

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.

MALBY *v.* GRAHAM *et al.*

(Circuit Court, S. D. New York. May 22, 1888.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

Injunction granted to restrain the infringement of reissued letters patent No. 5,502, granted to George J. Capewell, July 29, 1873, for a nail extractor, the validity of this patent having been twice sustained, and defendant's nail extractor being plainly an infringement.

In Equity. Bill for infringement of patent, brought by Douglass E. Maltby against John H. Graham and others. On motion for injunction.

*Francis Forbes*, for complainant.

*H. E. & Geo. H. Knight*, for defendants.

LACOMBE, J. This is an application to restrain the infringement of reissued letters patent No. 5,502, granted to George J. Capewell, July 29, 1873, for a nail extractor. The original patent was granted July 16, 1872. The patent has been twice sustained in this circuit. *Maltby v. Converse*, *Maltby v. Tool Co.* It is true that the Taft patent of 1870 (107,121) was not then before the court, but the Fish patent of 1866, (58,626,) which embodies the same principle, was then considered. The defendant's nail extractor plainly infringes. Motion granted. The propositions which defendants seek to sustain amount to a rehearing of the two cases before Judges WALLACE and SHIPMAN, and may be presented at final hearing.

CREAMER *v.* BOWERS *et al.*<sup>1</sup>

(Circuit Court, D. Delaware. May 24, 1888.)

## 1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT.

Where the defendants had at first bought large numbers of a patented article from the complainant, and afterwards, while manufacturing it themselves, as wanton infringers, did not wholly cease buying it from him, it is a reasonable conclusion, sufficiently free from doubt, that, had they not infringed, they would have purchased from him as many of the patented articles as they themselves made and used.

## 2. SAME—DEMAND OF COMPLAINANT.

A suit was brought upon two patented devices, capable of conjoint use. A decree for an account was rendered, and the complainant offered in his testimony to accept one dollar for each use of the two devices. The decree was amended so as to exclude the profits and damages arising from one of them. *Held*, that the plaintiff, not having been shown to have had in view any compromise, is not entitled to recover more than he claimed or assented to as the measure of his loss.

## 3. SAME—PERIOD OF INFRINGEMENT.

Where the complainant has limited the period within which he claims that infringements were made, the accounting must not include a later time.

<sup>1</sup>Reported by Marks Wilks Collet, Esq., of the Philadelphia bar.