosegay," accompanied with a photographic copy, and within 10 days delivered another photographic copy. Thereupon, and on February 2, 1885, the librarian duly recorded the name of the picture. Upon the prints struck off and sold to dealers the words "Opera Bouquet," a name descriptive of a certain brand of cigars, was substituted in place of the word "Nosegay," and the notice inscribed upon the face of the print gave the date of the copyright as of the year 1884, instead of 1885. The infringement now complained of consists in the copying by the defendants of some of these prints.

The facts show an attempted evasion by the plaintiffs of the provisions of section 3 of the act of congress of June 18, 1874, "to amend the law relating to patents, trade-marks, and copyrights." That section declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels. The case of *Schumacher v. Schwenneke*, 25 Fed. Rep. 466, is distinguishable from the present, because in that case the court found that the picture copyrighted was not made to be used for labels. It is doubtful whether the plaintiffs' action must not fail because they have not complied with the provisions of section 4962, Rev. St. U. S. That section requires as a prerequisite to maintaining the action that a notice be inscribed upon the face of a copyrighted painting or print which states the year of its entry for copyright. Here the wrong year was stated. Upon the authority of *Baker v. Taylor*, 2 Blatchf. 82, the insertion of the wrong year in the notice, although unintentional, and arising by a mistake, would seem to be fatal to the action. In *Myers v. Callaghan*, 5 Fed. Rep. 726, a more liberal view of the statute was taken. It is not necessary for present purposes to decide the point. The motion is denied.

NEW YORK GRAPE SUGAR CO. v. AMERICAN GRAPE SUGAR CO. *et al.*SAME v. BUFFALO GRAPE SUGAR CO. *et al.**(Circuit Court, N. D. New York. June 8, 1888.)*

## PATENTS FOR INVENTIONS—PRIOR USE—REHEARING—SUPPRESSION OF TESTIMONY—CREDIT OF WITNESSES.

N., the owner of letters patent No. 65,664, of June 11, 1867, to Joshua J. Gilbert, for "manufacture of starch," sued G. for infringement. Pending suit G. procured strong affidavits from Gilbert's employes that the process covered by the patent had been used in his factory for more than two years before his application on March 11, 1867. These affidavits being submitted to N., he became alarmed, and agreed, in consideration of their surrender to him, to secretly abandon the suit, which was done. He also retained the attorney who procured the affidavits. A., whom he had previously sued for infringement of the same patent, and had obtained a decree against, upon discovery of these transactions, moved for a rehearing on the ground of newly-discovered evidence as to public use for more than two years, and suppression of testimony upon that point by N. The testimony offered in support of the motion was all that of Gilbert's employes. Some of it was unimportant, and not new; and the most material part was that of Gilbert's foreman, who, at various times during the several suits, had made five affidavits as to such public use, two being entirely antagonistic to the other three, and the contradiction being unexplained. In addition, other affidavits excited serious distrust of their accuracy. *Held*, that although the conduct of N. was reprehensible, the rehearing should be denied; the testimony offered being untrustworthy

In Equity. On petition for rehearing.

*John R. Bennett and Sherman S. Rogers*, for the petition.

*Edward N. Dickerson*, *contra*.

SHIPMAN, J. These are petitions by the defendants for a rehearing of the above-entitled causes upon the ground of newly-discovered evidence, or evidence the knowledge of which had been withheld by the act of the plaintiff, upon the question of the public use of the invention covered by letters patent No. 65,664,<sup>1</sup> by J. J. Gilbert, the inventor and patentee, for more than two years before the date of his application for the patent, which was about March,<sup>2</sup> 1867. The opinions in the cases are contained in 18 Fed. Rep. 638, 20 Fed. Rep. 505, and 24 Fed. Rep. 604.<sup>3</sup> The bills in these cases were filed October 14, 1881. The defendants' testimony was closed November 14, 1882. The plaintiff's rebutting testimony was closed April 3, 1883. In June, 1883, a petition was brought by the defendants for leave to introduce additional and newly-discovered evidence in support of two of their defenses. A part of the new evidence was the testimony of John A. Owens, Daniel Murphy, Thomas Cavanagh, and John L. Palmer, that the process had been used in the J. J. Gilbert factory for several years before the application, and before 1865. These four persons are a part of the witnesses whom the defendants desire should testify upon the rehearing. This petition was heard by Judge WALLACE and was denied. Shortly after, the case was heard by me upon final hear-

<sup>1</sup>Issued June 11, 1867. <sup>2</sup>March 11. <sup>3</sup>See, also, 10 Fed. Rep. 835.