

cordials put up in such bottles, and with such labels, which they purchased in the open market, they say that such use was without knowledge of any special or exclusive right to such labels and bottles as is now claimed by the complainants, and without any intention or design of infringing upon or injuring any special or exclusive right complainants have to the use of the same. They further plead that upon learning, in July, 1891, that complainants claimed the exclusive right aforesaid, they at once desisted from using in any way in their business either the bottles or labels described in the bill, and have not since then manufactured or sold, or offered for sale, any Kummel in any such bottles or with any such labels; that they have none such in their possession, custody, or control; and that they have no desire or intention of manufacturing, selling, or offering for sale any cordial in such bottles, with such labels or other devices.

The complainants have set down the plea for argument, and ask the judgment of the court on its sufficiency.

The plea must be overruled. While it is a well-settled rule that courts of equity should decline to assist one who has slept upon his rights, and shows no excuse for his laches in asserting them, there is nothing in the plea to make the rule applicable here. The complainants' right and title to the trade-mark is not denied, and it is not alleged that they had any knowledge of the infringement by the defendants. It is true that it appears from the bill that the complainants have been represented by A. Stepeani & Co., of the city of New York, their sole and exclusive agents for the United States, with the exception of the state of California. But the inference sought to be drawn from the fact that the complainants had the means of knowledge of what the defendants were doing, and therefore were chargeable as if they had had actual knowledge, does not follow. The complainant cannot lie by for a long time before filing his bill, not only for an injunction, but for profits, without being guilty of laches, as was held in *Beard v. Turner*, 13 Law T. R. (N. S.) 747. There the plaintiff, having actual knowledge, waited two years before filing his bill, and the vice chancellor said he apprehended that the court would make the objection that he should have come into court at once, for the reason that he asks for an account of the profits, and because a complainant might conclude that it would answer his purpose to let the defendant go on selling four or five years, and at the end of that time call him to an account of profits as if he were the complainant's salesman. It was held in the same case that it would be a fraud to allow complainant to avail himself of delay to obtain benefit for himself, and therefore the court could not give a person an opportunity of lying by, and then asking for an account of the profits made by an injury committed. The cases in which the rule is applied are cases in which the complainant was guilty of laches similar to that stated in *Beard v. Turner*. But here the only circumstance relied upon to charge the plaintiffs with constructive notice is that they were represented by agents located at the city of New York, nearly 800 miles distant from the defendants' place of business. The defendants have been confessedly conducting all these

years a spurious business, manufacturing and selling imitation goods, and using labels that they must have known were calculated to deceive and defraud. They are hardly in position to come into court and assert equities growing out of that business against the manufacturers of the genuine article, whose trade-mark they have been infringing. It is not a case of innocent use with complainants' knowledge and acquiescence, nor is it a case where it is shown that the complainant had sufficient knowledge to lead him to the fact, and therefore should be deemed conversant. Regarded in any and every point of view, the plea is insufficient.

The defendants will be allowed 20 days within which to present an answer and apply for leave to file the same.

SPOKANE MILL Co. v. Post *et al.*

(Circuit Court, D. Idaho. April 9, 1892.)

1. NAVIGABLE WATERS—OBSTRUCTION—NUISANCE.

Rivers and streams, when of such size and channel that they may be used for the purpose of floating logs or in the transportation of any article of commerce, are public highways. While any obstructions placed in the same which will prevent such use are a public nuisance, they may be abated upon the action of a private individual who suffers some special damage, not common to the entire community.

2. SAME—PLEADING.

The party asking such abatement must allege and show that the commerce for which he would utilize the stream is lawful.

(*Syllabus by the Court.*)

In Equity. Bill by the Spokane Mill Company against Frederick Post *et al.* to enjoin the obstruction of a stream, and abate a nuisance. Heard on motion for a temporary injunction and on demurrer to the bill. Injunction refused, and demurrer sustained.

Edgar Wilson, for plaintiff.

Albert Hagan and John R. McBride, for defendants.

BEATTY, District Judge. The complainant alleges that, by obstructions placed in the Spokane River by defendants, it is prevented from floating down the stream a lot of logs it now has just above such obstructions, as well as from so using the river in the future as it has used it in the past, and asks the abatement of the obstructions. Responding to the order to show cause why a temporary mandatory injunction should not issue, the defendants deny the general allegations of the bill and the affidavits of complainant, and also demur to the bill as insufficient to justify the relief sought. The complainant is not asking the relief of a merely temporary restraining order to prevent waste and preserve the property as it now is pending litigation, but the extraordinary writ by