

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.

The witness Louis Prince who was called by the defendants is in the complainant's employ as foreman of the packing department. He was an unwilling witness but in many instances he corroborated Steinberger by stating that cigars, which the latter testified were largely or wholly of seed tobacco, went into Hoffman House boxes. It is true that Prince says that he never knowingly packed a seed cigar in a Hoffman House box, but this testimony is unimportant in view of his positive statement that he did not know how the cigars packed by him were made, or what kind of tobacco went into them. There is no escape from the finding of fact that the complainant has sold large quantities of seed cigars, or cigars with mixed fillers, representing them to be genuine Havana cigars. The rule of law applicable to such circumstances is perfectly clear. Equity will refuse to aid a complainant, in cases of this character, who is himself guilty of making material false statements in connection with the property he seeks to protect. *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556; *Pettridge v. Wells*, 4 Abb. Prac. 144; *Krauss v. Peebles' Sons*, 58 Fed. 585; *Seabury v. Grosvenor*, 14 Blatchf. 262, Fed. Cas. No. 12,576; *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990; *Connell v. Reed*, 128 Mass. 477. It would seem that this rule might be modified so as to permit the court, for the protection of the general public, to enjoin both parties; but so long as it remains the rule of the supreme court it is the duty of inferior tribunals to follow it. The bill must be dismissed.

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CORBETT v. PURDY et al.

(Circuit Court, S. D. New York. May 17, 1897.)

**COPYRIGHT—WHAT IS PROTECTED—TITLES.**

The right secured by the copyright laws is the property in the literary composition, and not in the name or title given to it; and an injunction will not be granted, under the copyright laws, to protect a title alone, separate from the book or dramatic composition it is used to designate.

This was a suit in equity by Adolphe Corbett against Fannie Rice Purdy and others to enjoin the alleged infringement of a copyright on a dramatic composition. The cause was heard on a motion for preliminary injunction.

James Foster Milligan, for plaintiff.

Abram Hummell, for defendants.

LACOMBE, Circuit Judge. The relevant provisions of section 4952, Rev. St. U. S., as amended by the act of March 3, 1891, are as follows:

"Sec. 4952. The author of \* \* \* any dramatic composition \* \* \* shall, upon complying with the provisions of this chapter, have the sole liberty of \* \* \* publicly performing or representing it or causing it to be performed or represented by others," etc.

There is no evidence to show that defendants are publicly performing or representing complainant's "dramatic composition." The

right secured by the copyright act is the property in the literary composition, and not in the name or title given to it. In no case, so far as this court is advised, has protection been afforded by injunction under the copyright laws to the title alone, separate from the book or dramatic composition which it is used to designate. *Osgood v. Allen*, 1 Holmes, 185, Fed. Cas. No. 10,603. Whatever rights complainant may have to restrain appropriation by another of the title of his work, on general principles of equity, cannot be considered in this suit, which is a controversy between citizens of the same state, and presents no federal question. Motion for injunction denied.

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RELIANCE NOVELTY CO. v. DWORZEK et al.

(Circuit Court, N. D. California. May 17, 1897.)

PATENTS—PRELIMINARY INJUNCTION—GAMBLING DEVICES.

The Wertheimer patent, No. 26,684, for a design to be placed on a case containing a coin-controlled machine, known as a "card-playing slot machine," held to cover a gambling device, for which reason a preliminary injunction would be denied, though it was claimed that the patent was applicable to other purposes; it appearing that, up to the time of the present proceeding, it had never been used except upon a card-playing machine.

This was a bill for infringement of design patent No. 26,684. Order to show cause why a preliminary injunction should not be granted the complainant pendente lite. Objected that patent covers a coin-controlling, card-playing machine used for gambling purposes. Injunction denied.

John L. Boone, for complainant.

Isaac Frohman, for defendants.

MORROW, District Judge. This case comes up on an order to show cause why a preliminary injunction should not be granted the complainant pendente lite. The bill charges the infringement of letters patent No. 26,684, issued to Benny J. Wertheimer on February 23, 1897, under section 4929, Rev. St., for a design upon the cases of coin-controlled machines, generally known as "nickel in the slot machines," which, in the case at bar, are of the kind commonly known as "card-playing slot machines."

Several objections are made by the defendants to the application for a preliminary injunction. It is claimed (1) that the defendants' design is different and does not infringe; (2) that complainant's design does not disclose originality and the exercise of the inventive faculty, it being claimed, in this connection, that complainant's patented design case is substantially the same in form and general appearance as the case of the Nafew-Goldberg Manufacturing Company; and (3) that it has no element of utility, but is used on a gambling device.

If the last ground be deemed to be supported by the proofs, it will be unnecessary to consider the other grounds. The design covered by complainant's patent is placed on a case, with a glass front, con-