

CONGER, District Judge.

This is a motion by the plaintiffs for leave to take depositions, under Rule 26 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The plaintiffs seek to examine one of the defendants, and several designated witnesses.

The answer has not, as yet, been served, and therefore the plaintiffs seek the leave of the court to take the examination. The purpose of the examination has nothing to do with preparation of the answer, or preparation for trial, but is solely as stated in the notice of motion: "as to whether or not the defendants or any of them have violated the temporary restraining orders issued herein and served October 21, 1939." There is not even a pending proceeding to punish the defendants for contempt of court.

It seems to me that the application goes far beyond the purpose for which examinations are granted under the Federal Rules, even giving the Rules a most liberal construction.

No cases on the point involved have been cited by either party, nor can I find any.

As bearing somewhat, however, on the purpose for which examination can be had, attention is called to Rule 26(b): "Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." If this section is to be taken literally, certainly, this examination cannot be allowed.

As also bearing upon this question, the following is found in Moore's Federal Practice (Ch. 26, Section 26.01, page 2441), where, in discussing Rules 26 to 37, it is stated: "The promulgation of this group of rules satisfies the long-felt need for legal machinery in the federal courts to supplement the pleadings, for the purpose of disclosing the real points of dispute between the parties and of affording an adequate factual basis in preparation for trial."

The plaintiffs in this application do not seek the depositions for the purpose of preparing an answer, nor in preparation for trial, nor for obtaining information which is relevant to the cause of action, or defense thereof. They seek the depositions for collateral purposes to the action; something which is not relevant to the subject matter thereof.

A very interesting question presents itself, although it does not have to be decided here, as to whether or not, if there were a motion to punish for contempt, the court would have the authority under the rules to allow such an examination.

Motion denied. Settle order on notice.

HOUGHTON MIFFLIN CO. v. STACK-
POLE SONS, Inc., et al.

District Court, S. D. New York.
Feb. 2, 1940.

Action by Houghton Mifflin Company against Stackpole Sons, Inc., and another to restrain copyright infringement. On plaintiff's motion for summary judgment.

Motion granted, and action referred to master on issue of damages and to require accounting of profits.

Hines, Rearick, Dorr & Hammond, of New York City (Archie O. Dawson, of New York City, of counsel), for plaintiff.

Philip Wittenberg, of New York City, for defendants.

CONGER, District Judge.

This is a motion for summary judgment in an action to restrain infringement of a copyright to the book "Mein Kampf", written by Adolf Hitler. The plaintiff made an application for a preliminary injunction, which was denied. Upon an appeal to the Circuit Court of Appeals for this circuit, this ruling of the district court was reversed, and the preliminary injunction was granted. 2 Cir., 104 F.2d 306; writ of certiorari denied, United States Supreme Court, 60 S.Ct. 131, 84 L.Ed. —, October 23, 1939.

The plaintiff is now moving for a summary judgment granting a permanent injunction. The defendant objects to the granting of this motion on the ground that there are two main issues which the plaintiff has failed to establish: (1) that title is in the plaintiff; and (2) that the copyrights are valid.

[1] Upon reading the decision of the Circuit Court of Appeals, I am of the opinion that defendants' contention cannot be sustained. The Circuit Court has held that title is in the plaintiff, and that the copyrights are valid. It has further held that since the Copyright Law makes the Certificate of Copyright prima facie evidence of the facts stated therein (17 U.S.C. § 55, 17 U.S.C.A. § 55), and since the certificate has not been controverted by any affidavits or evidence, the preliminary injunction must issue.

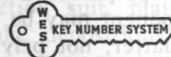
Upon this application there are no new facts presented, other than those that were before the Circuit Court. The only issue presented here is the contention of defendants that the plaintiff has not made out a prima facie case. It seems to me that this has been fairly and squarely passed on by the Circuit Court, and that therefore there is no real and genuine issue of fact to be

presented to the trial court. Under all these circumstances it seems useless and idle to allow this case to go to the trial court which would be faced with the decision of the Circuit Court, which has decided the issues herein.

[2] The defendants argue that summary judgment cannot be had in an action for permanent injunction. I cannot hold with defendants on this issue. Rule 56, 28 U.S.C.A. following section 723c, makes no distinction as to the character or kind of judgment which can be rendered. I can see no reason, under this rule, to differentiate between a case of this kind and any other case.

There being no question of fact to be presented to the trial court, I see no reason why summary judgment cannot be granted. As stated in Moore's Federal Practice, (p. 3177): "Rule 56 is the first instance where the procedure may be employed in any action, whether formerly denominated legal or equitable, and whether the claim is liquidated or unliquidated."

[3] Motion granted. Pursuant to Rule 53, this action is referred to a master to take evidence and pass on the issue as to the damages to the plaintiff, and to require an accounting of, and pass on, the profits of the defendants to which the plaintiff may be entitled. Settle order on notice.



PAGNOTTI v. ALAN WOOD STEEL CO.

District Court, S. D. New York.

Jan. 29, 1940.