

KRAUS *et al.* v. FITZPATRICK *et al.*

(Circuit Court, S. D. New York. February 24, 1888.)

PATENTS FOR INVENTIONS—DESIGN PATENTS—CORSETS—PATENTABILITY.

The design patent No. 13,620, dated February 13, 1883, and granted to Frank Walton, being a design for corsets, readily distinguishable by ordinary persons from those of any prior design, is valid.

In Equity. On bill for injunction.

Bill for injunction by Leopold Kraus *et al.* against James G. Fitzpatrick *et al.*, for infringement of design patent No. 13, 620, dated February 13, 1883.

Robert H. Duncan, for orators.

Lawrence E. Sexton, for defendants.

WHEELER, J. This suit is brought upon design patent No. 13,620, dated February 13, 1883, and granted to Frank Walton, assignor to the orators, to run seven years, for a corset. The principal features of the design, as specified in the claim, are a ribbed band at the lower edge, extending from the extreme front up over the hip, and down to the rear portion, and a series of ribs each side of the central hip line, beginning at the top and extending downward, and diverging onto the ribbed band. The shape given to the corset by extending the lower edge up over, instead of around, the hip, appears to add to the utility of the corset as an article of manufacture, as well as to its appearance. The patent is not, however, for an article of manufacture as such, which would have to be taken out under other provisions of the law than those relating to design patents; but is merely for the new appearance given to the article by constructing it according to the design. But the fact that a corset made according to the design would have that utility would not appear to make the design any the less patentable, if in itself, as a design, it was sufficiently new. The test of infringement of a design patent appears to be the existence of such similarities as will lead ordinary persons to think the articles in question are the same. *Gorham Co. v. White*, 14 Wall. 511; *Jennings v. Kibbe*, 20 Blatchf. 353, 10 Fed. Rep. 669. The test of novelty would, therefore, appear to be the existence of such differences between articles embodying the patented design and those existing before as would be recognized by the same class of persons. *Lehnbeuter v. Holthaus*, 105 U. S. 94. The nearest approach to the design of this patent shown by the evidence, and the one most relied upon by the defendants, is that shown in the patent to Paul T. Hertzog, No. 12,773, dated February 21, 1882. That has the ribbed band at the lower edge, but not extending up over the hip so far; and it does not have the series of ribs, distinguishable from the rest, on each side of the hip line. Most of the special features of this design are to be found, separately, in prior things, but they are nowhere combined so as to make such an effect as a whole; and that is what is to be looked at. *Perry v. Starrett*

3 Ban. & A. 485. As a matter of fact, in this view, it clearly enough appears that corsets of this design would be readily distinguishable by ordinary persons from those of any prior design. The patent appears, therefore, to be valid. Infringement is not disputed, and is clear; so clear that it shows the results of copying. The orators are, therefore, entitled to a decree.

Let a decree be entered that the patent is valid; that the defendants infringe; and for an injunction and an account according to the prayer of the bill, with costs.

WELLING v. LA BAU.

(Circuit Court, S. D. New York. February 25, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—REFERENCE.

Upon a reference in a suit for infringement of reissued letters patent No. 5,940, for an improvement in artificial ivory, consisting of shellac and talc in substantially equal parts, it appeared that defendant used a composition of shellac and "fiber white," claimed to be a different substance from talc, and to have been discovered since the issue of the patent. The master found that "fiber white" had all the physical and chemical properties of talc, and was talc. *Held*, that as his report showed there was, as to that fact, much conflicting testimony, his finding will not be set aside.

2. SAME—INFRINGEMENT—DAMAGES.

Where plaintiff's invention relates to a new composition of matter, and the infringing article is made of the patented material, and this alone, the measure of the patentee's damages is the entire profit he would have made, to the extent of the sales by defendant of the infringing article.

On Exceptions to Master's Report.

On the 30th of June, 1882, the complainant, William M. Welling, obtained a decree sustaining reissued letters patent No. 5,940, dated June 30, 1874, for an improvement in artificial ivory. See 12 Fed. Rep. 875. The defendant, John H. La Bau, having made and sold certain articles containing the patented composition, viz., shellac and talc, in substantially equal parts, was adjudged an infringer, and a master was appointed to take the account. After a long and vigorously contested controversy, during the progress of which the court was several times appealed to, (see 32 Fed. Rep. 293,) the master, on the 24th of December, 1886, presented a report, in which he assessed the complainant's damages at \$3,634.94. After the date of the original patent, and, probably, about the year 1872, in the extreme southeastern portion of St. Lawrence county, New York, a mineral was discovered which was placed upon the market and known commercially as "fiber white." Large quantities of this mineral were used by the defendant. The question of fact over which the main contest arose was whether "fiber white" was or was not talc. The master found that it had all the physical and chemical properties of talc, and was talc. He further found as follows: That the white checks sold by the defendant contained shellac and talc, in substan-