

No. 3616

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

MAJESTIC ELECTRIC DEVELOPMENT COMPANY,

*Appellant,*

VS.

WESTINGHOUSE ELECTRIC & MANUFACTURING  
COMPANY,

*Appellee.*

**APPELLANT'S OPENING BRIEF.**

[Design Patent 51,043, Electric Heater Casing.]

JOHN H. MILLER,

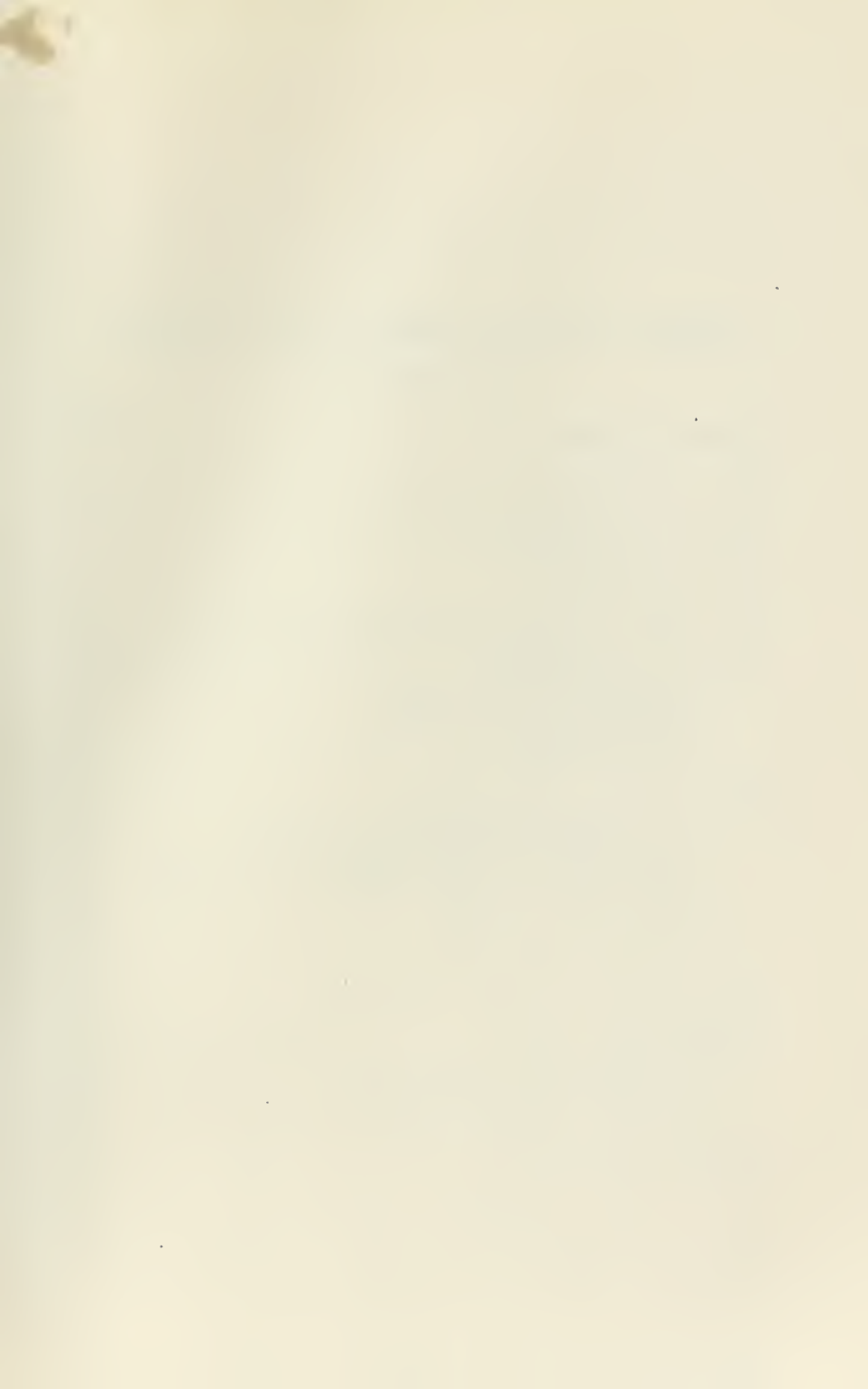
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### Statement of Facts.

This is an appeal from a final decree dismissing a bill of complaint. The suit was based on design patent, No. 51,043, granted on July 17, 1917, to Edmund N. Brown, assignor to the Majestic Electric Development Company. The invention is entitled "Design for an Electric Heater Casing", and relates to the portable electric heaters now widely used throughout the world, in which the heat generated by an electric element is

(1) The Majestic Electric Development Co. will for brevity be designated as plaintiff and the Westinghouse Electric & Mfg. Co. as defendant.

reflected from a copper reflector on the object to be heated, thereby heating the object by direct impingement of heat rays, as in case of solar heat, instead of by heating the surrounding air.

The suit was tried in the District Court for the Northern District of California before Honorable Frank S. Dietrich, District Judge of Idaho, acting under and pursuant to a designation duly made to that effect by the Senior Circuit Judge. The trial was completed on September 1, 1920, and thereupon Judge Dietrich returned to his home in Idaho without rendering a decision. Afterwards he prepared a written opinion while in Idaho, and transmitted it to the clerk of the court, the same being filed with the clerk on the 4th of October, 1920. On the same day the District Court (Honorable Maurice T. Dooling presiding) made and entered an order in the minutes to the effect that in accordance with the opinion referred to, the suit should be dismissed and a decree entered accordingly (Rec. 19). Afterwards, on November 1, 1920, in accordance with said minute order, the District Court through Honorable Robert S. Bean, United States District Judge of Oregon presiding, signed the decree dismissing the bill (Rec. 36), and it is from this decree that the appeal is taken.

We think that Judge Dietrich's opinion is based on an erroneous conception of the law of design patents. Therefore, it will be necessary for us, before arguing the facts of this case, to outline the law of design patents as to its fundamental principles, after which

a comparison of Judge Dietrich's opinion therewith will show the error we complain of.

### The Law of Design Patents.

There is a broad distinction between mechanical patents and design patents. In the former function is all important, and external appearance of no moment. There the fundamental inquiry is, what does the mechanism do, what function does it perform, not what it looks like in appearance to the eye of an observer. Hence beauty of appearance is not important. But in the case of a design patent function is of no moment and the appearance of the article is all important. The design is tested solely by its appearance to the eye.

The leading case is *Gorham v. White*, 14 Wall. 511. 524, where it is said in the syllabus:

“And the thing invented or produced, for which a patent is given, is that which gives *a peculiar or distinctive appearance* to the manufacture or article to which it is applied. It is *the appearance to the eye* that constitutes mainly if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance or sameness in effect upon the eye, is the main test of substantial identity of design.” (Italics ours.)

This court closely followed the *Gorham* decision in the case of *Grelle v. City of Eugene*, 221 Fed. 68.

In view of what has been said, the correct definition of a design can be easily formulated, but we know of no better one than that given by Mr. Robinson in Section 200 of his work on patents, which reads as follows:

“A design is an instrument created by the imposition upon a physical substance of some peculiar shape or orna-

mentation which produces a particular impression upon the human eye, and through the eye upon the mind. Its creation involves a change in the substance itself, and not merely in the mode of presenting it for sale; and affects, not its abstract qualities, nor those on which its practical utility depends, but those only which determine its appearance to the sight.”

Judge Nixon, when speaking of design patents in the case of *Theberath v. Harness Co.*, 15 Fed. 250, says:

“They differ from patents for inventions or discoveries in this respect, that they have reference to appearance rather than utility.”

We have referred to this fundamental doctrine because, in our opinion, the learned Judge of the lower court disregarded it in his decision and applied to our design patent the rigid rules of law applicable only to mechanical patents in matters respecting utility and function. That matter will be discussed later.

The law under which design patents are granted is Section 4929 of the Revised Statutes, which was passed in 1902.<sup>2</sup> It reads as follows:

“Sec. 4929. Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before 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, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due

(2) The first Design Patent law of the United States was passed in 1842, but was repealed by the Act of 1861, and that in turn was repealed by the Act of 1870. Finally the Act of 1902 was passed.



proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

According to this enactment the design, to be patentable, must be new, original and ornamental. The words new and original need no comment, as their meaning is sufficiently plain. The remaining term, ornamental, needs a word of explanation.

This term does not mean *artistic*, as will be seen from the fact that when Section 4929 was originally proposed in Congress, it contained the words "new, original, and artistic", but the word ornamental was substituted for artistic (H. R. No. 1661, 57th Cong. 1st Session). This word simply means *pleasing in appearance*. It is that characteristic which gives to an article a pleasing appearance, and thereby enhances its saleable value and enlarges the public demand therefor. This is the accepted rule, and no clearer exposition thereof can be found than Judge Coxe's opinion in *Untermeyer v. Freund*, 37 Fed. Rep. 342.

This pleasing appearance of an article may result from surface ornamentation and decoration. But the article may be entirely devoid of surface ornamentation or decoration, and in such case the pleasing appearance may reside in the shape or configuration of the article, or by the arrangement of the parts, or balanced effect of the several features as a whole, imparting the idea of gracefulness, strength, or harmony.

An instructive illustration is found in the case of *Ashley v. Tatum*, 181 Fed. 840, and the same case on appeal in 186 Fed. 339.<sup>3</sup> In that case the patent was for an inkstand having a certain contour and proportion of parts, but without any surface ornamentation. It was severely simple in contour, but graceful in proportion of parts.

Another apt illustration is found in the case of *Pelouze Scale Co. v. American Cutlery Co.*, 102 Fed. 916, where the design was wholly devoid of ornamentation, and the underlying concept was the idea of gracefulness and strength.

These views find an illustration in the ancient Greek architecture. The Doric column was severely simple and devoid of surface ornamentation, while the Corinthian and Ionic columns were highly ornate. Yet no one will deny to the Doric column the attribute of beauty. In fact the Parthenon, which utilized the Doric column, is considered to be the most beautiful specimen of architecture ever devised by the ingenuity of man. Its beauty resides primarily in its simplicity of outline carrying with it the idea of harmony, solidity, and strength.

We have submitted these considerations *in limine* because the opinion of the lower court seems to be based on the theory that a design patent is grantable only for surface ornamentation and adornment, which is an erroneous idea. We shall take up the matter later more in detail.

(3) On appeal the decision of the lower court was reversed on the ground of non-infringement, but the validity of the patent was not disturbed.

### History of the Brown Invention.

In 1914 the Majestic Electric Development Company was incorporated for the purpose of exploiting a portable electric heater. Edmund N. Brown and Milton H. Shoenberg were the two active parties in that corporation, and the company essayed to put on the market portable electric heaters made under a mechanical patent, which had been issued to Shoenberg on September 1, 1914, as No. 1,109,551 (Defendant's Exhibit I). The business was an experimental one at the start, Mr. Brown saying that it was "in a period of evolution", and they were experimenting all the time to see what was the best (Rec. 102). The relevancy of this will be appreciated when it is remembered that up to that time no successful portable electric heater had been placed on the market. Several efforts in that line had been made by others, notably one by the Westinghouse Electric & Manufacturing Company; but all those efforts proved unsuccessful and were practically abandoned. *The credit is due to Brown and his coadjutors for producing and placing upon the market the first portable electric heater which proved a permanent success, and that heater is covered by the patent in suit.*

The various evolutionary steps taken by Brown and his company will be instructive. The first heater they essayed to put on the market in 1914 was of the pendant type, designated by the plaintiff's trade name "No. 1". The reflector was of small dimensions, made of nickel, and the shape was like a pie-plate. It was adapted to be hung from a lighting fixture in the

ceiling or other point of suspension, not to be moved about on the floor (Rec. 97). One of the devices was introduced in evidence and marked "Plaintiff's Exhibit 6". This device was purely experimental. It proved unsuccessful and was soon abandoned.

Shortly afterwards the shape of the reflector of this first device was changed from a pie plate to that of a shallow dish or soup plate. It likewise was made of nickel and intended to be hung from a point of suspension as in the case of the first device. One of the devices was put in evidence by defendant and marked "Defendant's Exhibit A" (Rec. 98). This likewise proved to be a failure and was abandoned.

The next heater put on the market by plaintiff was one known by their trade name "No. 2". It consisted of a small nickel reflector of a flat dish shape mounted on a fluted column fastened in a base plate and adapted to be moved about from place to place in a room. It is represented by defendant's Exhibit B and was abandoned (Rec. 98).

About the same time another device was put on the market by plaintiff in which the reflector was similar to that of "No. 2", but was so arranged that it could be adjusted up and down on a vertical rod, and at the top of this rod was a glass knob adapted to be used as a handle for moving the device from place to place in a room. This device is represented by plaintiff's trade name "No. 3", and one of the devices is in evidence as "Defendant's Exhibit D". It likewise was abandoned (Rec. 98).

Thus we see that plaintiff made three distinct efforts to produce a successful device, designated as No. 1, No. 2 and No. 3, and they all proved ineffective and were abandoned.

The next effort of plaintiff is represented by a series of devices known by the plaintiff's trade names "1b", "2b", and "3b". They all had a small bell-shaped nickel reflector, differing radically from the reflectors of No. 1, No. 2, and No. 3 and roughly resembling a bell (Rec. 98-9). They were gotten up with the idea of being improvements in appearance upon the dish-shaped reflector devices which had preceded it and had been abandoned.

The device "1b" was of the pendant type, adapted to be suspended from a fixed point. The device "2b" corresponded to the original No. 2, except for the change in the shape of the reflector, while "3b" was the same as "2b" except for the addition of a second element. In other words, "1b" was to take the place of No. 1, "2b" was to take the place of No. 2, and "3b" the place of No. 3. These heaters were put on the market in the fall of 1915, but they proved to be unsuccessful and were soon abandoned (Rec. 99).

During that time the plaintiff had also gotten up another heater resembling in appearance an oil stove, but that also was abandoned. It cuts no figure in this case, except to show another of the numerous unsuccessful experiments of plaintiff put forth in search for a successful heater.

The next heaters put on the market by plaintiff were known by their trade names "No. 4", "No. 5" and "No. 6"; but they were of the box type form, and cut no figure in this case either one way or another. They show the general appearance of a fire place or grate, somewhat similar to the old style gas heaters with asbestos backing (Rec. 99).

At this stage of the game the heater covered by the patent in suit was devised. The exact date of the invention is not given in the evidence, but it does appear that as early as April 4, 1916 (Rec. 40), plaintiff made and produced a sample of this heater and gave to it the name "No. 7", by which name it will be hereafter referred to. The exemplar of the device in evidence is marked "Plaintiff's Exhibit No. 2" (Rec. 40). It proved to be a success from the start, and thereupon all the prior heaters were permanently abandoned, and No. 7 proved to be the successful device for which Brown had been striving since 1914. It was the culmination of his experiments (Rec. 99-100). In this connection Brown says at pages 99-100 of the record:

"Our object in getting out so many styles of these heaters 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 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 today, but that is a different type of heater. After our No. 7 came on the market we did not put out any other style or change the design."



With this sample heater of April 4, 1916, in hand, Brown went East in that month for the purpose of securing bids for its manufacture on a large scale (Rec. 40). He visited persons in Canada, New York, and Philadelphia, showed the sample heater to them, and got quotations on the manufacturing cost (Id). He was absent on this trip several months and returned to San Francisco in August, 1916 (Rec. 41). At that time he concluded to manufacture in San Francisco and immediately entered into a contract with the Boesch Lamp Company for the manufacture of the heater in quantities (Rec. 41). Dies, patterns, and other paraphernalia were prepared by the Boesch Lamp Company on a large scale and the manufacture of the No. 7 heater was begun in the fall of 1916 (Hiller, pp. 56-7, Record).

The first sale was made in October, 1916, to Holbrook, Merrill & Stetson and Harper & Reynolds at Los Angeles, totalling 500—250 to each of these firms (Rec. 40). The heater gave instant satisfaction (Id.). During the remainder of the year 1916 (about two months) plaintiff sold from 7000 to 8000 of the heaters, sending them throughout the entire United States (Rec. 41). The demand increased, and during the years 1917, 1918, 1919, and up to August, 1920 (the time of this trial), plaintiff sold from 350,000 to 400,000 (Rec. 42). The selling price at first was \$7.50 each, but at the time of the trial had increased to \$11.00.

A factory for their manufacture was started at Philadelphia to supply the eastern demand (Rec. 41), and an office was opened in Kansas City (Rec. 42) to

accommodate the middle-west territory, the parent factory being at San Francisco. From its inception in 1916, the business has increased with "leaps and bounds" (Rec. 100) until now it has reached enormous proportions, and what was once an infant industry is now a large and successful business extending not only throughout every part of the United States, but into China, Japan, New Zealand, Australia, Spain, France, Great Britain, Italy, Denmark and the South American countries (Rec. 42).

It is pertinent at this point to remark that the various forms of heaters attempted to be marketed by the plaintiff prior to the advent of No. 7 were experimental being put on the market in an effort to ascertain what was most satisfactory, and they were all abandoned as unsuccessful experiments immediately upon the advent of the No. 7 heater in October, 1916. Since then no substantial changes have been made in the No. 7 heater, and it is in substantially the same form now as it was in October, 1916, the only addition made being a hinge in the standard for varying the angle of the heat rays. That feature is covered by a separate patent to the plaintiff.

After the success of the No. 7 heaters had been demonstrated plaintiff applied for its patent on May 28, 1917, and the same was granted on July 17, 1917, for a term of seven years (Rec. Patent Exhibit 1).

It further appears that in the summer of 1917 the Hotpoint Electric Heating Company in Southern California put upon the market an infringing heater under



the name of the "Hedlite" heater. It was a portable electric heater having a copper reflector mounted on a standard supported in a base, with an electric element in the concave of the reflector, and was provided with a wire guard or cage on the front. As soon as this heater appeared on the market, plaintiff began two actions for infringement at San Francisco, one being against the Holabird Electric Co., a dealer, and the other against the Hotpoint Co. and its dealer, Hale Brothers, Inc. These actions were begun in September and October, 1917. Trials were had in June, 1919, and verdicts rendered in favor of the plaintiff, upon which judgments were entered. Writs of error were sued out, but before hearing in this court the controversy was compromised and licenses given (Rec. 42 and Judgment Rolls in those cases).

During the pendency of that litigation the Hotpoint Electric Company sold out to the Edison Electric Appliance Co., which said company assumed defense of the cases, and a compromise was effected whereby the litigation was terminated.

During the interim other companies began to sell what we claim to be infringements, and among them was the Westinghouse Electric & Mfg. Co., the defendant herein. This company put its heater on the market sometime during 1918 or 1919, and in July of 1919 formal infringement notice was sent to them (Rec. 44-5). The notice being disregarded, the present suit was commenced on November 1, 1919. Trial was had in August, 1920, resulting in a decree of dismissal. From that decree this appeal is prosecuted.

**Plaintiff's Patented Device.**

This heater, known by the trade-name "No. 7", comprises a substantial circular base usually colored a dark brown, a vertical standard mounted in the center of the base, a highly polished, concave, copper reflector mounted at the apex of the standard, an electric element mounted within the concave of the reflector transversely of its axis, a flat annular flange extending around the outer edge of the reflector, a wire guard or cage arched over the front of the reflector, and a handle at the back of the device for removal from place to place in a room. In addition to the above features there is a supplemental back attached to the rear of the reflector, providing a dead air space, but this feature is of no importance in the present case as it neither adds to nor detracts from the appearance of the device. In fact it is concealed from view.

This assemblage of elements into a unitary structure produces an article having a graceful and pleasing appearance, imparting at the same time an impression of harmony, symmetry, and beauty. In fine, it is a highly ornamental piece of furniture for the drawing room, bed room, or dining room. When lit up by the electric current, the copper bowl resembles a ball of fire. It arrests attention immediately as being ornamental as well as useful. That it is proper subject matter for a design patent cannot be denied, for it is a "new, original, and ornamental design for an article of manufacture" (R. S. 4929).

That it required the exercise of the inventive faculty for its production cannot be denied. The prior unsuc-

cessful and abandoned experiments made by plaintiff with the small nickel reflectors of other shapes, forms, contours, and appearance, together with the instantaneous and wide-spread success of the patented device when put on the market, and the fact that other large manufacturers took advantage of this and placed similar devices on the market are persuasive evidences of invention. Indeed, these facts were so potent that the learned judge of the lower court did not rule that the patent was invalid, but based his decision on the conclusion that it was not infringed by the defendant's structure.

The opinion of the lower court says:

“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.”

We start, therefore, with the premise that this patent is valid, and the sole inquiry is the question of infringement.

#### **Defendant's Device.**

The defendant's structure is a portable electric heater intended for identically the same purpose as the plaintiff's. It has a substantial circular base of dark color, in the center of which is mounted an upright standard. This standard, however, is forked at its apex so as to produce a trunnion joint, whereby the reflector can be tilted at different angles. This joint, however, is concealed from view when one stands in front of the device, so that the general appearance of the article from the front is in no wise affected there-

by. It also contains a highly polished concave copper reflector having a turned over edge or round flange around the outer edge, and an electric heating unit arranged within the bowl of the reflector, but longitudinally instead of transversely, a wire cage or guard arched over the face of the reflector, and a handle at the back of the reflector for moving it from place to place. It is illustrated by plaintiff's Exhibit No. 5.

It will be seen from the foregoing description that practically the only differences from plaintiff's device are (1) the arrangement of the heating element longitudinally instead of transversely, (2) the substitution of a turned over or round flange for the flat flange around the edge of the reflector.

We submit that these two modifications do not so alter the appearance as to prevent the article from having substantial similarity to that of the plaintiff. That is the question for decision.

Before proceeding further with the question of infringement, it may not be out of place to refer generally to the test of infringement applicable to a design patent.

#### **Rule of Law for Testing Infringement of a Design Patent.**

We need go no further than to refer to the leading case of *Gorham v. White*, 14 Wall. 511, where the court says at the bottom of page 526 et seq.:

“We are now prepared to inquire what is the true test of identity in design. Plainly it must be *sameness of appearance*, and mere differences of lines in the drawing or sketch, a greater or smaller number of lines, or slight vari-

ances in configuration, if insufficient to change the effect upon the eye, will not destroy the substantial identity. An engraving which has many lines may present to the eye the same picture, and to the mind the same idea or conception as another with much fewer lines. The design, however, would be the same. So a pattern for a carpet, or a print may be made up of wreaths of flowers arranged in a particular manner. Another carpet may have similar wreaths arranged in a like manner, so that none but very acute observers could detect a difference. Yet in the wreaths upon one there may be fewer flowers and the wreaths may be placed at wider distances from each other. Surely in such a case the designs are alike. The same conception was in the mind of the designer, and to that conception he gave expression.

“If, then, identity of appearance, or, as expressed in *McCrea v. Holdsworth*, *sameness of effect upon the eye*, is the main test of substantial identity of design, the only remaining question upon this part of the case is, whether it is essential that the appearance should be the same to the eye of an expert. The court below was of the opinion that the test of a patent for a design is not the eye of an ordinary observer. The learned judge thought there could be no infringement unless there was ‘substantial identity’ ‘in view of the observation of a person versed in designs in the particular trade in question; of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side.’ There must, he thought, be a comparison of the features which make up the two designs. With this we cannot concur; such a test would destroy all the protection which the Act of Congress intended to give. There could never be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like, that an expert could not distinguish them. No counterfeit bank note is so identical in appearance with the true that an experienced artist cannot discern a difference. It is said that an engraver distinguishes impressions made by the same plate. Experts, therefore, are not the persons to be de-

ceived. Much less than that which would be substantial identity in their eyes would be undistinguishable in the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. It is persons of the latter class who are the principal purchasers of the articles to which designs have given novel appearances, and if they are misled, and induced to purchase what is not the article they supposed it to be, \* \* \* the patentees are injured, and that advantage of a market which the patent was granted to secure is destroyed. The purpose of the law must be effected if possible; but plainly it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement.

“We hold, therefore, *that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.*” (Italics ours.)

This rule was applied by this court in the case of *Grelle v. City of Eugene*, 221 Fed. 68, where the court, at page 71, says:

“The leading case upon the subject of design patents is *Gorham v. White*, 14 Wall. 511. \* \* \* The rule was there laid down that the true test of identity of design was the sameness of appearance; that mere difference of outline in the drawing or sketch, a greater or smaller number of lines, or slight variations in configuration, if insufficient to change the effect upon the eye, will not destroy the substantial identity. That an engraving which has many lines may present to the eye the same picture, and to the mind the same idea or conception, as another with much fewer lines. That it is not essential to identity of design



that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other—the one first patented is infringed by the other. This rule has been uniformly followed in cases involving design patents.”

And this court then cites ten cases as authorities. We may add that since that decision, which was in February, 1915, many more cases to the same effect have been decided, one of the latest being *Geo. Borgfeldt & Co. v. Weiss*, 265 Fed. R. 268 (decided March 19, 1920).

This rule is plain and simple. It cannot be misunderstood or misinterpreted. It holds that *substantial similarity in appearance to the eye of an ordinary observer is all that is necessary to establish infringement*. It is not necessary that the thing patented should be copied in every particular. If the offending article has the same general appearance to the eye of an ordinary observer, and to such person appears to be substantially similar to the patented design, that is enough. If the resemblance is such as to deceive the purchaser and induce him to buy the article under the impression that he was buying the patented article, there is infringement. To put it in slightly different language, the true test is *substantial sameness of appearance to the eye of an ordinary observer, bringing to the examination of the article that degree of observation which men of ordinary intelligence usually give*.

It is no test to place the two articles side by side and note the differences. Such a test would be too severe on the validity of the patent. The true way is to take an ordinary person who was already familiar with the patented design and who had never seen the alleged infringing structure, and ascertain what impression would be made on his mind upon first seeing the infringing device in the absence of the patented device. In other words, having in mind the appearance of the patented device, would such a person upon seeing for the first time the infringing device in the absence of the patented device conclude that it was the patented device?

“Although two designs are easily distinguishable when placed side by side, if they are so nearly alike that an ordinary purchaser, giving such attention as is usually given, would be deceived, infringement is established.” *Symons on Pats. for Designs*, p. 63, citing *Friedberger v. Chapin*, 151 Fed. R. 264.

“This decision<sup>4</sup> is important in that it points out that the test of infringement is not properly made by placing the patented and alleged infringing device side by side; such a test is too severe on the validity of the patent.” *Symons on Pats. for Design*, p. 68 (bottom).

In *Graff v. Webster*, 195 Fed. 522, Judge Coxe said:

“Having seen the complainant’s design in a show case or shop window, the ordinary buyer would be very likely to mistake the defendants’ design for it, if seen in similar environment. This is the real test of infringement of design patents. If the ordinary buyer, having seen one of complainant’s dishes and wishing to procure one like it, would be induced to buy one of the defendants’ dishes in-

(4) Referring to *Perry v. Starratt*, 3 Bann & Ard 489; s. c. 19 Fed. Cas. 295.



stead, it is enough. That he would be so deceived is plain, not only from the testimony that persons were actually deceived, but also from an examination of the dishes themselves. Their general appearance is so similar that a minute and careful inspection is required to distinguish the differences.’’

This rule is repeated and affirmed by the Court of Appeals of the Second Circuit in the case of *George Borgfeldt & Co. v. Weiss*, 265 Fed. 268, decided March 19, 1920, and reported August, 1920. That case involved a design for a new doll invented by Miss Pfeffer of San Jose, and known to the public generally as “Splashme” dolls. A cut of the design appears at page 269 of the report, which shows a doll having a certain posture, with a bathing cap on its head provided with a flaring bow, and the feet of the doll are bare. A picture of the defendant’s doll is shown at page 270 of the report. It has no cap of any kind; the hair on its head is painted; the posture of the arms and legs are slightly varied, and it has painted slippers on its feet. It was called by the trade-name “Duckme”. The lower court thought that these differences obviated infringement; but the Court of Appeals thought differently and held that notwithstanding these differences the general appearance of the doll as a whole was so similar to that of the plaintiff as to constitute infringement. In other words, a person familiar with plaintiff’s doll and desiring to purchase another, if shown the defendant’s doll, would conclude that it was the plaintiff’s doll, notwithstanding the absence of the cap, the presence of the painted hair on the head and painted slippers on the feet. He would remember the

general appearance and posture of the doll, but he might not remember the presence of the cap on the head or the absence of the slippers on the feet. The general appearance as a whole would be the thing fixed in his memory. We think this decision is absolutely conclusive of the case at bar.

### **Question of Infringement.**

The sole question to be determined by this court is that of infringement. Does the Westinghouse heater, as represented by plaintiff's Exhibit 5, so closely resemble the plaintiff's patented design in appearance as to deceive a person of ordinary intelligence and induce him to think that the Westinghouse heater is a Brown patented heater? Or, to put it in a little different language, is the similarity of appearance between the heaters such that a Westinghouse heater can be passed off as and for a Brown heater upon an ordinary purchaser? This is a question of fact and must be answered by the testimony contained in the record.

#### **1. In the first place, the evidence of ones own sense of sight is sufficient to show infringement.**

At the time that Brown's No. 7 was put on the market there was no other electric portable heater on the market of such distinctive appearance as to be confused therewith. The Westinghouse Company had attempted to market a device known as the Cozy Glow heater, represented by their Geiger patent No. 1,194,168 and the model Exhibit M. But the appearance of that heater is so radically different from ours that it may be dismissed from consideration.

The small nickel-plated devices attempted to be marketed by the Majestic Company prior to No. 7 are so clearly distinguishable in appearance from No. 7 as to be ineffective for any purpose of the appellee.

In fine, heater No. 7 has a distinctive and characteristic appearance different from anything which preceded it, and it immediately became known as the product of the Majestic Electric Development Company. This must be true because the Majestic Company alone dealt in the article, and there was no other article on the market so nearly resembling it as to be taken therefor. It became identified in the mind of the public with the Majestic Company, so that whenever any person saw exposed for sale a portable electric heater having the elements of No. 7, with a polished copper reflector glowing like a ball of fire, such person would immediately conclude that it was a Majestic heater No. 7.

In this connection it is to be noted that the purchasers of such articles are those of ordinary intelligence, house-wives, servants, clerks, messenger boys, and persons in the ordinary branches of trade, having but little if any knowledge of electrical laws. If such person, knowing that the copper bowl reflector, mounted on a portable stand and having an arched wire guard in front, was the product of the Majestic Company, because that was the only company having such an article on the market at all, should happen to see in a display window of a store for the first time a Westinghouse heater, he would in all probability conclude that the same was a Majestic heater No. 7. The dominant

outstanding characteristics of the Majestic heater No. 7 are so striking and attractive that the result above indicated would probably follow. This is particularly true when the heater is lit up, as is frequently the case when it is on display in the shops.<sup>5</sup>

We ask your honors to place yourselves in this position—supposing that you were well acquainted with the Majestic heater, but with no other heater of the same type, and should see for the first time a Westinghouse heater displayed in a store window, would you not instantly suppose that it was a Majestic heater No. 7? Is not the general similarity in appearance sufficient to induce that conclusion? Undoubtedly if you were to place the two heaters side by side and make a critical comparison thereof, you would note differences, but that is not the proper test. The proper test is, assuming acquaintance with the patented design but not with the alleged infringing device, would an ordinary casual examination of the alleged infringing device in and by itself, in the absence of the patented design, be sufficient to induce an ordinary person to believe that it was the patented device and induce him to take it for the patented device? That is the fundamental question for this court to decide.

**2. But the fact evidence in this case appears to us conclusive.**

MRS. HENRY LABATT, who may be taken as a person of ordinary intelligence, was called as a witness for the

(5) It has been held that, in the case of lamp shades, it is proper to consider their appearance when lighted up as in actual use. *Macbeth v. Rosenbaum*, 199 Fed. R. 154.

plaintiff (Rec. 49-56). She was a housewife, residing in San Francisco, and for a long time had been familiar with the Majestic No. 7 heater but had not seen a Westinghouse. Accompanied by a friend she was walking along Sutter Street and saw a heater, which afterwards proved to be a Westinghouse, displayed in front of a store (The Liberty Electric Co.).

When she first looked at it she took it for a Majestic heater and passed on. After going a few steps she went back to the window and made a closer examination. She still thought it was a Majestic heater, but by a close examination she discovered the name "Westinghouse". When she saw that the heating element was arranged lengthwise instead of crosswise, she merely thought to herself that Mr. Brown had changed the position of the element. She did not for a moment suppose that the heater was made by someone else, and it was not until by a close examination she found the name of the Westinghouse Electric Mfg. Co. that she concluded that the heater was not made by the Majestic Company.

The point to be observed here is that the change in the position of the heater element from crosswise to lengthwise did not prevent the witness from being deceived, and she drew the conclusion most naturally to be drawn therefrom, to wit, that the heater was the Majestic heater, but for some reason or other it was thought advisable to change the position of the element. She said:

"Well, I just thought that 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 of the heater. That is what impressed me as I passed by the stove.” (Rec. 55.)

Again she says at page 51:

“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 Majestie heater. I was convinced until I saw the name that it was a Majestie heater.”

Again at page 52:

“I took a good look at the heater, and still thought, until I saw the name, that it was Mr. Brown’s heater.”

And at page 53:

“And the model of the stove is so similar to the Majestie, the whole structure of the stove is so much like the Majestie.”

We think this testimony is conclusive, because it shows a case of actual deception of a person of ordinary intelligence. Mrs. Labatt’s testimony appears between pages 49 and 56 of the Record, and we ask that it be read in its entirety.

But this was not all. The witness J. R. HILLER likewise gave testimony substantiating our contention (Rec. 56-63). He was the manager of the Boesch Lamp Co., manufacturer of plaintiff’s heaters and was thoroughly familiar with the Brown heater, having manufactured them by the thousands. At page 57 of the Record he says:

“I have seen the Westinghouse heater such as is shown by Exhibit 5, with the Westinghouse name and trade mark 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.”



Continuing his testimony he says that he had never seen one of these Westinghouse heaters until he went into a store on Mission Street operated by MR. WENTWORTH, who stated that he had just bought one of them (meaning the Majestic) and it was upstairs (Rec. 59):

“\* \* \* and he mentioned that he just purchased a heater, one of our heaters” (Rec. 61).

Thereafter the two men went upstairs where the heater was, and Mr. Hiller saw that it was not a Majestic, but a Westinghouse, and that was the first time Hiller had ever seen a Westinghouse heater, and he says (Rec. 59):

“what passed through my mind at the time was that it was a new imitation of the heater we were putting out”.

On cross-examination he said that Wentworth told him that “he had one of our heaters” (Rec. 60), and on page 62 of the Record we find the following testimony by Mr. Hiller:

“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 those 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 had no right to question him about it and I did not.

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.”

From this it is apparent that Wentworth had been deceived into buying a Westinghouse heater as and for a Majestic heater.

Subsequently Wentworth was called as a witness by the defendant and substantially confirmed the fact of his deception. His testimony will be found between pages 93 and 97 of the Record. It appears therefrom that he had been using three Majestic heaters No. 7 for quite a time, and having occasion to use another one, he gave orders to a clerk to go out and purchase another heater. The clerk did so and brought back a heater and set it up in Mr. Wentworth's office. He (Wentworth) did not examine it closely and had been using the heater for a month or something like that, evidently under the impression that it was a Majestic heater, when Mr. Hiller called on him, as testified to by Hiller, and he learned for the first time that this fourth heater was not a Majestic, but a Westinghouse. At page 95, after saying he had sent a clerk to buy another heater, he says:

“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<sup>6</sup> was brought up. \* \* \* When the talk<sup>6</sup> came up, it was called to my attention that it was not a Majestic heater such as was manufactured by the party.”<sup>7</sup>

And at page 96:

“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

(6) The talk referred to was the conversation with Hiller.

(7) The party referred to was Hiller.



five or six months ago. I cannot tell exactly. At that time I had been using the heater probably a month or something like that."

We think this testimony is convincing. Here was a man of more than ordinary intelligence, a dealer in electrical devices, who was familiar with the Majestic heater but not the Westinghouse. He was using three Majestic heaters, and wanted another one, and sent out a messenger who purchased what he (Wentworth) supposed was another Majestic heater, but which in fact was a Westinghouse. He used that Westinghouse heater for over a month, and when Mr. Hiller called on him he remarked in casual conversation that he had just bought "one of your heaters", referring to the recently purchased Westinghouse heater. This shows that Wentworth had been using the Westinghouse heater for a month or more under the impression that it was a Majestic heater.

Mr. Hiller also stated that several times damaged Westinghouse heaters were brought into his place of business for repair, and that evidently the people who brought them thought that they had been manufactured by the Boesch Lamp Company, the manufacturer of the Majestic (Rec. 59-60). While this is not direct, it is indirect evidence that the people who had purchased the Westinghouse heaters thought they were purchasing Majestic heaters. But in any event it shows confusion in the market caused by the Westinghouse heater.

Mr. Hiller also stated that on one occasion at Sacramento, where he had gone to take estimates for work

of some kind at an aeroplane factory, the manager, Mr. Jordan, brought out a couple of heaters which were damaged, and asked Mr. Hiller if he could fix them up, saying,

“Maybe you can fix up those two heaters of yours in there for me” (Rec. 58).

After examining the heaters Hiller told Jordan that they were not Majestic heaters, and Mr. Jordan seemed somewhat astonished and said,

“It looks very much like it” (Rec. 58).

It is true that these two heaters were not Westinghouse heaters. They were Hotpoint heaters; but the Hotpoint heaters had substantially the same general appearance as the Westinghouse heater in that they utilized a copper bowl reflector having a rounded flange instead of a flat flange. They are the heaters which were held to be an infringement of the Majestic heaters in the case of *Majestic Electric Development Company v. Holabird Electrical Company*.

We think that the testimony of Labatt, Hiller and Wentworth is convincing to the effect that the Westinghouse heater so nearly resembles the Majestic heater No. 7 in appearance that it not only can be, but has actually been, taken and passed off as and for the Majestic heater No. 7. That is the test of infringement. There was no evidence to contradict these three witnesses. It stands unchallenged. *We submit that cases must be decided upon the evidence submitted and that the decision in this case is directly contrary to the evidence. The lower court simply ignored this evidence.*

### 3. The prior litigation also sustains our contention.

The first infringing device to appear on the market was that of the Hotpoint Electric Manufacturing Company, and plaintiff promptly brought suit against the Holabird Electrical Company, the district agent of the Hotpoint at San Francisco, for infringement. The device therein involved is represented by Plaintiff's Exhibit 3. It will be seen therefrom that it has a copper bowl reflector and a rounded flange instead of a flat flange around the edge. It is smaller in size than the Westinghouse, but very much resembles the Westinghouse in appearance. If the Hotpoint device is an infringement, then the Westinghouse device is likewise an infringement. The Holabird case was tried before a jury of twelve men. They were men of ordinary intelligence, and they held that infringement had been made out. The judge who presided at the trial (Judge Trippet) declined to set aside the verdict, thereby holding, at least inferentially, that the verdict of the jury was correct. There we have the deliberate views of thirteen men [a jury of twelve and the presiding judge], deciding that in their opinion the Hotpoint copper bowl reflector having a round instead of a flat flange, is an infringement. While this decision cannot be claimed as *res adjudicata*, nevertheless it should have been followed on the doctrine of *stare decisis*.

As the matter now stands, one company (the Hotpoint) marketing in the Northern District of California, a heater having a copper bowl with a round instead of a flat flange is an infringer, while another company

(the Westinghouse), manufacturing in the same district substantially the same kind of a device is not an infringer. In other words, there is one rule of law for Hotpoint and a different rule of law for Westinghouse. And this too in the same district, to wit, the Northern District of California. Is it possible that the law on a certain subject can be one thing for one person and a different thing for another person at the same time and in the same jurisdiction?

In view of this situation and of the additional fact that there was evidence of actual deception from three witnesses, we think that the proper administration of justice would have been to decree infringement and leave to this court the ultimate decision on that question.

In view of the apparent simplicity of the case, according to our opinion, it will be instructive to ascertain the precise ground on which the case was decided. Therefore, we invite the court's attention to

#### **A Review of the Lower Court's Decision.**

The case was tried in conjunction with a case between the same parties on Brown's mechanical patent, No. 1,245,084, of October 30, 1917, and Brown's separate and second design patent, No. 51,253, of September 11, 1917, not involved on this appeal. As stated by the court, these cases were tried consecutively, the first being the present case. The opinion is an omnibus one dealing with all three of said specified patents. The first part of it is devoted to the mechanical patent, and the latter part to the two design patents conjointly. That portion referring to the second design patent (No.

51,253) is not material in the present case and will be discussed in a separate appeal which we have taken from the decision involving this second design patent, the said case being No. 3618 of this court. A copy of that portion of the decision relating to the design patent in suit, is hereto annexed as an appendix for the purpose of convenient reference. We have pursued this course because the second design patent (No. 51,253) was held by the lower court to be invalid, and therefore must be treated differently from the patent in suit, whereas the patent in suit (No. 51,043) was, inferentially at least, held to be valid but not infringed.

#### **Remarks on Extent of Design Patents.**

In the first part of the decision, it is said:

“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.”

There is a fundamental error contained in this quotation, showing that the learned judge had misconceived the scope of the patent. It is not correct to say that this patented design does not extend to the supporting standard or pedestal and relates solely to the reflector and the protective devices viewed in connection with the heater element. *It extends to the entire assemblage of elements producing a distinctive appearance as a whole.* One cannot segregate from that assemblage the pedestal or standard or arched wire guard, or any other

part and say that they are no part of the combination and that the claim must be limited solely to the residue or remaining parts. The device is sold as a whole, and the entire assemblage must be viewed together as such in ascertaining the impression imparted to the eye thereby. It is the entire assemblage of elements, not a limited part thereof, which produces the impression.

When one looks at the heater, a complete picture thereof in its entirety is reflected on the retina of the eye as upon a mirror, and that picture, through the optic nerve, produces the impression on the mind. Manifestly it is impossible to blot out any portion of the picture. One standing in front of a mirror sees his entire image in the glass. He cannot disregard a half of the image and say he sees only the remaining half.

In *Jammes v. Carr-Lowry Glass Co.*, 132 Fed. 828, which involved a design patent for a bottle, the court said:

“The *whole* is so connected as to form one design for an ornamental bottle as a bottle, and this is what the design is for. This court is of the opinion that it was not necessary to commingle the fluted neck with the ornamental base. They are connected and go together *as one whole*, and neither would be complete without the other. To commingle the fluted neck or its lines with the ornamental base would destroy the effect and beauty of the whole. In a design for a bottle, each part has its appropriate place and location, and in this case the general effect upon the eye of *the whole* is to be considered, and as all the parts are so connected as to form *one whole*, it is sufficient.” (Italics ours.)

In the case of *Boldt v. Turner*, 199 Fed. 142, which also covered a design for a bottle, the court said:



“Undoubtedly appellant is entitled to have its bottle considered as a whole—a unitary body. Whether or not the device of a design patent satisfies the requirements of the statute is a matter to be determined from the impression it makes upon the mind through the eye.”

In *Graff v. Webster*, 195 Fed. 522, the court said:

“It is the design *as a whole*, and not the segregated scrolls, leaves, flowers and forms which are united to produce the general effect which must be considered. The situation in this respect is analogous to machines made up of a combination of old elements. The machine produces a new result, the design a new impression upon the eye. To refuse patentability to a design because the separate elements are old, would be tantamount to denying originality to ‘The Lion of Lucerne’, because other sculptors before Thorwaldson had carved lions from stone. It would relegate ‘The Angelus’ to obscurity because other artists before Millet had painted peasants at work in the harvest field.” (Italics ours.)

In *Pelouze Scale & Mfg. Co. v. American Cutlery Co.*, 102 Fed. Rep. 916, it is said:

“Design, in view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration and the like, *taken as a whole*, makes an impression through the eye upon the mind of the observer. The essence of a design resides not in the elements individually, nor in their method of arrangement, but in their *tout ensemble*, in that indefinable *whole* that awakens some sensation in the observer’s mind.” (Italics ours.)

And this court in *Grelle v. City of Eugene*, followed the same rule and held that it was sameness of appearance to the eye which determined the identity of designs.

This rule clearly refers to the sameness of appearance of the article to which the design is applied as

a whole. It does not refer to sameness of appearance of a part of the article or to a portion of the individual elements forming the combination. It seems clear, therefore, that the learned judge of the lower court was in error in eliminating from consideration the supporting standard or pedestal or arched wire guard or any other part or element of the patented design and limiting his consideration to a comparison of defendant's reflector with the plaintiff's reflector. We insist that in ascertaining whether defendant's structure has the same appearance as that of plaintiff we must look to the structure as a whole, as an assemblage of elements constituting a whole, and cannot segregate or omit any one or more of the elements of the combination and confine our attention to what is left. The learned judge of the lower court dismissed from consideration all parts or elements of the plaintiff's assemblage save and except the reflector in connection with the attendant heater element, and then deduced the conclusion that the defendant's reflector with a longitudinal arrangement of heater element presented a different appearance from the plaintiff's reflector with a transversely arranged heater element. He should have compared the defendant's heater as a whole, including all of its various elements, with the plaintiff's heater as a whole and all of its elements, and then inquired whether the impression conveyed to the mind of an ordinary observer was substantially the same in both cases, whether one device could be taken for or passed off as the other. And in that connection he would naturally inquire whether a heater with the longitudinal arrangement of elements would produce a



different impression on the eye from a heater with the transverse element. We have already seen from the testimony of three witnesses that the impression would be the same and that persons were actually deceived.

#### **Distinguishing Features.**

The learned judge then goes on to specify what he styles "important distinguishing features" of the two devices, which are as follows:

(1) The flat flange around the edge of the plaintiff's reflector is said to be different from the round flange of the defendant's reflector and these devices are said to be "wholly dissimilar" as affects appearance.

(2) So likewise, he contends, is the longitudinal arrangement of the heater element in one and the transverse arrangement in the other.

(3) The casings of both the plaintiff and the defendant, it is asserted, "are entirely devoid of purely ornamental features, either of form or drapery", and are "nude utilities".

(4) Unless the plaintiff's patent is limited to the precise form illustrated in the drawings, meaning the broad flat flange and the transverse arrangement of element, it is said to be anticipated or devoid of invention.

We shall consider these four points briefly.

#### **Flat Flange v. Round Flange.**

As to the first of these distinctions, the flat flange around the reflector, we insist that it is not such "a conspicuous differentiating feature" of the plaintiff's

design as to negative infringement by a device having the round flange of the defendant. The crucial question here is whether the substitution of the round flange for the flat flange produces such difference of appearance in the whole article as to justify a person of ordinary intelligence, when looking at it for the first time, to conclude that it is not the plaintiff's design. We submit that this question must be answered in the negative, and in support of that we point to the fact that the evidence shows that it did not have that effect in ordinary practice. Mrs. Labatt was deceived. Mr. Wentworth likewise was deceived. Mr. Hiller testifies that frequently owners of Westinghouse heaters having the round flange brought them to him for repair thinking that they were the Majestic heaters.

And still further, a jury and a judge in the case against the Holabird Electrical Company decided that the Hotpoint device, which had a round flange substantially similar to that of Westinghouse, produced the same impression on the eye of an ordinary observer as the flat flange device of the plaintiff and was therefore an infringement.

If the evidence in the case is to govern, then it must be held that the difference in the form of the flange is not such "a conspicuous differentiating feature", as will prevent deception.

#### **Arrangement of Heater Element.**

As to the second contention that the longitudinal arrangement of the heater element is so different from the transverse arrangement as to produce a "wholly

dissimilar appearance" in the article itself, the same remarks apply as in the case of the flat flange. People were actually deceived, as a matter of fact, by Westinghouse heaters containing the longitudinal arrangement. Mrs. Labatt says that she was deceived notwithstanding the different arrangement, and even when she noted the different arrangement the conclusion which she arrived at was that the Westinghouse heater, which she saw for the first time, was a Brown heater, but that Mr. Brown had changed the arrangement of the element. She was not undeceived until by a critical examination she discovered the name Westinghouse on the heater as the manufacturer. We cannot conceive how there could be any stronger evidence than this.

And apparently Mr. Wentworth was deceived every day for over a month into thinking that a Westinghouse heater with the longitudinal arrangement of the element was a Majestic heater, and he was an electrical man engaged in selling electric motors. Of course, if he had placed the two heaters side by side and critically examined them, he, being an electrical dealer, would have detected differences and would also have found the name of the Westinghouse Company on the Westinghouse heater as the manufacturer; but, as we have already stated, that would not have been a correct test. There is no denial of the Wentworth episode, and it stands as a fact proven in the case.

On this point a most singular error is found in the opinion of the learned judge, where he says that during the trial, whenever it became necessary for him to quickly identify the defendant's design, his eye involun-

tarily sought the heater element as the most distinguishing mark. This, we think, proves our contention. For several days he had been critically examining the two heaters, and he had thereby learned the fact that in the plaintiff's the element was arranged transversely and in the defendant's longitudinally. *With this fact firmly fixed in his mind*, he would naturally distinguish the rival heaters by the arrangement of the elements, because that was the shortest and most convenient way of doing it. If one of the heaters had been provided with a red ribbon and the other with a blue ribbon his argument would have been no stronger. Apparently there seems to have been nothing else in his mind to distinguish the heaters, which at least shows that in his opinion the heaters were similar in appearance except for the arrangement of the element. Of course, if a person were told that plaintiff's heater is characterized by a transverse arrangement of element, and the defendant's heater by a longitudinal arrangement, and that fact became firmly fixed in his mind, he naturally would distinguish the heaters accordingly. The same result would follow if the heaters were distinguished by red and blue ribbons. But take the case of a person who was familiar with plaintiff's transverse arrangement of heater element and had never seen or heard of the Westinghouse heater with its longitudinal arrangement, and should for the first time see such a heater in the absence of the plaintiff's heater, would the Westinghouse heater with its longitudinal arrangement of element convey to his mind a distinctly different appearance from what he recollected was the appearance

of the plaintiff's heater? We answer the question in the negative. Such person may not have remembered the exact arrangement of the element in plaintiff's heater. He would remember, however, that there was a heater element there arranged in some way which produced the glow, and it would be immaterial to him whether it was arranged transversely or longitudinally. Both arrangements produce identically the same effect and there was nothing distinctively characteristic in the transverse arrangement which would carry a permanent picture thereof in his mind as distinguishable from a longitudinal arrangement. When he saw the Westinghouse heater for the first time he would see a heater producing by means of an element in a reflector the same effect as the Brown heater, and not having the Brown heater before him, but relying only on his recollection of it, he would naturally conclude that the heater he was looking at was a Brown heater, because the Brown heater was characterized by an element producing a glow. It was *the glowing element itself* which attracted attention, not the *angle of inclination* of such element. If by chance he should remember distinctly that in the Brown heater the element was arranged transversely, whereas in the heater he was examining the element was arranged longitudinally, while all the remaining parts of the heater were the same, then the natural conclusion would be that Mr. Brown had changed the inclination of his element, *and that was exactly what happened to Mrs. Labatt*. She saw the Westinghouse heater with the longitudinal element and concluded immediately, from her recollection



of the appearance of the Brown heater, that it was a Brown heater and that Mr. Brown had merely varied the inclination of the element. She was deceived, and it was not until she made a critical examination of the implement and found the name of the Westinghouse Company that she concluded it was not a Brown heater. *This is undisputed evidence in the case. It must be taken at its face value.*

But furthermore, the patent is entitled "Design for an Electric Heater *Casing*", and the specification and claim so designate the invention. It would seem from this that the heater element is no part of the design, but that the design is a *casing* to be used in connection with any kind of a heater element however that element is arranged.

#### **Purely Ornamental Features.**

As to the third contention of the learned judge that the casings of both the plaintiff and defendant "are entirely devoid of purely ornamental features, either of form or drapery; they are nude utilities", and the further statement that "they are bare mechanisms, no parts or lines of which can be dispensed with or substantially altered without impairing their utility", if by this is meant that the heater is not patentable as a design, we must entirely disagree. Such a doctrine would be destructive of the whole system of design patents. An article may be devoid of purely ornamental features; it may have no drapery, and yet may be the subject matter of a design patent. It is not necessary that there should be surface ornamentation or drapery



or adornment as distinguished from nude utility to sustain a design patent. Contour, configuration, form, proportion of parts, and balancing of elements into a symmetrical whole are sufficient to sustain a design patent. Indeed, the learned judge admits that these designs are not without "comeliness", and that by reason of their "simplicity and symmetry and the glow", they may be pleasing to the eye. If so, the requirements of the law as to design patents are complied with. Such an article is entitled to protection under the law of designs.

The learned judge has misconceived the law on this subject. He seems to think that there must be surface ornamentation or adornment or drapery or artistic excellence separate and apart from what he calls "nude utilities" in order to support a design patent. This is not the law. Contour, form, configuration, simplicity and symmetry of parts may and frequently do constitute beauty, or at least esthetic excellence. It is true that surface ornamentation, adornment, drapery and purely ornamental features may be made the subject matter of a design patent, whether the articles to which they are attached be useful or not in the utilitarian sense of the term. But they are not the only patentable devices within the purview of the law. Contour, configuration, simplicity, symmetry, producing on the mind a pleasing appearance, when applied to a utilitarian article of commerce, is within the purview of the law. Thus, design patents have been granted for chairs, washers, lamp shades, bedsteads, lamps, badges, stoves, harness trimmings, saddles, spoons, casings for disin-

fecting apparatus, grass hooks, brooches, neckscarfs, bottle stoppers, sign plates, bicycle saddles, reflectors, lace trimmings, hose supporters, hat bands, monuments, inkstands and many other devices (*Boldt v. Turner*, 199 Fed. R. 142).

Such is the article now before the court. It is a highly useful article from a utilitarian point of view, and at the same time it is of graceful and comely appearance because of its simplicity and symmetry of parts which produce a pleasing effect. In fine, it is ornamental as well as useful.

#### **Narrow Construction of Patent.**

As to the last contention of the learned judge, that unless limited to the precise form illustrated in the drawings, plaintiff's design is anticipated by prior patents or devoid of invention in view of the prior art, we have merely to say that here he has applied to a design patent a rigid rule of construction applicable only to mechanical patents. No design patent undertakes to cover anything more than what is shown in the drawing. The claim itself is merely a claim for the ornamental design as shown. It is the general appearance of the article which is covered by the patent. But when we come to the matter of infringement of such a claim, the question is whether the alleged infringing article has the same general appearance or such similar appearance as to cause deception. It may be different in details; it may omit one element; or it may add another; but if the general appearance is the same, then there is infringement.

“Many designs while differing in detail may present to the ordinary observer the same appearance. Sameness of appearance is identity of design.”

*Bolte v. Knight*, 180 Fed. R. 414.

You may not, as in the case of a mechanical patent, say that the omission of one element destroys the combination and thereby avoids infringement. The omission of one element in a design may not change the general appearance. The general appearance may be the same notwithstanding such omission. Otherwise the law of design patents would be of no efficacy at all. And so likewise the addition of an element may not change the general appearance. It is the substantial sameness of appearance which determines the question of infringement.

In the case of a mechanical patent for a combination, the omission of a single element, however insignificant, breaks the combination and avoids infringement. Not so, however, in case of a design patent. This distinction has been ignored by the learned judge, and we would say that his opinion is founded on this fundamental error. He has brought to the consideration of a design patent a rigid rule of law applicable only to mechanical patents. If his decision is allowed to stand in this case, it will practically destroy the law of design patents.

We again submit that the recent case of *George Borgfeldt & Co. v. Weiss*, 265 Fed. 268, is conclusive of the case at bar. There the plaintiff's doll had a cap on its head, with a flaring bow, whereas the defendant's doll had no cap at all. The hair of the plaintiff's doll was not painted and was concealed from view by the cap,

whereas the defendant's doll had painted hair and was open to view. The posture of the arms and legs of the two dolls slightly varied. The feet of the plaintiff's doll were bare, whereas the feet of the defendant's doll were covered with painted slippers. In other words, defendant had omitted certain elements of the plaintiff's combination and had also added other elements not found in the plaintiff's combination. These differences were much greater than the differences between Brown's heater and the Westinghouse heater. As we have already seen, the only differences worthy of note are a flat flange and the transverse element in Brown, and a round flange and longitudinal element in Westinghouse. Do these differences establish a different appearance of the article as a whole? The testimony of three witnesses answers this question in the negative.

If, as decided in the Borgfeldt case, the absence of a cap on the doll's head, together with the imposition of painted hair on the head, and the presence of painted slippers on the feet were not sufficient to change, in the mind of a purchaser, his recollection of the general appearance of a doll with a cap on its head and no slippers on its feet, then it is a reasonable conclusion that a heater having a round flange and longitudinal element would not be sufficient to change, in the mind of a purchaser, his recollection of the general appearance of a heater with flat flange and transverse heater. *Any way, such is the evidence in the case.*

#### **An Additional Thought.**

Supplementing what we have just said on this point, we call attention to another thought. Design patents

in many cases relate to matters which are comparatively trivial, and sometimes to objects which have no utilitarian feature, but are intended only to give pleasure through the sense of sight. Consequently, the law looks with much greater leniency upon such patents than it does upon patents for mechanical devices, and many of the harsh rigid rules applicable to mechanical patents are not applicable to design patents. In the case of designs, it seems incongruous to speak of a thing, which is characterized merely by its looks, as being an aggregation, or the mere product of mechanical skill, or devoid of invention in view of the prior art. The object of the law is to encourage the production of trivial things which give pleasure through the sense of sight. Judge Coxe, who has probably had as wide an experience with design patents as any other judge on the bench, used the following language in the case of *Untermeyer v. Freund*, 37 Fed. 345:

“It is impossible to read the literature upon this subject without being convinced that the courts, though applying the same rules, have looked with greater leniency upon design patents than patents for other inventions. From the nature of the case it must be so. A design patent necessarily must relate to subject matter comparatively trivial. The object of the law is to encourage those who have industry and genius sufficient to originate objects which give pleasure through the sense of sight.”

And similar views were announced by Judge Butler in the case of *Smith v. Stewart*, 55 Fed. 482. We quote from the opinion as follows:

“It would be absurd to say that the designs covered by these patents, generally, exhibit the exercise of ‘inventive



genius,' as the term is commonly applied to mechanical inventions. \* \* \* Some of the rules applied to mechanical patents are wholly inapplicable to those for designs. As said by the supreme court in *Gorham v. White*: 'To speak of the invention as a combination \* \* \* or to treat it as such is to overlook its peculiarities'. Such designs generally, if not uniformly, contain nothing new except the appearance to the eye, by arrangement of previously existing material, such as lines, scrolls, flowers, leaves, birds, and the like. The combination, where several separate objects are employed, need not be, and cannot be, such as this term signifies when applied to machinery—'the parts co-acting to produce a new and useful result' in the sense there contemplated. The object sought in a design is a new effect upon the eye alone—a new appearance; and the several parts need not have any other connection than is necessary to accomplish this result. \* \* \* All the statute, as commonly interpreted, requires is the production of a new and pleasing design, which may add value to the object for which it is intended. The invention consists in the conception and production of this, however simple it may be."

We submit that the learned judge of the lower court disregarded these considerations when passing on the patent in suit. We now ask this court to apply them on this appeal. If they are applied, we feel confident that infringement must be found, and a reversal decreed accordingly.

#### **Widespread Use.**

We claim that under the decision of this court in *Morton v. Llewellyn*, 164 Fed. 693, following the rule of law established by the Supreme Court in *Krementz v. Cottle*, 148 U. S. 556, due consideration must be given to the fact of widespread and extended use of the Brown invention. The several nickel plated devices of different shapes, forms and appearance which preceded



Brown's No. 7 heater, were experimental in character and soon abandoned. But Brown's No. 7 heater immediately caught the fancy of the public and went into widespread and extensive use. During the last two months of 1916 from 7000 to 8000 of them were sold, and the demand therefor increased by "leaps and bounds" (Rec. 100). During the following years of 1917, 1918, 1919 and 1920 approximately 400,000 of them were sold (Rec. 42). These sales extended not only over the entire United States but over practically all the countries of the world (Id.), so that it may be safely said that there is no part of the civilized world which these heaters have not occupied. It must be remembered also that at the time of the advent of this heater, there was no other successful and satisfactory portable electric heater on the market, although there was a want for the same. Plaintiff had tried to fill that want by its small nickel plated heaters which proved unsuccessful. In addition thereto, the Westinghouse Co. had attempted to market what was known as the Cozy Glow heater, made under the Geiger patent, No. 1,194,168 and represented by the model "Defendant's Exhibit M". It employed a copper reflector of corrugated form resembling in shape and contour a clam shell, and two large electric light bulbs of the ordinary kind located within the circumference of the reflector. That heater likewise was a failure and has been practically abandoned. It serves a useful purpose in this case, however, as showing the desire on the part of the Westinghouse Company to place a portable electric heater on the market and their failure to obtain

the desired result. After the failure of this heater to meet the wants of the public in that line and the success of the plaintiff, the Westinghouse Company adopted its present heater in the latter part of 1918 or first part of 1919, which is charged by us to be an infringement.

Now, what we complain of in this connection, is that the learned judge of the lower court failed to give effect to those pregnant and suggestive facts. He apparently recognized that some excuse was due for failure to give them effect, and in that behalf he made several suggestions.

*In the first place, he attributes success of the heater to nichrome wire.* He says, for four or five years immediately preceding the Brown patents there had come to be an unusual and widespread interest in the matter of electrical heating, and that 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. This nichrome wire is covered by what is known as the Marsh patent. While no direct evidence was given by defendant to show the time when the validity of that patent was determined, yet by referring to the Federal Reporter we can establish the date.

The case of *Hoskins Manufacturing Co. v. General Electric Company*, 212 Fed. 422, involved said patent, and the decision of the lower court therein establishing its validity was rendered on November 10, 1913, which

is three years before the Brown heater No. 7 appeared on the market.

A reargument of that case was had and another decision affirming the first one was rendered on April 15, 1914, which was two years and six months prior to the advent of Brown's No. 7 heater.

It appears from the case of *General Electric Company v. Hoskins Manufacturing Company*, 224 Fed. 464, that the decision of the lower court on the Marsh patent was affirmed on May 20, 1915, which is one year and five months prior to the advent of Brown's heater No. 7.

It will thus appear that the learned judge of the lower court was in error when he stated that the litigation over this Marsh patent wire "was not finally concluded until about the time of the Brown patents". The nichrome wire had been in use for three years before the advent of Brown's heater No. 7, and yet no successful heater had appeared up to that time.

And still further, it appears from the testimony of Brown (Rec. 97), that other types of wire answering the same purpose as the Marsh were on the market, notably a type of wire known as the "Excello", and another as "Calido".

*The learned judge of the lower court also surmised that heaters of this type began to be put on the market in increasing numbers "doubtless by means of advertising and the arts of salesmanship". There is no evidence in the record to sustain that surmise. That the plaintiff did do extensive advertising may be admitted; but it does not follow therefrom that it was the cause*

of plaintiff's success with its No. 7 heater. No amount of advertising can make an article successful unless the article itself is one which commands success. Plaintiff had extensively advertised its small nickel plated heaters, as evidenced by its exhibit at the Panama Pacific Exposition in 1915, yet they proved a failure because they were not efficient in use or attractive in appearance. The public refused to take them, and they were supplanted by the No. 7 heater, which has retained its popularity all over the world up to the present day. Therefore, we assert that the surmise of the learned judge, and it is a mere surmise unsupported by evidence, that "advertising and the arts of salesmanship" may be accepted as an explanation of the success of the Brown heater No. 7, cannot be sustained. *Cases must be tried on the evidence submitted and not on surmise or conjecture.*

*It is also suggested in the opinion of the learned judge that while plaintiff's No. 7 heater "was in some degree more efficient than its earlier devices and was more attractive in appearance", nevertheless 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". This is likewise merely a surmise. But if it has any meaning at all, it is that the success of the No. 7 was due to its pleasing appearance, which the opinion characterizes as "comeliness", added to its "simplicity and symmetry and the glow". But this is in direct support of our argument and destroys the theory of the decision. We are contending that*

the success of No. 7 is due in a large measure to its pleasing appearance, and the testimony of Brown sustains us in that contention. What matters it therefore if the pleasing appearance was due to "substitution of the warm copper bowl with suitable trim in the place of the nickel type of heater"? Any change or modification which produces a new and pleasing appearance is protected under the law.

It is also suggested in the opinion that :

*"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"*.

This likewise is a mere surmise unsupported by evidence in the case, and again we assert that law suits should be decided on the evidence produced and not on surmise and conjecture. But whether the surmise be correct or not, it in no degree weakens our argument, which is that the attractive appearance of this device was the principal cause for its great popularity, and it is of no moment what were the social conditions which gave rise to the demand for such a device. There may have been changes in "social and housing conditions"; there may have been a "rapidly growing tendency to use electrical energy for divers purposes in the home"; indeed, there may have been a multitude of industrial conditions calling for a heater of this kind—in fine, an urgent demand for such a heater. In such posture of affairs the man who, in response to the public demand, produces the heater wanted is entitled to the highest

credit, and if that heater goes into widespread and extended use all over the world, credit therefor, due to its inventor is not minimized by the social conditions which created the necessity for such a device. We submit that the opinion of the lower court does plaintiff a grave injustice and deprives it of the benefit of that which the law says it is entitled to.

### Was there a Mistrial?

In conclusion there is a matter which we desire to call to the court's attention and which we submit without argument. It is this. The case was tried before Hon. Frank S. Dietrich, District Judge of Idaho, sitting in the place and stead of the resident judge of the Northern District of California, in pursuance of an order of the Senior Circuit Judge of the Ninth Circuit. That order appears at page 18 of the Record, and it authorizes Judge Dietrich

“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”.

We have taken the liberty of underscoring the most essential parts of said order. In pursuance thereof, Judge Dietrich tried the case during the month of September, 1920, and took it under advisement. He then returned to Idaho, where he wrote an opinion which was transmitted to the court at San Francisco and filed by the clerk on *October 4, 1920*. On the same day Judge Maurice T. Dooling was presiding in the District Court



for the Northern District of California, and in pursuance of the written opinion which had been sent by Judge Dietrich, ordered that a decree be entered dismissing the bill. Afterwards on *November 1, 1920*, when the Hon. R. S. Bean, District Judge of Oregon, was sitting in the District Court for the Northern District of California, a decree signed by Judge Bean dismissing the bill was entered in accordance with the order entered by Judge Dooling on October 4, 1920.

The question at once arises, is such a decree valid?

Judge Dietrich was appointed to hold court in the Northern District of California under provision of Section 14 of the Judicial Code, which provides that a Circuit Judge may in certain cases designate and appoint a judge of another district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. It is to be observed, however, that the designated judge is to have and exercise judicial powers only "within the district" for which he is appointed. And it is to be further observed that according to the order of appointment Judge Dietrich was authorized to exercise those judicial powers only "during the months of August and September, 1920". The facts are that the term of Judge Dietrich's appointment expired before his opinion was filed, and said opinion was rendered by him while he was not within said district. Three questions arise:

(1) *Had he the power to act in the case at all while he was in Idaho and not within the Northern District of California?*

(2) *Had he the power to act in the matter after the expiration of the term for which he was designated to hold court in the Northern District of California?*

(3) *Can another Judge, who did not try the case, sign the decree?*

If either of these questions be answered in the negative, then there was a mistrial, and the decree would have to be reversed irrespective of the merits, and a new trial ordered. We submit these questions to the court for answer. They should be determined definitely in the interest of proper practice. It has not been unusual for a judge, who has been designated to hold court in the Northern District of California for a specified time, to return to his home after the expiration of that time and decide cases which were submitted to him during the designated time. In fine, it has been customary to follow the course pursued by Judge Dietrich in the present case, and were it a mere matter of convenience no question would be raised. But this is a question of power under a statute prescribing certain specific conditions under which a judge of one district may try and decide cases in another district. It must be conceded that Judge Dietrich would have had no authority to try this case in the Northern District of California in the absence of the designation required by the Judicial Code. If that is true, the question arises whether or not he has any authority under which a decree can be entered in the Northern District of California after the expiration of the time in which he was

designated to act as judge. In other words, it is not a case of expediency or convenience, but one of power.

Dated, San Francisco,

February 21, 1921.

Respectfully submitted,

JOHN H. MILLER,

*Attorney for Appellant.*

(APPENDIX FOLLOWS.)



## Appendix.





## APPENDIX.

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### That Part of the Opinion of the Lower Court Relating to Design Patent No. 51,043 (Rec. 29 et seq.).

#### 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 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, 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 defendants, 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 of 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, how-

ever 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. \* \* \*

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 the 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. 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.

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

(Endorsed): Filed October 4, 1920.

Walter B. Maling, Clerk.

