

wine and are listening to the same orator. The critical observer will note the absence of some of the Hoffman House banqueters and the addition of others made prominent by more recent events. But the central idea is there; the general impression is the same. The ordinary purchaser seeing this picture in a cigar shop would be likely to enter and take the cigar offered him supposing it was the same brand which he had learned to distinguish by this distinctive banquet scene. He would not stop to analyze the picture; he would not notice that Mr. Depew stands opposite to President Cleveland whereas in the earlier picture they are on the same side of the table; he would not notice the differences in background or table decorations. The general effect would remain in his memory and the general effect is unquestionably the same. In order to demonstrate the bold character of the piracy the complainant has pointed out instances where minute details and even mistakes have been copied; but it is unnecessary to consider these, for it seems too plain for discussion that the defendants have taken the complainant's idea and are endeavoring to march into public favor under a flag which they are not entitled to carry.

The foregoing was written under the impression obtained at the argument that the affirmative defense might be disposed of by the maxim, "De minimis non curat lex." But the more the testimony bearing on this defense has been studied, and it has been read several times, the firmer becomes the conviction that the charge of misrepresentation is most serious. The complainant has placed in its boxes of Hoffman House cigars a picture representing a stripping scene in Havana. On the reverse of the picture is the following statement:

"We use only the very best grades of Havana tobacco, and are the only house in our line in this country making a specialty of fine Havana cigars who have their own stripping factory in Cuba, under the personal supervision of our Mr. Edward Hilson. We manufacture only genuine Havana cigars, and represent our goods as they are. Our cigars are guaranteed choice Havana tobacco, not American tobaccos raised from Spanish seed.

"Very respectfully,

The Hilson Company.

"Fact. No. 1, 3rd Dist. N. Y."

It will be observed that this notice is signed by the present complainant, the Hilson Company. The notice could not, therefore, have been used in the business prior to November 29, 1893, when the change in the corporate name took place. The defendants assert that after Foster had retired and the Hilson Company began business under its present management it stated falsely that cigars made wholly and partly of domestic tobacco were genuine Havana cigars. It will be observed that the language used by the complainant is free from all doubt and ambiguity. The card says: "We use only the very best grades of Havana tobacco. * * * We manufacture only genuine Havana cigars. * * * Our cigars are guaranteed choice Havana tobacco, not American tobaccos raised from Spanish seed." The evidence of a special trade meaning for the word "Havana" is very meager and is insufficient to uphold a finding of fact. Even if there were such evidence it is doubtful if it could be considered as these cards are addressed to the consumer, who is not

supposed to know the technical language of the cigar trade. The complainant's words must, then, be given their ordinary dictionary meaning.

The complainant admits that the Hoffman House Boquet cigars are made with Havana fillers, seed binders and Sumatra wrappers; that they have, to a considerable extent, been manufactured by team work; and that they have never been manufactured exclusively of Havana tobacco. Upon these conceded facts is the complainant's representation true? Assume that an ordinary smoker goes to the complainant's factory to purchase Hoffman House cigars, and that a box is handed him by the president of the company with the oral statement, "These cigars are guaranteed choice Havana tobacco, we make only genuine Havana cigars and use only the best grades of Havana tobacco;" would not the purchaser be justified in believing that he was purchasing cigars made "only" of Havana tobacco? How could stronger language be employed? It is urged that the card does not say that the cigars are made "wholly" of Havana tobacco; but "only" is a synonym for "wholly" and the statement when read as a whole certainly precludes the idea of the use of domestic tobacco.

It is no answer to this defense to say that the defendant Foster knew of the way in which the Hoffman House cigars were manufactured. There is nothing fraudulent in the way they are made; the fraud consists in representing them to be what they are not. On the other hand it must be remembered that this is an affirmative defense grounded on fraud. Fraud must be proved and if the testimony terminated at this point it is possible that the question might be considered doubtful and the doubt resolved in favor of the complainant upon the lines pointed out in *Condit v. Glaccum*, 2 Trade-Mark Record, No. 29. Certainly this would be the inclination of the court in view of the clear evidence of infringement as before indicated. But the testimony does not stop here. Marx Steinberger was general superintendent and foreman of the complainant's factory from November, 1893, until March, 1895, and before that time he was employed in a similar capacity by the Foster-Hilson Company. He testified positively and with his memory refreshed by memoranda made at the time that large numbers of the complainant's cigars were made with mixed Havana and seed fillers, seed binders and Sumatra wrappers and that others were made wholly of seed tobacco except the wrapper, which was Sumatra tobacco. In other words, he testified that the complainant sold large quantities of cheap seed cigars in Hoffman House boxes with the written guaranty that they were "genuine choice Havanass." This evidence is wholly uncontradicted. Although Edward Hilson is directly implicated by Steinberger neither he nor Max Hilson is called as a witness. Steinberger stands not only uncontradicted and unimpeached but the inference is very strong that it was not possible to contradict him. The excuse that the Hilsons, or their superintendent, if called as witnesses might have been required to reveal business secrets seems wholly insufficient in view of the gravity of the charge and the conceded knowledge of the complainant's business already possessed by the defendant Foster.