

LA SOCIEDAD “GERMINAL,” PLAINTIFF AND APPELLANT, VS. MANUEL NUBLA, DEFENDANT AND APPELLEE.

G.R. No. 3538. January 25, 1908

Ponente: MAPA, J.

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MAPA, J.:

The complaint herein is for illegal and fraudulent competition, and was filed against Chan-Chuico and Manuel Nubla. The first named demurred thereto, the complaint having been answered only by the latter. Before the hearing upon the demurrer, the court ordered that evidence be taken in the case which, for this reason, was only continued between the plaintiff and the defendant Nubla, Chan-Chuico, the other defendant, being excluded.

In view of the evidence, the matter was decided in favor of the defendant with the costs against the plaintiff, who duly excepted thereto, and moved for a new trial in order that the evidence might be reviewed in this instance.

The judgment contains the following conclusions of facts:

"1. The evidence adduced shows that the plaintiff has been using a certain trade-mark and drawing, under which to place on the market and sell his cigarettes; that it had the exclusive right to the use of said trade-mark and drawing; that some time before this action was commenced there appeared for sale on the market certain cigarettes manufactured by the cigarette factory 'La Intimidad,' presented in a like form, and with a trade-mark and drawing similar to that used by the plaintiff, and that the manner in which they were offered, the trade-mark, and drawings were so nearly like those of the plaintiff that the public was almost deceived on buying them.

"2. It is evident that the plaintiff had the exclusive right to the use of the drawing and the trade-mark used by it, and that the trade-mark in question, 'La Intimidad,' is a violation of the rights of the plaintiff.

"3. There was also some evidence, not very satisfactory, tending to show that this defendant had sold some cigarettes in the manner above described, but this was positively denied by the defendant, and he Avas not contradicted.

"4. Whatever may be the case in this respect, no loss on account of such sale has been proven, nor have the profits thereby obtained by the defendant been shown."

Of the said conclusions the third alone has been argued as erroneous in the appellant's brief. Three witnesses, dealers in cigarettes, were offered by the latter in order to justify the sale made by the defendant, Nubla, of cigarettes "La Intimidad." One of them testified to having made four purchases of said cigarettes, in quantities of 500 packages at a time, at the rate of P40 a thousand, at Nubla's house on Calle Salazar, No. 8, in the months of February and March, 1903; that it was Nubla himself who sold them to him, telling him to buy them because they were cheaper than those of the "Germinal," and that he lately ceased to buy them because the last time he went to procure them at Nubla's house, the latter told him that there were no more. The testimony of another of the witnesses is identical, with the sole difference that this witness only twice purchased from Nubla cigarettes of the mark "La Intimidad." Twice also, according to the third witness, did he buy such cigarettes at Nubla's house, in

quantities of 100 packages the first time, and 50 the second; and although he states that it was one of Nubla's salesmen who sold them to him, and not Nubla himself, this circumstance, to which the appellee seems to attach great importance in his brief, does not alter in the least the probative force of the testimony of this witness, inasmuch as he asserts that at the same time Nubia was present, and that if he did decide to buy said cigarettes it was because the latter told him that they were very similar to those of the "Germinal."

The declaration, an interested one, of course, of defendant Nubia, denying that he ever sold cigarettes "La Intimidad" at his house; that of his codefendant, Chan-Chuico, assenting the same thing, acknowledging, however, to be true that said cigarettes were manufactured at Nubia's own house; the testimony of one of the clerks of the latter, as far as he says that he never saw him sell cigarettes, inasmuch as he has a salesman for such purpose, and the testimony of the salesman himself, who says no more than that he sold cigarettes wherever people applied to him for the same, which seems to show that purchasers did not always apply to him; declarations the three first of which are of a purely negative character, the latter one not being at all categorical, and all of them coming either from the defendant himself or from persons more or less attached to him, can not prevail as against the precise, positive, and express testimony of the witnesses of the plaintiff who assert affirmatively that Nubia had sold them cigarettes under the mark "La Intimidad." The preponderance of evidence in favor of the appellant is manifest, and the judgment should, therefore, be reversed in this respect.

In his brief the appellee argues that the evidence should not be reviewed in this case because the appellant had failed to submit some of the evidence offered at the trial. We have before us the whole of the evidence, both oral and documentary, offered by the appellant as proof, with the exception of the packages of cigarettes of the marks "Germinal" and "La Intimidad." The only object of such proof was to set forth the similarity or resemblance of one package to the other. This fact has been held as proven in the judgment appealed from, and neither the appellant nor the appellee has excepted or offered any objection whatever thereto; and upon the same having been consented to by the parties, it has, as a matter of fact and of law, become final and can not now be reviewed; nor, naturally, can the evidence which solely and exclusively refers thereto, as is the case with the packages in question, be reviewed. It is therefore idle to have them on view here, it being clear and evident for this same reason that the absence of such packages of cigarettes can not prevent the review of the other evidence concerning the questions set up in this instance as long as the same is complete, and as a matter of fact it is so in the record submitted, together with the bill of exceptions.

The appellant has further pointed out other errors which he assumes were committed at the trial of the cause.

He alleges that the first error consists in the fact that the judge ordered the trial to be held while the demurrer filed by one of the defendants was still pending resolution. The bill of exceptions does not show that the appellant excepted to said order of the court; for this reason he is not entitled to raise in this instance any question as to the legality or illegality of the same; therefore, his refutation is inadmissible.

The appellant also assigns as error the fact that the judge admitted as evidence the contract for the lease of certain cigarette-making machines between Nubla and his codefendant, Chan-Chuico. It is alleged in the complaint that the said two defendants manufactured and sold cigarettes in packages with marks, emblems, and distinctive features similar to those of the "Germinal." Such cigarettes were manufactured in Nubla's house and with machines which belonged to him. The contract alluded to was offered in evidence in order to prove that, notwithstanding said circumstances, Nubia had nothing to do with the manufacture of the cigarettes, for the reason that he had leased the said machines to Chan-Chuico, who, if the contract were an actual one, would be the real manufacturer. Such proof might unquestionably contribute to justify this point, and consequently the judge acted in accordance with the law when admitting it as material at the trial after duly establishing, as was done, the authenticity of the contract.

Finally, the appellant maintains that the judge erred when not allowing it to offer as evidence its own account books in order to prove the loss caused to it through the cigarettes of "La Intimidación" appearing on the market.

The complaint charges that the defendant Nubla made and sold the cigarettes. In his decision the judge held that the interest which Nubla had in the sale thereof was not proven, while nothing was said as to their manufacture. No error has been assigned by the appellant based on such omission; it simply limits itself to pointing out as erroneous the opinion of the court that Nubla had no interest in the sale. As a matter of fact, it states nothing in its brief regarding the interest which Nubla might have in the manufacture of the said cigarettes; its claim in connection with this matter must therefore be considered as abandoned. Under these circumstances there is no way to hold Nubla liable for the loss which, on account of the manufacture of such cigarettes, the appellant may have suffered, but only that caused by his proven interest in the sale thereof, and even this should be limited to such sales as he actually made as shown by the evidence. The loss which such sales, of very little importance, indeed, may have caused the appellant can not be determined by its own account books, which were offered for the sole purpose of showing a decrease in the sale of its own cigarettes, without previously establishing by evidence of another sort, which has not been attempted nor even offered, that such decrease in the sale was entirely and necessarily due to the express acts of the defendant—the only ones for which he should be held liable under the law. Therefore, the judge committed no error by refusing to admit in evidence the books in question.

Inasmuch as the amount of the loss suffered by the appellant by reason of the illegal and fraudulent acts of competition carried out by the defendant has not been proven, no amount can be awarded.

The judgment appealed from is hereby reversed and the defendant Nubla is directed to abstain from hereafter selling cigarettes made up in packages resembling or similar to those used by the plaintiff, and with the costs of the first instance against the said defendant. So ordered.

Arellano, C. J., Torres, Carson, Willard, and Tracey, JJ., concur.
Johnson, J., did not sit in this case.

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