

**THE ALHAMBRA CIGAR AND CIGARETTE MANUFACTURING CO.,
PLAINTIFF AND APPELLANT, VS. COMPANIA GENERAL DE TABACOS
DE FILIPINAS, DEFENDANT AND APPELLEE.**

G.R. No. 11490, October 14, 1916

Ponente: JOHNSON, J.

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JOHNSON, J.:

The only question presented by this appeal is whether or not the defendant is guilty of unfair competition in the manufacture and sale of a certain cigar. The plaintiff attempted to show that the defendant was guilty of a violation of section 7 of Act No. 666 of the Philippine Commission, and claimed that it had been damaged in the sum of P20,000, and prayed for a permanent injunction to restrain the defendant from the further manufacture or sale of the cigars alleged to have been made in imitation of a cigar manufactured by the plaintiff, and for an accounting.

Upon the issues presented the lower court reached the conclusion that the defendant was not guilty of a violation of said Act and absolved it from all liability under the complaint, with costs against the plaintiff. From that conclusion the plaintiff appealed to this court and made several assignments of error here.

An examination of the argument of the appellant with reference to said assignments of errors shows that the observation made by the appellee concerning the same is quite true. The appellee says:

"While the appellant has made an assignment of errors, it has practically abandoned them in its brief. There is no discussion of any specific error. The argument is directed to the subject in general. It is like discharging a shotgun loaded with birdshot. If it scatters sufficiently something may be brought down. No criticism of counsel is intended. It was practically the only course they had open. There was no error at which a rifle ball could be directed."

An examination of the record discloses the following facts:

The plaintiff and defendant are corporations engaged in manufacturing products of tobacco in the city of Manila. The plaintiff alleged that it had engaged in manufacturing a certain brand of cigars which it named Especiales Alhambra, since the year 1906; that these cigars are made of superior quality of tobacco and wrapped with perfect leaves of Sumatra tobacco; that each cigar is encircled with a band of a brown color, on which is imprinted in gold color the word Especiales Alhambra; that the cigars are packed with distinguishable labels and marks; that the cigars present a very definite appearance; that the plaintiff had extensively advertised the said cigar as "The little brown label cigar."

The plaintiff further alleged that the cigars had acquired a reputation for their excellence and had been a source of great profit. It was alleged that three months preceding the filing of the complaint (July 19, 1915) the defendant, "in disregard of plaintiff's rights and with intent to deceive the public and defraud the plaintiff," had sold and was selling a cigar "made in similar form, size, and appearance and in simulation of plaintiff's said cigar" that

defendant's cigar was named Especiales, and is "encircled with a brown colored band, with the words 'Especiales Imbela,' printed in gold letters upon it, with the intent to thereby imitate plaintiff's said cigars; that the defendant had so packed and ornamented the receptacles and boxes containing its cigars, in colors and forms of devices, as to give its said cigars, when offered for sale, the general appearance of plaintiff's said brand of cigars."

The plaintiff further alleged that all of said acts of the defendant were done with the intent to deceive the public and to defraud the plaintiff and that such acts did actually deceive the buyers of plaintiff's cigars.

To the foregoing allegations of the plaintiff, the defendant appeared and denied generally all of the allegations of plaintiff's petition.

Upon the issue presented by the petition and answer, the cause was brought on for trial, with the result above indicated.

Said section 7 of Act No. 666, for the alleged violation of which the present action was instituted, provides:

"Any person who in selling his goods shall give 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, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose, shall be guilty of unfair competition, and shall be liable to an action for damages, in which the measure shall be the same as that provided for a violation of trademark rights, together with discretionary power in the court to impose double damages, if the circumstances call for the same. The injured party may also have a remedy by injunction similar to that provided for in cases of violation of trademarks. 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 trademarks; and in order that the action shall lie under this section, actual intent to deceive the public and defraud a competitor shall affirmatively appear on the part of the person sought to be made liable, but such intent may be inferred from similarity in the appearance of the goods as packed or offered for sale to those of the complaining party."

In addition to the oral testimony, the plaintiff presented Exhibits A and B. Exhibit A is a box of cigars which the plaintiff claims the defendant was attempting to imitate. Exhibit B is a box of cigars which the plaintiff claims is an imitation of the cigars in Exhibit A and constitutes the infringement or unfair competition complained of. Exhibits A and B, including the size of the box, labels, etc., are as follows:

EXHIBIT A.

Exhibit A of the plaintiff was a box containing twenty five cigars and was 8 1/2 inches long, by 5 1/4 inches wide and 1 3/8 inches deep.

On the top of said box and in the center thereof there appeared the following label:

(See Image Vol. 35 Phil. 67)

On the inside of the top cover there appeared the following label:

(See Image Vol. 35 Phil. 68)

On the loose leaf immediately over the cigars there was the following label:

(See Image Vol. 35 Phil. 68)

Over the end of the box and pasted on the outside thereof, there appeared the following label:

(See Image Vol. 35 Phil. 69)

On each cigar was the following band:

(See Image Vol. 35 Phil. 69)

On the immediate front of the box there appeared the following label:

(See Image Vol. 35 Phil. 69)

The box contained twenty five cigars, of which the following is one:

(See Image Vol. 35 Phil. 69)

EXHIBIT B.

Exhibit B of the defendant was a box containing fifty cigars and was 7 3/4 inches long, by 5 1/8 inches wide, by 2 inches deep.

On the top of the said box and in the center thereof, there appeared the following label :

(See Image Vol. 35 Phil. 70)

On the inside of the cover there appeared the following label:

(See Image Vol. 35 Phil. 70)

On the loose leaf immediately over the cigars there appeared the following label:

(See Image Vol. 35 Phil. 71)

Over the end of the box and pasted on the outside thereof, there appeared the following label:

(See Image Vol. 35 Phil. 71)

On each cigar was the following band:

(See Image Vol. 35 Phil. 72)

On the immediate front of the box there appeared the following label:

(See Image Vol. 35 Phil. 72)

The box contained fifty cigars, of which the following is one:

(See Image Vol. 35 Phil. 72)

The lower court, after an examination of the evidence, states in the course of his opinion:

"There certainly is not sufficient similarity to justify the inference of actual intent on defendant's part to deceive the public and defraud a competitor, and this is an essential element of unfair competition."

An action for unfair competition is distinguished from an action for a violation of technical trademarks and is based upon the proposition that no dealer in merchandise should be allowed to dress his goods in simulation of the goods of another dealer, so that purchasers desiring to buy the goods of the latter would be induced to buy the goods of the former. The policy of the law is not to prevent competition but to prevent deceit and fraud. A

merchant is entitled to the fruits of his reputation and his ingenuity and no other merchant will be allowed to simulate the appearance of the goods of the former, for the purpose of taking advantage of his reputation and ingenuity in business. The law does not, however pretend to prohibit or enjoin every similarity. The similarity must be such that the ordinary purchaser will be deceived into the belief that the goods are those of another. It must be a "similarity in the general appearance," or in the goods "taken as a whole." (*Alhambra Cigar, etc., Co. vs. Mojica*, 27 Phil. Rep., 266; *Coats vs. Merrick Thread Company*, 149 U. S., 562; *Enoch Morgan's Sons Company vs. Troxell*, 89 N. Y., 292; *P. Lorillard Co. vs. Peper*, 86 Fed. Rep., 956.) It frequently happens that goods of a particular class are labeled by all manufacturers in a common manner. In cases of that sort, no manufacturer may appropriate to himself the method of labeling or packing his merchandise and then enjoin other merchants from using it. Instances of such articles are spools of thread, soap, cigars, etc. Thread, for example, is commonly put up on wooden spools of substantially the same size. That is a result of business demands. Soap is commonly sold in a similar sort of wrap per. Cigars, as a rule, have the same funeral shape and are usually labeled with bands of somewhat similar color. They are generally put up in packages or boxes of like shape, size, and form. A manufacturer of any one of these articles may put up his particular brand of goods in the common form, without running the risk of being enjoined by another manufacturer. He will, however, be enjoined if it clearly appears that there is a studied attempt to imitate or simulate certain distinctive features, adopted by one manufacturer, for the purpose of identifying or distinguishing his goods from others of the same general class and appearance.

In the case of *Coats vs. Merrick Thread Company*, supra, the question presented to the court was with regard to the similarity of the labels on spools of thread. The labels of both parties were black and gold, with the name of the manufacturer, kind of thread, and the number of the thread stamped upon it. These labels were small and were attached to the end of the spools. The court found that the small black and gold labels was in common use among manufacturers of that quality of thread. The court held, that in view of the limited space upon the label, and in view of the common right to use such label, the defendants were fully within their rights.

In the case of *Enoch Morgan's Sons Company vs. Troxell*, supra, the question was raised with reference to the method of packing and wrapping soap. In discussing that question, the court said:

"The only points of similarity between the two articles sold are that they are both small cakes of soap covered with tinfoil or tinned paper and having a blue band around them, with gilt lettering. The cakes are not even of the same shape, one being nearly square, and the other oblong. But we are of the opinion that this form of package, with a blue band and gilt lettering, can not be appropriated by the plaintiff as a trademark. There is nothing peculiar about it, it is an appropriate and usual form in which to put up small cakes of soap and the law of trademarks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label and exclude every one else from its use, or from the use of anything resembling it." (*Fleischmann vs. Newman*, 4 N. Y., Supp., 642.)

In the case of *Fleischmann vs. Newman*, supra, we have a further discussion of the right of merchants to pack their merchandise in the ordinary and usual form adopted by others. In the course of the discussion, the court said:

"The only point of similarity between the two (packages) is in the shade of yellow which the groundwork of the labels has. In the case of both plaintiffs and defendant the shade is lighter than that used by other dealers for twelve years past, but each has its distinctive characteristics, none of which would be liable to mislead even a careless purchaser, as may plainly be seen by an inspection of the labels contained in the preliminary statement. Under these circumstances the defendant can not be deemed to have simulated the design of the plaintiffs' package so as to give a right of action against him, for the simple reason that he has done no more than other dealers have done in putting up packages of this description, which must necessarily be about of a prescribed size in order to be marketable, and there is no law of this state which prohibits a manufacturer or

dealer from using the words 'Compressed Yeast.' The manufacture of this article is open to all competitors and they can not be held liable in any action to restrain them where they plainly put their name upon the label, even though they do happen to use light yellow for the background of the paper upon which the description of the commodity is given."

With reference to Exhibits A and B, upon a close examination some points of resemblance may possibly be found. A casual examination, however, shows clearly that there is an essential and marked difference. The allegation of unfair competition, however, can not be based upon the fact that by a close examination a similarity may be found. The similarity or simulation must be such as to defraud and deceive the purchaser into the belief that he is purchasing the goods of one person believing them to be the goods of another. The question is whether, taking the defendant's package and label as a whole, it so far copies or resembles the plaintiff's package and label, that a person of ordinary intelligence would be misled into buying the one, supposing he was buying the other. No inflexible definition can be given as to what will constitute unfair competition. Each case must depend upon its own particular facts. The rule which we are discussing can not be better stated than the plaintiff himself states it in his brief:

"The resemblance spoken of in the law of unfair competition is a resemblance in the general appearance of the goods, in the wrapping of the packages, or in the devices or words thereon, or in any other feature of their appearance which would be likely to deceive purchasers. It is not enough for the plaintiff's cause that in certain details there may be discovered something of similarity, provided that in the general appearance there is a decided dissimilarity. Nor is it enough to save the defendant that experts, on examination, can point to differences in details of the component parts of the markings or wrappings. Details may present differences and yet the whole be very much alike and very deceptive to the ordinary purchaser using ordinary care. * * * * An inspection of the cigars in question will afford the best test of their likeness in general appearance."

The late Mr. Justice Brewer of the Supreme Court of the United States, in the case of *P. Lorillard Co. vs. Peper* (86 Fed. Rep., 956), in discussing the general question of how unfair competition may be determined, said:

"Summing it all up, while there are certain minor points of resemblance which have been forcibly urged upon our attention by the counsel for plaintiff, yet, looking at the two packages with their labels,—taking the tout ensemble— it appears to us clear that they are so essentially different that no one of ordinary intelligence, desiring to buy the one kind of tobacco, would be misled into buying a package of the other. We shall not stop to review the testimony which is offered upon the question whether the resemblances between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these questions, and perhaps, looking at the matter of the testimony alone, it might be difficult to say on which was the preponderance; but such testimony, giving it all the weight that it is entitled to, does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We can not surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences."

In the present case there is no proof in the record that any person or persons had been deceived into purchasing the cigars of the defendant, believing that he was purchasing the cigars of the plaintiff. There is no proof that any person or persons were actually deceived. During the trial the plaintiff practically abandoned its contention that there was any resemblance or any attempt to simulate its cigars by the defendant, except in the color of the band or ring used on said cigars. Marker, a witness called by the plaintiff, testified:

"Q. In what particular way do you think a man might get these cigars mixed?—A. Well, they are both made with Sumatra wrappers, the label being brown. It is true, so far as the shape of the cigar is concerned, there is no resemblance."

"Q. As an expert, Mr. Marker, do you think any person would be likely to mistake the general appearance of the package or container of the Alhambra cigar for that of the Tabacalera?—A. The package, no; there would be no chance of his getting that mixed.

"Q. None whatever?—A. No.

"Q. Isn't it a fact, Mr. Marker, that the shapes of these two cigars are what may be termed in trade as distinctive shapes?—A. Yes, sir.

"Q. They come under different distinctions?—A. Yes, sir.

"Q. And this is a very different shape, is it not?—A. A very different shape; yes, sir.

"Q. How many other factories manufacture Especiales?—A. Probably four or five of them I should think.

"Q. And have been for many years?—A. Yes, sir.

"Q. You do not contend that the Alhambra were the first to use the word Especial, by any means, do you?—A. No."

Strickler, testifying for the defendant, states:

"Q. I say if you were looking for the cigar known as Especiales Alhambra (Exhibit A) and were familiar with that cigar and liked it, do you think you would be at all likely to take the cigar in Exhibit B, a different shaped cigar and ring?—A. If I was familiar with Especiales Alhambra, I would not take an Especiales Flor de Isabela for it."

From an examination on the band of the cigars of the plaintiff and a comparison of it with the ring of the cigars of the defendant (See Exhibits A and B above), it will at once be seen that there is no similarity in the shape of the two. The color is not exactly the same. The lettering is different; the names are different. It is difficult to understand, as Strickler testified, how any person familiar with the cigars of the plaintiff could be deceived into accepting the cigars of the defendant. The shape of the band is very different from the shape of the ring. There is also a marked difference in the color of the two. A most casual examination of the two will show a wide difference. The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled, so as to take one of the cigars for the other; seeing in such cases is believing, existing differences being at once perceived and remaining in the mind of the careful observer. There is no evidence in the record that any one was ever misled by the alleged resemblance between the two cigars. (Liggett & Myers Tobacco Co. vs. Finzer, 128 U. S., 182.)

The plaintiff makes no pretention that it has any absolute exclusive right to the use of the brown color or of the use of the Sumatra wrapper, nor to any of the infinite shapes and cigars, nor to any of the words of the alphabet. It does contend, however, that when it has fashioned a special cigar, has clothed it in a certain wrapper, has branded it with a brown ring with gold letters and has named it Especiales, and has established a trade for that cigar and made it popular and stylish because of its form, quality, and attractive appearance, that no other manufacturer can thereafter commence to make a similar cigar, resembling it in size and shape, using the same Sumatra wrapper, using a similar brown ring with equal gold letters, and with the identical name. That contention of the appellant is certainly in conformity with the provisions of the law. The difficulty with it, however, is that the cigars in the present case are not similar, either in size or shape. The bands or rings are not similar, either in their shape or the lettering thereon; neither are the names found upon the different bands or rings identically the same; neither are the colors exactly the same.

As has been stated in effect, any one who sells goods packed, or labeled, or otherwise prepared in such a manner

to induce intending purchasers to believe that the goods are of a make or origin other than the true, or who clothes his goods with a certain appearance for the purpose of deceiving the public, is deemed guilty of unfair competition as defined in section 7 of Act No. 666. (Brook Bros. vs. Froelich & Kuttner, 8 Phil. Rep., 580.) The true test of unfair competition is whether certain goods have been intention ally clothed with an appearance which is likely to deceive the ordinary purchaser, exercising ordinary care, and not whether a certain limited class of purchasers, with special knowledge not possessed by the ordinary purchaser, could avoid a mistake by the exercise of this special knowledge. (U. S. vs. Manuel, 7 Phil. Rep., 221; Song Fo & Co. vs. Tiu Ca Siong, 13 Phil. Rep., 143; Inchausti & Co. vs. Song Fo & Co., 21 Phil. Rep., 278; Baxter and Baxter & Co. vs. Zuazua, 5 Phil. Rep., 160; Nelle vs. Baer, Senior & Co., 5 Phil. Rep., 608.)

With reference to the similarity of bands or rings upon cigars, we held in the case of Nelle vs. Baer, Senior & Co., supra, in the absence of other proof, that the mere similarity in the appearance of two cigar rings is not sufficient to show the actual intent to deceive the public which is required by Act No. 666, section 7.

"Facsimiles of the two rings are in the record before us, and they are so nearly alike in general appearance that one might pass for the other. These rings so used on cigars are, however, so small, and are necessarily so similar in design and appearance, that we should hesitate to say that 'actual intent to deceive the public and defraud a competitor * * * may be inferred from the similarity in the goods.'"

In view of all of the foregoing and summing up all the arguments pro and con, while there are certain minor points of resemblance in the bands of the two cigars presented, which have been forcibly urged upon our attention by the respective counsel, yet, looking at the two cigars, with special reference to the rings or bands used by the plaintiff and the defendant, we are convinced that the two cigars. including their rings or bands, are so essentially different that no one of ordinary intelligence desiring to buy one would be misled or deceived into buying the other. "It is not enough for plaintiff's cause that in certain details and upon a close examination there may be discovered some thing of a similarity in the general appearance of the cigars, or bands or rings. The similarity must be such as to deceive and to defraud." It must be such as to induce a person to buy the cigars of the plaintiff, believing that he is buying the cigars of the defendant. In our opinion no such similarity exists. The boxes in which the cigars are packed are different. They are different in size and color. One contains fifty cigars while the other contains but twenty five. The labels, as will appear from Exhibits A and B above, are entirely different. There is no attempt on the part of the defendant to simulate, in the slightest degree, the box or the label used by the plaintiff. With reference to the cigars, the slightest examination discloses that they are of an entirely different shape. One is thick and blunt. The other is much thinner, pointed, and shorter. With reference to the bands or labels encircling the cigars, from an examination of the same, it is found, by reference to Exhibits A and B, that while both are of a brownish color they are not of the same brown color. Neither are the bands of the same shape. One is generally called a band while the other is a ring. We are unable to see or to understand how a person with reasonable or ordinary care, knowing and accustomed to use the cigar of the plaintiff, could ever be deceived into purchasing the cigar of the defendant.

For all of the foregoing reasons, we are of the opinion that the judgment of the lower court should be affirmed, with costs. So ordered.

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

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