

5 Phil. 608

[ G.R. No. 2357. February 13, 1906 ]

**FREDERICK NELLE, PLAINTIFF AND APPELLEE, VS. BAER, SENIOR & CO.,  
DEFENDANTS AND APPELLANTS.**

**D E C I S I O N**

**WILLARD, J.:**

The plaintiff is the owner of a cigar factory in Manila, called "Dos Hermanas." In August, 1903, he commenced' to use upon his brand of cigars known as "perfectos" a small paper ring, placing one of these rings upon each cigar. The defendant, the owner of another cigar factory in Manila, commenced in May or June, 1904, to use for its brand of cigars known as "perfectos" a ring similar to the ring used by the plaintiff. The plaintiff brought this action in the Court of First Instance to enjoin the defendant from the use of this ring, and for damages. Judgment was entered in the court below in favor of the plaintiff to the extent of perpetually enjoining the defendant from the use of said ring. No damages were allowed to the plaintiff. The defendant moved for a new trial in the court below, which was denied, and it has brought the case here by bill of exceptions.

The plaintiff, on the 13th of July, 1903, filed for registration in the Bureau of Archives, Patents, Copyrights, and Trade-Marks facsimiles of a certain trade-mark, and on the 24th day of May, 1904, said trade-mark was duly registered. Among the facsimiles so deposited by the plaintiff was a facsimile of the ring in question, but in the affidavit which the plaintiff made in his application for registration no reference is made to the ring. The claim is limited to two other designs, intended to be used upon cigar boxes. The design thus specified in the claim filed by the plaintiff does not appear upon the ring in question. The court below properly held that the ring was not duly registered as a trade-mark.

The judgment in favor of the plaintiff was, however, based upon section 7 of Act No. 666 of the Philippine Commission, which provides that—

“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 \* \* \* shall be guilty of unfair competition; \* \* \* 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.”

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 similarity in the appearance of the goods.” There is in the case, however, evidence which we think shows such actual intent. When the plaintiff adopted the ring he took into his employ a man named Nebo, Nebo continued in the employ of the plaintiff for some time, but afterwards left the plaintiff’s factory and went into the employ of the defendant. While in the employ of the defendant the defendant’s ring in question was adopted by it, and Nebo acted as salesman for the defendant. One witness testified that while Nebo was in the employ of the defendant he attempted to sell to the witness the defendant’s brand of cigars known as “perfectos,” and which bore this blue ring, telling the witness that the appearance of the cigars was so nearly like that of the plaintiff’s brand that they could not be distinguished. Another witness testified that he saw Nebo attempting to get dealers to exchange the cigars of the plaintiff for the cigars of the defendant.

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

*Torres, Mapa, Johnson, and Carson, JJ., concur.*

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