

that he has used the corporation solely for himself, for the purpose of appearing to be an officer of it, and that its property has been, in fact, his.

The correctness of this finding has been questioned; but as there was testimony tending to establish it, and as it was involved with the question of the liability of the respective defendants in the accounting sent to the master, and he does not appear to have acted in any manner improperly or unfairly, his finding cannot, with propriety, be disturbed here. *Bridges v. Sheldon*, 18 Blatchf. C. C. 295, 507; S. C. 7 FED. REP. 34. On this finding, Lewis, if an officer or agent, was such for himself, and all he received in such pretended capacity he received for himself. An infringer is liable to account for the profits of the infringement to the owner of the patent, because they are the avails of the property of the owner in the hands of the infringer, which he has no right to detain from the owner. Lewis, and he alone, has these profits, which are avails of the property of the oratrix in his hands, and which he has no right to detain from her. The pretext of doing business in the name of the corporation is too flimsy to shield him from accounting for them. During a part of the time for which the account has been taken he did this business in the name of an individual, for the reason that the corporation had been enjoined. This was equally unavailing to protect him from liability.

Exceptions overruled.

COLGATE v. WESTERN UNION TEL. CO.

(Circuit Court, S. D. New York. April 4, 1884.)

APPLICATION FOR A REHEARING—LACHES OF APPLICANT.

An application for a rehearing, based on alleged newly-discovered evidence, must be denied when it appears that the existence of such evidence was known to the applicant or his counsel at the time of the former trial, and that the evidence was not then produced.

Motion for Rehearing.

Betts, Atterbury & Betts, for complainant; *Wm. D. Shipman* and *Frederick H. Betts*, of counsel.

Porter, Lowrey, Soren & Stone, for defendant; *Geo. Gifford* and *Wm. C. Witter*, of counsel.

WALLACE, J. This is an application by the defendant for a rehearing in a cause heard in November, 1878, and in which an interlocutory decree was entered in December, 1878, adjudging the validity of the complainant's letters patent, and the infringement thereof by the defendant, and that complainant recover the profits of the defendant derived by such infringement. In January, 1879, the complain-

ant applied for a final injunction against the defendant to enjoin the infringement, which was granted as to any further use of the invention, but as to certain uses to which it had already been applied the question of issuing a perpetual injunction was postponed, to await an accounting and application for a final decree. Thereafter the parties entered into negotiations which resulted in defendant's taking a license of complainant and paying \$100,000 for a release. The application is made on the ground of newly-discovered evidence, which shows the withdrawal of an application for a patent. At the hearing of the cause the defense of abandonment of the invention was relied on by the defendant, and was considered in the opinion delivered by the court, and overruled in part upon the view that the application for a patent had never been withdrawn by the inventor.

Upon the hearing it was stated by counsel for the complainant that a letter had shortly before been found by him, in looking over the files of the patent-office, written by the inventor, formally withdrawing the application, and this fact was fully brought to the attention of the defendant's counsel. Whether it was assumed by defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the court as a conceded fact, is not material, in view of the decision and opinion of the court rendered within a few days after the hearing, by which it was plainly indicated that the fact was a material one, and was not in the proofs. If under these circumstances an application had been promptly made for leave to reopen the proofs, and for a rehearing, it would have been incumbent upon the defendant to satisfy the court that the evidence could not have been obtained by the exercise of reasonable diligence, and introduced before the hearing. *Baker v. Whiting*, 1 Story, 218; *Jenkins v. Eldridge*, 3 Story, 299. It is not necessary to search for authorities outside the decisions of this court maintaining the rule that a rehearing will be denied if the non-production of the evidence is attributable to the laches of the party or his counsel. *Ruggles v. Eddy*, 11 Blatchf. 524, 529; *India-rubber Co. v. Phelps*, 8 Blatchf. 85; *Hitchcock v. Tremaine*, 9 Blatchf. 550; *Page v. Holmes Burglar Alarm Co.* 18 Blatchf. 118; S. C. 2 FED. REP. 330. But, after the expiration of over three years since the discovery of the evidence, whatever might have been the result of an application if it had then been made, it would have appealed much more forcibly to the judicial discretion than can be expected now, after more than three years have elapsed, after a further hearing has been had, and a perpetual injunction ordered against the defendant, and after the defendant has recognized the complainant's rights by compromising for past use, and taking a license for the future use of the invention, and for a considerable period has been enjoying the use of the invention under the license.

The law of laches, as applied to motions for new trials or rehearings, is founded on a salutary policy. It is for the interest of the

public, as well as of litigants, that there should be an end of litigation, and that efforts to reopen controversies by unsuccessful parties, after they have had a full opportunity to be heard, and a careful hearing and consideration, should be discouraged.

A rehearing is denied.

WESTCOTT and others v. RUDE and others.

(Circuit Court, D. Indiana. April 1, 1884.)

1. PATENTS FOR INVENTIONS—ACCOUNTING BEFORE MASTER—EVIDENCE.

In an account before a master, evidence of payments for past infringement, for the purpose of ascertaining the amount which should be paid by the defendant, is incompetent. To admit it is contrary to the maxim, *Inter alios acta*, etc.

2. SAME—SALE OF LICENSES—MEASURE OF DAMAGES.

When the sale of licenses by the patentee has been sufficient to establish a price for such licenses, that price should be the measure of his damages against an infringer; but a royalty or license fee, to be binding on a stranger to the licenses which established it, must be uniform.

3. SAME—SINGLE LICENSE—MARKET PRICE.

Proof of a single license is not sufficient to establish a market price.

4. SAME—SEVERAL CLAIMS—ROYALTY.

In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value, any more than, in mathematics, a part can equal the whole. A licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention.

Exceptions to Master's Report.

H. C. Fox and *Wood & Boyd*, for complainants.

Stem & Peck, for defendants.

WOODS, J. The exceptions filed are numerous, but, passing by others, the court will consider only those which bring into question the measure of the damages assessed. Upon this point the master says: "Plaintiffs waive all claims for profits, and rely upon the proofs produced as establishing a fixed license or royalty as the measure of damages;" and, after giving an abstract of the testimony of the four witnesses who were examined on the subject, the report proceeds to say:

"It is very difficult to determine from this evidence whether it makes proof of such an established royalty or license fee as furnishes a criterion upon which to estimate complainant's damages. The owner of a patent is granted a monopoly. He may choose to reserve the right to use his invention exclusively to himself, and to make and sell machines, keeping all other manufacturers out of competition. He may enjoin infringers. He has the right to fix a reasonable license fee or royalty to be paid by manufacturers who use his invention in making machines. And if fixed and reasonable, and paid