CUERVO v. LANDAUER et al.

(Circuit Court, S. D. New York. September 7, 1894.)

1. TRADE-MARK—INJUNCTION AGAINST INFRINGEMENT—INNOCENT INFRINGER.
   Injunction will not be refused because defendants bought boxes with infringing labels on them without knowing of the infringement.
2. SAME—DEFENSES.
   Injunction will not be refused because defendants have made no sales, where it appears that they bought for the purpose of selling, and would have done so but for complainant's suit.
3. SAME—ORIGIN OF COMPLAINANT'S OWNERSHIP.
   Injunction will not be refused because complainant was not the original designer or owner of the trade-mark, but succeeded to the rights of a firm which owned it.

This was a suit by G. Garcia Cuervo against Julius Landauer and others to enjoin the infringement of a trade-mark in certain cigar-box labels. Heard on motion for preliminary injunction.

Jones & Govin, for complainant.
Weed, Henry & Meyers, for defendants.

LACOMBE, Circuit Judge. This is an application to enjoin violation of complainant's trade-mark in certain labels for cigar boxes. That the alleged infringing labels are imitations of complainant's is self-evident upon inspection. In fact, so close is the resemblance that, in the absence of any affidavit by the designer of the labels found in defendants' possession, it may fairly be assumed that they were intentionally devised to simulate the complainant's labels, and thus confuse the identity of the goods sold under their cover. That defendants did not know that the labels, which they bought, as they aver, from a cigar-box maker, were infringements, is no reason for refusing the relief prayed for. The owner of a trade-mark is entitled to protection against ignorant as well as against malicious infringers. Nor is the fact that no actual sale is shown material. It is manifest on the papers that defendants bought the boxes thus labeled to sell with their cigars, and that, but for complainant's appeal to the courts, they would have offered them for sale. Nor is there any force in the defendants' contention that complainant is not the original designer and owner of the trade-mark. The cases cited, viz. Stachelberg v. Ponce, 23 Fed. 430; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436,—do not apply. In the case at bar, complainant, at the time of the adoption of the trade-mark, was the manager of the business, and continued in that position until 1872, when he became a partner in the firm, and continued as such partner with the original Manuel Garcia until 1878, when the latter retired from business, leaving complainant as sole proprietor thereof. Why these circumstances should deprive him of the protection of the courts when the trade-mark, which is a part of the assets of the business to which he succeeded, is infringed, it is difficult to perceive. See Fulton v. Sellers, 4 Brewst. 42. Preliminary injunction is continued until trial.

BIRTWELL v. SALTONSTALL, Collector.

(Circuit Court, D. Massachusetts. September 28, 1894.)

No. 377.

CUSTOMS DUTIES—EXCESSIVE EXACTIONS—TIME OF MAKING PROTEST.

Rev. St. § 3011, provides that "any person who shall have made payment under protest," in order to obtain possession of goods, may maintain an action to recover back any excess paid, "but no recovery shall be allowed * * * unless a protest and appeal shall have been taken as provided in section 2931." *Held*, that the reference to the latter section is for the time as well as the form of the protest, and hence that it need not be made before or at the time of the payment of the duties, but is good if made within 10 days thereafter.

This was an action by Joseph Birtwell against Leverett Saltonstall, collector of the port of Boston, to recover duties paid under protest. There was originally a judgment for plaintiff (39 Fed. 383), but this was reversed, on defendant's appeal, by the supreme court (150 U. S. 417, 14 Sup. Ct. 169), and a new trial ordered. A new trial having been accordingly had, the opinion below was filed.

Josiah P. Tucker, for plaintiff.

Sherman Hoar, U. S. Atty., and Wm. G. Thompson, Asst. U. S. Atty., for defendant.

COLT, Circuit Judge. The position taken by the United States attorney in behalf of the defendant is that where an importer, in order to obtain possession of his merchandise, pays the duties under section 3011, Rev. St., he must, at or before the time of such payment, make a written protest; and that a protest made within 10 days after the ascertainment and liquidation of duties under section 2931 is insufficient, because too late in point of time; and that, therefore, such protest, although complying with the provisions of section 2931, cannot be admitted in evidence as a legal protest in a suit brought by the importer against the collector to recover back the excess of duties.

It must be remembered at the outset that the whole subject of the right of action by an importer to recover duties illegally exacted by a collector, which includes, of course, the question of protest, is now purely statutory. This has been so decided by the supreme court in Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. 184, and Porter v. Beard, 124 U. S. 429, 8 Sup. Ct. 554. The old common-law right of action recognized and applied in Elliott v. Swartwout, 10 Pet. 137, and which rests upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law did not authorize him to exact, has been superseded by an action based exclusively on a statutory liability. Mr. Justice Matthews, speaking for the court in Arnson v. Murphy, says:

"From this review of the legislative and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in Elliott v. Swartwout, 10 Pet. 137, has been converted into an action based entirely on a different principle,—that of a statutory liability, instead of an implied promise,—which, if not originated by the act