

duty on silk in the gum to 25 per cent., is in the same language as section 16 above quoted from. The act of March 3, 1863, § 2, amends a prior act so as to allow "cotton and raw silk, as reeled from the cocoon," to be in certain cases free of discriminating duty. This refers only to the same article described in section 23 above quoted. It might, no doubt, be urged that, being used here without the qualifying words of the earlier act, the meaning of this phrase is broad enough to cover cases where the article is advanced to "singles," "tram," "thrown," etc. In view, however, of the fact that the words "silk in the gum" do not appear in the later act, and of the evidence in the case which seems to indicate that there is no difference between "silk raw advanced to tram," etc., and "silk in the gum advanced to tram," etc., the point is too narrow to justify plaintiff's recovery.

**THOMPSON *et al.* v. AMERICAN BANK NOTE Co. *et al.*, (seven cases.)**

(Circuit Court, S. D. New York. June 6, 1883.)

**1. PATENTS FOR INVENTIONS—INFRINGEMENT—MACHINES FOR FORMING STAPLE-SEAMS.**

Claim 3 of letters patent No. 136,340, of February 25, 1873, to Samuel W. Shorey, for "machines for forming staple-seams in leather," is: "in combination with the bender-foot and driver, the inclined and retreating anvil, operating substantially as described." *Held*, that a machine which did not use the inclined and retreating anvil of the combination to support the crown of the staple, but did use that part of the device necessary to prevent the prongs from crippling inward as the staple is driven home, was an infringement; the inward support of the prongs being the principal part of Shorey's invention.

**2. SAME—PRELIMINARY INJUNCTION.**

Where the machine used by defendant is clearly an infringement, it is no defense to a preliminary injunction that the manufacturer from whom defendant bought it has been enjoined in another suit; and this is especially so where it does not appear that the decree against the manufacturer was for the profits of a sale for use.

**In Equity.** On motion for preliminary injunction.

Bill for an alleged infringement of letters patent No. 136,340, of February 25, 1873, to Samuel W. Shorey, assignor to Ezra B. Keith, for "machines for forming staple-seams in leather." The third claim is as follows: "In combination with the bender-foot and driver, the inclined and retreating anvil, operating substantially as described."

*Horace Barnard*, for the motion.

*G. P. Lowrey*, and *H. D. Donnelly*, *contra*.

**WHEELER, J.** This cause has now been heard on a motion for a preliminary injunction against an alleged infringement of a patent. The patent was under consideration, and the validity of the third claim was sustained in *Thompson v. Gildersleeve*, 34 Fed. Rep. 43. One function of the inclined and retreating anvil of that claim, operating substantially

as described, is to fill the space between the prongs of the staple as it is driven home, whereby they are prevented from inward crippling. This effect is not specifically set forth in the patent, but that omission does not exclude it from the exclusive rights covered by the patent. *Blanchard v. Beers*, 2 Blatchf. 411; *Roberts v. Ryer*, 91 U. S. 150. It was not mentioned in the decision of the former case, for the infringement there was clear, without reference to it, and it had not been made a subject of debate. These defendants do not use the inclined and retreating anvil of the combination, or its equivalent, in the operation of the device, to support the crown of the staple; the part of the device which performed that function is taken away. But the part which is necessary to prevent the prongs from crippling inward as the staple is driven home remains, and is used for that purpose. That part was made to retreat there by the force of the driver on the face of the incline. It is made to retreat here by the force of the driver operating by means of a projection from the driver on an inclined depression further back in the same part. That part of the inclined and retreating anvil which supported the crown of the staple appears to have been taken away for the purpose of evading the patent. The evasion would be successful if the support of the crown only was all that was covered by this claim, or the part supporting the prongs against inward crippling had not been left. But the support of the crown was not all, nor the most important part; the inward support of the prongs is the principal thing, although not made by the patent so prominent. The part which furnishes the latter support is retained, and accomplishes that result by substantially the same means, operating in substantially the same way as it is accomplished by the patented devices, and those before adjudged to be an infringement. It therefore is itself an infringement. *Cantrell v. Wallick* 117 U. S. 689, 6 Sup. Ct. Rep. 970.

This conclusion merely carries out the former decision, and does not appear to be contrary to the oral expressions of opinion by BLODGETT, J., in the Northern district of Illinois, in *Thompson v. Manufacturing Co.* The defendant in that case appears to be the manufacturer of the machines used by this defendant, and that fact is relied upon as a reason for refusing this injunction. But these users are infringers, and an injunction there would not cover this use; neither would a decree for the damages of manufacture cover those for the use. *Birdsell v. Shabiol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244. A decree for the profits of a sale for use, with satisfaction, might relieve the use from the monopoly, but no such decree appears to have been made and such proceedings may not be had. As this claim of the patent has been adjudged to be valid, and that adjudication stands in force, the orators appear to be entitled to the preliminary injunction asked for in this case and in the six other cases heard at the same time. Motion granted in all the cases.

FOOTE v. STEIN *et al.**(Circuit Court, S. D. New York. May 22, 1888.)*

## PATENTS FOR INVENTIONS—INFRINGEMENT—HAT-RACKS—GRAIN-BANDS.

Letters patent No. 56,569, July 24, 1866, for improvement in hat-racks, granted to Charles H. Keener, act on a different plan, and do not anticipate, letters patent No. 135,899, February 18, 1873, granted to Elisha Foote for improvements in grain-bands, bag-ties, etc.

In Equity. Bill for infringement of patent. On motion to open default.

Eunice N. Foote, administratrix, complainant, filed a bill to enjoin Edward A. Stone and Louis Stein, defendants, from infringing patent No. 135,899, February 18, 1873, granted to Elisha Foote for improvement in grain-bands, bag-ties, etc. Judgment by default against defendants; who moved to set it aside on the ground that the Foote patent had been anticipated by letters patent No. 56,569, July 24, 1866, for improvement in hat-racks.

*G. M. Plympton*, for complainant.

*H. A. West*, for defendants.

LACOMBE, J. Waiving all question as to the regularity of defendants' practice, and treating this as a motion to open a default upon newly-discovered evidence, I am nevertheless of the opinion that the relief they ask must be denied. The patent is undoubtedly a narrow one; and with every respect for the opinion of the able judges who have heretofore sustained it, (*Foote v. Frost*, 14 O. G. 860; *Frost v. Marcus*, 13 Fed. Rep. 88,) it is by no means certain that, upon a record which should contain the earlier Butterfield patent, No. 57,247, the supreme court would find that complainant's device exhibited either novelty or invention. If, therefore, it were a question of allowing the interposition of a defense which set up the last-named patent, the present application would stand upon a different footing. Such, however, is not the case. The Butterfield patent was well known to defendants when they confessed judgment, and the patent which they submit as newly discovered (Keener's improvement in hat-racks, No. 56,569) acts upon an entirely different principle, and is in no sense an anticipation of the patent here sued on.