

jected to the action of the steam. There are no adjustable stirrers, performing the functions of complainant's stirrers, and the flow is not regulated by their action. Nor can it be said, remembering that an equivalent must perform the same function in substantially the same manner, that for these elements mechanical equivalents are used.

Take, for illustration, the lower part of the seed receptacle. In the description the inventor states as follows:

"The lower part of the seed receptacle, (represented at O,) adapted for partially confining the seed and steam, when the softening and moistening process is required for pressing or other purposes, may be removed, and a perforated or screen-jacket substituted in lieu thereof. By the employment of the latter the steam may be forced directly through the moving seed and screen-jacket, in such a manner as to cleanse it, and remove and carry away all impurities and excess of moisture previously contained therein."

It is said that for this the steam-jacket of the defendants (the sides of their tub or kettle are made double and filled with steam) is an equivalent; but the defendants' jacket does not perform the same functions as the jacket O. Certainly it does not perform them in substantially the same way. If a curb were placed around complainant's table the defendants' jacket would, perhaps, be an equivalent for such curb.

For these reasons it follows that the bill must be dismissed.

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### TOMKINSON v. WILLETS MANUF'G Co.

(Circuit Court, S. D. New York. March 7, 1884.)

#### 1. PATENTS FOR INVENTIONS—DECREE BY CONSENT—RES JUDICATA.

When a decree has been entered by consent in a prior suit declaring a patent valid, and that complainant is the sole owner thereof, such decree will be considered binding, as to all questions determined thereby, in a second suit between the same parties.

#### 2. SAME—DESIGN PATENTS—INFRINGEMENT—RESEMBLANCE.

It is not necessary that a design patent should be copied in every particular to constitute an infringement. It is sufficient if the resemblance is such that an ordinary purchaser would be deceived, although the infringer has deviated slightly in details, or has omitted something which an expert could discover.

In Equity.

*Frank v. Briesen*, for complainant.

*Philo Chase*, for defendant.

COXE, J. This is an equity action for infringement founded upon design patent No. 13,295, granted to John Slater, assignor to Gildea & Walker, September 12, 1882, for a design for a vegetable dish. The patent is now owned by the complainant. The invention relates to a new shape or configuration for a vegetable dish or other similar household article of china. The claims are as follows:

(1) The design for a rectangular vegetable dish, having upper straight section, *c*, central curved section, *d*, and lower straight section, *e*, substantially as shown. (2) The design for a rectangular vegetable dish, having straight top and a section, *d*, curved first outward and then inward in such manner that the base of the dish is smaller than its top, substantially as shown. (3) The design for a vegetable dish, having parallel sides, *a*, *a'*, and parallel sides *b*, *b'*, and composed of the sections, *c*, *d*, *e*, substantially as shown.

It will be observed that as to the handles, ornamentation, size, and color of the dish, nothing is said in the claims. They are for the shape only.

In June, 1883, prior to this suit, the complainant commenced an action in the United States circuit court, district of New Jersey, against the defendant for an infringement of this patent. The complaint was in all respects similar to the one in the present suit. The defendant appeared by its president and consented to a decree and an injunction as prayed for. On or about the twenty-first of July, 1883, a final decree was entered, by which it was determined that the complainant is the sole owner of the letters patent in suit, and that they are good and valid in law. That decree was pleaded and proved in this action; it is valid and binding upon the rights of the parties, and, as to all the questions determined by it, is *res judicata*. Unfortunately, perhaps, for the defendant, the court is not now permitted to consider the defenses, which, by the defendant's own action, are thus eliminated from the case. The question of infringement is alone open to investigation.

In approaching this subject, the rule with reference to design patents should be kept steadily in view. It is by no means necessary that the patented thing should be copied in every particular. If the infringing design has the same general appearance, if the variations are slight, if to the eye of an ordinary person the two are substantially similar, it is enough. It is of no consequence that persons skilled in the art are able to detect differences. Those who have devoted time and study to the subject, who have spent their lives in dealing in articles similar to those in controversy, may see at a glance features which are wholly unimportant, and unobserved by those whose pursuits are in other directions, and who are attracted only by general appearances. If the resemblance is such that a purchaser would be deceived, it will not aid the infringer to show that he has deviated slightly from a straight line in one place and from a curved line in another, or that he has added or omitted something which an expert can discover. *Gorham Co. v. White*, 14 Wall. 511; *Lehnbeuter v. Holt-haus*, 105 U. S. 94; *Wood v. Dolby*, 19 Blatchf. 214; S. C. 7 FED. REP. 475; Sim. Pat. 218; Walk. Pat. § 375. Tested by this rule, I am constrained to say that the defendant infringes.

The principal difference pointed out between the two dishes in controversy is that in the upper vertical section of defendant's dish the sides are not exactly parallel, but bulge outwardly, departing from a straight line something less than half an inch. It is thought, how-

ever, that this divergence is not sufficiently marked to arrest the attention of the average observer. Bearing in mind that the patent deals with shape alone, the same conclusion must be reached with reference to the other differences suggested by the defendant's witnesses.

There should be a decree for the complainant.

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RICHARDSON v. BRESNAHAN and others.

(Circuit Court, D. Massachusetts. May 15, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—FOURTH CLAIM OF PATENT No. 101,931.

The fourth claim of patent No. 101,931, dated April 12, 1870, granted to N. J. Simonds for a leather-cutting press for shoe stocks, construed, and held not infringed by defendants in the use of a revolving block and cutting-die, without the cutting-press described in the specifications and drawings of the Simonds patent.

In Equity.

*W. A. Macleod*, for complainant.

*C. A. Taber*, for defendants.

COLT, J. This suit is brought upon letters patent, No. 101,931, dated April 12, 1870, granted to N. J. Simonds, for a leather-cutting press. The complainant derives title to the patent by assignment. The invention relates to certain improvements in cutting-presses, used for cutting shoe stock, and consists, among other things, in so constructing the press that the cutting-block, as it recedes from the die, will vibrate or swing, and thus expose the cutting-die; also, in imparting to the cutting-block a rotary motion relative to the cutting-die, whereby, in cutting, a change of contact of the surface of the block is constantly produced, and a smoothness of face preserved under the continued cuts of the die. The defendants are charged with infringing the fourth claim of the patent, which is as follows: "The revolving cutting-block, P, in combination with the cutting-press, substantially as and for the purpose specified." The defendants use a revolving block and cutting-die, but they do not use the cutting-press described in the specification and drawings of the patent. At the outset, therefore, the question arises as to the proper construction of claim 4. Does it cover the combination of a revolving block and cutting-die, or is it limited to the combination of a revolving block and the cutting-press set out in the patent? The claim says a revolving block in combination with *the* cutting-press. The cutting-press refers to the mechanism set out and described in the patent. It not only includes the cutting-die, but the other mechanism involved in the machine, and elaborately set forth in the specification. There is nothing to be found in the patent which shows that the words cut-