DELAMATER *ET AL. V.* REINHARDT.

Circuit Court, S. D. New York.   July 7, 1890.

PATENTS FOR INVENTIONS–ACTION FOR INFRINGEMENT–PRACTICE.

The defendant may be compelled to state whether he has in his possession the machine which is alleged to be an infringement of plaintiff's patent, though the plaintiff has not previously made out a prima facie case of infringement.

In Equity.

Witter & Kenyan, for complainants.

Shipman, Barlow, Larocque & Choate, for defendant.

LACOMBE, J. This is an application to compel the defendant, called as a witness for the complainants, to answer two questions. The suit is for infringement of a patent for a hot-air pumping engine. The questions are directed to the ascertainment of whether or not the defendant, subsequent to the date of the patent, and prior to the commencement of the suit, had upon his premises, at No. 171 Avenue C, in this city, a hot-air pumping engine. The manifest intention is to follow up these questions by others, showing that the engine which it is supposed he had and used was an infringing machine. It is objected that this cannot be shown by the defendant's testimony until the complainants first makes out a *prima facie,* case of infringement. Reference is made to a decision in the third circuit, *(Celluloid Go.* v. *Crane Co.)* in which it is said that a similar objection was sustained. As there was no opinion filed in that case, however, there is nothing to show upon what ground that court excluded it. Certainly there is no rule, or practice in this circuit which would require the exclusion of the questions which have been certified in this case. It is not claimed that defendant is the manufacturer of the machine, and the simplest and most efficient way to discover whether he had one is to ask him. The witness himself declined to answer on the ground that the question was an "inquiry into his private affairs)" To sustain such an objection would no doubt be very convenient for, those who buy and use infringing machines, but no good ground for so doing is shown here.