

MARKS *v.* CORN AND OTHERS.

*Circuit Court, S. D. New York.*      October 19, 1881.

## PATENTS—PRELIMINARY INJUNCTION.

Where the question of infringement is so doubtful as to make it improper to grant an injunction except as the result of a final hearing, a preliminary injunction will be refused.

*C. W. Betts*, for plaintiff.

*G. M. Plympton*, for defendant.

BLATCHFORD, C. J. Understanding the subject-matter of the motion for an injunction herein to be whether a cap constructed substantially like the cap annexed to the affidavit of Samuel Corn, sworn to October 6, 1881, infringes reissue No. 7,808, Division B, I am of opinion that the question of infringement is so doubtful as to make it improper to grant an injunction except as the result of a final hearing in the case. The cap in question, whether made so that the upper edge of the part which may be called the protector swings below the lower edge of what may be called the body of the cap, or whether made so that such upper edge does not swing below the lower edge of such body, seems to be unlike in structure to the cap of the patent, and unlike in structure to any of the caps held to be infringements in the suit against Fox and in the suit against Schwartz. The same ultimate results may be accomplished in protecting the ears and the neck, when desired, and in removing the protector up and down, when desired, and in having a finished appearance in the cap when the protector is up, but the claims of the patent are for the means of effecting such results. It would seem that the defendant's cap has no upper edge of a protector, in the sense of the patent, and no separate protector attached to the cap by a tape or cloth, as in the patent. The second claim, equally with the other two claims, must be construed

as applying only to such a separate protector as the patent shows.

The motion is denied.

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