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UNFAIR COMPETITION—MISREPRESENTATIONS BY A COMPETITOR OF THE QUALITY OR CHARACTER OF HIS OWN PRODUCT—The plaintiff, an exclusive licensee under certain patents, manufactures the "Purolator" oil filter. The A. C. Filter produced by the defendant was adjudged to be an infringement of plaintiff's patent rights and a permanent injunction was granted. Defendant then changed the internal construction of its oil filter without changing the shape, color, marking or appearance and thereafter sold the changed device representing that it was the same as the earlier infringing one. From a decree of the lower court dismissing plaintiff's bill alleging unfair competition, plaintiff appealed. *Held*, injunction granted restraining defendant from falsely representing the filter it is now selling to be of the same quality and character as the infringing filter. *Motor Improvement, Inc. v. A. C. Spark Plug Co.*, (C. C. A. 6th, 1936) 80 F. (2d) 385.

In the present case the court justly gives relief from a deceitful business practice. Viewed in the light of established principles of unfair competition, the basis for the decision is not so clear. It was formerly asserted that a suit by a competitor could be maintained only if the defendant was passing off his goods as those of the plaintiff.[1] Relief was granted for the protection of some property right which the courts found in trade-marks, trade names, and other distinguishing devices.[2] Courts were reluctant to recognize any property in a trader's interest in anticipated business relationships.[3] Diversion of custom by a competitor accomplished by false representation as to the quality of his own product was not actionable in the absence of any trade-mark infringement or passing off.[4] It

[1] Howe Scale Co. v. Wyckoff, Seamanst and Benedict, 198 U. S. 118 at 140, 25 S. Ct. 609 (1905), in which Chief Justice Fuller stated: "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of the complainant, the action fails." Ely-Norris Safe Co. v. Mosler Safe Co., (C. C. A. 2d, 1933) 62 F. (2d) 524; Rathbone, Sard Co. v. Champion Steel Range Co., (C. C. A. 6th, 1911) 189 F. 26; see 84 A. L. R. 473 (1933) for citation of cases on the point that passing off constitutes actionable unfair competition.

[2] American Washboard Co. v. Saginaw Mfg. Co., (C. C. A. 6th, 1900) 103 F. 281.

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

[4] American Washboard Co. v. Saginaw Mfg. Co., (C. C. A. 6th, 1900) 103 F. 281. The decision in this case seems to have rested solely on the ground that the only rights to be protected were property rights in a trade name and no action would lie

would seem that injury resulting from such deception is no less severe than that caused by passing off.[5] A more enlightened view suggests that passing off is no longer essential to relief.[6] At least one court has held that an action at law or in equity may be maintained whenever a rival's misrepresentation has resulted in the diversion of trade.[7] The Supreme Court of the United States, in reversing this decision for failure of plaintiff to establish loss of business, did not express an opinion on the question whether an action would lie if actual damage were shown.[8] In any event, there seems to be no good reason why loss of sales induced by a fraudulent claim that defendant's goods are the same goods which plaintiff alone can sell should not be ground for an action.[9] It is significant that the court emphasizes the wrong committed by the defendant rather than any property right of the plaintiff.[10] The decision is a welcome development in the law of unfair competition, if it can be interpreted as recognizing the right of a trader to be protected in his interest in anticipated business relationships from any unjustifiable invasion.

P. M. C.

merely on proof of loss by deceitful practice. Also see 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.

[5] "Thus, when *A*, the sole producer of aluminum washboards has created a demand for the product, a loss of business, produced by *B's* misrepresentation that his boards are made of aluminum in order to sell those concededly wanting aluminum boards, is no more palatable than when caused by direct misrepresentation that *B's* boards are *A's*." Handler, "False and Misleading Advertising," 39 YALE L. J. 22 at 36 (1929).

[6] "It is no longer true that there is no cause of action unless passing off is present. Passing off is but one of the various practices that are actionable as unfair competition." NIMS, UNFAIR COMPETITION AND TRADE MARKS, 3rd ed., p. 36 (1929). Also see Coco-Cola Co. v. Old Dominion Beverage Corp., (C. C. A. 4th, 1921) 271 F. 600; Vogue Co. v. Thompson Hudson Co., (C. C. A. 6th, 1924) 300 F. 509; Electric Auto Lite Co. v. P. & D. Mfg. Co., (D. C. N. Y. 1934) 8 F. Supp. 314.

[7] Ely-Norris Safe Co. v. Mosler Safe Co., (C. C. A. 2d, 1925) 7 F. (2d) 603 at 604. Judge Learned Hand expressed the more liberal view when he wrote, "It is as unlawful to lie about the quality of one's product as about their maker; it equally subjects the seller to action by the buyer." This decision is reviewed in 26 COL. L. REV. 199 (1926) and 39 HARV. L. REV. 518 (1926).

[8] Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132, 47 S. Ct. 314 (1927). The decision of the Supreme Court is discussed in 12 CORN. L. Q. 416 (1927).

[9] It would seem comparatively simple for the plaintiff to establish an actual diversion of business in the instant case since plaintiff, as exclusive licensee under patents, is alone entitled to manufacture and sell similar oil filters.

[10] Rogers, "Unfair Competition," 17 MICH. L. REV. 490 at 494 (1919).