

goes, involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough. It is true that that patent describes the tubular valve as being inside of the burner-tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination, and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. The record shows that prior to the existence of the appellant's burner it was common in gas-burners to check the flow of gas out of the burner by applying an obstruction operated by a screw indifferently outside or inside of the burner. It follows, from these considerations, that the defendants infringed the second claim of the Clough patent.

The decree of the Circuit Court will be reversed, with costs, and the cause remanded with directions to enter a decree for the appellant for an account and an injunction, as prayed in the bill, with costs, and to take such further proceedings therein as shall be in conformity with law and with the opinion of this court; and it is

*So ordered.*

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#### CLOUGH *v.* MANUFACTURING COMPANY.

1. The claim of letters-patent No. 105,768, granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners," is valid.
2. Although, in its method of supplying additional gas and in its valve-arrangement for regulating the supply, a gas-burner made according to the description of those letters infringes both of the claims of letters-patent 104,271, granted to Theodore Clough, June 14, 1870, for an "improvement in gas-burners," yet, as it dispenses with the interior tubular valve of Clough, and is made in two pieces instead of three, and is less expensive to make, and as, in regulating the supply, the shell alone revolves, and the flame always remains in one position, the modifications are new and useful, and therefore patentable.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

*Mr. Edward N. Dickerson* and *Mr. Roger H. Lyon* for the appellant.

*Mr. William Stanley* and *Mr. Stephen G. Clarke* for the appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This suit was brought by the Gilbert & Barker Manufacturing Company against Theodore Clough to recover for the infringement of letters-patent granted to John F. Barker, July 26, 1870, for an "improvement in gas-burners." The specification of that patent and its claim are set forth at length in the opinion in *Clough v. Barker, ante*, p. 166. The answer of the defendant admits that he has made and sold gas-burners substantially like those described in the Barker patent. The principal defence he sets up in the answer is, that he invented the improvement patented to Barker, and obtained letters-patent therefor from the United States on the 14th of June, 1870, being the same patent on which the other suit in the case just cited was founded, and the specification of which is set forth at length in the opinion therein; that the burners which he has made and sold were made under and according to that patent; that he made and used said improvement in December, 1869, and applied for a patent for it Dec. 4, 1869, which was granted, being the said patent of June 14, 1870; that after he had invented and perfected said improvement, and had filed such application for a patent for it, he showed a sample of it to Barker, in May, 1870; and that Barker, thereupon, fraudulently intending to deprive him of the benefits of his invention, obtained a patent for it, being the said patent of July 26, 1870, the gas-burner patented by him being substantially like that previously patented by the defendant, in construction, mode of operation, and result, and being a mere mechanical equivalent therefor. No other anticipation of Barker's invention is set up in the answer. The decree of the court below was in favor of the plaintiff.

The claim of the Barker patent covers a gas-burner having these features: a pillar with holes therein around the circumference at its bottom, and an adjustable or movable surrounding

shell or tube, such shell, by being moved up or down, either closing or opening the holes, and thus stopping or permitting the flow of gas through the holes. The general principle of the burner, so far as regards supplying additional gas to the burner, through the holes and the surrounding tube, as the illuminating qualities of the gas become weaker, and as regards having a method of increasing or diminishing such supply by a valve-arrangement covering or uncovering the holes as required, is the same as that of the prior patent to Clough, the appellant, and which was the prior invention. It has been held by this court, in the other suit between the same parties, that a gas-burner made according to the description in the Barker patent infringes both of the claims of the Clough patent, — the claim for the method of supplying the additional gas, and the claim for the application of a valve-arrangement to regulate the supply. But the point of the invention and patent of Barker is, that the surrounding shell or tube is so arranged that the screwing of such shell up or down causes it to act as a valve, on the outside of the pillar, to close or open the holes. As a consequence, the interior tubular valve of Clough is dispensed with, the burner is made in two pieces instead of three, is less expensive to make, and, moreover, in regulating the supply of gas, the shell alone revolves, and not the burner with it, as in Clough's burner, and so the flame always remains in one position. We think, from the evidence, that these modifications were new and useful, and sufficient in character to sustain a patent. The burner in the form patented by Barker appears to have superseded the burner in the form patented by Clough, and, after Barker had introduced his burner into use, Clough commenced making for market burners in the same form patented by Barker.

As to the claim that Clough made prior to Barker the form of burner covered by Barker's patent, the Circuit Court held that, the burden of proof being on the defendant to make out that allegation satisfactorily, the evidence fell short of showing clearly that Clough anticipated Barker as to that form of burner. Without discussing the evidence in detail, it is sufficient to say that we concur in that view. The burner of Clough which Barker saw before he made his burner was the

Clough burner which had the tubular valve in the inside of the burner-tube.

If the evidence as to the existence prior to the invention of Barker of other burners than that of Clough be considered, on the question of the novelty of the arrangement claimed by the Barker patent, it must be held that none of the prior forms of burner introduced in evidence anticipate the arrangement covered by the claim of the Barker patent.

*Decree affirmed.*

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OSBORNE v. COUNTY OF ADAMS.

A steam grist-mill is not a work of internal improvement, within the meaning of the act of Nebraska of Feb. 15, 1869, entitled "An Act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose."

ERROR to the Circuit Court of the United States for the District of Nebraska.

This was an action brought by Osborne against the county of Adams, Nebraska, to recover the amount of certain coupons detached from bonds of Juniata Precinct, a legal subdivision of that county. Pursuant to a vote of the qualified electors of the precinct, to aid in the construction of a steam grist-mill therein, the bonds were issued by the county commissioners under the authority supposed to be conferred by the act of that State of Feb. 15, 1869, the first and seventh sections of which are as follows:—

"SECT. 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement to an amount to be determined by the county commissioners of such county, or city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city: *Provided*, the county commissioners or city council shall first submit the question of the issuing said bonds to a vote of the legal voters of said