

United States
Circuit Court of Appeals
For the Ninth Circuit.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY, a Corporation,

Appellant,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY,

Defendant.

Bill of Complaint for Infringement of Patent.

Now comes plaintiff in the above-entitled suit and files this its bill of complaint against the defendant, and for cause of action alleges:

1. That the full name of the plaintiff is Majestic Electric Development Company, and at all times hereinafter mentioned plaintiff was and still is a corporation created under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

2. That the full name of the defendant is Westinghouse Electric & Manufacturing Company, and at all the times hereinafter mentioned said defendant was and still is a corporation created under the laws of the State of Pennsylvania, and having a regular and established place of business in the Northern District of California, Southern Division, to wit, at the City and County of San Francisco, State of California, with an agent engaged in conducting such

business in said Northern District of California, Southern Division.

3. That heretofore, to wit, prior to May 28, 1917, one Edmund N. Brown, a citizen of the United States, residing at the City and County of San Francisco, State of California, [1*] invented a new, original and ornamental design for an article of manufacture, to wit, an electric heater casing, not known or used by others in this country before his invention, and not patented or described in any printed publication in this or any foreign country prior to his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, and not abandoned; and being such inventor, heretofore, to wit, on May 28th, 1917, said Edmund N. Brown filed an application in the Patent Office of the United States praying for the issuance to him of letters patent of the United States for said design for an electric heater casing.

4. That after the filing of said application and prior to the issuance of any patent thereon, the said Edmund N. Brown for value received by an assignment in writing, sold and assigned to the plaintiff herein the aforesaid design, together with any and all letters patent that might be issued therefor, and in and by said assignment requested the Commissioner of Patents to issue the said patent to the said Majestic Electric Development Company, a corporation, its successors and assigns, which assignment was filed in the Patent Office of the United States

*Page-number appearing at foot of page of original certified Transcript of Record.

prior to the issuance of letters patent on said application.

5. That thereafter, to wit, on July 17th, 1917, letters patent of the United States for said design, dated on said day, and numbered 51,043 were issued and delivered by the Government of the United States to the plaintiff herein, Majestic Electric Development Company, a corporation, whereby there was granted unto the said plaintiff, its successors and assigns, for the term of seven (7) years from the 17th day of July, 1917, the exclusive right to make, use and vend the said invention covered by said letters patent throughout the United States of America and the territories thereof. [2]

6. That ever since the issuance of said letters patent plaintiff has been and still is the sole owner and holder thereof, and of all the rights, liberties and privileges thereby conferred, and has made and sold electric heater casings to which the said design was applied, and upon each and every one of the said articles so sold the date and number of the aforesaid patent were marked.

7. That after the issuance of said letters patent and during the term thereof, to wit, between the 17th day of July, 1917, and the commencement of this suit, in the Southern Division of the Northern District of California, to wit, at the City and County of San Francisco, in the State of California, and at other places in the Northern District of California, and at places outside of the Northern District of California, the defendant herein without the license or consent of the plaintiff did apply the design

4 *Majestic Electric Development Company vs.*

secured by said letters patent and colorable imitations thereof to articles of manufacture, to wit, electric heater casings, for the purposes of sale, and did sell and expose for sale the said articles of manufacture to which said design and colorable imitations thereof had without the license or consent of the plaintiff been applied, knowing that the same had been so applied, and did so also at the City and County of San Francisco, in the State of California, and elsewhere without the license of plaintiff to sell electric heater casings containing and embracing the invention patented in and by said letters patent No. 51,043.

8. That by reason of the infringement aforesaid plaintiff has suffered damages, and plaintiff is informed and believes and upon such information and belief alleges that the defendant has realized profits, gains and advantages, but the exact amount are unknown to the plaintiff.

9. That the plaintiff has requested the defendant to cease and desist from further infringement upon said letters patent [3] and to account to the plaintiff for the aforesaid damages and profits, but the defendant has failed and refused to comply with such request or any part thereof.

10. That the defendant is now continuing the infringement of said letters patent as aforesaid daily at the City and County of San Francisco, State of California, and elsewhere, and threatens to continue the same, and unless restrained therefrom by this Honorable Court will continue the same, whereby plaintiff will suffer great and irreparable injury and

damage, for which it has no plain, speedy or adequate remedy at law.

11. Plaintiff further avers that heretofore, to wit, on September 5, 1917, plaintiff commenced an action at law in this Honorable Court against the Holabird Electrical Company, a corporation, alleging the invention of the said design for electric heater casings by Edmund N. Brown; the assignment thereof to the plaintiff; the filing of an application for patent thereon, and the issuance of the said patent, No. 51,043; the ownership of said patent by plaintiff; the infringement thereof by the defendant in said action; the suffering of damages by said infringement of the defendant coupled with a prayer for judgment against the defendant and in favor of the plaintiff for damages; that the Holabird Electrical Co., defendant, appeared in said action and filed its answer, together with notices of special matter attacking the validity of the said patent and denying infringement; that afterwards, to wit, on June 16, 1919, said action came on for trial on the issues so framed, and the same was duly tried in this Honorable Court before a jury of twelve men, and was submitted to said jury for its verdict; that thereupon on the 16th day of June, 1919, said jury rendered a verdict sustaining the validity of said patent and finding infringement thereof and awarding the plaintiff damages for said [4] infringement; whereupon a judgment for plaintiff was duly made and entered by this Honorable Court, and the same has never been altered, set aside, or reversed, and is still in full force and effect.

WHEREFORE, plaintiff prays as follows:

First: That a final decree be entered in favor of plaintiff, Majestic Electric Development Company, and against the defendant, Westinghouse Electric & Manufacturing Company, perpetually enjoining and restraining the said defendant, its officers, servants, agents, attorneys, workmen and employees, and each of them, from making, using or selling the device or devices described, claimed and patented in and by the said letters patent either directly or indirectly, or from contributing to any such infringement.

Second: That upon the filing of this bill of complaint a preliminary injunction be granted to the plaintiff enjoining and restraining the defendant, Westinghouse Electric & Manufacturing Company, its officers, servants, agents, attorneys, workmen and employees, and each of them, until the further order of this Court, from making, using or selling the device or devices described, claimed and patented in and by the said letters patent, and from making, using or selling any device or devices in colorable imitation thereof, and from infringing upon said letters patent either directly or indirectly or from contributing to any such infringement.

Third: That plaintiff have and recover from the defendant Westinghouse Electric & Manufacturing Company the gains, profits and advantages realized by the defendant and the damages suffered by the plaintiff from and by reason of the infringement aforesaid, together with costs of suit, and such other and further relief as to the Court may seem proper

and in accordance with [5] equity and good conscience.

MAJESTIC ELECTRIC DEVELOPMENT
COMPANY.

By EDMUND N. BROWN,
Secretary.

JOHN H. MILLER,

Attorney and Counsel for Plaintiff,
723-6 Crocker Building,
San Francisco, California.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Edmund N. Brown, being duly sworn, deposes and says: That he is secretary of Majestic Electric Development Company, plaintiff, in the within entitled case; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

EDMUND N. BROWN.

Subscribed and sworn to before me this 1st day of November, A. D. 1919.

[Seal]

EUGENE P. JONES,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed:] Filed Nov. 1, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

(Title of Court and Cause.)

Second Amended Answer.

The answer of Westinghouse Electric & Manufacturing Company, the above-named defendant, to the bill of complaint of the above-named plaintiff.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit and advantage of exception which may be had, or taken, to the many errors, uncertainties, imperfections and insufficiencies in said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised that it is material or necessary to make answer unto, answering, says:

1. As to whether the full name of the plaintiff is Majestic Electric Development Company, and whether the plaintiff was and still is a corporation created under the laws of the State of California and has its principal place of business in the City and County of San Francisco of the State of California, defendant does not know and leaves plaintiff to make proof thereof.

2. Answering further, this defendant admits that the full name of defendant is Westinghouse Electric & Manufacturing Company and that it was, and still is, a corporation of the State of Pennsylvania and has a regular and established place of business in the City and County of San Francisco of the State of California, with an agent conducting such business.

3. Answering further, this defendant admits that,

on May 28, 1917, one Edmund N. Brown filed an application in the United States Patent Office praying for the issuance to him of Letters Patent of the United States for a design for an electric heater casing, but denies that the said design was new, original or ornamental; that it was not known or used by others in this country before his alleged invention thereof and not patented [7] or described in any printed publication in this or any foreign country before his alleged invention thereof or more than two years prior to his application for Letters Patent, and not in public use or on sale in this country for more than two years prior to his said application and that it had not been abandoned.

4. Answering further, as to whether the said Edmund N. Brown did, subsequent to the filing of said application and prior to the issuance of Letters Patent thereon, for value received, sell and assign to the plaintiff herein by an assignment, in writing, the aforesaid design, together with any and all Letters Patent that might be issued therefor, and requested the Commissioner of Patents to issue such patent to the Majestic Electric Development Company, its successors or assigns, and whether any such assignment was filed in the Patent Office of the United States prior to the issuance of Letters Patent on the said application, this defendant is not informed and leaves the plaintiff to make proof thereof.

5. Answering further, this defendant admits that Letters Patent No. 51,043, were issued to the Majestic Electric Development Company on July 17, 1917, for the term of seven years from that date, but

whether such Letters Patent were delivered to the plaintiff herein defendant does not know.

6. Answering further, as to whether the plaintiff has been and still is the sole owner or holder of the said Letters Patent and of all rights, liberties and privileges thereby conferred and whether the plaintiff has made and sold electric heater casings embodying the said design and whether any electric heater casings made and sold by the plaintiff were marked with the date and number of the aforesaid patent, defendant does not know and leaves the plaintiff to make proof thereof.

7. Answering further, this defendant denies that, between the 17th day of July, 1917, and the commencement of this suit, it has, [8] in the Southern Division of the Northern District of California, to wit, in the City and County of San Francisco, or in any other place or places in the Northern District of California or elsewhere applied the design secured by said letters patent or any colorable imitations thereof to electric heater casings for the purposes of sale or that it has sold or exposed for sale any such article of manufacture embodying such design or any colorable imitation thereof.

8. Answering further, this defendant denies that it has realized profits, gains or advantages or that the plaintiff has suffered damages by reason of any infringement of said Letters Patent No. 51,043 by the said defendant.

9. Answering further, this defendant admits that it has been requested by the plaintiff to desist from infringing said letters patent and to account

to plaintiff for alleged damages and profits, but this defendant denies that it has failed and refused to comply with any such request, or threatens or intends to continue to make, use and sell anything described and claimed in said letters patent, or that it has made, used and sold any such heater casings since the receipt of such notice, or at any other time.

10. Answering further, this defendant denies that it is now continuing infringement of the said letters patent, directly or otherwise, in the City and County of San Francisco, State of California, and elsewhere, or that it threatens to continue any such infringement or that the plaintiff will suffer great and irreparable injury and damage by reason of any acts of defendant.

11. Answering further, as to whether, on September 5, 1917, the plaintiff commenced an action at law against the Holabird Electrical Company, a corporation, alleging the infringement of letters patent No. 51,043; whether said action was tried and [9] whether a jury rendered a verdict sustaining the validity of said patent and finding infringement thereon; and whether a judgment for plaintiff was made and entered by this Honorable Court, which has never been altered, set aside or reversed, and is still in full force and effect, defendant does not know and leaves plaintiff to make proof thereof.

12. Answering further, this defendant denies that the finding of a jury in a case at law against the Holabird Electrical Company, a corporation, is binding upon this defendant because there is no privity of parties defendant in the alleged and in

the present actions; there is not such similarity of subject matter of the respective actions as to warrant such holding, and the articles manufactured and sold by the Westinghouse Electric & Manufacturing Company, the defendant herein, and alleged to infringe said letters patent bear no such similarity to the articles involved in the alleged suit against the Hollabird Electrical Company as to make any verdict of a jury in such suit in any manner or degree binding upon this defendant.

13. Answering further, this defendant denies that the alleged design for electric heater casings shown, described and claimed in said letters patent No. 51,043, contains and embodies any material beneficial advance over what had previously been known to those skilled in the art, but avers the fact to be that the patent is invalid and void, for the following reasons:

(a) Because the said Edmund N. Brown was not the original and first inventor or discoverer of the invention alleged to be shown, described and claimed in said letters patent, or of any material or substantial part thereof, but that the same and all material or substantial parts of the alleged invention had been patented or described in the printed publications and letters patent prior to the date of the alleged invention of the said Edmund N. Brown, as follows: [10]

LETTERS PATENT OF THE UNITED STATES.

	No.	Date.	Patentee.
	8,101	May 20, 1851	R. Jobson.
Design	45,317	Feb. 24, 1914	A. A. Warner.
Design	46,922	Feb. 9, 1915	F. X. Chassaing.
	235,199	Dec. 7, 1880	A. G. Bell.
	235,497	Dec. 14, 1880	A. G. Bell & S. Tainter.
	492,247	Feb. 21, 1893	W. E. Ulmer.
	530,016	Nov. 27, 1894	J. Cinnamon.
	654,630	July 31, 1900	H. V. Hayes & E. R. Cram.
	658,706	Sept. 25, 1900	H. J. Dowsing.
	684,459	Oct. 15, 1901	E. F. Porter.
	881,017	Mar. 3, 1908	W. E. H. Morse.
	893,994	July 21, 1908	F. C. Green.
	902,003	Oct. 27, 1908	A. D. Rathbone.
	921,476	May 11, 1909	W. A. Soles.
	988,824	Apr. 4, 1911	L. A. Sagendorph.
	1,084,375	Jan. 13, 1914	G. B. Swinchart.
	1,097,282	May 19, 1914	L. W. Andersen.
	1,109,551	Sept. 1, 1914	M. H. Shoenberg.
	1,120,003	Dec. 8, 1914	A. A. Warner.
	1,147,951	July 27, 1915	F. T. Kitehen.
	1,187,968	June 20, 1916	E. N. Cherry.
	1,205,011	Nov. 14, 1916	Phillips & Anderson.

LETTERS PATENT OF GREAT BRITAIN.

No. 19,311 of 1894.

No. 11,013 of 1910.

No. 2,764 of 1912.

No. 19,971 of 1913.

No. 102,070 of 1916.

PUBLICATIONS.

Page 79 of the issue of Jan. 25, 1912, *The Electrical Times*, published in London, England.

Page 37 of the issue of Jan. 11, 1912, *The Electrical Times*.

Page 239 of the issue of Mar. 7, 1912, *The Electrical Times*.

Page 362 of the issue of Mar. 6, 1913, *The Electrical Times*.

Page 364 of the issue of Mar. 6, 1913, *The Electrical Times*.

Page 214 of the issue of Oct. 3, 1913, the Supplement to "*The Electrician*," published in London, England.

Page 353 of the issue of Oct. 9, 1913, *The Electrical Times*.

Page 591 of the issue of Dec. 4, 1913, *The Electrical Times*.

Page 12 of the issue of Oct. 16, 1914, the Supplement to "*The Electrician*."

Page 19 of the issue of May, 1915, *Electrical Record*, published in New York, N. Y.

Page 162 of the issue of Aug. 31, 1916, *The Electrical Times*.

Page 14 of the issue of May, 1907, *Electrical Record*, published in New York, N. Y.

Advertising insert—page two of the Supplemental to "*The Electrician*" of the issue of September 20, 1912.

Page 163 of the issue of Aug. 16, 1912, of the Supplement to "*The Electrician*."

Pages 1 and 11 of the Oct. 3, 1906, issue of "Prometheus," published by Dr. Otto N. Witt in Berlin, Germany. [11]

Also in many other letters patent and printed publications not now known to this defendant, but which, when discovered hereafter, defendant prays leave of the Court to furnish and concerning which defendant prays leave to incorporate data in this, its answer, by suitable amendment thereof.

(b) Because, in view of the state of the art in respect to electric heater casings prior to, or at the time of, the alleged invention of the said Edmund N. Brown, the supposed improvement shown, described and claimed in said letters patent was not a patentable invention, discovery or improvement but comprised mere selections and adaptations from prior known structures requiring no invention but being within the domain of mere judgment and skill in the art and, in view of such prior art, this defendant refers to and hereby makes a specific part of its answer, the several printed publications and letters patent hereinbefore cited.

(c) Because, defendant is informed and believes, the said Edmund N. Brown was not the original and first inventor of the alleged invention, discovery or improvement described and claimed in said letters patent or any material or substantial part thereof; that, prior to any such invention by said Edmund N. Brown, said invention, discovery or improvement was publicly known to, and used by, others, at places in this country, to wit:

Alonzo A. Warner and Landers, Frary & Clark, at
New Britain, Connecticut, and elsewhere.

(d) Because, as defendant is informed and believes, the Majestic Electric Development Company, the plaintiff herein, manufactured, publicly offered for sale and sold electric heater casings like or substantially like that shown, described and claimed in the said letters patent No. 51,043, in the City and County of San Francisco, in the State of California, and elsewhere, and that such heater casings were so sold and were publicly [12] used more than two years prior to the 28th day of May, 1917.

(e) Because, as defendant is informed and believes, one Alfred R. Huntington, formerly of San Francisco, California, now of Riverside, California, was the originator of the design for which said design patent No. 51,043 was granted to Edmund N. Brown, and the plaintiff herein and said Edmund N. Brown surreptitiously and unjustly obtained the said design patent for that which was in fact invented or originated by another, to wit, the said Alfred R. Huntington, who was using reasonable diligence in adapting and perfecting the same.

14. Further answering, this defendant avers and says that, in view of the proceedings had and taken in the United States Patent Office during the prosecution of the application for the said letters patent No. 51,043, the claim forming part of the said letters patent cannot lawfully be construed as covering and embracing any device manufactured and sold by this defendant, or any substantial or material part thereof, but that said claim, if held

to be valid at all, must be so narrowly construed as not to cover or include the devices so manufactured and sold.

15. Wherefore, the said letters patent are null and void and have no effect to secure the plaintiff any exclusive right in or under the subject matter of the claim of the said letters patent.

16. This defendant denies that it has done any act or thing, or proposes to do any act or thing, which entitles the said plaintiff to an injunction or to an accounting or to any other relief.

All of which defenses said defendant is ready to further maintain and prove as this Honorable Court shall direct, and it prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

By T. P. GAYLORD,
Acting Vice-president.

Solicitor for Defendant.

WESLEY G. CARR,
Of Counsel. [13]

State of Pennsylvania,
County of Allegheny,—ss.

T. P. Gaylord, being duly sworn, deposes and says:

I am acting vice-president of the Westinghouse Electric & Manufacturing Company, the above-named defendant; I have read the foregoing amended answer to the bill of complaint in the suit

18 *Majestic Electric Development Company vs.*

of Majestic Electric Development Company, Plaintiff, vs. Westinghouse Electric & Manufacturing Company, Defendant, and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

T. P. GAYLORD,
Acting Vice-president.

Sworn to and subscribed before me this first day of May, 1920.

[Seal]

E. E. LITTLE,
Notary Public.

My commission expires at end of next session of Senate.

[Endorsed]: Filed June 9, 1920. Walter B. Maling, Clerk. [14]

(Order Designating Judge Dietrich to Sit in This Court.)

WHEREAS, in my judgment the public interest so requires, I hereby designate and appoint the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, to hold the District Court of the United States for the Northern District of California, during the months of August and September, 1920, and to have and exercise within said district the same powers that are vested in the judges thereof.

WITNESS my hand hereto this 23d day of August, 1920.

W. B. GILBERT,
Senior Circuit Judge of the Ninth Circuit.

[Endorsed]: Filed Aug. 24, 1920. W. B. Maling,
Clerk. [15]

At a stated term, to wit, the July term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 4th day of October, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 492—EQUITY.

MAJESTIC ELECTRIC DEVELOPMENT CO.

vs.

WESTINGHOUSE ELECTRIC & MNFG. CO.

(Order Dismissing Bill, etc.)

In accordance with the opinion of Honorable Frank S. Dietrich, United States District Judge for the District of Idaho (before whom this suit was heretofore tried), which said opinion is this day filed, it is ordered that the bill herein be and the same is hereby dismissed, with costs to defendant, and that a decree be signed, filed and entered accordingly. [16]

In the United States District Court, Northern District of California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

No. 493.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

No. 544.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

No. 499.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Plaintiff,

vs.

HOLBROOK, MERRILL & STETSON, a Corpo-
ration,

Defendant.

(Opinion Dismissing Bill.)

JOHN H. MILLER, Attorney for Plaintiff.

WESLEY G. CARR, DAVID L. LEVY, NA-
THAN HEARD, and SAMUEL KNIGHT,
Attorneys for Defendants. [17]

DIETRICH, District Judge:

Four suits for infringement (numbers 492, 493, 499 and 544) were tried consecutively, in a large measure upon the same evidence, and have now been submitted upon the same argument. In each of them the Majestic Electric Development Company is the plaintiff; the Westinghouse Electric & Manufacturing Company is the defendant in numbers 492, 493 and 544, and Holbrook, Merrill & Stetson in 499. Numbers 492 and 499 are for infringements of United States design patent No. 51,043, issued July 17, 1917, to the plaintiff company, as the assignee of Edmund N. Brown, patentee, whose application therefor was filed May 28, 1917. Number 493 is for infringement of mechanical or utility patent numbered 1,245,084, issued by the United States on Oc-

tober 30, 1917, to the plaintiff, as the assignee of Edmund N. Brown, patentee, whose application therefor was filed July 10, 1917. And number 544 is for infringement of design patent numbered 51,253, issued by the United States on September 11, 1917, to the plaintiff, as assignee of Edmund N. Brown, patentee, upon an application filed July 10, 1917. Hence three patents are in suit:

Design patent No. 51,043, applied for May 28, 1917, issued July 17, 1917.

Design patent No. 51,253, applied for July 10, 1917, issued September 11, 1917.

Utility patent No. 1,245,084, applied for July 10, 1917, issued October 13, 1917.

All of the patents relate to a portable electric heater or its casing, and cover substantially the same device. It will be more convenient first to dispose of the suit involving the utility patent. The claims are as follows:

“1. An electric heater, comprising a concavo-convex reflector, a heating unit supported at substantially the focus of said reflector, an annular member extending outwardly from [18] the margin of said reflector, and a protective cage having guard wires arched between opposite sides of said annular member.

2. An electric heater, comprising a concavo-convex reflector, a heating unit supported at substantially the focus of said reflector, an annular member extending outwardly from the margin of said reflector, and a protective cage of arched guard wires hinged to said annular member so

that it may be swung outwardly from the reflector.

3. An electric heater, comprising a concavo-convex reflector, a heating unit supported at substantially the focus of said reflector, a concavo-convex casing extending over the convex side of said reflector and spaced therefrom except at the margins, said casing having an annular portion extending outwardly from the margin of said reflector, and a protective cage having guard wires arched between opposite sides of said annular portion.

4. An electric heater, comprising a concavo-convex metal reflector, a heating unit in space relation thereto, said reflector being provided with apertures having their margins bent to form flanges, insulating means upon either side of said flanges, and connecting devices extending through said insulating means and connected to the terminals of said heating unit."

In the specifications we are advised that the invention relates to improvements in electric heaters, in which the heat rays generated by a resistance coil or heating unit are reflected from a highly polished surface, and, further, that one of the main purposes of the invention is to provide means by which the highly heated portions of the device are inclosed by protecting members. While the phrase "beam heater" is not used in the application for patent, the device is so referred to and characterized in the trade. The purpose thereof is by reflection to concentrate the radiant energy upon a comparatively

small area, and thus to furnish the desired measure of heat within the range of the "beam," without the necessity of heating to so high a degree the entire space in the room. Admittedly an ideal beam, of substantially parallel rays, cannot be realized, and the various devices used for the purpose only [19] approximate such a result, some more closely than others. It is also well understood that the physical laws relating to the reflection of heat are the same as those pertaining to the reflection of light.

The position of the plaintiff is that the invention disclosed by the patent in suit is generic, and that thereby Brown introduced a broad fundamental idea theretofore unknown in the art, whereas the defendant contends that he only embodied a familiar conception in a slightly different form of mechanism. Correctly, it is thought, counsel for the plaintiff so defines the underlying issue, and unless in that respect its position is sustained it cannot succeed. Considerable testimony, it is true, was offered to show that certain members of the defendant's heater are the functional equivalents of similar parts of the patented device. But if the patent is held to cover, not a generic idea, but only minor improvements in a known mechanism, there is no infringement. It is possible, of course, to characterize the turned-over edge of the defendant's reflector as a flange, and to find that in a slight degree it performs the function for which the annular member or flange illustrated in the Brown patent was designed, but such an effect is merely incidental. Its primary pur-

pose is to give to the reflector strength and a finished appearance. It is to be observed that the reflecting member of the plaintiff's heater also has a turned-over edge, so that if we eliminate the annular flange we still have a reflector very closely corresponding to the reflecting member of the defendant's heater, including the turned-over edge, and hence the novelty or patented feature in the Brown device, namely, the broad flange, to which the claims doubtless relate, is not found in the defendant's heater at all. The correctness of this view may be readily demonstrated by removing the reflector in the plaintiff's heater from its casing and thus separating it from the protective flange. [20]

The defendant's heater has no casing by means of which in the plaintiff's device the back of the reflector is protected, and therefore there can be no contention of infringement in that respect.

There is no novelty in the plaintiff's wire guard or cage, unless it be in the hinging device, and the defendant's guard is not hinged.

If valid at all, the fourth claim must be narrowly construed, for the necessity of insulation and generally the means by which it is accomplished are matters of familiar knowledge, and such novelty, if any, as the claim discloses must be found in the minute details of construction; but in such details the defendant's insulating and connecting devices are substantially different.

If, then, the plaintiff can succeed only upon the theory that the invention is generic, is such a theory tenable? Admittedly the language employed in the

patent application does not aptly express a claim of that character. Nowhere does the applicant suggest the view that he has discovered the principle of a "beam heater," or any broad, fundamental idea in relation thereto. Upon the other hand, there is an implied recognition of the fact that the principle has already found expression in the art. One of the main purposes of the invention, the applicant declares, is to provide, not a beam heater or a beam of radiant energy, but the means for enclosing and protecting the highly heated members of such a heater. And when we consider the prior art, with which Brown was doubtless familiar, the reason for limiting his claims to minor improvements, and particularly to protective devices, becomes apparent. He was at the head of the plaintiff company, which at the time was actively engaged in manufacturing and marketing beam heaters, under the Shoenberg patent, of which it was the assignee. (United States No. 1,109,551, issued September 1, 1914.) And it is difficult to resist the conclusion that, when the plaintiff's heater No. 7, illustrated in the patent in suit, [21] was first put on the market in 1916, the plaintiff understood and assumed that it was protected by the Shoenberg patent. That in so far as concerns the general principle or generic idea this patent anticipates the one in suit is scarcely open to question. The invention is described as relating to electric heaters or radiators in which, as here, "the heat waves generated by resistance coil are directed by a polished metal reflector." Even in certain details now emphasized by the plaintiff there is substantial

identity, for Shoenberg also provided both a wire guard for the front and a protective casing for the back of the reflector. Distinction is sought to be made because the reflector illustrated in the Shoenberg patent differs in contour from the one illustrated in the Brown patent, but admittedly this difference is not of the essence. The latter also differs from the one used by the defendant, in that the one is hemispherical and the other parabolic. It is not a question of the specific form illustrated, but of the principle involved and the scope of the claims of the patent, and it would hardly be contended that one manufacturing a device in all other respects like that illustrated in the Shoenberg patent could escape a charge of infringement by showing that he used a purely parabolic reflector. That patent is broad enough to embrace either a parabolic or hemispherical reflector. It refers to the reflector merely as a "reflector," without specifying the form, or as being "dome-like," or "hemispherical," or as having an "inner concave surface." But it discloses the purpose and principle or generic idea quite as clearly as does the patent in suit, and if it does not fully anticipate the latter, it is only because of the wide annular flange in the later device and possibly certain details in the matter of insulating the conducting wire and connecting it with the resistance coil. One has only to glance at the photograph (Defendant's Exhibit "E") of plaintiff's exhibit at the Panama Exposition to see how fully the general principle of such a [22] heater had already in 1914 found expression in the art. It is true that the types

of reflector illustrated in the Shoenberg patent and employed by the plaintiff prior to the patent in suit created a less perfect beam, but the difference is in degree only. In this respect the defendant's heater is an advance upon the one put out by the plaintiff under the patent in suit. But aside from the Shoenberg patent, the principle is clearly disclosed in the earlier patents and in the prior art. In English patent No. 12,320, Kempton claimed that by the use of a reflector of "parabolic or conical shape," located in a fireplace or in open space, for the purpose of throwing the heat into the room, gas could be used for heating purposes as cheaply as coal. He shows a gas jet in the same relation to the reflector as here the resistance coil. The principle is suggested in the Morse patent (United States No. 881,017, March 3, 1908), illustrating a device for applying heat to a portion of the body, to be used in the practice of therapeutics. In the English patent for the "Simplex," (No. 19,971, September 4, 1914), there is a very complete disclosure. True here again the reflector illustrated has the configuration of a cone, but the inventor's preference for this form seems to rest upon considerations of economy of construction. He adds that it may be "parabolic or the like contour." The heating element both in form and in its relation to the reflector closely resembles that of the defendant's device, and the front of the reflector is fitted with a wire guard. The object of the invention we are informed "is to provide an apparatus of convenient form in which the radiant heat issues in the form of a condensed beam of rays, di-

vergent, approximately parallel, or convergent, as the case may be, and adapted to be pointed in any desired direction, horizontally or vertically." It would be difficult to state the principle [23] more clearly or comprehensively. This device was manufactured and generally advertised before the Brown application was filed. Material also are the Warner patent of December 8, 1914 (United States, No. 1,120,003), and the Gieger patent of August 8, 1916 (United States, No. 1,194,168), and the Taylor patent of November 16, 1916 (English, No. 102,070). Noteworthy also are the "Ferranti Fires," devices in the market and more or less generally advertised as early at least as 1911, as appears from the trade literature offered in evidence.

THE DESIGN PATENTS.

One of these patents covers a casing of the precise form illustrated in the mechanical patent just considered, and the other a casing similar in form, exclusive of the wide annular flange. There could be, and of course is, no claim for size, color, or material, nor, as I understand, does the patent extend to the supporting standard or pedestal, which is of the common telephone type. The patented designs, therefore, relate to the reflector and the protective devices, viewed, of course, in connection with the attendant heater element.

The first design, the one with the wide annular flange (No. 51,043), is not thought to be infringed by the defendant's devices. They are neither reproductions nor colorable imitations. True, there are points of resemblance; so there are also points

of resemblance between these devices and the common telephone and electric fan. In all reflectors, whether for headlights or heaters, there are similarities of appearance. So common is a concavo-convex reflector that the word reflector alone immediately suggests such a device. But taking the heaters here as a whole and excluding from consideration slight differences of detail, there are two important differentiating features: Whatever may be said in support of the view that the turned-over edges of the defendant's reflectors are the functional equivalents of the broad annular flange in the plaintiff's heater, [24] clearly in so far as affects appearance they are wholly dissimilar, and the broad flange is a conspicuous differentiating feature of the plaintiff's design. So of the heater element. As shown by the testimony of one of the plaintiff's witnesses, who first observed the Westinghouse heater upon passing a show-window where it was displayed, this is an outstanding feature in the appearance of the device,—the attention is arrested by it; and the incident so testified to is in accord with my own experience during the course of the trial. When it was necessary quickly to identify the plaintiff's device, grouped as it frequently was with many others in the courtroom, my eyes involuntarily sought the element as the most conspicuous distinguishing mark. If, therefore, we consider the entire assemblage—the reflector, the protective members, and the element—as the design, there is substantial dissimilarity in appearance.

But in the second place, in so far as they are alike, the plaintiff's casings, as well as those of the defend-

ants, are entirely devoid of purely ornamental features, either of form or drapery; they are nude utilities. That, of course, is not to say that they are without comeliness. By reason of their simplicity and symmetry and the "glow," they may be pleasing to the eye; but the point is that they are bare mechanisms, no parts or lines of which can be dispensed with or substantially altered without impairing their utility, and one cannot, under cover of a design patent, debar others from employing the mechanical means necessary to give effect to a known and useful mechanical principle, however pleasing to the eye such requisite mechanism may be.

In the third place, unless limited to the precise form illustrated in the drawing, the plaintiff's design is anticipated in prior patents, to some of which reference has already been made, and, in view of the prior art, is without invention. Indeed it is difficult to perceive upon what basis a claim of patentable novelty for No. 51,253, the design without the annular [25] flange, can be predicated. The casing shown is simply a reflector of the most familiar type, old in the art, and without novelty either in configuration or feature. True, upon placing the device of this design as actually manufactured side by side with the heater actually manufactured by the plaintiff under the Shoenberg patent, we have a substantial contrast in appearance, but the contrast is of material, color, and size, and not of form. Make both of the same size and finish them both in nickel or copper, and we have similarity instead of contrast. Who, without having the specific object in mind, would, after ob-

servicing with reasonable care the drawing of patent 51,253, and thereupon being handed a photograph of the plaintiff's exposition exhibit, say with confidence that the device covered by the drawing is not shown in the photograph? The point is that in the absence of contrasting color or size there is a striking similarity in general appearance. Moreover, the design is almost identical with that shown in Figure 1 of the Taylor patent above referred to. (English, 102,070.) Substantial identity is expressly conceded by counsel for the plaintiff, who, however, contests the priority of the Taylor patent. It is true that while this patent was applied for on January 11, 1916, it was not finally issued until November 15, 1916. It is further true that Brown's "invention," as disclosed in his mechanical patent and his design patent 51,043 (covering the annular flange) was made as early as April, 1916, although the patents were not applied for until the following year. But if there is any evidence that the design invention of patent 51,253 antedates the application, which was filed July 10, 1917, it has escaped my attention. It is not without significance that in the application for the Taylor patent, made before any of the Brown "inventions," the applicant carefully limited her claim with the explanation that she was "aware that it is not broadly new to construct an electric radiator with a resistance wire wound spirally upon a tubular member made of refractory material, such resistance element being mounted in front of a reflector, with a protecting guard in front [26] of the element." In its more conspicuous features the plaintiff's design

also closely resembles the Warner device, the parabolic "Simplex," and the "Ferranti Fires." If it be said that the element in the Warner heater distinguishes its general appearance, the answer is that, as already noted, such distinction also exists between the plaintiff's designs and the alleged infringing devices.

As bearing upon the question of invention in either the mechanical or the design patents, or both, plaintiff puts great stress upon the fact that following the placing on the market of its No. 7 heater (the device with the broad annular flange), there was an increased demand and it soon went into general use, but while the fact is to be recognized as having weight, I have not deemed it sufficient, under all of the circumstances, to overcome the considerations hereinbefore stated. From the record it is manifest that in the period of four or five years immediately preceding the Brown patents there had come to be an unusual and widespread interest in the matter of electric heating. The invention of nichrome wire solved the problem of a dependable and efficient element, but the right to its use was involved in litigation, which was not finally concluded until about the time of the Brown patents. With this question out of the way, heaters began to be put on the market in increasing numbers, and doubtless by means of advertising and the arts of salesmanship, the desire for such heaters was greatly stimulated. In this work the plaintiff was active, but undoubtedly it was to some extent also the beneficiary of the activities of its competitors. It may be conceded that

its No. 7 heater was in some degree more efficient than its earlier devices, and was more attractive in appearance, but, as already pointed out, its attractiveness was due not so much to slight changes in form as to increase in size and more particularly a substitution of the warm copper bowl with suitable trim in the place of the nickel type of heater. [27] Furthermore, in the changes of social and housing conditions and in the rapidly growing tendency to use electrical energy for divers purposes in the home, may doubtless be found contributing causes for the increased demand. But whatever may be the full explanation, such popularity as heater No. 7 may have had and may now have cannot reasonably be attributed merely to the slight change in the contour of the reflector or the addition of the broad annular flange, or to both of these changes.

It is urged that in a measure the present design suits are ruled by the judgments recently procured by the plaintiff in this court against other parties, in actions at law for infringement of the same patents. The causes were tried with a jury, resulting in nominal verdicts for the plaintiff, and while they were pending upon writ of error in the Circuit Court of Appeals the parties made some adjustment, the nature of which is not disclosed, and accordingly, by agreement, the writs were dismissed. Just what effect should be given to the judgments under such circumstances is not entirely clear. It is, of course, not contended that they constitute a judicial estoppel. The judge who presided at the trial, it is true, must have entertained the view that the evidence

was sufficient to go to the jury, but there is nothing in the records to indicate what his conclusion would have been had he been called upon independently to decide the entire issue. I find no difficulty in accepting his views of the law as set forth in his charge; but while it is to be conceded that uniformity of decision in the same tribunal is highly desirable, and to that end, in the case of a doubtful issue, one judicial agency may with propriety defer to a precedent established by another of the same dignity, I am unable to say that here I entertain such doubt as would warrant me in subordinating my own judgment to that of the jury in the other cases, even if it be assumed that the evidence is substantially the same. [28]

There being no controversy touching such general principles of patent law as are involved, I have thought it unnecessary to add to the length of the opinion by stating them. Nor would it serve any useful purpose to review the cited cases. Altogether they are, of course, helpful, but no single one can be regarded as a controlling or even highly persuasive precedent upon the real issue, which is comparatively narrow, and more largely one of fact than of law.

For the reason stated, the bills must be dismissed, and such will be the decree in each case, with costs.

[Endorsed]: Filed Oct. 4, 1920. Walter B. Mal-
ing, Clerk. [29]

(Title of Court and Cause.)

Decree.

This cause came on to be heard before the Honorable FRANK S. DIETRICH, United States District Judge, at the July 1920 Term of court, on the 25th day of August, 1920, and thereupon was thereafter tried from day to day until and including the second day of September, 1920, upon the introduction of evidence oral and documentary, by each party hereto, and upon the argument of counsel; and thereupon after consideration thereof it was, on the 4th day of September, 1920, ORDERED that the bill of complaint be dismissed with costs to defendant, and that a decree be signed, filed and entered accordingly.

NOW, THEREFORE, it is hereby ADJUDGED AND DECREED that said bill of complaint be and the same is hereby dismissed, with costs to defendant to be taxed.

Dated: Nov. 1, 1920.

R. S. BEAN,
United States District Judge.

[Endorsed]: Filed and entered November 1, 1920.
Walter B. Maling, Clerk. [30]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

Stipulation in Re Statement of Evidence on Appeal.

IT IS STIPULATED AND AGREED by and between the parties to the above-entitled suit, that the annexed statement of evidence on appeal is true, complete and properly prepared, and that, under Federal Equity Rule 75, the same may be approved by the Honorable MAURICE T. DOOLING, Judge of and holding Court in the District Court of the United States for the Northern District of California.

Dated: December 16th, 1920.

JOHN H. MILLER,

Attorney for Plaintiff.

WESLEY G. CARR,

DAVID L. LEVY,

WALTER SHELTON,

Attorneys for Defendant.

IT IS ORDERED that the annexed statement of evidence in the above-entitled suit be and the same is hereby approved.

M. T. DOOLING,
Judge of the United States District Court for the
Northern District of California.

Dated: December 17, 1920. [31]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MFG. CO.,
Defendant.

**Statement of the Evidence Under Equity Rule 75 for
the Purposes of Appeal.**

This case came on for trial on August 25th, 1920, in the above-entitled court at the City and County of San Francisco, State of California, before Honorable FRANK S. DIETRICH, United States Judge for the District of Idaho, John H. Miller, Esq., appearing as attorney for plaintiff, and Wesley G. Carr, Esq., and David L. Levy, Esq., as attorneys for defendant.

John H. Miller made the opening statement on behalf of the plaintiff, and Wesley G. Carr made the

statement on behalf of the defendant, and thereupon the following proceedings were had.

Plaintiff offered in evidence the original letters patent No. 51,043, dated July 17th, 1917, issued to Majestic Electric Development Company, as the assignee of Edmund N. Brown, for the term of seven years, which said letters patent were received in evidence and marked "Plaintiff's Exhibit No. 1, Patent in Suit," and the same is hereby referred to and by such reference made a part hereof. [32]

Testimony of Edmund N. Brown, for Plaintiff.

EDMUND N. BROWN, being duly sworn, was called as a witness on the part of plaintiff, and testified on direct examination as follows:

I am 43 years of age and I reside at San Francisco; I am the president of the Majestic Electric Development Company, plaintiff in this suit. Its place of business is at 656 Howard Street, San Francisco, California, and consists in manufacturing Majestic Electric Heaters and Majestic appliances. I am the Edmund N. Brown referred to in the patent in suit, and I herewith produce one of the samples of the device referred to in that patent and marketed by the plaintiff. The tag attached to said device shows that it was offered in evidence by the plaintiff in a prior suit in this court of the Majestic Electric Development Company vs. Holabird Electrical Company, No. 16,100, where it was marked "Plaintiff's Exhibit No. 2." Thereupon the said device was offered and received in evidence and marked "Plaintiff's Exhibit No. 2, Brown

(Testimony of Edmund N. Brown.)

Patented Device," which said device is hereby referred to and by such reference made a part hereof.

(The witness continues:) My company, plaintiff, has placed these devices upon the market in a commercial way. The trade name I gave to this article which has been put in evidence as "Plaintiff's Exhibit No. 2" is "No. 7," and that is the name by which we sell it and by which it is generally known. The first commercial sale of that device was made by us in October, 1916, to Holbrook, Merrill & Stetson, in Los Angeles, California, and almost simultaneously to Harper & Reynolds of Los Angeles. We sold 500 of the devices to each of said firms; the devices so sold were the same as the model here "Plaintiff's Exhibit No. 2." The Boesch Lamp Company of San Francisco manufactured [33] the various parts of these devices for us with the exception of the electrical parts. We made the electrical parts and assembled the devices. Prior to this sale and shipment in October, 1916, I had made up a sample of the device in the early part of 1916, and I have an invoice under date of April 4, 1916, showing the same. The device so made at that time was identical with exhibit No. 2 except that it had a blue finish instead of a red finish, that is to say, the back of the heater, the base and the stem were colored blue, whereas those portions of exhibit 2 are colored red. With that exception the device made up by me in April, 1916, was identical with exhibit 2. I went East in April, 1916, first going to Canada, afterwards to New York and Philadelphia. I took

(Testimony of Edmund N. Brown.)

the heater which I made in April, 1916, with me and showed it to people to figure on its cost of manufacture. I went to several people with that idea and got prices from them as to what they would charge to manufacture the device. My headquarters were in New York, and we opened a plant in Philadelphia that year. I was east on that trip about four months. I first went to Canada and showed the device up there, then I went back to New York and showed the machine where I solicited bids for the cost of manufacture. I then went to Philadelphia for the purpose of opening up a plant there and subsequently made arrangements to open up said plant, and did open up the same and it has been operating to this day. We manufactured these heaters there and sold them all over the Eastern territory and foreign countries. I returned to San Francisco in August, 1916, and immediately arranged with the Boesch Lamp Company for dies to be made so that we could manufacture these heaters in quantities; the Boesch Company has continued to make them ever since for us, and they make them for us now. The devices which we sent to Los Angeles in October, 1916, gave general satisfaction so far as I could see, and after that we made and sold them during the [34] remainder of the year. Our first order to the Boesch Lamp Company was for 5,000 and we made 2,000 in addition thereto. During the remainder of the year 1916 we made and sold some 7,000 or 8,000 of the devices covering the entire territory of the United States and foreign countries.

(Testimony of Edmund N. Brown.)

We continued to manufacture them in 1917, 1918, 1919 and 1920, and have been manufacturing them ever since. During that period I should say roughly speaking, we have sold in the neighborhood of 350,000 or 400,000; that is an approximation. We also manufactured some at Philadelphia. We also had an office in Kansas City. Plaintiff is now manufacturing them both at Philadelphia and San Francisco. After the sale of the first thousand in October, 1916, the demand increased very much, and the business is now a large one extending generally over the world, you might say. We send them into practically every foreign country, China, Japan, New Zealand, Australia, Spain, France, Great Britain, Italy, Denmark and South American countries—practically all countries.

I am familiar with the former suits which were brought in this court by the Majestic Electric Development Company against the Holabird Electrical Company and Hale Brothers, Inc., with reference to infringement of this patent, and am familiar with the devices which were used in that case and testified to as being and decided as being infringements of the patent in suit, and can pick out the same from the exhibits now present. (Here the witness picks out from the exhibits before him and used in the said identified cases two exhibits and the same were thereupon offered in evidence and marked respectively "Plaintiff's Exhibit No. 3" and "Plaintiff's Exhibit No. 4.")

I am familiar with the device put on the market

(Testimony of Edmund N. Brown.)

by the Westinghouse Electric & Manufacturing Company, defendant herein. I think it was in 1918 that I saw the first one. I have one of those devices here which was put in evidence in the prior [35] litigation and marked "Plaintiff's Exhibit No. 17, Westinghouse," and I herewith produce it. (Such exhibit was then offered and received in evidence and marked "Plaintiff's Exhibit No. 5, Westinghouse Device.")

I have seen the Westinghouse device on sale in various stores in different parts of the country.

Thereupon the following question was put to the witness:

"Q. Now taking the case of an ordinary person who was familiar with the Brown heater No. 7, which has been put in evidence here, and had never seen or heard of a Westinghouse heater, and who desired to purchase a Brown heater, and who should go into a store and be shown a Westinghouse heater such as the exhibit which has been put in evidence here, what, in your opinion, would be the impression conveyed by the appearance of that heater upon the mind of such a person as that, using such care as persons of that kind usually use when desiring to purchase an article of that kind, so far as similarity of appearance is concerned?

"Mr. CARR.—I object to that as calling for a question of opinion, an expert opinion or any other kind of an opinion, as to which this man is entirely incompetent; also irrelevant, but especially incompetent."

(Testimony of Edmund N. Brown.)

The objection was sustained and to such ruling plaintiff excepted, the same being Exception No. 1.

At this point it was admitted by defendant's counsel that the defendant had manufactured and sold since the date of the patent in suit electric heaters shown, illustrated and identified by the Plaintiff's Exhibit No. 5.

Plaintiff then offered in evidence a letter admitted to be written by J. H. Miller, attorney for the Majestic Electric Company, to the Westinghouse Electric & Mfg. Co., dated July 29th, 1919, reading as follows:

San Francisco, July 29, 1919.

Westinghouse Electric & Mfg. Co.,

East Pittsburgh, Pa.

Gentlemen:

On behalf of the Majestic Electric Development Co. of this city, I desire to inform you that the electric heaters marketed by you are infringements upon some of the electric heater patents owned by the Majestic Co. and I must request that you desist from further sale of such heaters. In a suit recently tried in the U. S. District Court of San Francisco, brought by the Majestic Electric Development Co. against the Hotpoint Electric Heating Company and its agents, it was decided that the so called Hedlite heater formerly manufactured by the Hotpoint Electric Heating Co. and now being manufactured by the Edison Appliance Co. is an infringement [36] upon design patent No. 51,043, owned by the Majestic Company. In the trial of that case, one of the

(Testimony of Edmund N. Brown.)

Westinghouse heaters was in evidence and tested out. It is as much an infringement of this design patent as is the Hedlite heater. Not only is it an infringement of the patent mentioned, but it is likewise an infringement of design patent 51,253 and mechanical patent No. 1,245,084 both owned by the Majestic Electric Development Co.

On July 19th, I wrote to your attorney, Mr. Wesley G. Carr, advising him of these matters, but have had no reply from him.

We had hoped that after the decision of the Court in the above case, that your company would respect the decision and discontinue the infringements; but the fact seems to be that you are disregarding said decision, and continuing with the marketing of your infringing heaters. This causes us considerable damage and some of our orders are being cancelled on account of your infringing operations.

We beg, therefore, to call your attention to this matter and ask that you discontinue this infringement, otherwise we shall be compelled to commence legal proceedings against you or your agents. Before doing so, however, we beg that you will advise us of your intentions in the matter, and therefore we shall wait a reasonable length of time before commencing court proceedings.

Yours very truly,

JOHN H. MILLER."

Plaintiff also offered in evidence a letter written by Wesley G. Carr, as attorney for Westinghouse

(Testimony of Edmund N. Brown.)

Electric & Mfg. Co., to John H. Miller, Esq., under date of August 4, 1919, reading as follows:

“Mr. John H. Miller,
723 Crocker Bldg.,
San Francisco, Cal.

Dear Sir:

Your letter of July 29, addressed to the Westinghouse Electric & Manufacturing Company has been referred to me for attention. Your letter of July 19, addressed to me and covering the same subject-matter, was given careful attention and I replied to it in detail on July 25th. My reply to your former letter is believed to constitute an adequate reply to yours of July 29 except that it does not state specifically whether the Westinghouse Company will or will not discontinue manufacturing the heaters of which you complain. For reasons which I set forth in my former letter, I cannot see that the Westinghouse Company would be justified, at the present time, in retiring from the field as you expect, or at least, desire it to do.

Yours truly,
WESLEY G. CARR,
Attorney.”

Thereupon the following question was propounded to Mr. Edmund N. Brown, to wit:

“Q. Mr. Brown, in this letter that was written on July 29, 1919, to the defendant in this case, it is stated that some of your orders are being cancelled on account of the infringing operations of the de-

(Testimony of Edmund N. Brown.)

fendant; just state whether that is the fact, and if so, what are the details?" [37]

This question was objected to by defendant's counsel on the ground that it was irrelevant and immaterial in this controversy. The objection was sustained. Thereupon plaintiff's counsel excepted (Exception No. 2).

Thereupon the following question was put to the witness Brown by plaintiff's attorney, to wit:

"Q. State whether or not your company has lost any sales of its No. 7 heater by reason of the fact that the Westinghouse heater has been on the market."

This question was objected to by defendant's counsel on the same grounds and the objection was sustained, to which plaintiff excepted (Exception No. 3).

(The witness continued:) When we commenced to sell our No. 7 heaters, the price was \$7.50, and the present price is \$11. After the issuance of the patent in suit we marked our No. 7 heaters with the date and number of the patent.

Cross-examination of the Witness BROWN.

On cross-examination, the witness Brown testified as follows: The price of our No. 7 heater is determined by two factors; one is the license agreement with the Hoskins Company the patentees of the resistance wire which we use, who placed a minimum charge on heaters of this type, and the second is the cost of manufacture. Our company has a license from the Hoskins Company under the Marsh patent for the alloy wire. We do not use nichrome; we

(Testimony of Edmund N. Brown.)

use what is manufactured by Hoskins and called chromel A. Nickel chrome alloy would be more correct. We have been operating under license from that company for the Marsh patent I think since the fall of 1916. It was on my eastern trip in 1916 that we were granted a license.

Our more recent No. 7 heaters are provided with a name plate bearing the date "Patented September 1, 1914." That refers [38] to patent No. 1,109,551 granted to Majestic Electric Development Company on an application filed by Milton H. Shoenberg bearing that date, September 1, 1914.

Redirect Examination of Witness BROWN.

On redirect examination said witness testified as follows:

Regarding the license under what has been denominated as the Marsh patent, that refers to this resistance wire which is wrapped around this coil which we purchased from the Hoskins Manufacturing Company, which company controlled a patent for alloyed wire. It is just the wire itself that is covered by the patent and not the device itself. It is the alloy from which they make this particular kind of wire that is acted upon by electricity in the most advantageous way, whereas a different kind of wire, it seems, would not answer the purpose. The patent covers the alloy. The same resistance wire is used on toasters and in irons, and other electrical devices.

Testimony of Milton H. Shoenberg, for Plaintiff.

MILTON H. SHOENBERG, being duly called as a witness on behalf of plaintiff, testified as follows:

I reside in San Francisco and am 45 years of age. I am associated with the Majestic Electric Development Company whose place of business is 656 Howard Street, San Francisco. I am familiar with plaintiff's heater No. 7 represented by "Plaintiff's Exhibit No. 2." The plaintiff has put that device on the market. They began some time in 1916. I became actively associated with the company in 1917. I remember Mr. Brown going East in 1916. Before he went East I saw the heater which he had and which he took east with him, as testified to by him. After I became associated with the company in 1917, they continued the sale of the No. 7 heaters. I could not say as to the [39] number of heaters sold, because I am not in the sales department. I am the superintendent, but I do know that there have been extensive sales for these No. 7 heaters extending over the entire world.

Testimony of Mrs. Henry Labatt, for Plaintiff.

Mrs. HENRY LABATT, having been duly called as a witness and duly sworn, testified on behalf of plaintiff as follows:

I live in San Francisco, and have lived there for about six years. My residence is the Chesterfield Apartments, 560 Powell Street. I have seen and am familiar with the electric heaters which Mr. Brown and Mr. Brown's Company, Majestic Elec-

(Testimony of Mrs. Henry Labatt.)

tric Development Company sold. I recognize "Plaintiff's Exhibit No. 2" as one of these heaters. I have been familiar with them since they were first manufactured. I have also seen the heater of the kind represented by Plaintiff's Exhibit No. 5, having the Westinghouse name on it. The circumstances under which I first saw a Westinghouse heater were these. I was going out Sutter Street one afternoon, and I chanced to look at the exhibit outside of the Liberty, and I saw the heater, and I said: "Mr. Brown has a new stove out, and he has changed the element." It struck me so forcibly, I walked on a few feet and then I turned and went back to examine it more closely. I did not like the way he has changed the element. I liked the other element better.

Thereupon the following testimony was given by the witness:

"Q. When you first saw the heater, what impression was produced on you?

"A. It struck me as a Majestic heater, that is, I stood looking at it for a few minutes, and I chanced to see the word 'Westinghouse' on it. I took it for a Majestic heater when I first passed. [40]

Q. You say that when you first saw it you passed down the street a little ways?

A. Yes, just two or three feet, and I thought to myself I would go back and look at it, because it struck me that Mr. Brown had changed the element.

Q. Then, when you went back, did you examine the heater more closely then?

A. Yes, I stood and looked at it for a few min-

(Testimony of Mrs. Henry Labatt.)

utes, and still thought it was a Majestic, and then I chanced to see the little name down there, 'Westinghouse.'

Cross-examination.

Mr. CARR.—Q. What relation do you have to the Majestic Electric Development Company?

A. None whatever.

Q. Prior to your noticing this Westinghouse heater, had you ever seen and observed any other heaters of this general appearance except the Majestic?

A. Well, I had noticed the Hotpoint, when they first came out, that it was very similar to Mr. Brown's.

Q. Did you ever mistake the Hotpoint heater for the Majestic? A. No, sir.

Q. What was the striking feature that impressed itself upon you?

A. Just as I said, I thought that Mr. Brown had changed the position of the element in the heater.

Q. In your casual inspection, or notice of this device, you had substantially the same view of it as you have now, that is, a direct front view of it?

A. Yes.

Q. Did you examine it from any other point of view?

A. I went back and looked at it and examined it, and I still had the thought of Mr. Brown changing the element. I still thought it was a Majestic heater. I was convinced until I saw the name that it was a Majestic heater.

Q. But you did not examine it except from the

(Testimony of Mrs. Henry Labatt.)

front, looking at the front of it?

A. I saw the heater from the rear as I came up the street. I had seen that; it stood outside. I took a good look at the heater, and still thought, until I saw the name, that it was Mr. Brown's heater.

Q. Are you familiar in a technical way with devices of this kind, and do you understand their structure and mode of operation and the method of manufacture generally about them?

A. To the extent that I have always been fond of electricity, and as a housewife I have used many of the appliances in different ways.

Q. You have not been engaged in any way with the manufacture of them, or connected with the manufacture of them? A. No, sir.

Q. Or sale? A. No, sir.

Q. Have you used devices of this general character in your home?

A. You mean stoves, the little cook stoves, heating stoves?

Q. I mean devices of this character, for this purpose, these so-called beam heaters.

A. No, I have never used those heaters.

Q. Why do you use the term 'element' with reference to this part of the device?

A. Perhaps that is not the technical term, but I just thought that was the element; that is what I call it.

Q. You did not devise that yourself, did you?

A. No, I just always called the heating part of the [41] stove the element of the stove. I may

(Testimony of Mrs. Henry Labatt.)

be wrong in that, but that is what I called it.

Q. You are familiar with the use and operation of these heaters, are you?

A. I have seen them used.

Q. You have seen them in operation?

A. Yes, sir.

Q. Have you seen them in operation tilted at different angles?

A. I have the Majestic.

Q. But this one is not tiltable, is it? (Referring to Plaintiff's Exhibit No. 2.)

A. It does not look to me right now as though it is tilted. When they have them outside on display I rarely have seen them tilted. They just have them in the position that the Majestic is now. So I never have paid very much attention to that. That is the position I saw this one in.

Q. The feature that really impressed you, as I understand it, was the position of the part you term the "element"?

A. And the model of the stove is so similar to the Majestic, the whole structure of the stove is so much like the Majestic?

Q. Except that feature?

A. Yes. That was not, and therefore, I thought that Mr. Brown had changed the element.

Q. If I correctly understand the previous statement of yours, you really never noted and never observed whether the Majestic device was adjustable or tiltable at different angles, such as is possible and readily available with this Westinghouse device; is that correct?

(Testimony of Mrs. Henry Labatt.)

A. Yes, I did. I knew it was adjustable.

The COURT.—Q. You knew that Mr. Brown's device was adjustable—the Majestic?

A. The Majestic.

Q. That it could be tilted? A. Yes, sir.

Mr. CARR.—Q. That is not true, however, of this device shown to you, this Plaintiff's Exhibit 2? A. Well, one model is.

Q. If you have never had one of these devices of your own, how does it happen that you are so familiar with the structure?

A. I have friends who have the stove. At one time I was very much interested in getting one of the stoves, and I examined into it very thoroughly.

Q. Have you ever visited the establishment where these devices are manufactured?

A. Which devices?

Q. The Majestic? A. Yes, sir.

Q. You have seen more or less of the process of manufacture?

A. No, sir, I have not. I have just been through the establishment, but I have not seen the process of manufacture of it. I have been through the establishment.

Q. Are you in any way related to Mr. E. N. Brown? A. No, sir.

Q. Just a friend? A. Just a friend.

Q. Are you able to state what outstanding characteristics of the Westinghouse device caught your attention on the occasion you mention?

A. I thought Mr. Brown had changed the element in his stove, because the construction is so

(Testimony of Mrs. Henry Labatt.)

much like the other, like the Majestic.

Q. You observed that it was apparently an electrical heater, having a copper bowl-shape reflector?

A. Well, I just thought it was Mr. Brown's heater. I had no other thought but that that was Mr. Brown's heater, and that he had changed the element in the heater. That is what impressed me as I passed by the stove.

Q. Prior to that time had you seen at any place Majestic Company heaters of different sizes?

A. Yes, sir. [42]

“Q. I mean different from the one before you, Plaintiff's Exhibit No. 2? A. Yes, sir.

Q. Both larger and smaller? A. Yes, sir.

Q. Otherwise different in shape?

A. Some of the heaters are of different shape. The round heaters are all of the same shape.

Q. With reference to the Majestic factory, have you made more than one visit to that factory?

A. I think I have only been there once or twice, but perhaps not through the factory, just in the office.

Q. How recently? A. It has been a long time.

Q. Did you examine what you found there with any particular degree of particularity?

A. No, sir. I did not go for that purpose; I just went with a friend to go through.

Q. And was it there you saw these round heaters, as you have termed them, of different sizes, or have you seen them elsewhere?

(Testimony of Mrs. Henry Labatt.)

A. I have seen those in the windows, and I have had friends who had them and used them. I noticed that heater when it was first on the market."

Testimony of Edmund N. Brown, for Plaintiff.

Here E. N. BROWN, by permission of the Court, was recalled for further examination, and testified as follows:

I note that this heater, Plaintiff's Exhibit No. 2, is not tiltable so as to be tilted at different angles, but we put on the market also one that *is* tiltable or adjustable at different angles, and that heater is now on the market by my company. There is a joint in there we call a swivel, and it tightens up with a screw. That makes it adjustable or tiltable.

Testimony of J. R. Hiller, for Plaintiff.

J. R. HILLER, being called as a witness and duly sworn, testified on behalf of plaintiff as follows:

I have resided at San Francisco, California, about 22 years, and am manager of the Boesch Lamp Company, a corporation located at San Francisco. I am familiar with the Brown heater, known as No. 7, and we have manufactured a portion of these heaters for the Majestic Electric Development Company and for Mr. Brown. We have manufactured a great many for them, I should judge between 100,000 and 200,000. The first one we made was in April, 1916. I have with me the invoice showing the [43] date of April 4, 1916, and I can verify that

(Testimony of J. R. Hiller.)

date from our books. That heater did not differ from Plaintiff's Exhibit 2, except as to a different colored enamel. That portion of Exhibit No. 2 which is of a red tint was enameled blue in the heater referred to; that was the only difference. Mr. Brown went east directly after April 4, 1916, and returned some time about July or August of that year. He sent for me to talk over the production of this heater in quantities and asked estimates as to costs. I gave him estimates, and the result was an arrangement between the two companies for the manufacture of these heaters in quantities. We started in to manufacture an order for 5,000. Of course we had to make tools and it took us a month or two to get those tools into use, but before we had the 5,000 delivered we had other orders. The quantity ran considerably over what we estimated. We manufactured and delivered the first order for 5,000 and after that we delivered 10,000, and continued on up to the present time. We are making and delivering them up to date.

I have seen the Westinghouse heater such as is shown by "Plaintiff's Exhibit No. 5," with the Westinghouse name and trademark on it, and I know of occasions where there has been confusion created in the market by the similarity of that heater to Mr. Brown's No. 7 heater. The minute that there was another heater of that design put on the market, our attention was brought to the fact, and friends who were aware that we were manufacturing Brown's heater drew our attention to it,

(Testimony of J. R. Hiller.)

and from time to time our attention was perhaps forcibly brought to the fact. I recollect one particular time. It must have been in 1917 or 1918, I was called to Sacramento to give estimates on manufacturing goods for the aeroplane factory that was started there, and I had to see a Mr. Jordan who was general manager of that organization. He had been down to our place and I had shown him through the factory, and he sent for me to come up [44] there to Sacramento. When I arrived at the aviation grounds it was quite chilly. Mr. Jordan made apologies for the chilliness of the room. He said that if we had been putting up a little better product than what we were that would not have happened. He said, "Maybe you can fix up those two heaters of yours in there for me." I said, "What is the trouble?" He sent for a couple of heaters and brought them in and set them down before me. He said, "They don't work." I said, "Well, I don't know anything about those kind of heaters; those are not our make; they are not what we are making." He said, "They are not?" I said, "No. That is another make of heater, not what we are producing." He seemed to be somewhat astonished and said, "It looks very much like it." I showed him there was a slight difference in the element, and one thing and another, but in general appearance they were the same. I presume he purchased them on the strength of that. However, I was unable to do anything for him and that incident was passed. Those were Hotpoint heaters.

(Testimony of J. R. Hiller.)

Regarding matters of a similar nature in reference to the Westinghouse heater. I had never seen a Westinghouse heater, and one day I went into a store on Mission Street, looking at some electric motors. In the course of conversation in reference to business they wanted to know what we were doing principally, and I said, "We are making heaters still." The salesman said, "Are you still turning them out? We just bought one; it is upstairs." He then asked if there was quite a sale for them and I said, "Yes, we have been kept pretty busy on them." We were in the basement when this happened. When we went upstairs I went into his office and looked down and saw the heater, and I saw that big "W" on it, and I sized it up thoroughly. It was the first time I had seen one of their heaters. What passed through my mind at the time was that it was a new imitation of the heater we are putting out. It was one I had not seen, and I came to the conclusion that it was [45] not very good for our business, but as we were not concerned in the patents on it, I mentioned nothing about it and went away. That was one instance.

While I used to devote some of my time in the store taking care of customers, several times these heaters have been brought in there by people who were aware that we were manufacturing heaters and asked us to make repairs on them. I remember a Westinghouse heater having been brought in there and other makes brought in for repairs. Evidently the people had been directed to us as man-

(Testimony of J. R. Hiller.)

ufacturers of that heater. Of course we were not in the business of repairing electrical goods, we were manufacturing heaters, the metal portion of it. We directed the people who had Majestic heaters to the Majestic Electric Development Company. Some of the Westinghouse heaters were brought into our place that way, and we received telephone messages from time to time to send someone up to repair the heaters. On inquiry if they called the name of it, we would tell them what we could in reference to it. We did not do any of those repairs.

Cross-examination of J. R. HILLER.

On cross-examination, the witness testified as follows:

In reference to the incident of the Westinghouse heater testified to on direct examination, it was at the Widenthal & Gosliner motor house, at the corner of New Montgomery and Mission Streets, and I was talking with a salesman whose name was Wentworth. Since that time he has become General Manager of the institution.

Thereupon the following testimony was given by the witness:

“Q. He told you merely that he had one of these heaters? A. That he had one of our heaters.

Q. One of your heaters?

A. Yes. I consider that heater is our heater just as much as Mr. Brown's. We are making it; we are doing the mechanical work on it. While it is not being sold by us as the owners of the patent, it is one we are making. We are just as much con-

(Testimony of J. R. Hiller.)

cerned in the production and efficiency of it as anybody." [46]

(Witness continues:) I did not ask Mr. Wentworth from whom he purchased the heater. He said he had just purchased it and I saw it there in the office.

In reference to those other incidents mentioned, I was told and led to believe that the heaters in question were Majestic heaters. Up to the moment that he showed them to me I expected to see Majestic heaters. His conversation had all been directed in that direction. He evidently thought they were Majestic heaters himself, or he would not have spoken to me as he did. He didn't mention the name Majestic, but he did bring two heaters in there that he accused me of being the producer of, and that were out of order, and he wanted me to repair them. He had seen us producing them in the factory and admired them, and asked me some questions about them at the time when he was through our factory a few days previously. I know that when I take anything for repair, if I know it is being manufactured in a certain place, I take it to where I know it is being manufactured to have repairs made in order to get the best results. That is true of machines of any kind or character.

I cannot tell you the exact language that Wentworth used. I was talking about matters and business, and how business was, and he mentioned that we were busy with heaters, and he mentioned that he just purchased a heater, one of our heaters. There was nothing said further and we went back

(Testimony of J. R. Hiller.)

to the subject of motors. When I went upstairs and went into his office I saw the heater, and I was very much surprised; I noticed the "W" on it. I had not previously seen one of these heaters. It just passed through my mind—"Another infringer on the patent," that I presumed existed.

"Q. He might have said, 'I have just purchased one of these heaters such as you make,' might he not?"

A. Had he said that, I would have forgotten the incident, it would have gone entirely out of my mind, because I know that people are purchasing these heaters here, there, and everywhere; but he said, 'One of your heaters,' it was forcibly drawn to my attention that he must have been misled. That fact could not be changed. It was not my business where he purchased his heater, and I [47] had no right to question him about it and I didn't.

Q. Well, whatever he said, he conveyed to you the impression that in his mind he had purchased one of the heaters turned out by your establishment?"

A. That was what was conveyed to me at the time.

Q. But these other instances you mentioned merely because heaters were brought in to be repaired?"

A. I cannot say I mentioned the incident at Sacramento as one of them.

Q. But those were not Westinghouse heaters?"

(Testimony of J. R. Hiller.)

A. Well, the people who brought them into the store, of course those people were strangers, and we were not anxious for any repair work, and we directed them to some other place. We were aware of the fact, though, that it was just one more incident to draw our attention to the fact that people knew we were producing the heater.

Plaintiff then produced from the records of this court the judgment-rolls in the case of Majestic Electric Development Company versus Holabird Electric Company, No. 16,100, and the Majestic Electric Development Company versus Hale Brothers, Inc., No. 16,103, and it was stipulated that they should be considered as having been offered in evidence. The said judgment-rolls are hereby referred to and by such reference made a part hercof as fully and completely as though the same were incorporated herein.

Thereupon the plaintiff rested its *prima facie* case. [48]

DEFENDANT'S TESTIMONY.

Defendant produced and offered in evidence page 79 of a printed publication entitled "The Electrical Times," dated January 25, 1912, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 1," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 37 of a printed publication, entitled "The Electrical Times," dated January 11, 1912, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 2," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 239 of a printed publication, entitled "The Electrical Times," dated March 7, 1912, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 3," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 362 of a printed publication, entitled "The Electrical Times," dated March 6, 1913, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 4," the same being hereby referred to and by such reference made a part hereof. [49]

Defendant produced and offered in evidence page 364 of a printed publication, entitled "The Electrical Times," dated March 6, 1913, published at London, England, and by stipulation of

counsel it was agreed that the original be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 5," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 214 of a printed publication, entitled "Supplement to the Electrician," dated October 3, 1913, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 6," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 353 of a printed publication, entitled "The Electrical Times," dated October 9, 1913, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 7," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 591 of a printed publication, entitled "The Electrical Times," dated December 4, 1913, published at London, England, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substi-

tuted therefor, which photographic copy was then offered in evidence and was marked "Defendant's Exhibit 8," the same being hereby referred to and by such reference made a part hereof. [50]

Defendant produced and offered in evidence page 12 of a printed publication, entitled "Supplement to the Electrician," published at London, England, dated October 16, 1914, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 9," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 162 of a printed publication entitled "The Electrical Times," dated August 31, 1916, published at London, England, and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy thereof be substituted therefor, which said photographic copy was then offered in evidence and was marked "Defendant's Exhibit 10," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 163 of a printed publication, entitled "Supplement to the Electrician," published at London, England, dated August 16, 1912, and by stipulation of counsel it was agreed that the original should be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was then offered in evidence and was marked "Defend-

ant's Exhibit 11," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence an advertising insert, page 2, of a printed publication entitled "The Electrician," dated September 20, 1912, published in London, England, and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was offered in evidence and marked "Defendant's Exhibit 12," the same being hereby referred to and by such reference made a part hereof. [51]

Defendant produced and offered in evidence page 1 of a printed publication entitled "Prometheus," dated October 3, 1906, published at Berlin, Germany, in the German language, and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was offered in evidence and was marked "Defendant's Exhibit 13," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 11 of a printed publication, entitled "Prometheus," dated October 3, 1906, published at Berlin, Germany, in the German language, and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy substituted therefor, which said photographic copy was offered in evidence and marked "Defendant's Exhibit 14," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence

page 14 of a printed publication entitled "Electrical Record," dated May, 1907, published at New York City, New York, and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy thereof be substituted therefor, which said photographic copy was offered in evidence and marked "Defendant's Exhibit 15," the same being hereby referred to and by such reference made a part hereof.

Defendant produced and offered in evidence page 19 of a printed publication entitled "Electrical Record," dated May, 1915, published at New York City, N. Y., and by stipulation of counsel it was agreed that the original be withdrawn and a photographic copy thereof substituted therefor, which said photographic copy was offered in evidence and marked "Defendant's Exhibit 16," the same being hereby referred to and by such reference made a part hereof. [52]

Defendant produced and offered in evidence an electric heating device which was marked "Defendant's Exhibit 'A,'" and it was admitted by counsel for plaintiff that said device was manufactured and sold by the Majestic Electric Development Company more than two years prior to the date of application for the patent in suit.

Defendant also produced and offered in evidence another electric heating device which was marked "Defendant's Exhibit 'B,'" which said device was a duplicate of a device offered and received in evidence in the prior litigation as "Defendant's Exhibit 'E,'" and it was admitted by plaintiff's counsel that the said device was made and sold by the

Majestic Electric Development Company more than two years prior to the application for the patent in suit.

Defendant then produced and offered in evidence another electrical heating device which was received and marked as "Defendant's Exhibit 'C,'" the same being a duplicate of a device which was offered and received in evidence in the said prior litigation, and there marked "Plaintiff's Exhibit 13," and it was admitted by the plaintiff's counsel that such device was made and sold by the Majestic Electric Development Company as early as the fall of 1915.

Defendant produced and offered in evidence another electrical heating device which was marked "Defendant's Exhibit 'D,'" and it was conceded by plaintiff's counsel that such device was made and sold by Majestic Electric Development Company more than two years prior to the application for the patent in suit.

Defendant produced and offered in evidence and the same was marked "Defendant's Exhibit 'E,'" a photograph of the Majestic Electric Development Company's exhibit at the Panama Exposition prior to May, 1915. [53]

Testimony of Victor S. Beam, for Defendant.

Defendant then produced as a witness VICTOR S. BEAM, who having been duly sworn, testified as follows:

I am 44 years of age and reside at Maplewood, New Jersey; my occupation is electrical and

(Testimony of Victor S. Beam.)

mechanical engineer with offices at 165 Broadway, New York City, I graduated in Electrical Engineering from Princeton University, in 1899. From there I entered the employ of the Westinghouse Electric & Mfg. Co. in July, 1899, and have been connected with that Company either directly or indirectly ever since. I am still in the employ of that company. During my employment with the Westinghouse Company and others I became quite generally familiar with the design and operation and construction of various electrical devices and machines manufactured in this country and have always followed the electrical heating art quite closely. I am quite familiar with the laws and rules governing those devices and the design and operation of the same.

The following question was propounded to the witness by defendant's attorney, viz:

“Q. Please give the pertinent portions of the history of this specific art as applicable to the plaintiff's and defendant's heaters now before the court?”

Plaintiff's counsel objected to said question as entirely improper because it calls for the opinion of the witness in that it calls for what he considers to be the pertinent part of the prior art and also those parts that are applicable to this device.

The objection was overruled, to which ruling plaintiff excepted, and thereupon the defendant's witness answered as follows:

“A. These devices and the patents relate to a spe-

(Testimony of Victor S. Beam.)

cial form, a special type of electric heating, namely, the heating of the object; they are not attempting to heat the whole room or enclosure in which the object is located. The object is usually a person who wants to be warmed, and that purpose necessarily brings in the matter of portability; the device should be [54] portable, so as to be carried around from one place to another in the room, or from one room to another; and of course, if the owner moves from one part of the city to another, to take it with him. It is related quite closely to the electric light art. It was quite old to have flash lights to carry around when you wanted to light up a particular object; you would not have enough current to light the whole room, but you would simply light the particular object you were interested in. They have search-lights on boats and other places, selective in application so that they only light up one or a few objects at a time.

They have had flood light projectors, in which large quantities of light were generated, and used to light up large objects, and oftentimes buildings. That art is quite old. Flood lighting was done in numerous places, and I daresay it goes back to 1905 and 1906, at least, but it reached almost perfection at the Panama Pacific Exposition in 1915 at San Francisco. The previous World's Fairs had been lighted in a very extensive manner, with the requirement of wiring the outside of the building. At the Buffalo Exposition in 1901, that was quite a feature; they used current from Niagara Falls to light up the outside of the building, in order to get the esthetic

(Testimony of Victor S. Beam.)

effect. That was much advertised. In the exposition in 1904 at St. Louis that plan was likewise followed, but at the Panama Exposition in San Francisco they simply selected the object in a large area and lighted that up. Also headlights use the same scheme. Of course, heat and light are really undistinguishable, because no one has yet produced a source of light that does not give heat; that is the great object that nobody has yet done. Likewise, when you try to get electric heating, you do not get it very effective unless you have some light with it to attract the eye; you must light up the device, because there is a certain amount of psychology about it; you have got to have people attracted by the heat and the light. [55]

Now, the first projecting device for heat of which I have knowledge was the device shown in Morse's United States Patent, No. 881,017. There an incandescent lamp, probably an inefficient one, was placed in front of a concave surface, with a guard in front to protect it, and that was used as stated in the patent, to concentrate the heat upon the affected part. In that particular case, it was sought to apply heat to certain portions of the body; that would be usually held quite close to the body, but it has the principle there of selecting the object you are going to heat, and throwing the rays all in one direction. Quoting from lines 71 to 77 of this patent, I read:

'The feature of mounting the electric lamp in a horizontal position within the reflector is considered highly advantageous, as by this arrangement, the lamp projects its heat more effi-

(Testimony of Victor S. Beam.)

ciently onto the surface of the body, and furthermore, the socket of the lamp then operates effectively as a handle, facilitating the handling of the heating device.'

There in that device you have both heat and light projected in a beam onto a selected object.

Now, another early device was gotten out by the Westinghouse Electric & Manufacturing Company about 1912 or 1913 and was shown in the Geiger patent, No. 1,194,168, granted August 8, 1916. This device was put on the market, and has been on sale ever since by the Westinghouse Company. That device consisted of a concave structure, a shell somewhat resembling a seashell, the idea being to make it extremely ornamental; the heat source in that case was carbon wires or coils inside of tubes. It is, in effect, an incandescent electric lamp, although of low efficiency, so far as light is concerned. But the device was made in considerable quantities, and gave out both heat and light, and projected the rays of both heat and light in a definite direction, selective, [56] so as to light and heat the object. The patent says, 'Although the reflector 8 is shown of the clam-shell design, it is understood that such a reflector may be of any other design or form,' and as to the source of heat and light it says 'preferably it should be of the luminous type, preferably arranged side by side and extend upward in front of the reflector. It is understood that other suitable types of heating units may be employed with my invention.'

Now, that device was extremely ornamental; it was not as efficient as some of the devices to-day, and of

(Testimony of Victor S. Beam.)

course it is objectionable in that these lamps break quite readily; an incandescent lamp at its best is quite fragile, and it has many objections, but it was highly ornamental. I have one of these here, and produce the same, which consists of a clamshell coppered on the inside, pleasing in appearance, with incandescent lamps placed within the curvature of the shell, and is a device that a housewife would not certainly object to having around. They might not possibly buy it simply for the beauty of it, but it certainly is more pleasing in appearance than some of the more practical devices which have followed it. That, as I say, was built by the Westinghouse Company quite a number of years, and it was about the only type of heater that it could build at that time, prior to say the middle of 1917, because while it was recognized that incandescent lamps were not the best sort of thing to generate heat for that purpose, the advisability of utilizing the more efficient form of wire was doubted by the Westinghouse Company, first because there was considerable doubt about the wires which were then on the market standing up, that is, their resisting oxidation, and the other handicap that presented itself was the patent situation with respect to the nickel-chromium alloy of the heating element, the only heating element that would stand up in exposed conditions, when being burned or illuminated. When an electric wire is exposed [57] to the air, heated to a luminous state, it is attacked so readily by the oxygen of the air that it almost immediately burns up; the carbon filament in a lamp would not last an instant if exposed to the air;

(Testimony of Victor S. Beam.)

they have to put that in a vacuum. Of course, there are a lot of heat applications where you cannot use lamps, and there were devices using wire on the market, but to a great extent they were in places like in a flat-iron where your wire is covered up and not exposed to the air, so that while there were, prior to the middle of 1917, considerable heating devices on the market, and quite a number with the wire exposed, yet there was a patent situation there that had not been cleared up, and it was not until 1917 that the Westinghouse Company felt free to extend its operations in that particular field. That patent situation was the result of a patent to Marsh, that was granted in 1906 but it was some years before it was put in litigation, and it developed very slowly under it, because it was held by a comparatively small company, and the litigation was long-drawn out, and that was not finally decided until some time in 1915 by the Court of Appeals of the Seventh Circuit, the case of Hoskins Electric Manufacturing Co. v. General Electric Company. In that case, from which I have an extract, the court pays great tribute to the alloy for making up a heating device. It said:

‘The invention of toasters, heaters’—

Mr. MILLER.—I object to his going into this matter. I don’t know what he is reading from, so far as that is concerned, but I do not think it is proper for him to go into a matter of this kind regarding the Marsh patent. The Marsh patent decisions are reported in the Federal Reporter, and we have access to them.

(Testimony of Victor S. Beam.)

The COURT.—Yes. [58]

A. (Continuing.) That alloy which is sold under various trade names, one of which is Nichrome, has the distinguished ability to stand up, to resist oxidation when it is red hot, and it is the use of that alloy, the availability of that alloy to the electrical art that has made possible a large number of devices and particularly the devices in question here; that is, the radiant heaters, where the heating element must necessarily be exposed to the air when in operation.

I may have given the impression yesterday that a nickel chromium composition was the only wire that could be used in an exposed heater of that sort. I should correct that, as it would be possible to use platinum if the same could be obtained, but as that is very scarce and very expensive, it is practically out of the question.

The next and perhaps the most interesting prior device of the reflecting heater is that shown in the British patent No. 19,971, of 1913, of the Simplex Conduits Limited. That shows a reflecting heater in several views. The reflector is shown in the figures as a fluted cone, but it mentions in the description that that reflector may have various forms, one of which is a parabola. That appears to be the same device that is shown in exhibits Nos. 9 and 10. Now, the form shown in the drawings is rather of an ornamental nature, in that it has the fluting. That does not tend to its efficiency.

MR. MILLER.—I object to this line of testimony.

The COURT.—Yes.

(Testimony of Victor S. Beam.)

Mr. MILLER.—When he undertakes to say that it does not tend to its efficiency, or something like that, that is something beyond the theory of this case.

The COURT.—Yes, I think so.

A. The device as shown in Figure 1 consists of a stand which [59] is somewhat like the stand that is used for electric fans. It consists of a dome-shaped piece, and of a vertical standard, and then mounted in that is a U-shaped trunnion; that is the form illustrated in the Westinghouse device in this case; then the cone-shaped reflector is mounted so as to tilt in that trunnion, and, therefore, the direction of the light rays is adjustable. Figure 1 is a side view of the whole device, Figure 2 is a front view, the trunnion arrangement being shown in dotted lines. Now, as I say, the fluted cone-shape is shown in that figure for the reflector, but in the provisional specifications it is set forth that the condensed beam of rays may be divergent or approximately parallel or convergent, meaning that the reflector may have various forms, and then, further along, in the second paragraph it says the reflector is preferably in the form of a cone, this being a shape which can be cheaply rolled into form out of sheet metal. Then, further along in line 34, it says, ‘or the reflector may be in whole or in part of parabolic or the like contour, according to the form desired for the emergent beam of rays.’ Then, further on, line 40, in respect of the reflector, it says:

‘It may with advantage be corrugated or fluted, as this stiffens it and improves its in-

(Testimony of Victor S. Beam.)

ternal appearance when the heating element is incandesced.'

So that while it is shown as a corrugated reflector, it is contemplated that it be perfectly smooth on the inside and that it may take the form of a parabola, or the like.

Further, in the provisional specifications line 42, it says:

'We prefer to mount the reflector pivotally on a forked stem, which, itself, can pivot on a foot bracket, so that the beam of rays can be turned to point in any direction.'

And then in the complete specifications, line 37, it speaks of the color of the inside of the reflector; it may be of a cast [60] metal lined with copper, and that it may be wholly corrugated. The heating element in this case is arranged in line with the longitudinal axis of the cone or the parabolic reflector, as it may be, and that as an arrangement of coil tends to give uniform distribution of the light rays. It must be recognized in this art that you cannot get your source of light down to a single point. Your coil takes up space, and therefore you cannot get your light source at any geometric or mathematical point; so that you may go to a great deal of trouble to get your reflector mathematically perfect, but you will be thrown out from your calculations by the fact that you cannot get your heating element down to a point; it takes up a space, and, therefore, it is quite advisable to make your reflector conform to the shape of your heating device, or accommodate itself to the

(Testimony of Victor S. Beam.)

requirements of the heating device. A guard is shown in this patent designated by the letter H. It is shown in Figures 2 and 3. It consists of a central ring, with three radiating spokes to support it. I have had a device made up in accordance with this patent for illustration and herewith produce the same. I have had both the corrugated reflector and the parabolic reflector made. The parabolic reflector is mounted in the trunnion, and the corrugated reflector is separate. The form of guard shown in that particular exhibit I have made up is that shown in exhibit No. 9 in this case.

Another illustration of the prior art devices is the Warner patent No, 1,120,003, granted December 8, 1914, United States patent. That patent shows—

The COURT.—Cannot you save time by introducing these? I think they are clear enough without lengthy explanation of them.

Mr. CARR.—I do not think it is necessary for the witness to state very much. He might state a word or two with reference to the patent. [61]

The COURT.—Where there is a cut or illustration together with an explanation, it would seem to be quite obvious. It is a question largely of appearance.

Mr. CARR.—I think perhaps that any features that might be deemed necessary and advisable to bring more definitely and specifically to your Honor's attention could be done in the argument.

The COURT.—Yes.

Q. You say this is an American patent?

A. Yes. I was simply going to add that that form

(Testimony of Victor S. Beam.)

of heating coil is not the best, and they had used the lamp in there to illuminate the device, to get the red effect. It shows a concave bowl, mounted on a stand, handles for carrying it. It has, I would say, a rather inefficient form of heating coil, and they have taken the precaution of putting a double casing on there in the rear of the reflector. That is to prevent the part that the public might touch, marked "e" from becoming heated from the coil—as a matter of protection there. There would be a dead air space in between the curved line "e" and the curved line "f."

Another American patent is one to Milton H. Shoenberg, assigned to the Majestic Electric Development Company, San Francisco, and is numbered 1,109,551, and dated September 1, 1914. One particular thing shown in that patent is two linings to the casing, the dead air space in between, as shown specifically in Fig. 10; it has the bowl-shape reflector, the heating element arranged within the curvature of the same, and it has a guard to protect the heating element from being touched. I would call particular attention to the arrangement of the heating coil with respect to the reflector. You will see that that arrangement runs through all of the devices produced here as the product of the Majestic Electric Development Company, the plaintiff. The coil is arranged transverse to the longitudinal axis of the reflector. That arrangement of the coil has [62] some drawbacks, as it is difficult to arrange it uniformly with respect to the reflecting surface, and portions of the reflecting surface are liable to get

(Testimony of Victor S. Beam.)

very warm, and it is necessary to take some precautions to overcome that arrangement. In the latter forms of the Majestic devices, a flange is provided for protecting the public from being burned by the heat which would be generated in the reflecting surface, and also there is provided that double casing, an additional curved member at the back of the reflector, so as to prevent the public from touching the heated reflector. As I understand it, the intent was to get the coil as near to the focus as possible. Looking at it one way, that is accomplished, but since the coil must have length, it would get very much out of focus at the ends, and that is the part that causes the trouble in the heating of the reflector. That necessity for the flange in the Majestic devices, and likewise for the extra casing is clearly set forth in patent 1,245,084 to E. N. Brown, dated October 30, 1917, in which it says:

At this point counsel for plaintiff objected to this testimony, as being directed purely to the utility of the device, and that the witness is now proposing to read from another patent and the court ruled that the objection was well taken.

Thereupon the witness continued as follows:

A. I simply want to mention that the Porter U. S. Patent No. 684,459, granted October 15, 1901, shows a form of guard which might be used in this form of heater; although the device there has the appearance of a fan, and is a fan, it is a fan equipped with a heating element, so that it may blow warm air instead of cool air. When the Westinghouse Company started

(Testimony of Victor S. Beam.)

to design the present type of heater, it had available the straight-line coil of the Simplex Conduits device, and it had the curved reflecting device of the Warner patent, No. 1,120,003. [63] It recognized the fact that it could not get a heating coil at a single point, and that the coil would have to have length, so it arranged its coil in the same order that the Simplex Company of England, had arranged its coil, and utilized the curved reflector of the Warner patent, although it is also clear from the Simplex Conduits Company patent that practically any form of reflector may be used. I have shown in the exhibit 1 one form of parabola, but as a parabola may take many forms, depending upon the distance that you take between the point called the focus and an outside line called the directrix, the law of a parabola being that the distance from any point on the curve to the focus must be the same as the distance to the line on the directrix; but the parabola, as I say, may take many different forms, and when you get a parabola of a wide flare, that is, the distance between the focus and the point on the line, large, you approach a curvature of a circle, so that like in some of the devices here, though one may be a parabola and the other a circle—it is extremely difficult to tell which—a reflector in the form of a segment of a circle cannot, strictly speaking, have a focus, and in the Westinghouse device it is not attempted; it is recognized that it could not have a focus, and no attempt is made to get one; in fact, the heating coil is strung along, extended along the longitudinal axis, and the curve of

(Testimony of Victor S. Beam.)

the reflector is made so as to accommodate that, so that the light, going from any point on that coil, is reflected properly. The Westinghouse device has a reflector corresponding to the arc of a circle, and that gives a very wide beam of light, and the coil being arranged on the transverse longitudinal axis, gives a very good heat distribution over the surface of the reflector, so that the reflector keeps cool itself and it needs no provision for protecting the public from the heat, and likewise [64] it has no double casing at the back to provide a dead air space and prevent the public coming in contact with heat. Of course, it has a guard in front to protect the public from coming in contact with the heated coil, such as they provide guards on electric light reflectors and on fans; they are very old and necessary expedients.

The COURT.—Q. You say the reflector on the Westinghouse device does not become hot?

A. No, not as on the others, where the coil is not arranged properly.

Q. It does not become as hot as the Majestic?

A. No; that has been my experience. The reason for that is, the Westinghouse device is not designed along mathematical or geometrical lines; its design is rather imperial; but it was designed with the appreciation that a straight-line coil on a longitudinal axis is the only proper device; and it has discarded the [65] idea of making the reflector parabolic. A parabolic curvature is theoretically the proper one, if you have got a point for the source of your light and heat. In this case it is

(Testimony of Victor S. Beam.)

both light and heat. If you want strictly parallel rays, you only need to take a parabola and put a point of light at the focus and you will get strictly parallel rays, but the difficulties of that is that your coil must have size, and when you get out of the focus then that more than overcomes any nicety which you have in mind in arranging the curvature of your reflector."

Continuing in answer to questions by defendant's counsel the witness testified as follows:

There are not any features or characteristics of Defendant's Exhibits "A," "B," "C" and "D" which are not readily and obviously apparent to the Court as to which I could give any enlightenment. I think they are all quite clear on the face. I have called attention to the arrangement of the heating coil and called attention to the fact that there are some elements of the earlier ones, the fluted stand, for instance, that is not in the latter device, that is not in the No. 7 heaters. A close inspection shows that the reflectors of all four devices built earlier than No. 7 have a single thickness, that is, in the earlier devices, No. 1, No. 2, 2b, and 3 (Defendant's Exhibits "A," "B," "C," and "D") had a single thickness of the reflector on the back, whereas in No. 7 there are two thicknesses giving a dead air space in between. I might add that double casing allows of bringing out of the electric leads a little better form. You will notice that in all of these prior devices there are two exposed terminals, requiring insulation, sufficient to protect from the

(Testimony of Victor S. Beam.)

atmosphere, whereas in the No. 7 device all that is arranged on the inside, between the two casings, so that the leads come out through a single opening; that is a much better arrangement. Of course the reason for the two connections comes from [66] the fact that they use a transversely arranged coil, and it is necessary to make contact at the two ends of that coil; of course the coil being long requires that the connections to it be quite a distance apart, so that necessitates bringing the contacts out from the rear of the casing at quite a distance from each other. I might point out that with the straight line form of heating coil, as used in the Westinghouse device, that connections to the coil can be made much more readily and without having a double casing. Of course, I point out that the earlier devices were nickle plated, whereas the later ones are copper colored. With reference to No. 1, 2, 2b and 3 appearing here as Defendant's Exhibits "A," "B," "C" and "D," those early devices do not have the marginal, relatively wide marginal flange and the double casing found in No. 7 Majestic heater, those earlier devices do not have those protective features.

Cross-examination of Witness BEAM.

On cross-examination the witness BEAM testified as follows:

I am one of the salaried employees of the Westinghouse Electric & Mfg. Co. and have been such since 1916, but either directly or indirectly I have been connected with them since 1899. The princi-

(Testimony of Victor S. Beam.)

pal place of business of that company is at Pittsburgh, but they have offices in New York City, and I have a room there in those offices as any other employee would have. I am the mechanical and electrical expert employed by them in reference to their various devices. In reference to nichrome wire used in some of the devices, it is the wire referred to by me as being covered by the Marsh patent and used by the Westinghouse Company in its coil under a license from the owners of the Marsh patent. The final arrangements for the license were made in the middle of 1917, prior thereto the Westinghouse Company used in the unexposed heating element a wire made by the [67] Driver Harris Company which had no chromium in it, and also some nichrome wire made by the Driver Harris Company and some excello wire, a German wire. While the final arrangements with reference to the license were not completed until the summer of 1917, we actually had the license through our subsidiary company, the Westinghouse Electric Products Company, some time before that, but there was considerable litigation over the matter so that the whole subject was not cleared up until the summer of 1917. This Excello wire which I referred to was on sale in the United States, but during the war it was impossible to get it. I believe it was on sale as early as 1912, and I believe anybody in the United States could use it who chose to purchase it, if he overlooked the Marsh patent for the time being. The Westinghouse Company had used some of

(Testimony of Victor S. Beam.)

this excello wire but they used as little as they could.

Mr. Thornton and Mr. Forsbee got up the design of the Westinghouse heater that is involved here. Mr. Thornton was an engineer in the heating department and Forsbee was his assistant, I believe. Neither of these gentlemen came out with me and they are not available as witnesses here. Mr. Thornton is at Mansfield, Ohio, and I don't know where Mr. Forsbee is.

When I said that the Westinghouse Company had at that time available for use in getting up their design this Simplex Conduits English patent, I mean simply that that was an open public document that they could refer to if they desired, a part of the prior art. I suppose you could consider the Brown No. 7 heater a part of the prior art in a sense. I believe the Westinghouse Company began getting up this design in the latter part of 1917, but production was held up on account of the war until the latter part of 1918 I believe. As near as I can recollect, the first ones were put on sale in the latter part of 1918. [68] When I say they had available for their purpose this English patent, I do not think that they placed the English patent before them and proceeded to make a design corresponding with that patent; engineers do not usually work that way. They also had available in making up the design everything that was known at that time. They may have taken a Brown No. 7 heater

(Testimony of Victor S. Beam.)

and examined that and looked it over and noted its characteristics at the time they got up the Westinghouse heater. I do not know of my own knowledge regarding that matter. The Westinghouse Company has a heater here which has a clam shell reflector. They began to manufacture and sell that device in 1912 and 1913, and they sold devices of that kind. Mr. Geiger got up the device, and he is the gentlemen to whom the patent was issued and it has been assigned to the defendant. Defendant's counsel has produced a heater here which consists of a deep, parabolic reflector mounted on a stand, which could have been made in that way instead of making it in the way of a fluted cone. That particular device was made in Mansfield, Ohio, at our plant, and was manufactured for illustrative purposes in this case, as an interpretation of the patent. It was not manufactured for sale. We have not any like that for sale. The other device consisting of a fluted cone, that is in the same category, that is to say, it was made for illustrative purposes in this case in our plant at Mansfield, Ohio, as an interpretation of the British patent, possibly, well, possibly under my direction and possibly under Mr. Carr's. I was present at Mansfield, Ohio, when it was being made, and I think the only actual suggestion I made was to make the casing a bit thicker so that it would hold its shape. Mr. Thornton really supervised the actual construction. Mr. Carr instructed Mr. Thornton and I did, too, to

(Testimony of Victor S. Beam.)

make it according to the construction of the British patent.

Instructions were given by Mr. Carr as to how to make it. [69] In making the Westinghouse heater which is involved in this case, we made a flat curve instead of a deep one as shown in the Simplex Conduits device because we wanted a little wider spread. With a longitudinal arrangement of the coil we would have to make the bowl to fit it to get the best distribution of heat on the radiating area. They apparently found that that shape caused the best heat distribution. I am sure that is what they were after. I think it did give a better heat distribution than the particular form of parabola shown in the English patent. The patent mentions that you can get divergent or parallel or convergent rays. It gives wide instructions there. You could readily make a wider one under the patent. There are no directions in the patent as to what kind of parabola you would make, whether deep, flat or more elongated, there are no directions in there as to what kind of parabola you can make. The only suggestion about it at all would be the most natural one to make in the first instance, although you were not limited to that. You would make one of the shape more nearly corresponding to the cone shown there, you have a wide choice under the language there. That choice is left to the party who wants to make a parabolic reflector in accordance with that suggestion. It is stated in there that the interior may be smooth; that would

(Testimony of Victor S. Beam.)

necessarily apply as well to the parabola as to the cone. Of course the man who designed that tended rather towards the artistic because he showed the fluted cone; all those British things are rather more ornamental.

On redirect examination the witness said:

“I do not know the composition of the Excello wire to which my attention has been called. I am quite sure it has some nickle and some chromium in it, but the exact composition of it I do not know at this time.” [70]

Defendant then offered in evidence certified copy of English patent No. 19,971, application filed September 4, 1913, and accepted September 4, 1914, by the Government of Great Britain to Simplex Conduits, Limited, which is attached to an affidavit on motion for preliminary injunction, in this case.

Defendant offered in evidence copy of U. S. letters patent No. 881,017, issued to W. E. H. Morse on March 3, 1908, and the same was marked Defendant's Exhibit “F.”

Also copy of U. S. patent No. 1,194,168, issued to Albert J. Geiger, assignor to Westinghouse Electric and Manufacturing Co. on August 8, 1916, which was marked Defendant's Ex. “G.”

Also copy of the U. S. patent No. 1,120,003, issued to A. A. Warner assignor to Landers, Frary & Clark, on December 8, 1914, which was marked Defendant's Exhibit “H.”

Also copy of U. S. patent No. 1,190,551, issued to Milton H. Shoenberg, assignor to Majestic Electric

Development Co. on September 1, 1914, which was marked Defendant's Exhibit "I."

Also a model as illustrative of the disclosure of the British patent 19,971 application filed September 4, 1913, and accepted September 4, 1914, and the same was marked Defendant's Exhibit "J."

Also a fluted cone produced as illustrative of the reflector shown in the British patent, 19,971, application filed Sept. 4, 1913, and accepted Sept. 4, 1914, and the same was marked Defendant's Exhibit "K."

Defendant read in evidence two letters received from Mr. John H. Miller, representing the Majestic Electric Development Company, as follows:

"December 31, 1918.

"Westinghouse Electric & Mfg. Co.,
165 Broadway,
New York City, N. Y.

Gentlemen:

On behalf of my client, the Majestic Electric Development Company of this city, I beg to notify you that the electric heaters, shown on page 16 of the Westinghouse Catalogue, Section 8-C, of November, 1918, known as 'Cozy-Glow Radiator,' are an infringement upon United States letters patent No. 1,245,084, of October 30, 1917, and U. S. design patent 51043, of July 17, 1918, also U. S. Letters Patent No. 1255814 of February 5, 1918, all of which patents are owned by the said Majestic Electric Development Company. [71]

The object of this letter is to advise you of the said infringement and request a discontinuance of

the same. In default of compliance with this request, we shall be under the necessity of commencing suit against you in the United States District Court for infringement and a recovery of damages and profits. It is possible that in marketing this device you were not aware of the existence of these patents or that you were interfering with the rights of my client. Consequently, before instituting suit, I shall be pleased to hear from you relative to this matter, and an early response will greatly oblige

Yours very truly,

“JOHN H. MILLER.”

“February 7, 1919.

Westinghouse Electric Mfg. Co.,
165 Broadway,
New York City, N. Y.

Gentlemen:

Attention of Mr. Victor S. Beam.

During an extended absence from my office notice was sent to you by my managing clerk charging infringement of certain patents owned by the Majestic Electric Development Co., and I have your favor of January 6th requesting the specification of the claims of patents relied on.

In reply I beg to say that the claims and patents relied on are as follows, viz.:

1. Design patent, No. 51,253 of Sept. 11, 1917.
2. Patent 1,245,084, of October 30, 1917, claim 1.
3. Patent 1,255,814, of February 5, 1918, claim 2.
4. Patent 1,109,551, of September 1, 1914, claim 1.

The above particulars differ a little from the notice heretofore sent you but the writer of the first

letter was not fully posted on the situation and you may disregard the first notification and accept this one as the correct one.

Yours very truly,

“JOHN H. MILLER.”

Defendant's counsel then offered in evidence a model which he claimed to be a reproduction of what is shown in the Warner patent, No. 1,120,003, which he said was not made for sale or copied from anything which was made for sale, but was simply made from what is shown in the patent as nearly as he could make it, and the same was marked Defendant's Exhibit “L.”

Defendant also offered in evidence a device produced and identified by the witness Beam as made under and corresponding to the Geiger patent, No. 1,194,168, referred to as the clamshell heater, and the same was marked Defendant's Exhibit “M.”

Defendant produced as a witness G. L. Wentworth, who, having been duly sworn, testified as follows: [72]

Testimony of G. L. Wentworth, for Defendant.

I reside in Oakland, and am an electrician, and my place of business is 625 Mission Street. I own electric radiant or beam heaters, similar to those before me on the table. I have one double one and two single ones in the place, and I bought one that I have in my home. I bought them one at a time as I needed them. The first three I just told the boys there to order them. I got them one at a time as I wanted them, one for the main office, one for

(Testimony of G. L. Wentworth.)

downstairs, and one for myself to take home. They got three heaters. I think the first three heaters came, I think the name is Majestic—it is Majestic something—I don't know just what the name is. The place is down on Howard Street, I think between New Montgomery and Third. I think that is where they came from. I did not ask for any particular brand, but I just got Majestic heaters. I know it because I O. K.'d the Majestic bills in those three cases. I do not recall any statement that I made to anyone with reference to the heaters that I purchased, but I do recall—I was caused to recall it by it being brought up yesterday; a little talk came up regarding it, and if it had not been called to my attention I would never have thought of it again. Since the talk came up yesterday I do recall it, but I cannot recall word for word now what the conversation was. I remember that it came up in a casual way regarding heaters. It was some time ago; it was during the cold weather last year, it must have been six or seven months ago, or something like that. That was in reference to the last heater which I have not mentioned yet. I have four. I mentioned 3. It was the last one that I bought. The circumstances of buying that heater were, I gave the clerk orders to get me another heater. I did not say what I wanted or anything; four, five, or six days went by and it was still cold, and I had a cold myself and I didn't get the heater. When I spoke about it [73] they said it was back ordered but it had not come yet. So I wanted a heater and I gave the nearest clerk to me \$10 and

(Testimony of G. L. Wentworth.)

told him to go out and get me a heater. He did so. He came back with a box about as large as a hat-box, and took out the heater, and screwed the plug into a socket over my desk and turned it on and I had a heater. That was all there was to it. I did not then look to see what it was. It was the heat I was looking for and I got it. I paid cash for that heater. I gave him \$10 and I think I got a little change back. I think that heater was brought from the railway. I had one ordered for several days before, maybe a week before, but it did not come. It was a Westinghouse heater that came. I have a recollection as to when I observed that it was a Westinghouse heater, at the time the talk was brought up. I don't remember how long that was after I purchased the heater. I did not pay any attention to what it was. When the talk came up, it was called to my attention that it was not a Majestic heater such as was manufactured by the party.

Cross-examination.

On cross-examination the witness testified as follows: I originally had three Majestic heaters, and then I ordered a fourth one from the same place that the others came from, but I didn't get it because there were none available. I sent out a boy to get the fourth heater but didn't get the heater, and so I sent a different boy the next time. I told him to get it. I didn't make any remarks and didn't pass any judgment on anybody's heater. I just wanted a heater. We make the order out at the order clerk's desk, and we have an errand boy

(Testimony of G. L. Wentworth.)

to send out for these things, but I didn't trust the errand boy the second time, I gave the order to an order clerk—a clerk to whom I pay \$250 a month, and he went out and got the heater for me. I paid the money out of my own pocket. [74] When he returned with it in a box and it was brought to my office and taken out of the box, and the cord was taken out and it was serewed into a socket and the electricity turned on, the clerk simply said to me, "There is your heater." I had been doing a little bit of talking about it, and I guess rather strong talk too, and so I got a heater. I did not pay any attention to what brand or make it was. I saw that it was red and that it was what I was looking for. I didn't pay any attention to it and didn't give it a thought, and never thought of it until the controversy was brought up afterwards. I kept using that heater and am still using it whenever it is cold and I need it. I didn't pay any further attention to it, as I had other things to worry about. But somebody ultimately called my attention to the fact that it was different from the other heaters, and that person was Mr. Hiller. I should judge that was four or 5 or 6 months ago, I cannot tell exactly. At that time I had been using the heater probably a month or something like that. The three Majestic heaters I referred to are located I think, one at my home and two in my main office. I do not know where the Westinghouse heater is now. I loaned it to a man to be used by some woman in a hospital, and I have not seen it since, so I have all Majestic heaters now. I am not going to get it from this

woman. I am not going to say a word about it. I have already paid for it and I will just let it go. I do not know if I am going to buy a new one. If I do I will probably do the same thing over again, and do the same as I did before. I will simply just say, "Get me another heater."

At this point defendant rested its case. [75]

PLAINTIFF'S REBUTTAL.

Testimony of Edmund N. Brown, for Plaintiff (In Rebuttal).

In rebuttal plaintiff produced as a witness E. N. BROWN, who testified as follows:

With reference to the use of alloys or wire made of alloys, other than the Marsh device, in these exposed heaters, we used either chromium or nichrome. We used Excello first obtained from the Herman-Boker Company in New York. It was a wire that was on sale in the market, and we used it on all of our heaters prior to the time that we commenced to manufacture our No. 7. We had no trouble in getting that wire until after the War was on. The difficulty then was because of war conditions. We also used another wire besides the Excello called Calido made by a firm at Morristown, N. J. After the plaintiff started in its business in 1914, the first heating device we put on the market was a pendant type, called by our trade name No. 1. The shape of the reflector of the device was what we called a pie-plate and is the same as the device which I now produce.

Here the device in question was put in evidence and marked Plaintiff's Exhibit 6.

(Testimony of Edmund N. Brown.)

(Witness continuing:) After that we put on what is called a kind of a dish plate which is represented by this model, Exhibit "A." It was made of nickel, and intended to be suspended from a point of suspension projecting from the wall or hanging from the wall. We do not offer that device for sale now.

The second device which we put on the market was known by our trade name No. 3. It has a glass knob, and it is represented by Defendant's Exhibit "D." We have not continued the sale of this device, and it likewise has been abandoned.

The next device we put on the market was the one termed by our trade name No. 10. That was the same shape as an oil [76] stove. It had a back to it like an oil stove, about one-third of it—the front part was a guard, different from the ones we have on the other type heaters; it stood up on four legs. It looked very much like an oil stove. We also discontinued the sale of that device and it likewise was abandoned.

The next device we put on the market was the one we styled by our trade name "No. 2," and represented by Defendant's Exhibit "B." We abandoned that device likewise as we did the other devices.

The next heaters we put on the market were designated by the trade names 1b, 2b and 3b, which were put on simultaneously. They were to take the place of our former Nos. 1, 2 and 3. They had a bell shape which we thought would be more efficient. Defendant's Exhibit "C" represents the

(Testimony of Edmund N. Brown.)

said 2b and 1b was the pendant type, and the one with two elements was 3b. The 1b was the suspension type, the 2b and 3b were the same with the exception of the number of elements. The 2b was to take the place of the former 2, and the 3b was to take the place of the former 3. We proceeded to sell the 1b, 2b and 3b, and we abandoned them later.

The next heaters were known by our trade names 4, 5 and 6. They were of the square type or box type, and are illustrated by a device which was put in evidence in the prior litigation and marked Plaintiff's Exhibit 18. There were three figures shown at the bottom of the said exhibit. They have the general appearance of a guard or fire place, and are called our box type heaters. No. 4 has a single element, No. 5 two elements, and No. 6 three elements. That and the dimensions are the only differences between them. We met with considerable success in the sale of our Nos. 4, 5 and 6 heaters, and have continued to sell them to this date, and carry them in our catalogue and stock. [77]

The next type of heater we got out was known by our trade name No. 7, which is represented by my model in evidence here, and that is the one I have testified about on direct examination. Our object in getting out so many styles of these was that I knew I did not have the one that I wanted until I got the No. 7. I was striving until I hit on the No. 7. I did not have the one that I thought was the proper heater. I tested that matter out by putting them on the market and before

(Testimony of Edmund N. Brown.)

the trade and selling them, and in this chain of evolution I finally reached the No. 7 heater, and I found that out as I put them out to the trade. The others were abandoned all excepting Nos. 4, 5 and 6 (box type heaters) which we are selling to-day, but that is a different type of heater. After our No. 7 came on the market we didn't put out any other style or change the design. We got out what we called a No. 8 of the same design, only that we put two elements on it; that was to get additional heat. I might add that we are confining ourselves in the No. 8 to absolutely the same type reflector. Our sales of No. 7 which we put on the market in comparison with the sales of previous heaters increased, you might say, with leaps and bounds, I mean the No. 7 heater. The No. 7 sold in much greater numbers, several times greater, you might say, as it went on, and the sale of No. 7 is increasing all the time. The present year is the largest we have had up to date in the sale of the No. 7 heaters. I want to say one thing. This year we are putting out a little larger reflector on our No. 7 and calling it 11, but that is the only change. We are calling it that to let the trade have something to distinguish it by. The diameter of No. 11 is 12 inches. We abandoned the four types of heaters and confined ourselves to No. 7 because we considered the No. 7 a better article, and we sold a great many times more of the No. 7 than we did of any other types. [78]

The photograph of our exhibit at the Panama Exposition which has been put in evidence shows

(Testimony of Edmund N. Brown.)

our former heaters, No. 1, No. 2, No. 3 and No. 10, and there is one kind of a bird cage we had there, but it was only an experiment; we did not market them generally. We had one hung up on the wall that was portable also, but we did not sell many of these. Those were all of the portable type. The photograph does not show either 1b, 2b or 3b. Those, the 1b, 2b and 3b were gotten up in the fall of 1915, which was too late for the Exposition to be shown in the photograph. That series, 1b, 2b and 3b, was gotten up to take the place of the 1, 2 and 3.

Referring to the heater of the Simplex Conduits, Limited, of London, England, designated as the British patent, which has been offered in evidence, Application filed Sept. 4, 1913, and accepted (No. 19,971, Sept. 4, 1914). No heaters of that description and appearance have been on the market in the United States that I know of, and my opportunity of determining what heaters are on the market in the United States is that I make it my business to always keep in touch with anything that comes out in our line.

Regarding the other heater which has been offered in evidence here, the Warner patent (Defendant's Exhibit "H"), I talked to some dealers and they tell me that that has been taken off the market by Landers, Frary & Clark, the manufacturers. I have endeavored to find another one in the city here but have been unable to do so.

When we got up our No. 7 heaters, the heaters

(Testimony of Edmund N. Brown.)

which we abandoned and discontinued were the "b" type heaters, 1b, 2b and 3b and No. 10, and previous to getting out of these types we had abandoned the others, 1, 2 and 3. Those prior heaters were abandoned because we were, you might say, in a period of evolution. We were experimenting all the time to see what was the best and we found the No. 7 a better heater, more efficient more ornamental to the eye and looked better. [79] Since we put our No. 7 on the market, we have not put any other or different type of heaters on the market, except our No. 8 which is the same as No. 7 with the exception of having two elements. As to how our sales of the No. 7 compared with the sale of our previous heaters which were abandoned, they were so far ahead—they ran into the hundreds of thousands, that is the No. 7 did. We have not sold many thousands of the others. The trade liked the No. 7 better than the others; in fact, to state an expression of the trade, I can state one remark, that we had out now the right kind of a heater; and such like remarks.

Cross-examination of E. N. BROWN.

Our sales of the previous heaters, Nos. 1, 2 and 3 and 1b, 2b, and 3b, were not confined to the Pacific Coast. We were given to understand by the trade that the reason why they seemed to like the No. 7 better than the preceding heaters was that they liked the appearance better; it was also a more efficient heater; they liked the appearance. They made the remark, "Now, you have got something

(Testimony of Edmund N. Brown.)

that looks right." Never prior to our No. 7 heater did we market a heater of portable type having a burnished copper reflector. In regard to our ability of disposing of all the heaters of the beam type we have been able to make, I will say that we have restricted our manufacture on account of the infringement. We could make a great many more than we are making to-day if we knew our rights were being protected. We have not been able to dispose of all we made. We carried over some last year. I believe we could supply the entire trade of the country if we had an unrestricted right.

The Excello wire referred to by me is similar to the Marsh patent wire. We took a license under the Marsh patent because we knew we would be infringing if we did not, and that we would be subject to being sued. [80]

We have a few of the heaters preceding No. 7 on hand of different types that we have been unable to sell, but we do not list them on the market. We have not been able to dispose of those heaters.

Defendant then produced a pamphlet or folder and the witness identified it as a pamphlet which plaintiff is now getting out, containing illustrations and reading matter on heaters Nos. 4, 5, 6, 7, 8, 11, 15, 30 and 35 types, and stated that said catalogue represented all the types of heaters which the plaintiff was now marketing except No. 9, which is similar to No. 6, only that it has two more heat units, and in proportion is a little larger in size. The

document was then offered in evidence and marked "Plaintiff's Exhibit 9."

Defendant also offered in evidence an exhibit referred to in the former case as "Plaintiff's Exhibit 18," for the purpose of showing the types of heaters of the plaintiff, numbered 4 and 5 and 6, and the same was marked "Plaintiff's Exhibit 10."

At this point counsel for defendant, by permission of the Court, offered in evidence a patent which had formerly escaped his attention, copy of U. S. Letters Patent No. 684,459, issued to E. F. Porter, Oct. 15, 1901, and the same was marked "Defendant's Exhibit 'N.'"

Testimony of George J. Henry, for Plaintiff.

GEORGE J. HENRY, being duly called as a witness on behalf of plaintiff, testified as follows:

I am 48 years of age and reside at the City and County of San Francisco. I am mechanical and electrical engineer and patent solicitor. I have been following the profession of mechanical engineer for 26 years; and I have been engaged in designing and manufacturing mechanical and electrical and physical devices over practically all of that period of time. I have taken out a number of patents on inventions of my own. I have practiced before the Patent Office for the last seven or [81] eight years in connection with my professional work. I am a member of the American Society of Mechanical Engineers, American Society of Civil Engineers, associate member of the American Institute of Electrical Engineers. I have examined a great many

(Testimony of George J. Henry.)

mechanical devices, including heaters, including electrical devices generally, reported on some of them, and had a good deal to do with the designing of many devices in this field.

The Morse patent 881,017 of March 3, 1908 (Defendant's Exhibit "F") shows an incandescent electric bulb mounted inside of a reflector, and a wire cage or guard stretched across the reflector in front of the incandescent lamp. The device is labelled "Heating device." The reflector is presumably of hemispherical shape generally, and the lamp is materially out of focus in the curve in figure 1, the wire screen set relatively close to the lamp and well within the reflector. The device is a therapeutical instrument and is intended for that purpose. The invention relates to a device for applying heat to a portion of one's body, and is intended to be used in the practice of therapeutics. It is a small instrument to be taken in one's hand and carried around and applied to any place where you want heat transmitted. It is principally for that purpose. The handle of the incandescent lamp serves as the handle for the device, and also as a socket for the incandescent lamp. It has no standard or anything of that kind, and is for the purpose of concentrating the heat upon the affected parts as you move it around in your hand from one spot to another to apply the heat, apparently by setting it directly over the part itself, not by reflection, but by holding the heat of the bulb within the container.

In the English patent, entitled "Simplex Con-

(Testimony of George J. Henry.)

duits, Limited" (No. 19,971, application filed Sept. 4, 1913, and accepted Sep. 4, 1914). I find a conical-shaped container [82] fluted on its outer surface, at least in the preferable form and in all the forms illustrated. It is mounted upon a standard and swivels in any direction, the standard carrying a U-frame which is pivoted to the conical-shaped reflector. The heat element is a long resistance wire *would* upon insulating material located about the axis of the cone, but not coincident with the axis. A wire screen is stretched across the front of the conical opening, so that the whole thing has the appearance of a funnel. The device which you now hand me appears to be the device described in the English patent. The interior of the cone is corrugated, made of copper or plated with copper. The wire screen is a wire mesh, what is known in the trade as wire cloth or wire mesh, fixed in an annular frame, which may be slipped over the front of the heat opening of the conical reflector. It is mounted on horizontal trunnions and also on a vertical swivel or trunnion, so that it can be swung in any direction, up or down, or around a vertical axis. That portion of the specification which refers to changing the cone to a parabola, commencing at line 25, page 3 of the specification, reads as follows:

“We have found that a diameter of the large end approximately equal to the depth of the cone gives good results, but the cone angle may be greater or less than that was indicated, or the reflector may be in longitudinal section,

(Testimony of George J. Henry.)

in whole or in part, or of a parabolic or the like contour, according to the form desired for the emergent beam of rays.”

With regard to the sufficiency of that disclosure as to instructing a person to make the heater of parabolic shape instead of conical shape, I don't think it is any more specific as regards any other shape than that shown that would be perfectly apparent to anyone in the art. A parabolic reflector to have any useful function, would have to be, as the expert on the other side, Mr. Beam, stated, it would have to have its source [83] of heat located at the focus of the parabola; and with the long element that is here shown, I cannot see how a parabola could possibly be effective, for the purpose of directing rays in any better shape than this cone does. After careful reading of the patent, I came to the conclusion that the inventor had in mind, rather, the form of the curve of these inverse flutes rather than substituting a parabolic form of the whole cone. These individual flutes might easily be curved parabolically in such a way that the focus of the parabola, or rather, the locus of the foci of the parabola of a single flute would be coincident with the center of the heat element; but I cannot conceive a parabola in the plane of a heat element as the substitution for this cone which would perform any of the functions of reflection aimed at by the patentee when he says, “You can direct the beam as you choose by changing the shape of the reflector.” With such a long heat element, the divergence from

(Testimony of George J. Henry.)

the focus of any single parabola would be so great over most of the portions of the heat element that your emitting area would not be anywhere near a parallel beam; it would be widely divergent from it. I am very sure that the most accurate parabola that could be constructed as a substitute for a curve—and I have in mind now such a parabola as has been presented here as made by the Westinghouse company—such a reflector as that, I am very sure, would get hot and make a divergent beam that would cross a dozen times, probably, in the parabola before it got out, and would make a very wide divergent beam. I am referring to the model made by the Westinghouse Company of the English Simplex patent, or any similar reflector made of parabolic to be this form of heat element and based on any teaching contained in the Simplex patent. The conical fluted type of reflector is the only one shown in the illustrations. [84]

Plaintiff then offered in evidence the device representing the English patent testified to by the witness, and the same was marked "Plaintiff's Exhibit 7."

I have examined and understand the Warner patent, No. 1,120,003, dated December 8, 1914, Defendant's Exhibit "H." The device which you now hand me I believe to be the same device as described in this Warner patent. The striking feature of this device when you look at it from the front is the heat element, and its location with respect to the other parts. It is annular in shape and occupies

(Testimony of George J. Henry.)

a large portion of the entire device. The large cage covering it is very prominent in appearance. Of course, if the device were lighted up the incandescent lamp will also be a noticeable feature. There is an incandescent lamp in it, and the lamp is also shown in the model which you have handed me and concerning which I have testified.

Plaintiff then offered in evidence the said device or model referred to by the witness as representative of the Warner patent, and the same was marked Plaintiff's Exhibit 8.

(Witness continuing:) The device which has been put in evidence by defendant and marked Defendant's Exhibit "L" is representative of this Warner patent. I do not consider it a fair representation thereof. It has a very materially different appearance. The same elements are present, and probably function the same way, but they are materially different in size of proportion and respect to each other. The heat element is located much deeper in the reflector than in the first one you handed me. It is also much smaller in cross section relatively, resulting in a very much less prominent appearance. It is the dominating element in the appearance in the patent drawing and also in the heater which you have handed me (Plaintiff's Exhibit 8) as distinguished from Defendant's Exhibit "L." [85]

Referring further to the English Simplex patent, I note that it does not very prominently show in its illustration a guard wire over the front. It

(Testimony of George J. Henry.)

states that it should be fitted with coarse wire mesh or the like, but that does not appear in the illustration, it is not shown in the illustration.

Referring to a model which has been put in evidence by the defendant marked "Defendant's Exhibit 'J,'" as illustrative of the Simplex English patent, I do not consider that the model correctly represents the patent, although it might easily be a construction which one skilled in the art, looking at the Simplex picture and reading the Simplex description, might arrive at a variation. It is materially different from the drawings in the Simplex patent. The heat element is relatively shorter. The reflector is curved and smooth on its inner surface instead of fluted, and is provided with a special form of wire guard, whereas no form of wire guard is illustrated in the Simplex patent.

Cross-examination of G. J. HENRY.

On cross-examination the witness testified as follows: I am a practicing attorney as well as engineer, and at present am associated with Mr. Miller, counsel for plaintiff, in connection with some work. I have stated that the drawing of the Simplex Conduits patent, No. 19,971 of 1913 shows no guard for the heater. I consider that the part marked "H" shown in Figs. 2 and 3 of sheet 1 of the drawing, also in Fig. 7, to be the frame work on which the patentee intends to stretch a wire mesh, which wire mesh is mentioned in the specification. The specification does say on page 3, line 21, "The end of the reflector is fitted with a guard H, to pro-

(Testimony of George J. Henry.)

tect the heating element." Now, if he intended the element H of Figs. 2, 3 and 7 to be the guard for the heating element, then I am at a loss to interpret some of his drawings. [86] Take, for example, Fig. 7: This Figure 7 is "A view similar to Figure 3 of a modification with three heaters." He shows the lines H commencing apparently at the small end of the cone and entirely disconnected in any way from the outer ring; consequently I cannot see, judging from that figure alone, how that can be a guard across the front of the reflector, although it might be a ring inside and around the three elements of Fig. 8. The same testimony applies to the showing in Figure 3. The guard seems to be away inside of the reflector. I find nothing in any of the other figures to clear up such a hiatus. Figure 2 shows the guard H extending apparently all the way from the outer ring and as such it would be a three-wire guard extended across the front of the heater with a circular opening at the center; but it would so radically diverge from the wire mesh mentioned in the body of the specifications, that I am inclined to think he did not mean it as a guard across the front of the heater in the sense of the wire mesh shown, for example, in the model Plaintiff's Exhibit 7. I have criticised the portion of the patent specification relative to the parabolic curvature reflector as not adapted for use with the heater element here shown, on account of the length of the heater element. It has not occurred to me that if the reflector were made more

(Testimony of George J. Henry.)

shallow the heater element would naturally be made shorter to correspond. Quite the contrary. With the type of parabolic reflector shown in Defendant's Exhibit "J," the heat element would be shorter rather than longer. Generally speaking, the shorter the distance between the focal point and the directrix in two parabolas, the less will be the permissible area of volume within which your heat should be generated. In this case of Defendant's Exhibit "J," we have rather an acute parabola, one in which the focus is very deep seated, nearly to the bottom. The result would be that your heat element in such parabolic reflector would be very [87] much smaller proportionately than if the focus were much further forward; in other words, if the parabola were flatter. I take it that it is well within the scope of the presumed knowledge of the designer to proportion these parts to suit the conditions imposed by the laws of heat generation and radiation. If you have any definite set or parts to work to, he could undoubtedly proportion a curve that would be well suited to those particular parts, but my testimony was in reference to a long heat element. In this particular Defendant's Exhibit "J" type of parabola, it is a fact that the heat radiating from the outer portions—I think I am safe in saying that nine-tenths of the outer portions of the heat units upon being received upon the wires by the reflector will be projected inward into the reflector instead of outward.

JOHN H. MILLER,
Atty. for Plff.

[Endorsed]: Filed Dec. 17, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [88]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY,

Defendant.

**Plaintiff's Petition for an Order Allowing Appeal
from Order and Decree of October 4, 1920,
and from the Final Decree of November 1, 1920.**

Plaintiff in the above-entitled case feeling itself aggrieved by the order and decree heretofore made and entered in the minutes of the Court on October 4, 1920, whereby it was ordered that the bill of complaint be dismissed, and that a decree be signed, filed and entered accordingly, and feeling itself aggrieved by the final decree heretofore made and entered in the case on November 1, 1920, wherein and whereby it was ordered, adjudged and decreed that the plaintiff's bill of complaint be dismissed with costs to the defendant, which said decree was

signed by Hon. Robert S. Bean, United States District Judge.

Comes now into court by its counsel and prays the Court for an order allowing it to prosecute an appeal from the said order and decree of October 4, 1920, and from said final decree of November 1, 1920, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and pursuant [89] to the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security of costs and damages which said plaintiff shall give and furnish on said appeal, and that upon said security being given, all further proceedings in this court and the issuance of execution be suspended and stayed until the final disposition of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

JOHN H. MILLER.

Dated: November 17, 1920. [90]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

Order Allowing Appeal of Plaintiff from Order and Decree of October 4, 1920, and from the Final Decree of November 1, 1920.

Plaintiff in the above-entitled suit having filed its petition for an order allowing an appeal from the order and decree made and entered in the minutes of the Court on October 4, 1920, and from the final decree made and entered in the case on November 1, 1920, accompanied by an assignment of errors:

NOW, THEREFORE, on motion of John H. Miller, Esq., attorney for plaintiff, it is

ORDERED that the said petition be and the same is hereby granted, and the plaintiff is hereby allowed to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and decree made and entered on the minutes of this court on October 4, 1920, whereby it

was ordered that the bill of complaint be dismissed with costs to the defendant, and that a decree be signed, filed and entered accordingly, and also from the final decree made and entered in the above-entitled case on November 1, 1920, [91] wherein it was ordered, adjudged and decreed that the plaintiff's bill of complaint be dismissed with costs to the defendant.

And it further appearing that the plaintiff has prayed for a supersedeas and stay of execution of said decree pending said appeal.

IT IS ORDERED, ADJUDGED AND DECREED that the amount of security to be furnished by the plaintiff for damages and costs be and the same is hereby fixed at the sum of five hundred (\$500.00) dollars, and that upon the plaintiff furnishing and giving and filing with the clerk of the court the aforesaid bond, for damages and costs on appeal, in the sum of five hundred (\$500.00) dollars, conditioned as required by law, all further proceedings in this court and the issuance of execution be and the same are hereby suspended and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

And it is further ORDERED, ADJUDGED AND DECREED that upon the giving of the bond aforesaid conditioned according to law, a certified transcript of the records and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Nov. 17, 1920.

R. S. BEAN,
U. S. District Judge.

[Endorsed]: Filed Nov. 17, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY,

Defendant.

**Plaintiff's Assignment of Errors on Appeal from
Order and Decree Entered in the Minutes, Octo-
ber 4, 1920, and Final Decree Made and Entered
November 1, 1920.**

Now comes plaintiff herein by its counsel and specifies and assigns the following as the errors on which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree made and entered in the minutes of the court on October 4, 1920, whereby it was ordered that the bill herein be dis-

missed with costs to defendant, and that a decree be signed, filed and entered accordingly, and from the final decree made and entered in the above-entitled case on November 1, 1920, whereby it was ordered, adjudged and decreed that the bill of complaint be dismissed with costs to the defendant to be taxed, viz.:

1. Error of the Court in making and entering the order and decree of October 4, 1920, whereby it was ordered that the bill of complaint be dismissed, and that a decree be signed, filed and entered accordingly. [93]

2. Error of the Court in making and entering its final decree of November 1, 1920, wherein and whereby it was ordered, adjudged and decreed that the plaintiff's bill of complaint be dismissed with costs to the defendant to be taxed.

3. Error of the Court in ordering, adjudging and decreeing that the plaintiff's bill of complaint be dismissed.

4. Error of the Court in holding that the patent in suit does not extend to the supporting stand or pedestal.

5. Error of the Court in holding that the design of the patent in suit relates to the reflector and the protective devices viewed in connection with the attendant heater element.

6. Error of the Court in holding that the patent in suit was not infringed by the defendant's devices.

7. Error of the Court in holding that the de-

defendant's devices are neither reproductions nor colorable imitations of the design patent in suit.

8. Error of the Court in holding that there are points of resemblance between the device of the patent in suit and the common telephone and electric fan.

9. Error of the Court in holding that there are two important differentiating features between the design patent in suit and the design of the defendant.

10. Error of the Court in holding that the turned over edges of the defendant's reflector in so far as affects appearance are wholly dissimilar to the broad annular flange of the patent in suit.

11. Error of the Court in holding that the broad annular flange is a conspicuous differentiating feature of the design patent in suit. [94]

12. Error of the Court in holding that upon the testimony of one of the plaintiff's witnesses who first observed the Westinghouse heater upon passing the show window where it was displayed shows that the outstanding feature in appearance of plaintiff's device was the heater element.

13. Error of the Court in holding that the design of the patent in suit is entirely void of purely ornamental features either of form or drapery.

14. Error of the Court in holding that the design of the patent in this suit is a nude utility.

15. Error of the Court in holding that the design of the patent in suit is a bare mechanism, no part or parts or lines of which can be dispensed with or substantially altered without impairing its utility.

16. Error of the Court in holding that one can-

not under the cover of a design patent debar others from employing the mechanical means necessary to give effect to a known and useful mechanical principle, however pleasing to the eye such requisite mechanism may be.

17. Error of the Court in holding that unless limited to the precise form illustrated in the drawing of the patent in suit, plaintiffs' design is anticipated in prior patents.

18. Error of the Court in holding that unless the design of the patent in suit is limited to the precise form illustrated in the drawing, the design is without invention.

19. Error of the Court in holding that the design of the patent in suit is anticipated.

20. Error of the Court in holding that the design of the patent in suit is without invention.

21. Error of the Court in holding that the casing shown in plaintiff's patent is simply a reflector of the most familiar type, old in the art, and without novelty either in configuration or feature. [95]

22. Error of the Court in holding that the contrast between the design patent in suit and the design as actually manufactured by the plaintiff under the Shoenberg patent is but the contrast of material, color and size, and not of form.

23. Error of the Court in holding that if prior designs manufactured by the plaintiff and the design of the patent in suit were both made of nickel or copper, there would be a similarity instead of a contrast between the two.

24. Error of the Court in holding that in the absence of contrasting color or size, there is a strik-

ing similarity in general appearance between the design of the patent in suit and the design previously manufactured by plaintiff under the Shoenberg patent.

25. Error of the Court in holding that the design of the patent in suit is shown and disclosed by the photograph of plaintiff's exposition exhibit.

26. Error of the Court in holding that the design of the patent in suit is almost identical with that shown in Fig. 1 of the English patent to Taylor, No. 102,070.

27. Error of the Court in considering or giving any effect whatever to the alleged English patent of Taylor, No. 102,070.

28. Error of the Court in holding that the alleged date of application for the alleged English patent to Taylor, No. 102,070, stated to be January 11, 1916, could be considered or have any effect in this case.

29. Error of the Court in holding that the alleged English patent to Taylor, No. 102,070, was applied for on January 11, 1916.

30. Error of the Court in holding that the alleged English patent to Taylor, No. 102,070, was issued November 15, 1916. [96]

31. Error of the Court in quoting from the alleged English patent of Taylor, No. 102,070.

32. Error of the Court in holding that the design in the patent in suit closely resembles the Warner device.

33. Error of the Court in holding that the design of the patent in suit closely resembles the parabolic "Simplex."

34. Error of the Court in holding that the design of the patent in suit closely resembles the "Fer-ranti Fires."

35. Error of the Court in holding that in the period of four or five years immediately preceding the patent in suit an unusual or widespread interest in the matter of electric heating had arisen.

36. Error of the Court in holding that the invention of the nichrome wire solved the problem of a dependable and efficient element.

37. Error of the Court in holding that the right to use the nichrome wire was involved in the litigation which was not finally concluded until about the time of the Brown patent in suit.

38. Error of the Court in holding that it was because of the invention of nichrome wire that heaters were put on the market in increasing numbers.

39. Error of the Court in holding that it was because of advertising and the arts of salesmanship that the desire for such heaters was greatly stimulated.

40. Error of the Court in holding that the plaintiff was to some extent the beneficiary of the activities of its competitors.

41. Error of the Court in holding that the attractiveness of the design of the patent in suit was due, not so much to slight changes in form as to increase in size and more particularly a substitution of the warm copper bowl [97] with suitable trimmings in place of the nickel type of heater.

42. Error of the Court in holding that the widespread use of the design of the patent in suit was due in part to changes in social and housing condi-

tions or the rapidly growing tendency to use electrical energy for divers purposes in the home.

43. Error of the Court in holding that the widespread use of plaintiff's design cannot be attributed to a slight change in the contour of the reflector.

44. Error of the Court in holding that the widespread use of the design of the patent in suit was due to the causes or any of them specified in the opinion of the Court.

45. Error of the Court in that its decree is not supported by the evidence.

46. Error of the Court in that its decision and decree is contrary to the evidence.

47. Error of the Court in its failure to give effect to the testimony produced by the plaintiff showing confusion in the trade, and deception of persons of ordinary intelligence taking the defendant's heater as and for the plaintiff's heater.

48. Error of the Court in failing to give effect to the testimony of the witness Labatt in respect of confusion in the trade and deception caused by defendant's heater.

49. Error of the Court in failing to give effect to the testimony of J. R. Hiller in respect of confusion in the trade and deception caused by the defendant's heater.

50. Error of the Court in failing to give effect to the testimony of G. L. Wentworth in respect of confusion in the trade and deception caused by the defendant's heater. [98]

51. Error of the Court in entering its order and decree in the minutes on October 4, 1920, through and by Honorable Maurice T. Dooling, the District

Judge who was then presiding, whereas the case was tried by and before Frank S. Dietrich, U. S. District Judge of Idaho, and the written opinion in the case was rendered by him.

52. Error of the Court in making and entering its order and decree of October 4, 1920, through and by Honorable Maurice T. Dooling, District Judge presiding, whereas the case was tried by and before Honorable Frank S. Dietrich, U. S. District Judge of Idaho, who had been specially designated to act as a trial judge for the Northern District of California only for the months of August and September, 1920, and such authority and commission expired on the last day of September, 1920.

53. Error of the Court in making and entering its decree of November 1, 1920, through Robert S. Bean, District Judge, whereas the case was tried by and before Honorable Frank S. Dietrich, United States Judge of Idaho, who had been designated and appointed to hold United States District Court for the Northern District of California during the months of August and September, 1920, only, and his authority and commission expired on the last day of September, 1920. [99]

NOW, THEREFORE, in order that the foregoing assignments of error may be and appear of record, the plaintiff presents the same to the Court and prays that the same may be filed and such disposition be made thereof as is in accordance with the laws of the United States in that behalf made and provided, and prays that said final decree be reversed, and that the District Court of the United

States for the Northern District of California, Second Division, be directed to enter an interlocutory decree in favor of the plaintiff and against the defendant in the usual manner and form, adjudging and decreeing the validity and infringement of claim 1 of the patent in suit, and enjoining any further infringement thereof, and referring the case to a Master in Chancery for an accounting of damages and profits. All of which we respectfully submit.

Dated: November 17, 1920.

JOHN H. MILLER,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 17, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [100]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That American Surety Company of New York, a

corporation organized and existing under and by virtue of the laws of the State of New York and duly licensed to transact a suretyship business in the State of California, is held and firmly bound in the penal sum of Five Hundred Dollars (\$500.00) to be paid to the Westinghouse Electric & Manufacturing Company, defendant, its successors or assigns, for which payment, well and truly to be made, the American Surety Company of New York binds itself, its successors and assigns firmly by these presents.

The condition of the foregoing obligation is such that,

WHEREAS the Majestic Electric Development Company, plaintiff in the above-entitled suit, has taken or is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and decree made and entered on October 4, 1920, and the final decree made and entered on November 1, 1920, by the District Court of the United States [101] for the Northern District of California, Second Division, in the above-entitled suit, whereby plaintiff's bill of complaint was dismissed with costs to defendant.

NOW, THEREFORE, the conditions of the foregoing obligation is such that if the said Majestic Electric Development Company shall prosecute its said appeal to effect and shall answer all damages and costs, if it shall fail to make its plea good, then this obligation shall become void; otherwise to remain in full force and effect.

Dated at San Francisco, California, November 17th, 1920.

AMERICAN SURETY COMPANY OF
NEW YORK.

By D. ELMER DYER,
Resident Vice-president.

[Seal]

Attest: E. C. MILLER,
Resident Asst. Secy.

Approved Nov. 19, 1920.

R. S. BEAN,
Judge.

[Endorsed]: Filed Nov. 19, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 492.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY,

Defendant.

Order Allowing Withdrawal of Original Exhibits.

Good cause appearing, on motion of John H. Miller, Esq., counsel for Majestic Electric Development Company, plaintiff in the above-entitled suit.

IT IS ORDERED that all of the original exhibits offered in evidence in the above-entitled cause may be withdrawn from the files of the above-entitled court and from the clerk thereof, and be by said clerk transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal of the plaintiff herein to said Circuit Court of Appeals, from the order and decree made and entered in the minutes on the fourth day of October, 1920, and the final decree made and entered on the first day of November, 1920, which said original exhibits are to be returned to the files of this Court upon the determination of said appeal by the said Circuit Court of Appeals.

Dated Nov. 23d, 1920.

(Sgd.) R. S. BEAN,
Judge U. S. District Court.

[Endorsed]: Filed Nov. 24, 1920. Walter B. Maling, Clerk. [103]

(Title of Court and Cause.)

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court:

Please prepare transcript of record on appeal from the final decree in the above-entitled suit, and incorporate therein the following:

1. Bill of complaint.
2. Final amended answer.
3. Order designating Judge Dietrich to hold court in the Northern District of California.

4. Opinion of Judge Dietrich.
5. Minute order of October 4, 1920.
6. Final decree of November 1, 1920.
7. Statement of evidence.
8. Petition for order allowing appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Order allowing withdrawal of exhibits.
12. Bond on appeal.
13. Citation.

JOHN H. MILLER,
Attorney for Plaintiff.

Dated November 23d, 1920.

Service of the within praecipe for transcript of appeal admitted this — day of November, A. D. 1920.

D. L. LEVY,
W. SHELTON,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 23, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [104]

In the Southern Division of the United States District Court, in and for the Northern District of California; Second Division.

No. 492—EQUITY.

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred four (104) pages, numbered from 1 to 104, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$46.50; that said amount was paid by John H. Miller, Esq., attorney for plaintiff; and that the original citation issued herein is hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of December, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [105]

Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Westinghouse Electric & Manufacturing Company,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Majestic Electric Development Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ROBERT S. BEAN,
United States District Judge for the District of Oregon, designated to hold and holding the District

Court of the United States, for the Northern District of California, this 19th day of November, A. D. 1920.

R. S. BEAN,
United States District Judge. [106]

Received a copy of the within Citation on Appeal this 23d day of November, 1920.

D. L. LEVY,
W. SHELTON,
Attorneys for Defendant.

[Endorsed]: No. 492. United States District Court for the Northern District of California. *Majestic Electric Development Co.*, Appellant, vs. *Westinghouse Electric & Mfg. Company*. Citation on Appeal. Filed Nov. 23, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3616. United States Circuit Court of Appeals for the Ninth Circuit. *Majestic Electric Development Company*, a Corporation, Appellant, vs. *Westinghouse Electric & Manufacturing Company*, a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed December 29, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

MAJESTIC ELECTRIC DEVELOPMENT COM-
PANY,

Appellant,

vs.

WESTINGHOUSE ELECTRIC & MANUFAC-
TURING COMPANY,

Appellee.

**Order Enlarging Time to and Including January
20, 1921, to File Record and Docket Cause.**

Good cause being shown, it is hereby ordered that the appellant in the above-entitled suit may have to and including the 20th day of January, 1921, within which to file the record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 20, 1920.

W. H. HUNT,
Circuit Judge.

[Endorsed]: No. 3616. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Jan. 20, 1921, to File Record and Docket Cause. Filed Dec. 20, 1920. F. D. Monckton, Clerk. Refiled Dec. 29, 1920. F. D. Monckton, Clerk.

