

upon the market price of cotton, therefore the parties to these contracts must have intended the same thing. Now, if this be true and generally known, the courts are allowed to know it, and to declare it as a presumption of fact. It is idle to require proof in each case of what it is known can be certainly proved by identical evidence in every case. Or if it be true that the conclusion formed by the jury in a number of cases with identical evidence will not be uniform, then the uncertainty is a serious inconvenience, because no business man will know what to expect. In matters that have been often subjects of litigation parties should find it possible to ascertain beforehand whether or not it is safe to sue. The only course open to the courts is to declare that there is a presumption growing out of the known course of business that contracts for the future delivery of goods not owned by the seller are intended as wagers, or to wholly take from the jury the consideration of the evidence when it is, as in this case, merely general evidence, having no specific application to the particular case. To take the former course would be to reverse the almost uniform decisions of the courts of England, and this country from the date of the decision of *Hibblewhite v. McMorine*, 5 Mees. & W. 462, (1839,) down to the decisions in volumes of the present year. The latter course is the one taken in the present action, and, as is conceived, is sustained by authority. The *dictum* in the case in 110 U. S. does not affect this position. MATTHEWS, J., says:

"It might be the case that a series of transactions such as that described in the present record might present a succession of contracts perfectly valid in form, but which, on the faces of the whole taken together, and in connection with all the attending circumstances, might disclose indubitable evidences that they were mere wagers. The jury would be justified, in such case, without other evidence than that of the nature and circumstances of the transactions, in reaching and declaring such conclusion." 4 Sup. Ct. Rep. 166.

If the transactions in dispute were all between the same parties, if the uniform custom in prior transactions of the same kind, as well as in those in suit, had been settlements by payments of differences and no real delivery of goods, it might well be that a jury would find, and properly, the conclusive evidence of an illegal contract. Such were the facts in the case of *Grizewood v. Blanc*, 11 C. B. 526. But in the present controversy there is no succession of contracts; instead, contracts with a succession of different persons. The "attendant circumstances" are not attendant upon the contracts in dispute, but upon all future contracts; the jury are asked to find, not a conclusion applicable to the case, but one applicable to all cases. It was contended that the defendant's instructions to plaintiffs contemplated a gambling contract; that it must be presumed that the latter carried out his instructions, and therefore that he made contracts with the third parties which were wagering in their nature. To this there are three answers: *First*, the instructions to plaintiffs do not bear such a construction; *second*, there is no evidence that such in-

structions were ever communicated to the third parties; *third*, if the plaintiffs intended the contracts made by them for their principal to have been settled in all events by the payment or receipt of balances, it would not have made a particle of difference in his ability to carry out that intent, whether he communicated it to the other parties or not.

It is my conclusion that neither in the evidence submitted, nor in any evidence offered and excluded, is there anything upon which a jury could properly have found a verdict for the defendant upon the point discussed; and upon that point the burden is upon him. A new trial is therefore refused.

ESTES and others v. WORTHINGTON.

(Circuit Court, S. D. New York. January 5, 1885.)

1. TRADE-MARK—INJUNCTION—LACHES.

When delay of the owner of a trade-mark to prosecute infringers has been of a tendency to mislead the public, or the defendant sought to be enjoined, into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing.

2. SAME—USE OF TRADE-MARK BY OTHERS.

Where the extensive use of a trade-mark by others, with the implied acquiescence of the owner, has contributed to give a reputation and create a demand for the article to which it has been applied, which it would not otherwise have acquired, equity should not by any stringent intervention assist the owner to secure these fruits.

3. SAME—COMPLAINANT GUILTY OF FRAUD.

A complainant who has refused to recognize the rights of the original foreign proprietor of a trade-mark until he thought it would be more profitable to purchase his rights in this country, and thus obtain a monopoly, reserving the right to annul the contract at his discretion, will not be entitled to a preliminary injunction against alleged infringers of the trade-mark, but be left to his rights at final hearing.

Motion for Preliminary Injunction.

J. L. S. Roberts and G. G. Frelinghuysen, for complainants.
Scudder & Carter, for defendant.

WALLACE, J. The validity of the complainants' title to a trade-mark in the word "Chatterbox," as applied to juvenile books, and which they acquired by purchase from James Johnstone, of England, in the year 1880, has been established, and is not open to controversy upon the case made by the defendants. *Estes v. Williams*, 21 FED. REP. 189. The only doubt as to the complainants' right to a preliminary injunction is suggested by the fact that the various publishers of such books since 1876 have been permitted without prosecution to apply the word to their publication of juvenile books in this country, and have used it as a trade-mark in hostility to the real proprietors;