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UNFAIR COMPETITION - FORGERY OF RARE STAMPS

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UNFAIR COMPETITION — FORGERY OF RARE STAMPS — The defendant took stamps from a common, imperforate issue and perforated them to resemble exactly a perforate issue which because of its rarity had become very valuable, These were circulated among unscrupulous dealers who passed them off on the public as the genuine rare stamps at a much lower price than the genuine. This caused the value of the genuine stamps to fall and honest dealers to lose trade. The defendant did not try to deceive the dealers; he merely pointed the way for the deception of the public. The American Philatelic Society, an organization of some four thousand stamp collectors, most of them dealers for profit, and two others united to seek an injunction on behalf of the stamp dealers of America. *Held*, the conduct of the defendant amounts to the simulation by one party of the

goods of another, which is the essence of unfair competition and is enjoinable. *American Philatelic Society v. Claibourne*, (Cal. 1935) 46 P. (2d) 135.

It is difficult to decide into just what category of the law of unfair competition to place this case. In many respects it appears unique. The court reaches a result, which from any enlightened view appears desirable, on the theory that this was just another case of one party passing off his goods as those of his competitor. This has always been considered unfair competition and is clearly enjoinable.[1] The law is also clear that it is immaterial that the manufacturer does not try to deceive the dealer. The wrong may lie in his designedly placing the means of deceiving the public in the hands of the dealer.[2] But to decide the case thus easily the court had to pass over some serious difficulties. Normally a suit to enjoin the passing off of one's goods as those of another is brought by the manufacturer whose goods are being simulated. The basis of the relief in these cases is the protection of a property right. This property right is found in certain marks, names or non-functional features of the articles he produces to which his good will attaches.[3] The courts have been slow to recognize as worthy of protection a trader's general interest in freedom to enter into anticipated business relationships.[4] The only manufacturer in the instant case is the United States government, which has no interest in the controversy. The case is unique in that the suit is brought by dealers who do not base their claim on any trade mark, technical or non-technical, of their own. The court took the interesting view that the dealers had the same kind of property rights in their stamps as have manufacturers in their products in the normal case.[5] It would seem that the real right protected here is the right not to have the value of one's property decreased

[1] See 84 A. L. R. 473 (1933) for a citation of at least one hundred cases on this point.

[2] 84 A. L. R. 473 (1933); Von Mumm v. Frash, (C. C. N. Y. 1893) 56 F. 830; Warner & Co. v Eli Lilly & Co., 265 U. S. 526, 44 S. Ct. 615 (1923); Kawneer Mfg. Co. v. Detroit Show Case Co., (D. C. Mich. 1917) 240 F. 737; Hostetter Co. v. Becker, (C. C. N. Y. 1896) 73 F. 297; Hostetter Co. v. Brueggeman-Reinert Distilling Co., (C. C. Mo. 1891) 46 F. 188. In Frischer & Co. v. Bakelite Corp., (Cust. & Pat. App. 1930) 39 F. (2d) 247, the court said, at p. 260: "Even if dealers understand they are buying a counterfeit and not a genuine product, the manufacturer of the counterfeit will be enjoined from selling it to such dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer."

[3] In fact it has been strongly stated that a property right must be present in the picture or the court has no jurisdiction. American Wine Co. v. Kohlman, (C. C. Ala. 1907) 158 F. 830; American Washboard Co. v. Saginaw Mfg. Co., (C. C. A. 6th, 1900) 103 F. 281; Borden's Condensed Milk Co. v. Horlick's Malted Milk Co., (D. C. Wis. 1913) 206 F. 949; New York & R. Cement Co. v. Coplay Cement Co., (C. C. Pa. 1890) 44 F. 277. In the latter case *D* sold cheaper quality goods as genuine. The court refused to allow *P*, an honest competitor, to recover, saying, at p. 279: "unless there is an invasion of some trade-mark, or trade-name, or peculiarity of style, in which some person has a right of property, the only persons legally entitled to judicial redress would seem to be those who are imposed upon by such pretenses."

[4] Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?," 33 MICH. L. REV. 321 (1935).

[5] Query as to just what the court considers the property right to be here? It may be the particular pattern of the perforation, to which a certain amount of good will

by unfair means.[6] This is a decided advance in the law of unfair competition. It might be urged that the view taken by the court is illogical in that the unscrupulous dealers were not passing off the fake stamps as those of the plaintiff but were selling them as stamps exactly like those of plaintiff. From this point of view the case appears more nearly analogous to cases of misbranding or false advertising.[7] These are clearly recognized as "unfair acts of competition" and enjoined by the Federal Trade Commission.[8] However, the authorities have very generally held that such activities were not enjoinable at the suit of a competitor.[9] A strong line of cases holds that unless there is passing off there is no right of action.[10] However, even along this front the law is progressing. In a recent case the Supreme Court has intimated that if the plaintiff can show conclusively that he has been injured by defendant's misbranding, an injunction will be granted.[11] The instant case, then, is welcome either as a sign of the growing recognition that our concept of the rights which equity will protect is broadening, or of the

attached. The source of the good will in this case was the rarity of the product. Hence it would seem that the court recognized a property right in the rarity of one's possession.

[6] Wherein lies any practical difference whether *D* wrongfully takes away half of one's property absolutely, or does an act which decreases it in value by one-half? The loss is the same. From this point of view the plaintiff herein had a very real property right invaded.

[7] It would appear that either view might logically be taken. There was simulation in that fake stamps were being passed off as stamps of a certain issue of the United States Government, and there was misbranding and false advertising in that the dealers were selling the false stamps as exactly like those sold by the plaintiff.

[8] Sears, Roebuck & Co. v. Federal Trade Comm., (C. C. A. 7th, 1919) 258 F. 307; Federal Trade Comm. v. Winstead Hosiery Co., 258 U. S. 483, 42 S. Ct. 384 (1922). See also for a good collection of cases, Handler, "False and Misleading Advertising," 39 YALE L. J. 22 at 42 (1929).

[9] American Washboard Co. v. Saginaw Mfg. Co., (C. C. A. 6th, 1900) 103 F. 281; Armstrong Cork Co. v. Ringwalt Linoleum Works, (D. C. N. J. 1916) 235 F. 458; Singer Mfg. Co. v. Domestic Sewing Machine Co., 49 Ga. 70 (1873); New York & R. Cement Co. v. Coplay Cement Co., (C. C. Pa. 1890) 44 F. 277; Borden's Condensed Milk Co. v. Horlick's Malted Milk Co., (D. C. Wis. 1913) 206 F. 949. The typical cases of misbranding and false advertising are the ones in which *D* brands his goods or advertises his goods as of a certain type or quality, when in fact they are of an inferior quality or a different type, to the injury of *P* who sells the genuine. Note that the decision in the Armstrong case was reversed on appeal but solely on the ground that too important questions were involved to be decided without final hearing and full proof.

[10] See cases cited in note 9, supra; also Rathbone, Sard & Co. v. Champion Steel Range Co., (C. C. A. 6th, 1911) 189 F. 26, in which the court cites many cases to support the view that "nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition" (p. 30).

[11] Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132, 47 S. Ct. 314 (1927). This decision by the Supreme Court reversed a decision by the Circuit Court on the ground that it was not definitely shown that the purchasers who were deceived into purchasing *D's* article would have otherwise traded with *P*. That objection might not apply to the instant case which is a representative suit brought in the name of all the stamp dealers of America, as permitted by the California statutes. Otherwise the Supreme Court did not quarrel with the opinion of the lower court in which Judge Hand

growing recognition that there may be cases of unfair competition other than the typical passing off.[12] We are getting farther from the hampering effects of the requirement of a property right before equity will intervene, and closer to the ancient basis of unfair competition which was the deceit of the public and incidental injury to a competitor. We are bringing the law of unfair competition more closely into line with the fundamental principle of tort law, that when one man intentionally inflicts temporal damage upon another he must make recompense to that other, unless he can justify his conduct.

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stated, "But we conceive that in the end the questions which arise are always two: Has the plaintiff in fact lost customers? And has he lost them by means which the law forbids? . . . It is as unlawful to lie about the quality of one's wares as about their maker." (C. C. A. 2d, 1925) 7 F. (2d) 603 at 604. See 12 CORN. L. Q. 416 (1927) for an enlightened discussion of this case.

[12] "It is no longer true that there is no cause of action unless passing off is present. Passing off is but one of various practices that are actionable as unfair competition. The growth has been gradual but constant. At the outset, actual passing off was enjoined. Later, although no actual passing off was proven, injunctions were issued against acts that might result in passing off, if continued. Later still, acts were enjoined which injured the plaintiff even though no passing off was present or threatened." NIMS, THE LAW OF UNFAIR COMPETITION AND TRADE MARKS, 3d ed., c. 2 at p. 36 (1929). To like effect see 12 CORN. L. Q. 416 (1927); 26 COL. L. REV. 199 (1926); In re Northern Pigment Co., (Cust. & Pat. App. 1934) 71 F. (2d) 447 (interpreting clause in tariff act which says that "unfair acts of competition are declared unlawful"). See also Standard Oil Co. of Maine v. Standard Oil Co. of New York, (C. C. A. 1st, 1930) 45 F. (2d) 309. In Steiff v. Bing, (D. C. N. Y. 1914) 215 F. 204 at 206, Judge Hough declared, " 'Unfair competition' consists in selling goods by means which shock judicial sensibilities; and the Second Circuit has long been very sensitive."