

M. A. CLARKE, PLAINTIFF AND APPELLANT, VS. MANILA CANDY CO. (LTD.), DEFENDANT AND APPELLEE.

G.R. No. 10487. January 23, 1917

Ponente: CARSON, J.

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CARSON, J.:

The complaint filed in this action (omitting the exhibits) is as follows:

"Plaintiff states:

"I. That the defendant is a corporation organized under the laws of the Philippine Islands, with principal office and residence in the city of Manila.

"II. That the plaintiff for twelve years last past has been and still is engaged in the manufacture of a large line of confectionery products including candy of various and numerous kinds in the said city of Manila.

"III. That ever since the year 1905, the plaintiff has used as a trade-mark to designate his various candy products the representation of a rooster, and that until the wrongful and unlawful acts of the defendant hereinafter specified, no other manufacturer or dealer in candy in the Philippine Islands has used such representation in connection with the manufacture and sale of candy in any form.

"IV. That on the 10th day of November, 1911, the plaintiff caused to be duly filed and registered in the division of archives, patents, copyrights and trade-marks for the Philippine Islands, said trade-mark, as shown in Exhibit A hereto attached and made a part of this complaint.

"V. That ever since said registration, and for a considerable time before it, the label containing said trade-mark has been used extensively by the plaintiff upon all packages containing the candy of plaintiff.

"VI. That from the year 1905, the plaintiff has used as a wrapper, for individual pieces of candy, paper bearing said rooster trade-mark in substantially the form shown on Exhibit B hereto attached and made a part hereof.

"VII. That since July 31, 1911, plaintiff has distributed in connection with the manufacture and sale of his candy many hundreds of the cards of which Exhibit C hereto attached and made a part hereof is a sample.

"VIII. That since August, 1911, plaintiff has used as an advertising poster upon shipping cases and in public places generally throughout the Islands many hundreds of the labels of which Exhibit D hereto attached and made a part hereof is a sample.

"IX. That since January, 1912, plaintiff has used for various kinds of his candy, paper boxes, of which Exhibit E hereto attached and made a part hereof, is a sample.

"X. That at various times prior to January 12, 1912, the date of incorporation of the defendant company, plaintiff advertised his candy products extensively in the local papers, as shown by Exhibits F and G hereto attached.

"XI That besides the use, display, and advertising of said mark in the manner above indicated, plaintiff has during public festivals held in the city of Manila for several years past, and within the exhibition grounds of said festivals, used paper mache roosters of large size, carried about said grounds during the exhibition with the words Clarke's candies written upon said roosters.

"XII. That in consequence of such use, display and adVertising of said rooster as the trade-mark for plaintiff's candies, said candies have for several years last past been known and are now known to the trade in these Islands, both wholesale and retail, and to the consumers of candy as the rooster or Manoc brand.

"XIII. That on January 12, 1912, the defendant company was organized as shown by a copy of the Articles of Incorporation hereto attached and made a part of this complaint, and that two of the directors of said defendant company are ex-employees of the plaintiff and at the time of the organization of said corporation, as well as long prior thereto, were well aware of the use by plaintiff of the said rooster or Manoc as a trade-mark in connection with the manufacture and sale of plaintiff's candy.

"XIV. That notwithstanding the fact that said directors were well aware of the use of said trade-mark by plaintiff, and that no other manufacturer of or dealer in candy in these Islands except the plaintiff had ever used such mark in connection with the manufacture or sale of candy, the said defendant corporation through its said directors, shortly after the organization of the defendant corporation, began the use of the label Exhibit H which accompanies, in connection with the manufacture and sale of the various candy products of the defendant company.

"XV. That on the 5th day of June, 1912, there was filed against the said two directors of the defendant company, by the prosecuting attorney of the city of Manila, a complaint of which Exhibit I hereto attached and made a part of this complaint, is a copy.

"XVI. That the said defendants pleaded not guilty to said complaint, and after trial thereon before the Hon. A. S. Crossfield, presiding in Sala I of this court, were acquitted in the manner and form shown by the court's decision, a copy of which accompanies this complaint as Exhibit J.

"XVII. That notwithstanding said criminal prosecution, and notwithstanding the warning to the defendant company contained in said judgment, the said corporation defendant has since the rendition of said judgment continued to sell and dispose of its candy products under the said label Exhibit H as rooster or Manoc candy and that retail dealers of defendant's candy are also selling and disposing of said candy as Manoc candy.

"XVIII. That the word Manoc is the generic term for chicken in all the principal native dialects of these Islands, and that because of the limited number of descriptive adjectives in each of said dialects, and the limited use of those that do exist, any representation of a chicken, or chickens, on a label, will naturally and inevitably become known to all persons who speak and transact business in any of said dialects as chicken or Manoc brand; that the great majority of persons who buy, sell or consume candy in the Philippines speak one or more of such native dialects.

"XIX. That the said defendant corporation, through the use of said label Exhibit H, in selling its goods, has given and is giving said goods the general appearance of the goods of this plaintiff in such a way as is likely to influence purchasers to believe that the goods offered by defendant are those of the plaintiff, and that such appearance has so influenced, and is now influencing purchasers.

"XX. That such imitation of plaintiff's mark has been done by the defendant for the purpose of deceiving the public and defrauding the plaintiff of his legitimate trade, and that the public have been and are being deceived, and this plaintiff has been and is being defrauded thereby to his great damage.

"Wherefore, plaintiff asks this honorable court that, upon filing and approval of bond herein, it be ordered:

"(a) That a temporary injunction be issued against the defendant company, its officers, agents, and employees, restraining them and each of them from any further use of the said label Exhibit H in the sale or other disposition of candy by defendant, until further order in this case;

"(b) That after due hearing herein the defendant corporation be directed to render under oath of its proper officer a true and complete account of profits upon all sales and other dispositions of its candy products under the said label Exhibit H; and that judgment be entered in favor of the plaintiff and against defendant for double the amount thereof;

"(c) That judgment be entered against the defendant company, its officers, agents, and employees perpetually enjoining them from using the said label Exhibit H or any other like imitation of plaintiff's said mark; and

"(d) That the court grant to plaintiff any other remedy that may be proper under the law, together with the costs herein.

"Manila, July 11, 1912."

To this complaint the defendant company interposed a general denial and in due course the case was heard in the Court of First Instance of Manila, and judgment entered in favor of the defendant. From this judgment plaintiff appealed,' and the case is now before us on his bill of exceptions.

It will be seen that in support of his prayer for relief, plaintiff relied in part on his allegations of a technical infringement of his trade-mark, and in part upon his allegations of unfair competition, in that, as he alleged, the defendant "in selling his goods, has given and is giving said goods the general appearance of the goods of this plaintiff in such a way as is likely to influence purchasers to believe that the goods offered by the defendant are those of the plaintiff," and this "for the purpose of deceiving the public and defrauding the plaintiff of his legitimate trade."

Counsel for the defendant corporation lay some stress upon their contention that "the exact nature of the action is impossible to define; it is either to restrain the alleged infringement of a trade-mark, or to restrain unfair competition. The complaint of plaintiff (bill of ex., pp. 2-7) embraces both causes of action, although they are essentially different and distinct," and that "the fact that appellant himself is wholly unable to determine whether his alleged case is one of infringement or of unfair competition demonstrates quite conclusively that it is neither."

We are of opinion, however, that under the terms of Act No. 666, a prayer for an injunction forbidding the use of a specific emblem or design and for damages for its use may properly rest upon allegations of a technical infringement of a trade-mark united in the same complaint with allegations of unfair competition. Cases may well arise wherein the conduct complained of constitutes a wrong under either theory, or wherein the complainant may be satisfied that he can establish his right to relief under one or the other theory, though he is in doubt as to which theory will prove acceptable to the court, and in such cases the plaintiff should not be forced to an election of either theory in the introduction of evidence in support of the prayer of his complaint. Under the code system of pleadings in force in this jurisdiction, plaintiff may set forth in his complaint as many distinct causes of action as he may deem proper, the only limitation upon his right to do so being the provisions of section 90 of the Code of Civil Procedure, which prescribes that, "if the complaint contains more than one cause of action, each distinct cause of action must be set forth in a separate paragraph containing all the facts constituting the particular cause of action."

The infringement of a trade-mark is, in truth, a form of unfair competition. The law, however, allows relief from

the wrong done by a trade-mark infringement under circumstances and upon proof which would not entitle the plaintiff to relief upon the theory of unfair competition where it does not appear that there was a technical infringement of a trade-mark. Plaintiff may be in doubt as to whether he can establish a technical infringement of a trade-mark to the satisfaction of the court, and in such a case he may desire to offer additional evidence to support his contention that, if in the opinion of the court a technical infringement has not been established, the evidence is sufficient to sustain a charge of unfair competition, by the use of misleading emblems or designs upon the goods of the defendant. We know of no reason why he should not be permitted to do so. (Cf. the recent case of *Hamilton-Brown Shoe Co. vs. Wolf Brothers & Co.*, 240 U. S., 251.)

We are not unmindful of what was said in the case of *Compania General de Tabacos vs. Alhambra Cigar & Cigarette Manufacturing Co.* (33 Phil. Rep., 485). But what was said there must not be understood as denying the right of a plaintiff to allege as many distinct causes of action as he may deem proper in support of his prayer for relief. It was said in the opinion in that case that a clear distinction must be drawn under our statute between actions for infringement and actions for unfair competition, in that under our statute, evidence sufficient to justify relief upon one or the other theory necessitates the grant of relief upon that theory and precludes the grant of relief under the other; but this does not mean that the plaintiff, in cases of this kind, may not allege in support of his prayer for relief facts which he believes will establish his claim that there has been either an infringement or unfair competition, and thus secure the relief prayed for, whichever theory the court is of opinion is sustained by the proof adduced at the trial.

There is no substantial dispute as the various allegations of the foregoing complaint, except as to plaintiff's contentions that his candies have become known to the wholesale and retail trade as Manoc brand candies; that the defendant corporation has sold and continues to sell its candies as Manoc candy; that in making use of the trade-mark, Exhibit H, the defendant corporation has given and is giving its goods the general appearance of the goods of the plaintiff; and that in thus imitating the goods of the plaintiff the purpose and intention of the defendant corporation has been and is to deceive the public and defraud the plaintiff of his legitimate trade.

An examination of Exhibits A, B, C, D, E, F, and G, which were made a part of the above-cited complaint, leaves no room for doubt that the dominant and striking pictorial feature of each and all of them, except perhaps of Exhibit A, is a single rooster standing in an attitude of challenge. Exhibit A is a representation in colors of a rural scene in the Philippines, with a small circular insert, uncolored, containing the figure of the rooster as shown in the other exhibits, and the words "trade-mark" on the lower margin of the circle. The original of this exhibit was registered by the plaintiff as a trade-mark, but it is not contended that the defendant has made any improper use of this rural scene taken as a whole, or of any part of it except the picture of the rooster which is found in the insert, either as a trade-mark, or for the purpose of dressing his goods in imitation of those manufactured by the plaintiff. Plaintiff's case rests wholly upon his claim that by long-continued use upon the wrappers and containers in which his goods are packed, and as a prominent feature of all his advertising matter, he has lawfully adopted and appropriated as a trade-mark, the representation of a rooster; and these exhibits, taken together with the evidence of record conclusively establish this claim, which, in fact, is not seriously disputed.

Exhibit H is an oval panel which has, in the language of counsel for the defendant, "as its central and predominating feature, two large and highly colored roosters in an attitude of combat," with the words "Manila Candy Co., Ltd.," the corporate name of the defendant company, in large and distinct letters running along the upper margin, and along the lower margin the words, "Trade-mark, Manila."

Upon the whole record we are of opinion that the evidence of record does not affirmatively and satisfactorily sustain plaintiff's claim that his candy has actually become known to the trade as Manoc candy; nor does it sustain his allegations that the defendant corporation has sold or is selling its candy as Manoc candy, or that its candies

are sold in the retail trade under that name.

The question then which presents itself is whether in the absence of proof of these allegations, the other evidence of record is sufficient to sustain a finding that there has been either a technical infringement of plaintiff's unregistered trade-mark, or unfair competition by the defendant corporation by the use on the containers of their goods and otherwise of the design set forth in Exhibit H.

We think that the bare statement of the undisputed facts disclosed by the record leaves no room for reasonable doubt as to the guilt of the defendant corporation of unfair competition as defined in Act No. 666.

The plaintiff, a candy manufacturer, had for many years made use of a pictorial representation of a rooster upon the packages and wrappers used in connection with his business, and in advertising his goods had made continuous use of a rooster as his trade-mark. Two of his workmen left his employ and organized a corporation which engaged in the business of manufacturing candy. This corporation adopted as its trade-mark a pictorial representation of two roosters, and it has made extensive use of this trade-mark upon the packages and containers in which it put its candy on the market.

No reason has been suggested for the use of this particular design with its predominant display of two roosters as the trade-mark of the defendant corporation other than that alleged by the plaintiff; that is to say, that the new manufacturer, well knowing that the plaintiff had used a rooster as his trade-mark, hoped to secure an unfair advantage by misleading the public, and inducing it to believe that its candies bearing a representation of two roosters were made in the plaintiff's factory, which had always marked its goods with one or more pictures of a single rooster, and at the same time had made extensive use of this design in connection with its advertising campaigns.

Counsel for defendant insist that there is no real resemblance between a picture of one rooster and a picture of two roosters; that no person could or would be deceived by the use by the defendant of a trade-mark wholly distinct from that of the plaintiff; that the fact that the defendant used two roosters as its trade-mark clearly discloses its innocence of any intent to deceive, since a comparison of the trade-mark of the plaintiff with that of the defendant makes apparent at once that one was not intended to be an imitation of the other.

We ask, however, why, with all the birds in the air, and all the fishes in the sea, and all the animals on the face of the earth to choose from, the defendant company selected two roosters as its trade-mark, although its directors and managers must have been well aware of the long-continued use of a rooster by the plaintiff in connection with the sale and advertisement of his goods?

There is nothing in the picture of one or more roosters which in itself is descriptive of the goods sold by the plaintiff or by the defendant corporation, or suggestive of the quality of these goods. A cat, a dog, a carabao, a shark or an eagle stamped upon the container in which candies are sold would serve as well as a rooster for purposes of identification as the product of defendant's factory. Why did defendant select two roosters as its trade-mark? We cannot doubt that it was because the plaintiff's candies had acquired a certain reputation under the trade-mark of a rooster, and the defendant corporation hoped to profit unjustly by that reputation. Defendant knew that the use of a single rooster would be prohibited as a technical infringement of plaintiff's trade-mark, but it hoped that it could avoid that danger by the use of two roosters; and at the same time get such advantage as it must have believed it could secure from the use of a design on the containers of its goods, not absolutely identical with that used by the plaintiff, but so similar in the dominant idea as to confuse or mislead the purchasers. Children, and for that matter the average purchasers of candies, might well be expected to recall that packages containing Clark's candies, which they had been accustomed to buy and for which they had acquired a taste, had pictures of a rooster on the outside, and to accept candies made by the defendant company as candy of the same mark, although the design

used displayed two roosters in each instance instead of the single rooster used by the plaintiff.

In the language of counsel for defendant the trade-mark used by defendant on the packages and containers in which it shipped its goods has, "as its central and predominating feature, two large and highly colored roosters, in attitude of combat," and we are satisfied that the predominant idea conveyed to the mind by the use of that trade-mark is substantially identical with that conveyed to the mind by the use of the single rooster by the plaintiff as his trade-mark. The fact that defendant used two roosters, and that these roosters, unlike the rooster in plaintiff's trade-mark, are highly colored, and the further fact that the words "Manila Candy Co., Ltd." are used in connection with defendant's trade-mark, are wholly insufficient to relieve the design used by the defendant, of the vice of an unfair and misleading use of the predominant idea set forth in plaintiff's unregistered trade-mark, in such manner as to be likely to cause confusion in the minds of the ordinary purchasers as to the origin of the goods.

By the terms of section 61 of Act No. 666 unfair competition may be found to exist where the deceitful appearance of the goods, misleading as to original ownership, is affected either by the general appearance of the package containing the goods or by the devices or words used thereon. We have no doubt the use of the pictorial representation of two roosters on the containers of the goods of the defendant rendered the defendant corporation guilty of unfair competition, for under all the circumstances of the case, we are of opinion that we are justified in inferring the intent of the defendant corporation to deceive the public and defraud the plaintiff.

A large number of cases are cited by counsel in their briefs in support of their respective contentions, and it must be confessed that it is difficult if not wholly impossible to reconcile the principles upon which some of those cases seem to turn, though the apparent conflict would seem to arise in most instances from the application by the various courts of recognized principles to the varying facts of each case.

The truth is, as suggested by counsel for the plaintiff, that there has been a very marked change in the attitude of the public and of the courts in recent years, in dealing with the offense known as "unfair competition," which is reflected in the progress made by the law in developing rules and remedies relating to dishonest and unfair commercial practices. Our own statute, Act No, 666, is in itself a clear recognition of the more modern attitude of the lawmaker with relation to these practices. Mr. Justice Holmes said twenty-five years ago that:

"The law has got to be stated over again. And I venture to say that in fifty years we shall have it in a form of which no one could have dreamed fifty years ago." Our statute crystallizing as it does the modern view as to what the law should be on this subject is a striking realization of that prophecy.

In 1895 a writer in the Harvard Law Review, vol. 13, p. 265 [vol. 10, p. 275] observed that:

"Unfair competition, as the designation of a legal wrong which the law will undertake to redress or prevent, has only of late years begun to make its appearance in the books. To most lawyers, it is safe to say, the title carries no very definite meaning, for as yet its use is almost entirely confined to the Reports, and in these it is used only in the most general way, and always with the facts of the particular case in view, while it is quite unrecognized in digest, text book, or dictionary."

The following extracts from the introduction to Nim's work on Unfair Business Competition explain in some sort the tendency of the courts in recent years to hold to more rigid account those charged with unfair competition:

"There is a maxim as old as the law that there can be no right without a remedy, but it is equally true that men are constantly acquiring new rights and new kinds of property almost unknown to the law, and in lawful ways are putting themselves in new positions, in which they soon suffer wrongs which the court seems powerless to prevent or to end. It seems, sometimes, as if the progress of the unscrupulous merchant and manufacturer in

inventing new schemes for filching away the trade of others unfairly, has been far more rapid than that of the courts in finding ways of protecting the honest business man against such schemes. But whatever has been the activity of these unscrupulous members of the business community in the last decade, during this time very marked progress has been made by the law in developing rules and remedies relating to dishonest and unfair commercial practices.

"It is but few years since cases involving applications for relief against unfair dealing were indifferently classed as trade-mark cases or injunction cases, or hidden away in digests under headings most surprisingly disassociated from ideas conveyed by the term 'Unfair Competition.' Now we find that phrases 'Passing Off,' in England, 'Concurrence Deloyale,' in France and 'Unfair Competition' in America, are recognized legal terms, embracing rules of law applicable to cases of this character."

The citation of authority in the briefs would seem to have for its object the development of a definition, as disclosed by judicial interpretation, of the illegal acts now generally known in the United States as "unfair competition," and also of what is generally recognized as "technical infringement of a trade-mark." But for this purpose we can and should look to our own statute, recently enacted, which quite clearly defines, delimits, and penalizes these offenses, and provides for the enforcement of civil remedies for the wrongs resulting therefrom.

No little difficulty seems to have been encountered by the courts in determining the degree of similarity between an alleged infringing trade-mark and the original which should be required in order to sustain a claim of technical infringement, though it is generally recognized that exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection. Colorable imitation is deemed sufficient, and redress is granted where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, in the exercise of ordinary care and caution in such matters. But in cases wherein it could hardly be said that there was any colorable imitation of the form and arrangement of the original trade-mark, although the presence of some predominant feature in both designs was likely to create confusion or uncertainty, the difficulty in applying the rules touching technical infringements of trade-marks was notably increased. Some of the courts have gone to greater lengths than others in holding that in such cases, if the use of such design was likely to cause confusion as to the origin of the goods, such use constituted a technical infringement of the original trade-mark. And in order to furnish a remedy for the manifest wrong involved in such conduct, some authorities would appear to have unduly expanded the doctrine as to the right of appropriation of emblems, signs or devices as trade-marks, through a failure to perceive that the remedy for the wrong is to be found in the application of the modern doctrine of unfair competition, without the necessity for the straining of established principles controlling technical infringements of trade-marks. (Cf. *Liggett & Myers Tobacco Co. vs. Finzer*, 128 U. S., 184; *Bickmore, etc., Co. vs. Karns Mfg. Co.*, 126 Fed., 573, 574; *Popham vs. Cole*, 66 N. Y., 69; *Munro vs. Tousey*, 129 N. Y., 38; *Bulte vs. Igleheart Bros.*, 137 Fed. Rep., 492, 502, with which contrast the discussions of "The Owl Case," No. 3, vol. 8, *Bulletin of the U. S. Trade-Mark Association*; "The Teddy Bear Case," *idem*; "The Hercules Wrestling Match Case," No. 11, vol. 7, *idem*; "The Star Tea Case," No. 10, vol. 7, *idem*; "The Metropolitan Candy Case," No. 11, vol. 7, *idem*.)

But it would seem that the recognition of the wrong complained of in such cases as a technical trade-mark infringement involves in many instances an undue strain upon the well-settled rules and principles which have long controlled this branch of the law—while no difficulty presents itself in dealing with abuses of this kind under the modern doctrine of unfair competition. Certainly, under our statute, all difficulty can and should be avoided, by limiting relief prayed for on the ground of trade-mark infringement to cases wherein there is an exact or at least a colorable imitation of the original trade-mark, and in other cases applying the provisions of section 7 of the statute (Act No. 666) which defines the offense of unfair competition. That section expressly provides that unfair com-

petition exists when one selling his goods "gives them the general appearance of goods of another manufacturer or dealer, either in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer, and who clothes the goods with such appearance for the purpose of deceiving the public and defrauding another of his legitimate trade," and it is further provided that "this section applies in cases where the deceitful appearance of the goods, misleading as to origin or ownership, is effected not by means of technical trade-marks, emblems, signs, or devices, but by the general appearance of the package containing the goods, or by the devices or words thereon, even though such packages, devices, or words are not by law capable of appropriation as trade-marks."

Under the precise terms of this statute, the use under the conditions therein specified of devices or words, which would be likely to cause confusion as to the origin of the goods, although they may not amount to a colorable imitation of the form and arrangement of a trade-mark, constitutes the offense of unfair competition, and there is no necessity, therefore (in order to give a remedy for the wrong involved in such conduct), for the straining of the well settled principles which have long controlled in cases of technical infringements of trade-marks.

We have already indicated that the use by the defendant company of the pictorial device of which the predominating idea is two roosters upon the containers or wrappers in which the goods of the defendant are sold is "likely to influence purchasers to believe that the goods offered" for sale by the defendant are those of the plaintiff manufacturer, and that the manifest purpose of the use of this device is to deceive the public and defraud the plaintiff of his legitimate trade. It follows therefore that plaintiff is entitled to the relief prescribed in the statute, notwithstanding the fact that the devices are dissimilar in so many respects as to preclude a finding that the device of the defendant is a reproduction or a colorable imitation of plaintiff's trade-mark.

The judgment entered in the court below denying relief must, therefore, be reversed, without costs in this instance, and the record returned to the court wherein it originated, where judgment will be entered in conformity herewith granting injunctive relief as hereinbefore indicated and making proper provision for the accounting prayed for in the complaint. So ordered.

Torres, Trent, and Araullo, JJ., concur.

Moreland, J., dissents.

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