

**ED. A. KELLER & CO., LTD., PLAINTIFF AND APPELLEE, VS.
KINKWA MERIYASU CO. (P. I.), INC., DEFENDANT AND APPELLANT.**

G. R. No. 36765. October 01, 1932

Ponente: BUTTE, J.

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BUTTE, J.:

This is an appeal from a judgment of the Court of First Instance of Manila, dated October 13, 1931, in an action for infringement of trade-mark and unfair competition under Act No. 666 as amended by Act No. 3423.

On December 2, 1930, the plaintiff-appellee filed in said court its complaint alleging in substance that on October 24, 1904, it duly registered in the Philippine Islands its trade-mark, consisting of the picture of a peacock (pavo real), which it again registered on March 12, 1924; that for forty years last past it has been selling high grade men's undershirts of a distinctive pattern and design in Manila and elsewhere in the Philippine Islands under said trade-mark, and its goods became generally known to the buying public by the name of "PAVO" or "Marca PAVO"; that the defendant has sold and is offering for sale in the Philippine Islands a cheap imitation of the plaintiff's goods stamping thereon a trade-mark consisting of the picture of a turkey with the name "PAVO" or "Marca Pavo" printed thereon; that there is such a similarity between the trade-mark used by the defendant and the plaintiffs that the buying public has been and is being deceived thereby to the grave damage and injury of the plaintiff's business; that plaintiff has suffered damages to the extent of P10,000 and prays for an order of injunction against the defendant and an accounting of profits realized by the defendant from its unlawful and unfair competition in the use of said deceptive trade-mark.

The defendant, on January 31, 1931, answered with a general denial and set up, as a special defense, that its trade-mark, consisting of the picture of a turkey and the words "Marca Pavo", was acquired by the defendant from other firms which had been using the same for fifteen years; that the words and trade-mark "Marca Pavo" used by the plaintiff instead of the correct words "Marca Pavon" are an infringement on the defendant's trade-mark and that defendant prays damages resulting from such infringement in the sum of P2,000 and injunction restraining the plaintiff from using the words or label "Marca Pavo" or "Pavo"; in other respects, the prayer of the cross complaint is similar to the prayer of the complaint. On February 14, 1931, the plaintiff filed a general denial to the cross complaint.

The court below, in a well considered decision, dismissed the cross complaint and rendered judgment in favor of the plaintiff, granting a permanent injunction prohibiting the defendant from using its alleged trade-mark on undershirts and fixing the plaintiff's damages at P10,000.

The first assignment of error of the defendant-appellant is as follows: "The court below erred in holding that defendant's registered trade-mark has infringed plaintiff's, whereas as a matter of fact it might have been otherwise."

A comparison of the alleged trade-marks used by appellant and appellee respectively during the period when the infringement took place, that is, during the years 1928 to 1931, with the original certificates filed by them, reveals

at a glance that neither the appellant nor the appellee was using the identical trade-mark authorized by its original certificate. Essentially, therefore, the action is not for infringement of trade-mark but rather for unfair competition under section 7 of Act No. 666 as amended by Act No. 3423 (1927).

The evidence in the court below satisfactorily establishes that the plaintiff has been selling its goods continuously since at least the year 1913 under the trade name of "Marca Pavo" and established under that trade name a reputation for its goods and a volume of business of substantial value. The defendant first commenced selling imitation goods under the trade name "MARCA Pavo" in 1928. It well knew that the plaintiff's goods were sold under the trade name of "Marca Pavo" because it bought 50 dozen "Marca Pavo" undershirts from the plaintiff on February 28, 1928. Thereafter, it imported and sold large quantities of goods almost identically in appearance with plaintiff's, using the words "Marca Pavo" in conspicuous letters over the picture of a turkey as its trade name. We have carefully examined the exhibits and the testimony produced at the trial and we hold that they amply sustain the conclusion of the court below that the defendant was guilty of unfair competition in its use of the alleged trade-mark which is enjoined by the judgment appealed from.

The second assignment of error is covered by what we have said with regard to the first error.

The third assignment of error is that the court erred in "allowing damage to the plaintiff, especially in an amount at once excessive, not supported by evidence and contrary to law." We find no force in the argument that the plaintiff under the facts established is not entitled to any damages. The only question that needs to be discussed is whether P10,000 is an excessive amount.

The appellant insists that there should be deducted from the gross profits, as found by the court below, the following items of expense as stated in its brief: Ocean freight, marine insurance, landing charges and transportation, 10 per cent to 15 per cent of the cost of the goods in Japan (estimated at 12 per cent); customs duties, 25 per cent ad valorem; discounts on sales, 1 per cent to 8 per cent (on basis of 2 per cent on selling price); overhead expenses for selling, etc. based on average of 5 per cent, sales taxes, 1 per cent.

According to appellant's own admission, the only evidence concerning these expenses is the oral testimony of the defendant's manager, part of which is quoted in appellant's brief. We have read the complete testimony and find nowhere any reference to a specific amount actually paid for any of the expenses above listed. The manager's testimony is confined to general estimates. The profits found by the court below were realized upon the sale of 1,828 dozen of underwear specifically set out in the defendant's invoices shown in Exhibits K to K-12. The books and receipts kept by the defendant should, and doubtless do, show the exact amount paid, if any, on the items of expense above listed. This conclusive evidence was in the possession of the defendant and should have been produced, if the defendant honestly desired to enlighten the court as to the correct amount of the necessary and proper expenses that were actually paid.

The judgment below is affirmed with costs against the appellant. So ordered.

Malcolm, Ostrand, Villa-Real, Abad Santos, Hull, Vickers, and Imperial, JJ., concur.

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