

the plaintiff's exclusive rights thereunder. The demurrer is upon the ground—it being admitted that this court has jurisdiction of the cause only by reason of its subject-matter, and that the jurisdiction of the court is such only as is authorized or conferred by the statutes of the United States,—that a bill in equity, in the circuit court, between parties who are residents of the same state will not lie to prevent an anticipated infringement, no infringement having actually occurred. Section 4921 of the Revised Statutes provides that “the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent.” In my opinion the suit is one arising under the patent laws of the United States, and is properly brought. “The case is not like that of an action at law for the breach of a patent, to support which it is indispensable to establish a breach before the suit was brought.” “A bill will lie for an injunction if the patent right is admitted, or has been established, upon well-grounded proof of an apprehended intention to violate the patent right.” *Woodworth v. Stone*, 3 Story, 749. The same doctrine is declared in *Poppenhusen v. Comb Co.*, 4 Blatchf. 184.

The demurrer is overruled.

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**COLGAN *et al.* v. DANHEISER *et al.***

(*Circuit Court, N. D. Illinois. May 17, 1888.*)

**1. TRADE-MARKS—DESCRIPTIVE WORDS.**

The words “Taffy Tolu,” as applied to chewing-gum, being descriptive of the character of the article, rather than indicative of its origin, are not susceptible of appropriation as a trade-mark by one having no patent for the exclusive use of the ingredients which constitute the article, or for the article itself.

**2. SAME—MANNER OF PACKING AND LABELING.**

Complainant, a manufacturer of chewing-gum, put the article up in small bundles, each consisting of six small oblong cakes bound together with a rubber band, and each cake wrapped in a white label bearing two black imprints about the size and shape of the cakes themselves, the imprints being designed and made to rest conspicuously one on each side of the cake, and the most conspicuous imprint being the words “Colgan's Taffy Tolu Chewing-Gum.” *Held*, the words indicated not being susceptible of appropriation as a trade-mark, that complainant was not entitled to an injunction in the absence of proof that he had first established a reputation for his goods by thus packing and labeling them, and that defendant had attempted to supplant him in the market by an unlawful use of such devices.

**In Equity.** Bill to enjoin use of alleged trade-mark.

*Schmitt & Hubbell*, for complainants.

*Israel Cowen and West & Bond*, for respondents.

**GRESHAM, J.** The complainants' label their small packages with the words “Colgan's Taffy Tolu Chewing-Gum,” and insist that by virtue of

prior appropriation they are entitled to the words "Taffy Tolu" in this connection, as a trade-mark indicating the origin of their goods. The complainants have no patent which secures to them a monopoly in the exclusive use of the ingredients which constitute their goods, or in the goods themselves. The words "Taffy Tolu" indicate or describe the character of the labeled goods, rather than their origin. The defendants have an equal right to make and sell Taffy Tolu, provided they make and sell it as their own manufacture, and not as that of the complainants. The words being descriptive of the compound or goods, they are incapable of appropriation. The proper designation of an article cannot be appropriated as a trade-mark; and it is quite immaterial who first gives the proper name to a new article. The defendants are at liberty to make and sell Taffy Tolu the same or similar in ingredients as the complainant's manufacture, provided they label and sell the article as made by themselves, and not by the complainants, which they seem to be doing.

The complainants put up their chewing-gum in small bundles, each consisting of six small oblong cakes bound together with a rubber band, each cake wrapped in a white label bearing two black imprints about the size and shape of the cakes themselves, the imprints being designed and made to rest conspicuously one on each side of the cake, the most conspicuous imprint being the words, "Colgan's Taffy Tolu Chewing-Gum." Complainants insist that this packing and labeling is original with them, and constitutes their trade-mark or trade-name. It is not clear from the evidence that the complainants had established a reputation in the market for their goods by thus packing and labeling them, before the defendants and others became competitors. No relief can be granted to complainants on this branch of the case, unless it clearly appears that they were the first to introduce their goods in this particular way, and that the defendants have attempted to supplant them in the market by disposing of their goods on the strength of the complainants' reputation. The bill is dismissed for want of equity.

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BATE REFRIGERATING CO. v. HAMMOND *et al.*

(Circuit Court, D. Massachusetts. September 24, 1887.)

In Equity. Rescript.

COLT, J. The questions raised under the stipulation in this case having recently been decided by Mr. Justice BRADLEY, in favor of the defendants in a suit by this complainant against Gillett and others, (31 Fed. Rep. 809,) in the circuit court for the District of New Jersey, and both parties desiring to appeal the case to the next term of the supreme court, a decree may be entered sustaining defendants' plea, and dismissing the bill.