

together, are cogent enough, in my judgment, to deprive it of the character of such convincing evidence as must, under the law, support a defense of this character. The first of these is that George W. Brown, who is said to have used this machine, was the pioneer in the field of corn-planter manufacturing and invention. His patents constitute much of the literature of this art. His litigations gave shape, largely, to the judicial decisions relating to the art. He was aggressive, both in advancing the art, and in claiming the benefit of his inventions therein. The second fact is that the Odell invention, when introduced, in 1887 or 1888, quickly supplanted the majority of its predecessors. Even the Brown Company adopted it as a part of their planter. It is confessedly, within the field it covers, the most useful and the most marketable device yet discovered. I cannot reconcile these two facts with the assumption that Brown successfully put, as early as 1882, a similar device in the field, and then abandoned it. If the experiment were successful, why did he not recognize its superior value,—a recognition that did come from him in 1890? Why was no patent applied for, or steps taken to protect his invention? Is not such inattention to his interests wholly at war with his previous history? Why should this leader in the art, with his eyes fully opened by successful experiment, relegate to a garret a device that, in the nature of things, was destined to supplant all its predecessors? An attitude such as this, to an improvement so advanced as this, by a man like Brown, is highly unnatural and improbable. In the face of these facts and circumstances, I have no such strong belief in the existence of the planter in 1882 and 1883, claimed by the defendants, as would justify a finding of anticipation. A decree may be entered as prayed for in the bill.

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KELLY et al. v. CLOW et al.

(Circuit Court, N. D. Illinois, N. D. December 13, 1897.)

PATENTS—NOVELTY—WATER-CLOSETS.

The Smith patent, No. 258,144, for an improvement in water-closets, consisting of a water connection wherein the devices for operating the valve are entirely within the water way with the valve stem projecting therefrom into the hopper, and actuated from within the hopper itself, is void for want of novelty.

Suit by Thomas Kelly and others against James B. Clow & Sons to restrain the alleged infringement of a patent.

Dyrenforth & Dyrenforth, for complainants.

Gridley & Hopkins, for defendants.

GROSSCUP, District Judge. The bill is to restrain the infringement of letters patent No. 258,144, issued to Robert D. O. Smith, May 16, 1882, relating to a new and useful improvement in water-closets. The intended scope of the patent, as well as its controlling feature, is very succinctly stated in the first claim as follows:

"In a water-closet, or other similar receptacle, a water connection, wherein the devices for operating the valve are entirely within the water way, with the valve stem projecting therefrom into the hopper, and actuated from within the hopper itself."

The remaining claims are as follows:

"A valve, D, in the service pipe, combined with a controlling stem, E, entirely within the water way, and a lever, F, within the hopper, to engage with and operate said stem, and mechanism whereby said lever, F, may be actuated. In a water-closet or other receptacle, the combination of the stem entirely within the water way, and actuating mechanism within the bowl, and a water connection provided with a valve, D, and a valve, M, both mounted on and simultaneously operated by the same stem, and an intermediate reservoir to the closet. In a water-closet or other similar receptacle, a water connection provided with a valve, D, combined with a valve, M, and an intermediate reservoir, closed at its top to form an air chamber, and an air valve, which may be placed more or less near the top. In a water-closet or other similar receptacle, a service pipe provided with a valve, D, a valve, M, provided with a chamber, O, and a valve stem, E, common to both of said valves, and a lever, F, actuated by suitable mechanism. In a water-closet or other similar receptacle, a water-service pipe provided with a valve, D, and its operative stem, located entirely within the water way, combined with a compound lever, whereof one member, F, is within the hopper, A, and the other member is outside the same."

The particular advantage of this construction over other constructions has been variously stated by the patentee: First, that it affords no place where water can leak out, excepting into the hopper, where it can do no harm; second, that the valve is located so close to the bowl into which the water is discharged that the volume of water will have no space within which to dissipate or lose its force before it reaches the bowl. In both these respects, the patent under consideration may perhaps produce results different from, and superior to, those produced by any previous devices. I find nothing in the patent, however, which indicates a purpose to point out, with reference to the bowl, a location for the valve best suited to the purpose of flushing. Evidently the matter of the location of the valve close to the bowl was not among the original purposes of the inventor. His claim for a device leaves the mechanic at liberty to locate the valve even a considerable distance from the bowl. This feature, therefore, although urged with great strenuousness, I cannot find to be a part of the patentee's claim. The other feature of advantage, namely, the exemption from leakage, except into the bowl, is shared by a number of other previous devices brought to the attention of the court. It is insisted that such devices should be excluded from consideration, because they do not relate to the same art, namely, flushing closets, as distinct from slow-acting closets, or pan closets. I cannot concur in this, however. The relation between this character of closets is so close that devices relating to one may, by a mere mechanical adaptation, be applied to the other. The patent in suit is not for a closet as an entirety, but only for one of its mechanical elements, and such elements by adjustment may be adapted to any kind of closet. Rejecting this distinction, therefore, the previous art contained devices for operating the flushing entirely within the water way, so that there could be no leakage, except into the hopper. I am not at liberty to disregard the scope and breadth of the pat-

entee's claim, nor to cut it down to such particulars of construction as, in the devices actually shown, may be new. I must take the claim as stated, or reject it altogether, and, as stated, it is clearly anticipated in the prior art. For these reasons, the bill will be dismissed.

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**HOHORST v. HAMBURG-AMERICAN PACKET CO. et al.**

(Circuit Court, S. D. New York. January 6, 1897.)

**PATENTS—INFRINGEMENT—ASCERTAINMENT OF PROFITS.**

Nominal damages only can be decreed where, although it appears that the defendant has infringed, and has derived some benefit therefrom, yet the evidence is so uncertain, and the knowledge of the witnesses so limited, that it is impossible to obtain any basis for calculating the amount of profits, other than mere haphazard speculation.

This was a suit in equity by Friedrich Hohorst against the Hamburg-American Packet Company and others for infringement of a patent. The cause was heard on exceptions to the master's report in respect to damages and profits.

Charles M. Demond, for complainant.

Walter D. Edmonds, for defendants.

COXE, District Judge. On the 15th day of May, 1896, the master filed his report, in which he says, *inter alia*:

"I am convinced that the complainant has not made out a case entitling him to a recovery of profits within the rule applicable to this subject. I cannot make, as complainant suggests, 'an approximate calculation.' On the evidence, I can be no better satisfied that five or ten or twenty per cent. of certain goods were handled by the nets than two-thirds were so handled. If, therefore, I should report that complainant has shown profits made by defendant on the basis of a given proportion of certain goods handled, and a given proportion of time saved in handling them, such report would be based on the merest haphazard speculation. I do not consider that I am justified in making such conjectures." Citing 3 Rob. Pat. pp. 522, 523.

Accordingly, he found that the complainant is entitled to recover nothing by way of profits, and nominal damages only.

On the 29th of July, thereafter, the circuit court of appeals announced its decision in *Tuttle v. Clafin*, 22 C. C. A. 138, 76 Fed. 227. It is agreed on all sides that this is "a closely analogous case" to the one at bar, and that the law as there enunciated is now the rule in the second circuit. The court has been considerably perplexed as to the proper disposition of the case in view of this decision. After careful consideration it is thought fair to the learned master and just to all parties concerned, to refer the accounting again to the master with the suggestion that he follow the rule of *Tuttle v. Clafin*, and take such further action in the matter as he may deem proper.

**On Exceptions to Supplemental Report.**

(December 23, 1897.)

TOWNSEND, District Judge. In this suit, the court, having decreed upon final hearing that complainant's patent, No. 119,765, for