

the court said that, while the first proposition is a matter of dispute, there is none in respect to the conclusion that the purchaser who has "received and used the article," and derived a benefit from it, cannot then rescind the contract.

The court below further instructed the jury that "any right which the defendants may have had to rescind the contract in suit was lost by the defendants if the jury find that they delayed for an unreasonable time in asserting it." In *Morgan v. McKee*, 77 Pa. St. 228, the court held that the seller's default in making one of the stipulated deliveries of the material bought gave the buyer the right to rescind the whole contract, but that the right must be exercised promptly, and that any undue delay would be regarded as a waiver. What is a reasonable time, where the facts are undisputed, is a question of law to be determined by the court. When the article is a subject of speculation, and the market price varies with the demand and supply, if the purchasers, instead of rescinding the contract as soon as it is broken, or within a reasonable time thereafter, take the chance of a rise in the price, it is but equitable and just that they should be treated as having waived the right to rescind. In that case, a month's delay, when the delivery was to be monthly, was regarded as unreasonable. In the present case the question of promptitude or of undue delay in exercising the right of rescission by the defendants, if they had any, was left entirely for the determination of the jury. In view of all the facts disclosed by the record, and of the law applicable to them as above stated, further discussion would be needless. The conclusion arrived at is that the whole case was fairly left to the jury, and that they could not have been misled, either by the general charge or by the special instructions of the court. The issues of fact were distinctly presented, and the questions of law were correctly decided by the circuit court, and its judgment is therefore affirmed.

FISHEL et al. v. LUECKEL et al.

(Circuit Court, S. D. New York. December 23, 1892.)

1. COPYRIGHT—INFRINGEMENT—JOINT TORT FEASORS.

Defendants bought certain copyrighted pictures, furnished them to a photogravure company, ordered copies to be made, and gave general directions as to how the work should be done; the company agreeing to take the risk of infringement. *Held*, that defendants were liable for infringement as joint tort feasors.

2. SAME—INTENT IMMATERIAL.

When the infringement of copyright is established, the question of intent is immaterial. *Harper v. Shoppell*, 26 Fed. Rep. 519, followed.

3. SAME—ENGRAVINGS AND ETCHINGS—INCOMPLETE COPIES—PHOTOGRAVURE.

A photogravure company, under an agreement with defendants, made copies of copyrighted engravings and etchings, omitting the tint, title, and plate mark, shipped them to London, and there caused the tint, title, and plate mark to be put on, and delivered the finished pictures to defendants. *Held*, that under Rev. St. § 4952, the copyright was infringed, whether the unfinished copies were marketable or not.

4. SAME—REMEDIES—INJUNCTION WITHOUT PROOF OF DAMAGE.

On proof of infringement of copyright, injunction should issue without proof of actual damage.

In Equity. Bill by Aaron A. Fishel, Abraham I. Adler, and Samuel Schwartz against August Lueckel, William Unger, and Henry Heininger for infringement of copyright. Decree for complainants.

Benjamin F. Lee, for complainants.
Samuel Greenbaum, for defendants.

TOWNSEND, District Judge. In this case the complainants are the owners of six copyrights for certain engravings and etchings. Under an agreement with the defendants, the Brooklyn Photogravure Company, of New York, manufactured copies of said pictures, omitting from said copies the tint, title, and plate mark, and shipped them in this condition to London, where it caused the tint, title, and mark to be put on, and delivered the finished pictures to defendants. The defendants deny infringement, because, as they claim, the copies were not complete without tint, title, and plate mark, and therefore were not marketable. That being so, they claim that the copies produced by the photogravure company were not "copies" in the sense in which the term is used in the copyright law. The evidence shows that, although it is usual to tint and mark such pictures, yet incomplete copies such as were produced by the photogravure company would have some market value. This fact alone would seem to be sufficient to establish the infringement. But the suit is brought under section 4952 of the Revised Statutes, which secured to the complainants the "sole liberty of printing, reprinting, publishing, completing, and copying," etc., these engravings. The object of this law is to protect the results of the creative genius of the composer or designer. The appropriation of part of a work is no less an infringement than the appropriation of the whole, provided "the alleged infringing part contains any substantial repetitions of any material parts which are original and distinctive." Here the defendants had the whole picture copied, except the plate mark and title. They omitted the mere work of the artisan; they appropriated the genius of the artist. The question is not whether a copy is marketable, but whether it is piratical. *Bump*, Pat. pp. 499, 500; *Drury v. Ewing*, 1 Bond, 540; *Richardson v. Miller*, 12 O. G. 3. There is no equity in this claim of the defendants. The copyright has been infringed.

The allegation of the defendants that they had no intention to infringe the copyright is no defense in this case. Where the infringement is otherwise established, the intention is immaterial. *Reed v. Holliday*, 19 Fed. Rep. 325.

The defendants further claim that they are not liable for infringement, because the photogravure company was not their agent, but was an independent contractor, and agreed to take the risk of infringement. The evidence shows that the defendants bought the pictures from the complainants, furnished them to the photogravure company, ordered the copies made, and gave general directions as to how the work should be done. The defendants procured the infringing act to be done. They are therefore liable as joint tortfeasors. *Estes v. Worthington*, 30 Fed. Rep. 465; *Rob. Pat.* § 910. The case of *Harper v. Shoppell*, 26 Fed. Rep. 519, cited by defendants,

is, so far as it applies to this case, an authority in support of complainants' claim. There Judge Wallace says:

"The plaintiffs might have copyrighted the cut as an independent subject of copyright. If they had done this, a reproduction of the copyrighted thing would have been piracy, however innocent the defendants might have been of intentional wrong."

Furthermore, as the defendants authorized the infringing act, knowing that there was danger on account of the copyright act, and on condition that the photogravure company was to take the risk, they may properly be considered to have intended the result of such act. The act of infringement having been committed in this country, the subsequent acts abroad are immaterial, except upon the question of damages. *Ketchum Harvester Co. v. Johnson Harvester Co.*, 8 Fed. Rep. 586; *Goucher v. Clayton*, 11 Jur. (N. S.) 462. The infringement having been established, the appropriate relief in a court of equity is by an injunction and account of profits. *Gilmore v. Anderson*, 38 Fed. Rep. 848. And "the court will grant an injunction without proof of actual damage." *Reed v. Holliday*, 19 Fed. Rep. 327. "The right to an account of profits is incident to the right to an injunction in copyright cases." *Stevens v. Gladding*, 17 How. 447. It appears that the defendants may have derived advantages or profits from having the infringing act done in this country. This question can only be determined by proceedings before a master.

Let there be a decree for an injunction and an accounting.

THE PACIFIC.

THE S. B. POMEROY.

(District Court, E. D. Michigan. October 17, 1892.)

COLLISION—VESSELS ENTERING CANAL—EVIDENCE.

A schooner, the stern vessel in a tow lying near the lower entrance of the ship canal at Sault Ste. Marie, awaiting the locking through of another vessel, was injured by collision with a steamer. The libel therefor alleged that the steamer came up astern of the schooner with great speed, striking the dock, then bounding off and striking the schooner; and was supported by testimony of libellant and of the crews of the schooner, the tug, and another vessel in tow, which was contradicted by the evidence for the defense. From uncontested facts and testimony of disinterested witnesses, unimpeached, it appeared that, while the tow was moving up the river, the steamer was on her way to the dock, and came around under the stern of the schooner, and on her port side, between her and the dock. The wind, about northwest, varying from 22 to 36 miles per hour, would strike ascending vessels on the starboard bow, and the starboard side of the schooner was exposed to the full force of the wind and current. The injury to the schooner was confined to her plank-sheer, rail, and bulwarks, without any mark of the steamer's stem. The only damage to the steamer was the splintering of a starboard fender, and she had no mark, or even abrasion of paint, on either side; and the jar of the contact was scarcely noticeable on the steamer. *Held*, that the cause of the collision was that the schooner was suffered to drift, and the combined force of the wind and current carried her across the bow of the steamer, her rail and bulwarks receiving and yielding to her momentum as she rubbed along the fender of the steamer; and that the libel should be dismissed.