

The appellants rely on *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, laying down the rule that the question of what is a primary or pioneer patent, and also the question of the differences between the patented machine and the alleged infringing machine, are for the jury; but even in this case the court (page 325, 135 U. S., and page 833, 10 Sup. Ct.) recognizes the exception that these questions are not to go to the jury when, if a verdict should be found on them for the plaintiff, it would be proper for the court to set it aside. That in the present case any finding of a jury that McDonald's invention, in whatever form it could reasonably be stated by the plaintiffs, was excepted from the practical application of the rule touching mere combinations stated in the cases cited, could not be accepted by the court, and that there are no facts in the case which, on any reasonable theory, could state the mechanical principles of McDonald's machine and of the alleged infringing machine, so far as they are now involved, other than as we have stated them, are plain propositions.

The reference to the Larrabee patent in McDonald's specifications, on which the appellants rely, instead of weighing against our propositions, adds to them. It is referred to, with other patents, for the purpose of stating that neither of them "show or describe two feed rolls for feeding a hide or skin to the scouring roll," etc. In the absence of qualifying matter, the fair interpretation of this expression is the literal one.

The appellants rely on the fact that the patented machine was the first successful one, and on the fact that it had great commercial success. The decisions touching the effect of these propositions are so numerous and modern that they need not be referred to specifically, but they limit the application of them to doubtful cases turning on questions of utility or patentable invention. They have no pertinency to cases which turn on the construction of the patent. We think no well-authenticated case can be found where they have been admitted with reference to such issues. On the whole the majority of the court are satisfied with the conclusion of the circuit court.

The decree of the circuit court is affirmed.

FRENCH v. KRELING et al.

(Circuit Court, N. D. California. August 13, 1894.)

UNPUBLISHED OPERA—UNAUTHORIZED PRODUCTION—ACCOUNTING FOR PROFITS.

One who produces an opera without authority from the author must account to him for the profits, where such opera has never been circulated or published, though copies had been printed for the private convenience of performers, in learning their parts.

Bill for an accounting by T. H. French against Joseph Kreling and others. There was a decree for plaintiff, as prayed.

Joseph D. Redding, for complainant.

HAWLEY, District Judge. This is a bill in equity to compel respondents to account for the receipts of the Tivoli Opera House, at which the operetta of Falka was performed, and for other and further equitable relief. From the testimony taken on behalf of complainant, it appears that he is the owner of said operetta; that one Henry Farnie, of London, England, was the author and composer of the dialogue and words of the songs of said operetta, and that it was by him adapted into the English from the French original, entitled "Le Droit d'Ainessi;" that this English adaptation is in many respects an entirely original work; that from the middle of the second act to the end of the third act the plot and situations are entirely original; that four of the characters, and all the situations and dialogue appertaining to the characters, were the creation of Farnie; that the entire English dialogue of Falka is original; that the title "Falka" is an original title affixed by Farnie; that prior to his composition of the dialogue, words, and songs, the said operetta had never been used in connection with any other composition or operetta; that the music was written by Francis Chas-saigne; that the operetta consists of a libretto in three acts, and a musical score; that the dialogue, words, songs, and spoken parts thereof have never been published; that the musical score has been published with the words of the songs so set to music; that the dialogue, libretto, and stage business, etc., have never been published; that, if any copy of said unpublished libretto ever came into the possession of respondents, such copy was obtained by illegal means; that the authorship of said operetta has been asserted in newspapers, and has been known and recognized throughout the United States; that royalties have been received from the licensed performances thereof; and that the property of said operetta is valuable, etc. Upon the part of the respondents, it was attempted to be shown by the testimony of Alfred Hays, of London, England (a musical publisher), that the comic opera Falka had been published in book form. The testimony of this witness, which is quite lengthy, fails to show any such publication. He testified that:

"The words were printed for the use of the artists to learn their respective parts. The book was printed in 1883, and was never in circulation. Such books were kept by myself at my private residence, under lock and key, and copies were handed to the stage manager by myself. As he required them, he would hand them to the artists, to be used by them only for the purpose of learning their respective parts. * * * They were never published and circulated. The book was only printed for the convenience of the artists, to enable them to learn their parts. * * * I say that said book, nor any counterpart thereof, has never been published. It was merely printed for the private use of the artists, as is the custom in this country, and is not now public property."

This book, upon its title page, contains the words, "Right of representation and reproduction reserved;" and on the inside page is written in ink the names of the original cast in America, and at the top of the next page, written in ink (evidently in the same handwriting): "Property of F. J. McCarthy. Presented to him by E. J. Steyne, Comedy Theatre, London, E." In the original cast of characters appears the name of F. J. McCarthy as "Tekeli."

The law protecting the rights of authors in their compositions, literary and musical, where they have not been dedicated to the public, or published with the author's consent, is well established. The principles announced by this court in *Goldmark v. Kreling*, 11 Sawy. 215, 25 Fed. 349; *Henderson v. Tompkins*, 60 Fed. 764; and in *Drone on Copyrights*, §§ 97, 121, 383, 526,—are conclusive in favor of complainant's right to a decree, with costs. Let a decree be so entered.

SNOW v. MAST et al.

(Circuit Court, S. D. Ohio, W. D. August 4, 1894.)

1. COPYRIGHT OF PHOTOGRAPH — EQUITY JURISDICTION — SUIT FOR PENALTIES AND FORFEITURES.

Complainant filed a bill to recover penalties and enforce forfeitures, under Rev. St. §§ 4963, 4965, for infringement of copyright on a photograph, and also prayed an injunction, and that defendants be required particularly to answer how many copies they had sold. *Held*, that there was an adequate remedy by action at law, and equity had no jurisdiction.

2. SAME — DISCOVERY.

Under Rev. St. § 860, an alleged infringer of a copyright on a photograph cannot be required, by answer or otherwise, to disclose any fact upon which a claim against him for penalties and forfeitures accruing under Rev. St. §§ 4963, 4965, may depend.

This was a bill in equity by Blanche L. Snow against Mast, Crowell & Kirkpatrick for infringement of copyrights of photographs.

Wood & Boyd, for complainant.

Keifer & Keifer, for respondents.

SAGE, District Judge (orally). The bill is for an injunction and account. It is founded upon the alleged infringement by defendants of three separate copyrights of photographs, with reference to each of which the complainant seeks to recover penalties for the violation of sections 4963, 4965, Rev. St. U. S. The complainant prays for an injunction, and that the defendants appear and answer all the averments of the bill,—particularly, how many copies of each of said copyrighted photographs they have sold, and the number they have on hand,—and that they may be ordered and decreed to render an account of the copies that they have sold, or in any wise disposed of, together with those on hand or under their control; also, that they may be ordered to surrender and deliver up the copies on hand or under their control, and the plates from which they were made, to an officer of the court, to be sold or destroyed, and that they may be ordered to pay into court, to be distributed according to law, the damages established by law as the penalty for their aforesaid unlawful acts and doings, and for other relief. The defendants demur to the bill generally for want of equity, and that the bill is multifarious, and for other reasons.

The demurrer will be sustained, and the bill dismissed. The complainant has a plain, adequate, and complete remedy at law, by an action. This consideration, of itself, disposes of the bill, under sec-