

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;

and among them were the complainants themselves, who did so for two or three years before they purchased the right of Johnstone.

Laches in prosecuting infringers has always been recognized as a sufficient reason for denying a preliminary injunction; sometimes, apparently, by way of discipline to a complainant who has manifested reluctance to burden himself with the expense and vexation of a lawsuit, and delayed legal proceedings until his patience was exhausted. See *Bovill v. Crate*, L. R. 1 Eq. Cas. 388. When delay of the owner of a patent or 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. So also where as in this instance the extensive use of the 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. The complainants do not occupy a position that commends them to a court of equity; because they seem to have refused to recognize the rights of Johnstone, the original proprietor of the trade-mark, until they thought it would be more profitable to purchase his rights in this country and obtain a monopoly here in the use of the trade-mark. By their contract of purchase they reserved the right to annul the contract at their option. They should be left to their rights at final hearing according to the usual course of equity. The motion is denied.

GLEN COVE MANUF'G CO. v. LUDELING.

(Circuit Court, S. D. New York. January 1, 1885.)

1. TRADE-MARKS—INFRINGEMENT—INJUNCTION.

Complainant was the owner of two trade-marks, registered under the act of congress of March 3, 1881, which he used in commerce with foreign nations, as applied to a preparation of corn-flour for food, by printing them upon the packages in which the corn-flour was put up for sale. The first consisted of the word "Maizena," and the second of an allegorical picture representing the cultivation of the corn, and the preparation and cooking of the flour, by Indians. Complainant had used these trade-marks for many years. Defendant, whose mark had also been registered, used, in the same manner, in the sale of his corn-starch in foreign countries, the word "Maizharina," accompanied with a pictorial representation of a man carrying a quantity of maize in his arms. *Held*, that defendant was guilty of infringement of complainant's trade-marks, and should be enjoined from further violation of complainant's right to the exclusive use of his trade-marks.

2. SAME—RESEMBLANCE.

To enable the proprietor of a trade-mark to relief against an illegal appropriation, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; it is sufficient if there is such a degree