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UNFAIR COMPETITION BY FALSE STATEMENTS OR DISPARAGEMENT

Harry D. Nims†

The International Association for the Protection of Industrial Property, at its convention in London, in May, 1932, considered a proposal to amend its definition of unfair competition to read: “1. Every act of whatever nature to create confusion by any means, with the establishments, the services, or the products of a competitor. 2. Statements in the course of commerce of a nature to discredit the establishments, the services, or the products of a competitor. 3. False allegations made in the course of commerce of a nature to attract trade and which have to do with the origin, the nature, the manufacture, the sale of products, or the reputation of the commercial establishment, or industrial benefits.”

Such recommendations are reminders of the importance of a question which has been under discussion for some years, i.e. whether the rules of unfair competition law comprehend false, unfair, or defamatory statements concerning a competitor or his goods or his business methods.

In 1916 Dean Pound, in an article entitled “Equitable Relief against Defamation and Injuries to Personality,”1 reviewed the leading cases involving disparagement of goods, and then wrote in conclusion:

“Looking back over these cases of injury to person or property by writing and publishing, we see that the English Courts now deal with them as with any other torts; that in England the subject has had the very same development as equity jurisdiction over trespass, over disturbance of easements, and over nuisance. We also see that American Courts are moving in the same direction, reaching such cases indirectly by laying hold of some admitted head of equity jurisdiction and tacking thereto what is in substance concurrent jurisdiction over legal injuries through publication. In some of the cases this is so obviously but a matter of pleading that we may be confident some strong court presently will take the direct course and will be followed therein. Most of the cases that grant relief speak strongly of the injustice that must result from denial of jurisdiction in these cases. In substance, the traditional doctrine puts anyone’s business at the mercy of any insolvent, malicious defamer who has sufficient

† Member of the New York bar; author of Unfair Competition and Trade Marks (3rd ed. 1929).

imagination to lay out a skillful campaign of extortion. So long as
denial of relief in such cases rests on no stronger basis than authority
our courts are sure to find a way out."

In the sixteen years since this was written apparently no "strong
court" has been willing to "take the direct course", but some of our
courts have further cleared the way for an outright declaration that
defamation or disparagement of a competitor's goods is unfair com-
petition and a proper subject of injunctive relief.

The nearest approach is that made by the New York courts. In
1928 the Appellate Division of the New York Supreme Court de-
cided Allen Mfg. Co. v. Smith, a suit between competitors. "The
defendant in 1921 instituted a campaign of false disparagement
against the plaintiff's goods which he has continued to conduct.
Salesmen were instructed to make false statements as to the efficacy
of 'So-Bos-So', (plaintiff's product), "to tell prospective purchasers
that they could be fined for selling it, and that any of the 'So-Bos-So'
product which they had on hand was subject to seizure by inspectors
of the United States government. The defendant even caused to be
printed two spurious documents, one purporting to be a bulletin of
information about fly sprays, and the other containing analyses of fly
sprays. Each dealt severally with 'So-Bos-So'. Each fraudulently
represented on its face that it was an official document of the United
States Department of Agriculture."

Passing off and trade-mark infringement also were charged, and
the Appellate Court denied relief as to both. Nevertheless it sus-
tained the judgment of the court below "enjoining the practice of
false disparagement of plaintiff's product". Judge Sears, in his
opinion for the Appellate Division, noted the fact that "Actions for
unfair competition are not now confined to 'passing off' cases", and
then distinguished the leading New York cases on disparagement of
goods, saying that these were "not cases of unfair competition but
suits against the publishers of libels". This may be intended as a
ruling that when the libel is published by a competitor it is unfair
competition and may be enjoined—a radical departure from the de-
cision in Mauger v. Dick, which Judge Sears cites on the New York

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2 Pound, supra note 1, at 668.
4 Brandreth v. Lance, 8 Paige (N. Y.) 24 (1839) and Marlin Fire Arms Co. v.
  Shields, 171 N. Y. 384, 64 N. E. 163 (1902).
5 55 How. Pr. (N. Y.) 132 (1878). Soon after Mauger had left Dick's employ
  and started a competing business, Dick issued a circular stating "certain parties
  are infringing our trademark rights", and threatening to punish "any encroach-
  ments on our rights". It was held that "the jurisdiction of a court of equity does
law, but does not attempt to distinguish. It is a departure, too, from such precedents as *Kidd v. Horry*; *Baltimore Car Wheel Company v. Bemis*; *Citizens' Light, Heat and P. Co. v. Montgomery*; *Finnish Temperance Soc. v. Rawaaja Pub. Co.*; *Whitehead v. Kitson*; *Consumers' Gas Co. v. E. C. O. K. C. Gaslight & Cola Co.*, all of which are actions against competitors, where injunctive relief was denied on the ground that equity may not enjoin a libel. Furthermore, this decision is a step ahead of the cases in which injunctive relief against trade libels has been granted as incidental to relief from other acts such as boycott and conspiracy, charges of patent infringement and threats of litigation made not in good faith but to intimidate and not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander, and the complaint was dismissed.

*628 Fed. 773 (E. D. Pa. 1886).* This was the first application by a federal court of the rule against injunctive restraint of a libel, in a suit involving disparagement of a competitor's goods. In *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69 (1873), an injunction restraining defendant from representing to plaintiff's customers that plaintiff's goods infringed defendant's patents was refused on the ground of lack of jurisdiction in the Court of Chancery over cases of libel and slander or of false representations as to plaintiff's property.


*817-553, 563 (N. D. Ala. 1909).* Here the court held that there were "constitutional difficulties in the way of suppressing the injury resulting either from circulation of defamation, or of lawful solicitation of customers." Plaintiff had argued that the court had the power to interfere by injunction "because in so doing it would be enforcing the policy of the Constitution and prevent the accomplishment by one competitor of an avowed and undoubted purpose, by means fair or foul, to drive his rival to the wall, and thus defeat the very purpose of the Constitution in securing 'reasonable competition'."

*119 Mass. 28, 29, 106 N. E. 561, 562 (1914)*, where it was held that "It is settled by our decisions that where no breach of trust or of contract appears, a bill in equity will not lie to enjoin the publication of libelous statements injurious to the plaintiff's business, trade or profession, or which operate as a slander of his title to property."


*1100 Mo. 501, 13 S. W. 874 (1890)*, also following *Boston Diatite Co. v. Florence Manufacturing Co.*, supra note 6.

*221 U. S. 418, 31 Sup. Ct. 492 (1911)*; *Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1907)*; *Chamber of Commerce v. Federal Trade Commission, 13 F. (2d) 673, 684 (C. C. A. 8th, 1926)*. A note on this last case in *12 Iowa L. Rev.*, 77, 78 (1926), refers to the "dictum" that equity has no jurisdiction to enjoin a libel. "In most cases of threatened tort to property interests preventive relief is now available, yet, where unrestrained publication may cause irreparable injury, and where the legal remedy is totally inadequate, equity denies relief for largely historical reasons."
coerce customers of plaintiff,\textsuperscript{13} or misrepresentations as to the scope of a decree.\textsuperscript{14}

In Old Investors & Traders Corp. v. Jenkins,\textsuperscript{15} a few months after the decision of Allen v. Smith, the New York Supreme Court refused to dismiss a complaint which alleged publication of circulars containing false statements intended to injure the plaintiff in its business and prayed for an injunction to restrain the publication of another such circular. The Appellate Division affirmed the decree.\textsuperscript{16} Here the plaintiff and one defendant were dealers in stocks and bonds; a second defendant published the circular entitled “Bowen’s Confidential Service, Financial Investigations and Reports”. The distributor of the circular, who was a competitor of the plaintiff, and the publisher, who was not, both were enjoined. In his opinion, Judge Peters distinguished the case from the Marlin case,\textsuperscript{17} on the ground that there was “much more involved in this case than the mere publishing of a libel”. He said:

“The complaint is based on the theory of unfair trade competition. The mailing or sending of false, untrue and dishonest statements to the customers of an established firm, for the purpose of injuring the firm in its business and deceiving the public and plaintiff’s customers, is a form of unfair trade competition which can be as injurious as the establishment of a competitor in the neighborhood using the same or a similar name and circularizing the firm’s customers for the purpose of confusing them and obtaining their patronage.”\textsuperscript{18}

Now, as formerly, trade libels frequently are enjoined in cases in which they are considered with acts that come under “some admitted head of equity jurisdiction”,\textsuperscript{19} but in such cases the language of the courts indicates an increasing willingness to recognize the need for adequate relief from disparagement of goods by a competitor. In


\textsuperscript{15}133 Misc. 213, 232 N. Y. Supp. 245 (Sup. Ct. 1928).


\textsuperscript{17}Supra note 4.

\textsuperscript{18}Supra note 15 at 214, 232 N. Y. Supp. 245, 246 (1928).

\textsuperscript{19}See Pound, supra note 1 at 668.
Maytag Co. v. Meadows Mfg. Co., the Seventh Circuit Court of Appeals said: "As a general rule, a court of equity will not enjoin the publication of a libel in the absence of facts of conspiracy ** but where there is widespread propaganda, indicating a well-founded plan, skillfully disseminated throughout the land to intimidate customers and coerce them, to frighten dealers so as to cause them to cease representing another, equity will, because of such intimidation, coercion and conspiracy, take jurisdiction and afford adequate and full relief."

The Maytag case is cited in Dehydro v. Tretolite, a suit to restrain circulation of letters among the complainant’s customers, and oral statements to such customers that complainant’s compound infringed patents owned and controlled by the defendant and that complainant’s customers would render themselves liable in damages if they used complainant’s compound. The Court referred to the "well-established rule, in the absence of a statutory authority, that the courts are without jurisdiction to enjoin a libel or slander", citing Kidd v. Horry, supra, and similar cases but overruled a motion to dismiss, on the ground that this was not an action to enjoin a libel or slander. "Where the gravamen in the action is to enjoin unfair competition, the question of libel and slander is only incidental to the action, and such an action is not one to enjoin a libel or slander." A motion to dismiss was denied.

There are indications that the courts in the United States, both state and federal, are likely to overrule the early precedents as to equitable jurisdiction over disparagement of a competitor’s goods, or, at least, to ignore them. The argument that injunctive relief must be

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21 Supra note 20 at 408, citing Hicks v. National Sales Ass’n., 19 F. (2d) 963 (C. C. A. 7th, 1927); Farquhar v. National Harrow Co., supra note 13; Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827 (C. C. A. 2nd, 1903); Emack v. Kane, supra note 13. In the Maytag case, a final decree was entered and upon appeal was affirmed (with a reduction of the judgment). Maytag Co. v. Meadows Mfg. Co., 45 F. (2d) 299 (C. C. A. 7th, 1931).
22 53 F. (2d) 273 (N. D. Okla. 1931). See also Lawrence Trust Co. v. Sun-Am. Pub. Co., 245 Mass. 262, 139 N. E. 655 (1923). Suit was brought against a newspaper and the wrong was "interference with plaintiff’s business," rather than unfair competition. The defendants were charged with having sought to persuade and induce depositors to boycott the plaintiff because its methods of business and financial results appearing in its statements and returns, when compared with other trust companies inferentially showed incompetent management." It was held that the court had jurisdiction to maintain a bill to enjoin similar publications.
denied in such cases on constitutional grounds, no longer is seriously advanced, nor does it find support. Few of the more recent cases in which the old precedents have been cited and followed, and the old rule again laid down, are actions between competitors. For instance, in *Willis v. O'Connell*, plaintiff sold a proprietary medicine and defendant published a newspaper. Though the opinion tends to support the narrow rule as to equity's jurisdiction over trade libels, the case is not authoritative on disparagement of competing goods. As the Alabama District Court fairly pointed out, it did not involve unfair competition in trade. *Robert E. Hicks Corporation v. National Salesmen's Training Association* was a suit brought by the proprietor of a correspondence school for salesmanship against a magazine publisher. The plaintiff's activities included publication of a magazine, and defendant's magazines included one devoted to salesmanship; still, the libelous statements with which defendant was charged, were "mere libels" rather than unfair acts directed against

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24In Chamber of Commerce v. Federal Trade Commission, 13 F. (2d) 673 (C. C. A. 8th, 1926), Stone, J. said (p. 686): "It is true that there was no jurisdiction in equity to enjoin publication of a libel (Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148 (1886)), but this was not because of constitutional reasons and such jurisdiction might be conferred by statute", citing Am. Malting Co. v. Keitel, 209 Fed. 351 (C. C. A. 2d, 1913).

It has been suggested, in this connection, that "The position that the constitutional provision prohibits previous restraint in all cases of tortious writing or speaking would preclude relief in many cases where equity, however, will enjoin publications which it conceives are incidental to the attempted infringement of property rights." Note in (1916) 30 Harv. L. Rev. 172, 173. Lawrence, however, (EQUITY JURISPRUDENCE (1929), Vol. II, p. 919) still refers to the constitutional guarantee of the right of free speech as being "generally held to preclude this jurisdiction, on grounds of public policy, though the concurrence of other independent grounds of relief may confer the jurisdiction."


26Supra note 24, see p. 1014 of the opinion: "I think it not unfair to say that the cases cited and relied upon by the plaintiff, as a general proposition, may be divided into three classes. (1) Where patent rights were infringed; (2) Where lawful violence was threatened and imminent; and (3) Where unfair and illegal methods were resorted to by competitors in trade. Of course, this case does not involve the infringement of a patent, or any threatened unlawful violence, or any unfair competition in trade."

2719 F. (2d) 963 (C. C. A. 7th, 1927).

28The statements published by the defendant, as restated by the Court, were: "Salesmanship cannot be taught by means of correspondence; success cannot be sold and delivered like a commodity; appellee advertises, not in express terms, but by implication, that it can and will procure lucrative employment for its students, and this service is offered as an inducement to prospective students to
a competitor. In this case the Seventh Circuit Court of Appeals acknowledged the old rule, but the case is too near the border line between "mere libel" and unfair competition to be a formidable authority against equitable protection from disparagement of goods.

Finally, the two New York cases, Allen Mfg. Co. v. Smith, and Old Investors & Traders Corporation v. Jenkins, while they do not directly overrule the earlier decisions, may well be held to have taken out of the old rule cases involving competitors and those contributing to disparagement of a competitor's goods.

The need for relief of this kind has been recognized by legal com-
take this course in salesmanship, and thus it undertakes to sell success; it does not procure such positions, and hence it does not deliver what it sells; it is selling a gold brick; such advertisements are dishonest and fraudulent; the persons using them are confidence destroyers, thieves, mail order crooks, direct selling jackals, frauds, crooks, vermin; they are taking money under false pretenses, and trading their honesty and their decency for dollars; their methods are thieving contracts and schemes," etc. supra note 27, at 964.

"The general rule is that a court of equity will not enjoin the publication of a libel. The operation of the rule is not affected by the fact that the false statements may injure the plaintiff in his business or as to his property, in the absence of acts of conspiracy, intimidation, or coercion."

"See Maytag Co. v. Meadows Mfg. Co., supra note 20, in the same court, in which the Hicks case is cited.

Two recent decisions in actions between actual competitors follow directly and unqualifiedly the early cases on enjoining threats and unfounded claims. Oil Conservation Engineering Co. v. Brooks Engineering Co., supra note 13, was brought on the theory that defendant's threats of infringement suits and claims, involving both patents and trademarks, constituted unfair competition. The District Court granted an injunction, and dismissed counterclaims for patent and trademark infringement. The Circuit Court of Appeals reversed the decision on the main bill, saying (pp. 785, 786) that defendant's notices to competitors, and similar accounts, were in good faith. "If not well based, they are in the nature of libels or slanders of title; possibly they are analogous to a cloud upon the competitor's title to his business and to his output. A court of equity has no jurisdiction to enjoin a mere slander or libel. See American Malting Co. v. Keitel, supra note 24; Kidd v. Horry, supra note 6. It is only when such slanders are both in bad faith—that is, malicious—and are working destruction of property or property rights, that equity will interfere; otherwise the remedy is at law." Citing Emack v. Kane, supra note 13, as the leading case on the subject, the court then says that "bad faith and malice must appear before any such power exists. . . . There have been, in recent years, occasional reported opinions which seem somewhat to disregard this essential basis; but in so far as they may bear that construction, we cannot think they are well decided."

"See Old Investors and Traders Corporation v. Jenkins, supra note 32, where a non-competing publisher of a trade libel was enjoined.
mentators in the past, and continues to be acknowledged. In England it has been granted for many years—a natural development in the Chancery Courts. Commonly, however, this has been attributed to the Judicature Act of 1873, and has come to be classified as a statutory remedy. It has been suggested that the American courts are moving, or should move in the same direction. It should be noted, however, that the English courts, treating these cases of disparagement as libel cases, subject, nevertheless, to injunction, have required proof of special damage before granting either legal or equitable relief. Trade libels are not libelous per se.

Neither legislation similar to the English statute, nor a reversal of the precedents against enjoining libels, promises complete relief from commercial abuses of this nature. A more nearly adequate solution is to be found in the law of unfair competition. A statement about a competitor’s goods which is untrue or misleading, and which is made to influence, or tends to influence the public not to buy, certainly is not a method of competition which honorable merchants can countenance. Prompt relief against competition of this sort, often vital to protect property and good-will, can be given only by injunction. This is the direction in which our courts seem to be moving.

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34 See Dean Pound’s article, supra note 1, at 668; CLARK, PRINCIPLES OF EQUITY (1919) says of “Disparagement of Property” (Sec. 238): “There is no plausible reason why equity should not give injunctive relief since only rights of property and not of personality are involved. The strong tendency in this country, however, has been to refuse relief, due largely to confusing the subject with that of disparagement of character.” See also an article, Jurisdiction of Equity over Libels Affecting Trade, (1926) 75 U. of Pa. L. REV. 258. C. R. Jonas, Disparagement of Goods as Trade Libel, (1927) 6 N. C. L. REV. 72, writes: “*** The modern American decisions, while not so outspoken as the English authorities, are awake to the danger of their position and, whenever some recognized equitable principle is involved, they are granting the relief necessary. Probably it is safe to say, from the recent trend of decisions on this subject in this country, that some court will soon take advantage of the opportunity here presented to discard this indirect and unsatisfactory approach and blaze a trail direct to the heart of this problem.” 35 & 37 Vict. c. 66, 816. 37 C. J. 272.

35 See Alcott v. Millar’s Karri, etc., 91 L. T. Rep. 722, (1905). In a comment on this case it was said, 167 Law Times 24 (1929), “In addition to having to show that a statement was false and that it was published maliciously a plaintiff must prove that he has suffered special damage. Unless he has suffered such loss, which can be and is specified by him, he had better avoid all litigation and ignore the disparaging remarks altogether.”

Attempts to restrain disparagement of a competitor's goods through action by the Federal Trade Commission offer no adequate solution of the problem here presented. They do show, however, the existence of a growing feeling that the use of false and defamatory statements is not a fair method of competition. If this sentiment develops, it will soon be reflected in decisions of equity courts in unfair competition cases. In the Commission these complaints have resulted in Trade Practice Conference Rules, in stipulations entered into with the Commission, and in orders of the Commission, only a few of which have reached the Courts.40

40In 1924 an order that a manufacturer of hydrogen peroxide "cease and desist from directly or indirectly publishing, circulating or causing to be published or circulated, any false, deceptive, or misleading statements of or concerning the product of a competitor, and particularly from publishing, circulating, or causing to be published or circulated, directly or indirectly, such statements concerning the product 'Daxol' manufactured by the Proper Antiseptic Laboratories of Cincinnati, Ohio, ***", came before the Circuit Court of Appeals for the Second Circuit and was reversed on the ground that the product for whose special protection the order was issued, was misbranded and was labeled to be used for purposes for which it was unfit, and that the public had no interest in the protection of such an article. John Bene & Sons v. Federal Trade Commission, 299 Fed. 468 (C. C. A. 2d, 1924). In 1928 the Circuit Court of Appeals for the Sixth Circuit, reviewed an order which prohibited a number of allegedly unfair acts including the circulating of false statements concerning the abilities of a competitor to fill orders, the adaptability of the competitor's product for its intended use and as to the competitor's financial standing and business methods. Philip Carey Mfg. v. Federal Trade Commission, 29 F. (2d) 49 (C. C. A. 6th, 1928). The order was reversed on the ground that the evidence was insufficient, Judge Moorman saying (p. 51): "*** the evidence shows that petitioners, not only did not authorize their salesmen to disparage the products of their competitors, but expressly instructed them not to do so. Their policy, as disclosed in the evidence, was to sell their product on its merits and not on the demerits of other like products. Proof that a salesman here and there out of many—as many as 600 at one time—spoke disparagingly of the product of a competitor (not more than a dozen times in all) does not amount to substantial evidence of an unfair method of competition." Another such order, namely, "From publishing or causing to be published, directly or indirectly, adverse, disparaging or derogatory interviews, expressions, opinions, statements or comments regarding the nature, ingredients, composition or effect of its competitors' baking powders, concealing or withholding respondent's connection with or interest in such publication thereof, and causing such expressions, opinions, statements or comments to seem to be either anonymous and therefore disinterested, or the voluntary interviews or contributions of disinterested and technically qualified authorities or persons acting only in the public interest, or to be mere news items or the ordinary and usual record of current events published only as matters of public interest, not inspired by nor published for the use and benefit of, or by procurement of, respondent.", came before the Court of Appeals of the District of Columbia in Royal Baking Powder Co. v. Federal Trade Commission, 32 F. (2d) 966 (1929),
but not on the issue of the power of the Commission to restrain trade defamation. Subsequently, the Royal Baking Powder Company consented to an injunction restraining these acts. There was no trial.

A considerable number of industries which have held Trade Practice Conferences have included among those rules which are approved by the Federal Trade Commission and accepted by the Commission as legally enforceable, a rule usually reading substantially thus: "The defamation of competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, questionable credit standing, or by other false representations, or the false disparagement of the grade or quality of their goods, with the tendency and capacity to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice."