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[G.R. No. 1952. December 06, 1906]

CARLOS GSELL, PLAINTIFF AND APPELLANT, VS. VALERIANO VELOSO YAP-JUE, DEFENDANT AND APPELLEE.

D E C I S I O N

MAPA, J.:

In an action between the plaintiff and the defendant herein judgment was rendered in the court below on the 11th of December, 1903, the adjudging part of which is as follows: "It. is ordered that the defendant (the accused in these proceedings) abstain from manufacturing canes and umbrellas with a curved handle by means of a lamp or blowpipe fed with mineral oil or petroleum, which process was protected by patent No. 19228, issued in favor of Henry Gsell, and by him transferred to Carlos Gsell." In the month of February, 1904, the plaintiff presented a petition alleging that "on the 8th of tlie said month, and some time prior to that date, the defendant in disobedience of the aforesaid judgment, and in violation of the same, was and is now engaged in the unlawful manufacture of umbrella handles by the identical process described in and protected by said patent No. 19228, or a process so like the patent process as to be indistinguishable," and accordingly asked the court to punish the accused for contempt and to order the latter to indemnify the plaintiff as damages in the sum of $1,000, United States currency, and to pay the costs.

The parties having appeared in open court and stipulated that "the defendant had used, and was still using, as a process for curving canes and umbrella handles, the same process described in the memoir which accompanied the patent, with the exception that he has substituted for an oil an alcohol-burning lamp."

The court considering that the plaintiff had only the exclusive right to the use of the *coal or mineral* oil-burning lamp, held that the defendant was not guilty of contempt, to which decision of the court the plaintiff duly excepted.

Patent No. 19228, referred to in the judgment of the 11th of December, 1903, does not appear in the bill of exceptions. Since these are contempt proceedings for the disobedience of said judgment, we should have before us the patent in order to determine whether there was any actual disobedience of the order of the court. It is evident that the accused had not committed any direct violation, plain and manifest, of the prohibition imposed upon him in the judgment. The violation, if there has been any, was not of such a character that it epuld be made patent by the mere enunciation of the acts performed by the defendant, which are alleged to constitute the said violation. These acts were not clearly and manifestly contrary to the precise terms of the prohibition. According, to the express language of the judgment, the prohibition is against the manufacture of canes and umbrellas with curved handles by means of the use of a coal or mineral oil-burning lamp or blowpipe, and the parties have stipulated that the defendant did not use a coal or mineral oil-burning lamp, but an alcohol-burning lamp.

The question, however, arises as to whether that prohibition included the substitution of alcohol for coal or mineral oil. In more abstract and general terms, the appellant propounds this question in his brief as follows: "The question presented by this appeal is whether or not the use of a patented process by a third person, without license or authority therefor, constitutes an infringement when the alleged infringer has substituted in lieu of some *unessential part* of the patented process a *well-known mechanical equivalent*." It is seen that by its very terms this question implies in the present case the existence of two fundamental facts which must first be duly established, viz: (1) That the use of the lamp fed with petroleum or mineral oil was an unessential part of the patented process the use of which by the accused was prohibited by the said judgment; and (2) that alcohol is an equivalent and proper substitute, well known as such, for mineral oil or petroleum in connection with the said process. The appellant has failed to affirmatively establish either of these two essential facts, lie has merely assumed their existence, without proving the same, thus begging the whole question. Consequently the contempt with which the accused is charged has not been fully and satisfactorily proved, and the order appealed from should accordingly be affirmed in so far as it holds that the defendant is not guilty of contempt. Having reached this conclusion, it is unnecessary for us to pass upon plaintiff's prayer for a preliminary injunction, as the same is based upon the alleged infringement of the patent upon which these proceedings for contempt were based.

The order of the court below is hereby affirmed, with the costs of this instance against the appellant. After the expiration of twenty days let judgment be entered in accordance herewith, and ten days thereafter the case be remanded to the court below for execution. So

ordered.

Arellano, C, J., Torres, Carson, Willard, and *Tracey, JJ.,* concur.

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