FALSE AND MISLEADING ADVERTISING*

MILTON HANDLER

"The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country." Thus reads the indictment of current advertising practices by Chairman Humphrey of the Federal Trade Commission in an address to representatives of 6000 publishers attending a trade practice conference in New York.[1] A "toll of millions" is taken "annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope."[2] Findings no less harsh are made by Messrs. Chase and Schlink, who, as a self-constituted super-commission, made a painstaking examination of the evidence.[3] "How can this gigantic evil of false advertising be suppressed?" was the question posed by Mr. Humphrey and is the problem with which this paper will deal.

It is the modern temper to turn to the law for the solution of pressing social problems. Whether the solution to the problem of false advertising is thus to be found, I am unable to say. That much, however, can be accomplished by the intelligent use of some of the legal devices already available seems reasonably clear.

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[1] TRADE PRACTICE CONFERENCE, PUBLISHERS OF PERIODICALS, STATEMENT BY THE COMMISSION (1928) 3. The Commissioner did not, of course, condemn modern advertising generally. He confined his attention to advertisements "openly and shamelessly false on their face, those about which no reasonably intelligent man could be mistaken."

[2] *Ibid.*

[3] CHASE & SCHLINK, YOUR MONEY'S WORTH (1927).

Corroboration of these conclusions is found in the experience of the Postmaster General. "The failure of victims to make complaint promptly to the department has, in a number of instances, resulted in enormous losses to the public. One promoter, who has the ability to carry his victims from one scheme to another, constantly holding their confidence and securing money from them, admitted that over a period of years he had handled approximately $100,000,000 in connection with his enterprises." POSTMASTER GENERAL REP. (1927) 69.

A survey of the legal devices that may be employed for the curtailment and suppression of false advertising seems never to have been made. Their variety is not generally appreciated. Their possible utility for this purpose has never been fully canvassed. A definitive and scientific evaluation of their efficacy could be made only on the basis of data which is in the main unavailable. Only the crudest beginnings of such a study can be made here. The shortcomings as well as the potentialities of the legal sanctions can at best be merely suggested. Consequently this paper takes the form of a running summary of researches conducted by the writer with occasional conclusions tentatively advanced rather than the more typical formulation and defense of a thesis.

These devices or sanctions may roughly be grouped into (1) civil actions available to the party aggrieved, whether purchaser or competitor, (2) proceedings in which the state is a party, (3) sanctions of various kinds which indirectly tend to discourage false advertising. The discussion, for purposes of clarity, will not follow this precise order.

CIVIL ACTIONS AVAILABLE TO THE PURCHASER

Heading the list is the action of deceit. To succeed, the purchaser must prove that the advertisement in question contained a misrepresentation of fact, as contrasted with a mere statement of opinion, a glowing exaggeration or puff, which was false to the advertiser's knowledge, and that in reliance upon and induced by the advertisement the purchase was made to the resulting harm of the plaintiff. The difficulties of successful suit are dramatically instanced by a recent Massachusetts case.[4] The plaintiff purchased a loaf of Ward's bread in which was imbedded a part of a wire nail. The nail was swallowed with the more edible parts of the loaf to the great discomfort of the purchaser. The action sounded in deceit, based upon the following representation contained in advertisements and printed upon the wrapper: "This bread is 100 per cent pure, made under the most modern, scientific process, has very special merit as a healthful and nutritious food." This representation, the court found, fairly construed, merely negatived the use of deleterious and unwholesome ingredients in the preparation of the bread and not the accidental presence of a foreign substance, such as a nail. The plaintiff, therefore, it was held, had failed to prove the falsity of the representation. Moreover, no proof that the defendant had known of the presence of a nail in the bread had been adduced. And finally, since it appeared that the purchaser

[4] Newhall v. Ward Baking Co., 240 Mass. 434, 134 N. E. 625 (1922).

had given an order for groceries including bread, without specifying any particular brand, it was felt that the plaintiff had not satisfactorily proved that she had known of the representation, much less that she had purchased in reliance thereupon.[5]

Without pausing to discuss the soundness of this decision, let us suppose that the same approach is adopted in the case where a dentifrice is advertised as a sure cure for pyorrhea, as the perfect paste for whitening teeth and removing film, and finally, as containing popular drugs of known therapeutic value, all of which are false. Mr. Purchaser discovers to his disgust, after consuming six tubes of the stuff, that his pyorrhea lingers and that his teeth still lack the desired ivory lustre. Were he to invest several hundred dollars in a law suit to recover the nominal sum involved, he probably would be informed that it was folly to rely upon glowing representations made by unknown dealers (with which, to be sure, he would agree), that the law presumes that prudent people will estimate the artifices of enterprise and competition at their usual worth, that he should have made a personal examination or relied upon the advice of competent, reliable and impartial persons,[6] that moreover, with the exception of the misrepresentations of the ingredients, the statements were puff, or matters of opinion, and finally, that *scienter*[7] had not been adequately proved. Upon which, Mr. Purchaser would conclude, even as we, that the action of deceit as a possible deterrent to false advertising possesses rather severe limitations.[8]

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[5] *Accord:* Alpine v. Friend Bros., 244 Mass. 164, 138 N. E. 553 (1923). An interesting problem in the reconciliation of cases is presented by Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N. E. 95 (1912), an earlier decision by the same court.

[6] I have paraphrased the opinion in Berman v. Woods & Co., 38 Ark. 351, 354 (1881), dealing with an analogous problem. The court, curiously enough, was untroubled by the inability of most purchasers to obtain competent, reliable and impartial advice. It is for the establishment of agencies capable of rendering such a service that Chase and Schlink contend.

[7] As will more fully appear later, a false statement in an advertisement may ground an action for breach of warranty. The warranty action originally sounded in tort—an action on the case in which it was not necessary either to allege or prove *scienter*. Ir those jurisdictions where the common law theory of the action still obtains it seems possible to avoid the necessity of proving *scienter*. *Cf.* Shippen v. Bowen, 122 U. S. 575, 7 Sup. Ct. 1283 (1887); WILLISTON, SALES (2d ed. 1924) §§ 195, 196.

[8] The cases permitting recovery in deceit for misrepresentations in advertisements are collected in Note (1922) 17 A. L. R. 672, 707; Note (1925) 39 A. L. R. 991, 999. See especially the interesting case of Marsh v. Usk Hardware Co., 73 Wash. 543, 132 Pac. 241 (1913).

A handmaiden of the action of deceit, especially in the food cases, is the direct action by the consumer against the manufacturer of defective goods for negligence in their preparation. The "privity" bugaboo no longer casts its baleful spell upon the courts where the article is of an

If our purchaser were litigious, or if his purchase had involved a considerable expenditure, he might be inclined to try his chances with an action for breach of warranty. Under Section 12 of the Uniform Sales Act any affirmation of fact or any promise relating to the goods contained in the advertisement which induced the purchase would have the effect of an express warranty.[9] Here, too, there are many disheartening obstacles to a successful suit. The necessity for proving reliance upon the representations in the advertisements might involve some difficulties of proof. The parol evidence rule, assuming that a written contract of sale had been executed, might prove embarrassing.[10] And then there is always the friendly doctrine of sellers' puff to shield the advertiser from liability. If such statements as, "these second hand tires are as good as new," [11] "this suit of clothes will wear like iron," [12] "these bicycles are unsurpassable, having been subjected to severe and practical tests; we are in

"inherently dangerous" character, or is one affecting human life, or where the defect was consciously concealed without warning to the user. But even if the article purchased falls within this vague and constantly expanding category, the purchaser's troubles are not at an end. He is confronted with the difficulty of proving the manufacturer's negligence, often without the aid of any presumption or the benefit of the *res ipsa loquitur* rule, although as to the latter, the cases are divided. See Note (1919) 4 A. L. R. 1559; Note (1927) 49 A. L. R. 592. For collections of cases dealing with the responsibility of the manufacturer of defective goods to the ultimate consumer, see Note (1922) 17 A. L. R. 672; Note (1925) 39 A. L. R. 992; Note (1927) 40 HARV. L. REV. 886. In Rosenbusch v. Ambrosia Milk Corp., 181 App. Div. 97, 168 N. Y. Supp. 505 (1st Dep't 1917), the categories of negligence and actionable misrepresentation seem to overlap.

[9] Section 12 of the Uniform Sales Act provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

It should be noted that an advertisement is normally regarded as a mere invitation for an offer rather than as an offer. 1 WILLISTON, CONTRACTS (1920) § 27. Hence it is possible for the advertiser to attract purchasers to his place of business by glowing statements and then expressly rule out the advertisement as a basis of further negotiation. A contrary rule of interpretation, precluding withdrawal by the advertiser after the prospective purchaser had signified his assent to the terms of the advertisement, might perhaps tend to generate greater care in the preparation of copy.

[10] See the full discussion of this problem in Note (1929) 29 COL. L. REV. 805. Regardless of the parol evidence rule, it would always seem possible to introduce the advertisements to explain and give content to the warranties implied in accordance with Section 15 of the Sales Act.

[11] Warren v. Walter Auto Co., 50 Misc. 605, 99 N. Y. Supp. 396 (Sup. Ct. 1906).

[12] Harburger v. Stern Bros., 189 N. Y. Supp. 74 (Sup. Ct. 1921).

a position to guarantee them to be all that is claimed for them, perfect of their kind," [13] or, "this article will give first class satisfaction, it is the best upon the market, it will sell like hot cakes and will be the best drawing card ever handled," [14] are regarded as puffs, then all the copy writer has to do is to give free rein to his fancy and avoid conveying any useful information about the article. The facts besides being dull do not sell the article and may involve liability.[15]

Thus far it has been assumed that the purchase has been made directly of the advertiser. This, of course, is not the typical case under our present system of marketing. Advertising is usually carried on by the producer or national distributor; sales to the consumer are made by the dealer. What then is the position of the purchaser? If the dealer has not repeated the representation in the advertisements, there obviously is no right of action against him. Even if he shows the purchaser a manufacturer's circular, he is held not to have warranted the truth of the statements therein contained.[16] And though the dealer were to make the representations in the advertisements his own, there would still be the difficulties already adverted to.

What about a direct action against the advertiser? The purchaser could not rely upon any express warranties made by the manufacturer to the dealer, as it is established law that such warranties do not run with the article in the event of a resale or other transfer.[17] The privity of contract bugaboo promises to be an insuperable obstacle to a direct action based upon Section 12 of the Sales Act. And yet in national advertising, the manufacturer is typically addressing his appeal to the public and not to dealers, inducing the consumer to purchase from retailers chosen to serve as distributing media. The dealer's role is but passive. The gap between the producer and the consumer has been bridged by national advertising; the manufacturer now reaches his "hands over the retail tradesman's shoulder." [18] Is it

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[13] League Cycle Co. v. Abrahams, 27 Misc. 548, 58 N. Y. Supp. 306 (Sup. Ct. 1899).

[14] Detroit Vapor Stove Co. v. Weeter Lumber Co., 61 Utah 503, 215 Pac. 995 (1923). See Note (1924) 28 A. L. R. 999.

[15] "In getting up new labels and revising old ones, the fewer positive statements of fact they contain the better and the fewer things will the proprietor have to explain and justify if he has to resort to litigation to stop an infringement." ROGERS, GOOD WILL, TRADE MARKS AND UNFAIR TRADING (1914) 98; *cf.* CHASE & SCHLINK, *op. cit. supra* note 3, *passim.*

[16] *Cf.* Cool v. Fighter, 239 Mich. 42, 214 N. W. 162 (1927); Loxter Camp v. Lininger Implement Co., 147 Iowa 29, 125 N. W. 830 (1910).

[17] Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1923); *cf.* Hall Mfg. Co. v. Purcell, 199 Ky. 375, 251 S. W. 177 (1923); Note (1920) 8 A. L. R. 677.

[18] Quotation from H. G. WELLS, THE WORLD OF WILLIAM CLISSOLD, in

stretching the point to say that the dealer so chosen is authorized, while consummating the sale induced by the manufacturer's advertisement, to make a collateral agreement between the purchaser and the manufacturer in the terms of the advertisement? [19] "Buy of the dealer—we have authorized him to extend our warranty that the goods are as represented." "Demand the gold-band stocking—it bears our mark—the guaranty of a reputable house." If this analysis of the facts is sound, it requires no innovation of legal theory to impose liability on the advertiser.[20]

It is apparent that the traditional actions of deceit and warranty as developed by the courts can be of little utility in a campaign against false advertising. There are not many signs at present that the common law in this field possesses sufficient capacity for growth to originate a new action on the case for damages flowing from false statements contained in advertisements.[21] While interstitial changes in the requirements of the actions might not be of much help, a good deal can doubtlessly be accomplished in the field of warranty law by a more sympathetic application of established doctrines.

Similarly, the remedy of rescission is of slight use in this movement. Although available in cases of innocent misrepre-

Schechter, *Rational Basis of Trademark Protection* (1927) 40 HARV. L. REV. 813, 818.

[19] Undoubtedly, the view proposed in the text requires distortion of the facts in many cases and the deliberate use of fictions to attain a desired end. But, though directness seems preferable, this is not the place to discuss the wisdom of a system of law which requires that new cases be fitted into such predetermined molds as the actions of deceit or warranty. I am taking the actions as I find them, cataloging merely present shortcomings and limiting myself to suggestions by which, without any major changes in the theory of the actions, they can be made more effective.

A similar view of the doctrine of privity is taken in an excellent Note (1929) 42 HARV. L. REV. 414.

[20] Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; *cf.* Hall Mfg. Co. v. Purcell, *supra* note 17. Suits by the sub-purchaser against the manufacturer on an implied warranty have been allowed by some courts. See Note (1922) 17 A. L. R. 672, 709; Note (1925) 39 A. L. R. 1000.

[21] See the stimulating essay by Professor Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, in which he argues for liability in all cases of honest misrepresentation where the facts were readily ascertainable to the utterer. Professor Bohlen sees a tendency in the cases for the sharp distinctions between deceit, negligence and warranty to be obliterated and for such categories to overlap. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733. It has been suggested that the purchaser should be permitted to maintain, without proof of negligence, a civil action for injury caused by the advertisers' violation of the Printers' Ink Model Statute, discussed later, a penal statute enacted to protect a class of which the purchaser is a member. See Note (1929) 29 COL. L. REV. 805, 812. Query however whether such an action will be allowed. Compare the interesting Note on *Enjoining the Violation of a Penal Statute as Being an Unfair Method of Competition* (1929) 42 HARV. L. REV. 693.

sentation, it obviously can be invoked only where the representation was made by the seller, and even when so made the necessity for restitution may preclude its use or diminish its utility.[22]

CRIMINAL SANCTIONS

Only a brief consideration of the crime of obtaining money by false pretenses is necessary here. With its similar requirements,[23] it possesses as a deterrent or sanction all the weaknesses of the civil action of deceit. In addition, since a criminal prosecution is involved, it becomes necessary to prod the district attorney into action and to prove *scienter* and the other elements of the crime beyond a reasonable doubt. The defendant, moreover, need not take the stand and is entitled to the presumption of innocence. Finally, there will be a natural reluctance on the part of the jury to return a verdict which will stigmatize the advertiser as a criminal. Only the most flagrant cases of fraud can be reached in such prosecutions.

The same, in the main, holds true of prosecutions under Section 215 of the Federal Criminal Code,[24] forbidding the use of the mails in the furtherance of schemes and artifices to defraud. According to Judge Denison, "the 'schemes' which have been punished have all smacked of the confidence game, of getting something for nothing, like selling worthless corporate stock; running a bucket shop under the pretense of doing real trading; running a 'fake' marriage bureau; getting consignments without intent to remit; financial schemes impossible of performance and the like." [25]

To this list may be added land frauds, oil well promotions, swindles of people seeking employment, sales of fake medicines for the cure of all ailments, especially sex disorders, and submission of false statements to credit agencies. Only rarely has this sanction been invoked against misleading mercantile or commercial advertising.[26] And on those rare occasions the courts, it must be confessed, have manifested a tolerant amusement with the blustering impetuosity of the advertiser rather than an understanding of the problem involved or the potentiality of the

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[22] For the rudiments of the suit for rescission, see 3 WILLISTON, *op. cit. supra* note 9, §§ 1454 *et seq.*, 1500.

[23] 2 BISHOP, CRIMINAL LAW (9th ed. 1923) §§ 414, 415, 449 *et seq.*

[24] 35 STAT. 1130 (1909), 18 U. S. C. § 338 (1926).

[25] Harrison v. United States, 200 Fed. 662, 666 (C. C. A. 6th, 1912).

[26] The reports of the Attorney General do not reveal the number of prosecutions under § 215. There unfortunately seem to be no statistics available. During approximately a four year period, there were reported in Vols. 1 to 24 of the second Federal Reporter series and the reports of the

device they were devitalizing. In *Harrison v. United States*,[27] circulars were sent through the mails extolling the virtues of a hand-operated vacuum cleaner, which, the court found, was an efficient and useful device, sold at a reasonable price. It was asserted that the machine had a constant and terrific suction, that it would clean carpets thoroughly with little physical effort, that it could be operated by a child or a weak woman and that it would abolish house-cleaning. In reviewing the evidence on an appeal from a judgment of conviction, the court found that

"the sum of the whole matter is that if we except extreme phrases like 'terrific suction' and 'abolish housecleaning,' the utterance of which cannot be seriously thought to be criminal, we find that every statement of fact is literally true, or, more accurately, might, under favorable conditions, be literally true; and nothing remains except that this advertising matter exaggerated the quality and extent of the work the machine would do with slight physical effort, and minimized the physical effort necessary to make the machine do the complete work of which it was said to be capable."

It did not overlook, the court went on to say, an admission by the defendant that he was aware of the fact that the cleaner was too laborious for a child or a weak woman. Its holding was that Section 215 was never intended and should not be construed to cover such puffing as was here involved. It quoted with approval the views of Judge Severens:

"Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell; and within any proper reasonable bounds such a practice is not criminal. It must amount to some substantial deception, in order to be subject to cognizance by the courts." [28]

Harrison's conduct, no doubt, would be condoned by many of his fellow citizens. It may well be that the penalties imposed by Section 215 are disproportionate to his offense. But if any

Supreme Court for the same years, 74 causes in which violation of § 215 was charged. Of these, 27 were stock frauds; 15 fraudulent land developments, mostly oil lands; 7 were cases of false financial statements submitted to credit agencies; 4 were schemes for swindling people seeking employment; 7 were cases of merchandise purchased on credit and disposed of to confederates or to the public at ruinous prices, culminating in bankruptcy or a profitable getaway; and one was a blackmail scheme. In one case advertising space was sold in a non-existent directory which was not intended to be published. Only 2 cases were concerned with misrepresentations of articles offered for sale, and in one, the case was twice sent back for a new trial.

[27] *Supra* note 25.

[28] United States v. Staples, 45 Fed. 195, 198 (D. Mich. 1890).

progress is to be made in this movement for the elimination of falsehoods in advertising, it must be realized that the nub of the problem consists of puffing. The statements in advertisements are either true or false—there is no in-between. Legitimize puffing while forbidding downright falsehood and the door is open to subterfuge, litigation and argument. No advertiser will ever believe, no less admit, that his untruths rise above the plane of puffs. And more important still, only the bungler among copy-writers will resort to positive misstatements capable of contradiction when the same ends may be attained by the shrewd use of exaggeration, innuendo and subtle half-truth. The only question here is not whether puffing should continue to be condoned, but whether it is politic to employ this sanction for its suppression.[29]

Closely allied to Section 215 is the administrative control of the mails by the Post Office Department, which, by the issuance of a fraud order, may close the mails to the dishonest advertiser.[30] While the language of the statutes under which the Postmaster proceeds is somewhat similar to Section 215, he has successfully dealt with less flagrant frauds, the courts generally respecting his discretion.[31] In his report for 1927, the Postmaster General points with some pride to the issuance that year of two hundred and thirty-nine orders, of which four alone were contested, only to be approved by the courts.[32] Two

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[29] I have been unable to determine whether § 215 applies to the publisher of a periodical containing false advertising as well as to the advertiser. The obscenity cases afford the closest analogy. The publisher there is equally guilty with the advertiser. *Cf.* United States v. Kelly, Fed. Cas. #. 15514 (C. C. Nev. 1876); Rex. v. De Marny, [1907] 1 K. B. 388; United States v. N. Y. Herald Co., 159 Fed. 296 (C. C. N. Y. 1907) *semble.* Such an interpretation of § 215 would probably result in the establishment of more effective censorship systems than at present exist.

[30] 17 STAT. 322 (1872), 39 U. S. C. § 259 (1926); 17 STAT. 323 (1872), 39 U. S. C. § 732 (1926).

[31] Harris v. Rosenberger, 145 Fed. 449 (C. C. A. 8th, 1906), certiorari denied, 203 U. S. 591, 27 Sup. Ct. 778 (1906); Putnam v. Morgan, 172 Fed. 450 (C. C. N. Y. 1909); *cf.* Leach v. Carlile, 258 U. S. 138, 42 Sup. Ct. 227 (1922). As to the weight to be given such decisions in prosecutions under § 215, see Harrison v. United States, *supra* note 25, at 666.

The proper procedure by which to obtain judicial review of the postal order is by injunction. Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639 (1913). As the order of the postmaster is binding upon the courts if supported by any evidence, Putnam v. Morgan, *supra*, the review is generally but an idle ceremony.

[32] POSTMASTER GEN. REP. (1927) 69. Three hundred and one orders were issued during 1928. POSTMASTER GEN. REP. (1928) 65. The reticence of the postal authorities has rendered it impossible properly to gauge the effectiveness of their work. For a description of the practical administration of this fraud order section, see Donnelly, *The Brotherhood of the Elastic Conscience*, Printers' Ink, Oct. 1, 1925, at 73.

hundred and thirty-nine as compared with the hosts of deceptive advertisements analyzed by Chase and Schlink!

If the possible harshness of Section 215 militates against its use in the case of mere exaggerations, it should not be overlooked, before the assistance of the Post Office is enlisted to a greater extent than hitherto, that the issuance of such orders by a departmental official, may, in close cases at least, smack of a censorship which can become oppressive.[33]

The ineffectiveness of these sanctions made apparent the necessity for additional legislation imposing criminal penalties for publishing false or misleading advertisements. The initiative was taken by advertising clubs and associations. The assistance of *Printers' Ink*, which sponsored the model statute that bears its name, was obtained only after assurance had been given that suitable agencies for the enforcement of the legislation would be established. The history of this movement has been recounted elsewhere.[34] Suffice it to say here that the model statute, after considerable opposition on the part of those who misapprehended its purpose,[35] has been enacted to date in twenty-three states,[36] while variants of it are in force in three other states and the District of Columbia.[37] The basic philosophy of the legislation, as expressed by the draftsman, Mr. Harry Nims, is that the advertiser, who alone is benefited by the statements

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[33] See dissent of Mr. Justice Holmes in Leach v. Carlile, *supra* note 31, at 140, 42 Sup. Ct. at 228.

[34] Comment (1927) 36 YALE L. J. 1155; Note (1917) 17 COL. L. REV. 258; Note (1913) 61 PITTS. L. J. 221; Printers' Ink, Feb. 24, 1921, at 13; Mar. 3, 1921, at 121.

[35] The opposition of many publishers who had misconceived the scope of the legislation, believing that the publisher as well as the advertiser was to be held responsible for misstatements, was withdrawn as soon as the contrary aim of the statute became known. Economic reasons dominated the disapproval of Georgia papers which feared the loss of the profitable patent medicine advertisements. The patent medicine industry has lately changed its position and now endorses the legislation.

[36] See Comment (1927) 36 YALE L. J. 1155, 1157; Printers' Ink, June 5, 1924, at 93; July 28, 1927, at 25. The act reads:

"Any person, firm, corporation, or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor."

[37] See Comment (1927) 36 YALE L. J. 1155, 1157.

appearing in his advertisements and who is in the best position to determine their truth, is under a duty to the public "to see that these benefits are honestly and fairly obtained, and that all reasonable precautions are taken by him to avoid the purchase of his merchandise under any misapprehension or mistake as to its quality or character." [38] The requirements of *scienter* and reliance which have debilitated the civil action of deceit and the crime of false pretences [39] were dispensed with. The sponsors have strenuously opposed bastard legislation, imposing criminal penalties only when the advertisements were known, or by the use of reasonable care should have been known, to be false, a form of statute substituted for the model act in twelve states.[40]

Unfortunately, only misrepresentations of fact are prohibited by the model act and hence the way has been left open for the courts to exempt puffs from its operation by regarding them as matters of opinion. The purpose of the legislation has not yet been frustrated by such a restrictive interpretation, although the Supreme Court of Washington in *State v. Massey* [41] practically achieved the same result through an equally unsympathetic construction of the act. Massey had been charged with violating the model statute by falsely representing that pianos, which were being offered for $167 and $200, formerly had a market value of $375 and $400, when in truth they never were of the market value stated. In support of this charge, the state introduced an advertisement reading:

"Pre-Opening Sale of Used Pianos. These pianos must be closed out to make room for carload of new pianos coming from the East . . . Smith & Barnes, oak case, was $400; now $200. Schilling & Sons, beautiful case, was $375, now $167."

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[38] Printers' Ink, Mar. 26, 1921, at 125; quoted in Comment (1927) 36 YALE L. J. 1155, 1159n.

[39] Attention should also be called to the vagaries of construction that the phrase "scheme or artifice to defraud" in § 215 of the Criminal Code has received. See Durland v. United States, 161 U. S. 306, 312-313, 16 Sup. Ct. 508, 510-511 (1896); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33 (1902); Kaufman v. United States, 282 Fed. 776, 779 (C. C. A. 3d, 1922), certiorari denied, 260 U. S. 735, 43 Sup. Ct. 96 (1922); Corliss v. United States, 7 F. (2d) 455, 456 (C. C. A. 8th, 1925); Knickerbocker Merchandising Co. v. United States, 13 F. (2d) 544 (C. C. A. 2d, 1926), certiorari denied, 273 U. S. 729, 47 Sup. Ct. 239 (1926). These vagaries are avoided by the model act.

[40] See Comment (1927) 36 YALE L. J. 1155, 1158. "The practical effects of including 'knowingly' or its equivalent in the law are to becloud the issue, to protract argument, and to afford splendid opportunities for the citation of errors, thus wasting the time of the higher courts with appeals and wearing out the patience of the prosecution." Printers' Ink, June 5, 1924, at 93, 98. Corroboration of this view, if any were needed, is furnished

The purport of this proof was that an untrue antecedent value had been put upon the pianos, thus creating a false impression of drastic price reductions. In reversing a judgment of conviction, the court said:

"At the threshold, we are confronted with the question of whether the advertisement contains this statement. The publication does not, in terms, refer to the 'market value' of the pianos mentioned, and it seems clear to us that the language used will not bear the meaning sought to be ascribed to it. The plain and common sense meaning of the advertisement, as we read it, is that the retail selling prices of the pianos formerly were $400 and $375, but at the time of the publication, those prices had been reduced or marked down to $200 and $167. The statements referred to the retail selling price of the pianos and not to their market value. If the complaint had alleged that appellant had published an advertisement in which he asserted that the retail selling prices of the pianos referred to formerly were $400 and $375, but that those prices had been reduced to $200 and $167, and the pianos were offered for sale to the public at the latter prices, when in truth and in fact the retail selling prices of the pianos never had been $400 and $375, nor approximately those amounts, an entirely different question would be presented. If, however, it be conceded that the statements complained of referred to the market value of the pianos, the case must likewise fail, for the reason that, by so construing the advertisement, it is not deceptive or misleading nor would it reasonably tend to induce the public to purchase the instruments. If the expressions 'was $400' and 'was $375' referred to the former market values of the pianos, then the expression 'now $200' and 'now $167' must have referred to the market values of the instruments at the time of the publication; and the effect of the statements, taken as a whole, was to assert that the market values of the pianos during the period referred to, whatever that period may have been, had depreciated fifty per cent. How such an advertisement could, in any manner, tend to deceive the public or induce a member of it to acquire title to, or an interest in, the pianos is more than we are able to understand." [42]

Granting that the technicalities of criminal procedure and practice necessitated a finding of variance between the charge and the proof (and one may well doubt whether the prosecuting attorney misapprehended the meaning of the advertisement in charging a misrepresentation of the former market value) there was no warrant for the court's interpretation of the statute, once it assumed that the proof supported the charge. The advertisement, no matter how construed, was concededly false, inasmuch as these pianos had never been sold for the price

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by Beam v. State, 106 Tex. Cr. App. 341, 292 S. W. 239 (1927); State v. Wohlmouth, 78 W. Va. 404, 89 S. E. 7 (1916).

[41] 95 Wash. 1, 163 Pac. 7 (1917).

[42] *Ibid.* 3-4, 163 Pac. at 8-9.

stated and had never been of that market value. The statute in terms forbids statements of fact which are "untrue, deceptive or misleading." The disjunctive and not the conjunctive is used. Consequently the state was not compelled to prove the statement to be misleading as well as false, as the court seemed to think. The mischievous character of such an interpretation, which would appear to be a back-hand way of requiring reliance on the part of a prudent purchaser, requires no elaboration.[43]

The act has happily fared better with other courts.[44] As the purpose of the statute from the outset was minatory, there have been comparatively few prosecutions. Its greatest value to the Better Business Bureau, the agency established for its enforcement, has been as a club to be used only when moral suasion has failed.[45]

CIVIL SUIT BY COMPETITOR

The persons most likely to be injured by false advertising are purchasers and competitors. The remedies of the former have already been discussed. Are there any available to the competitor of the tradesman who puffs, misdescribes or misbrands his wares? Suppose *D* sells handsomely varnished cardboard as linoleum. *P*, a seller of the genuine product, while unable to prove that *D*'s misrepresentation has resulted in a diversion of trade which would normally have been his, is conscious, however, of the injury that this fraud will inflict upon the linoleum

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[43] Moreover, the court's assumption of fact is questionable. It says that a false representation of a previous market value is not misleading so long as the present market value is truthfully revealed. But may not such an admitted misstatement mislead those who desire to purchase products which have slumped in market value to hold until the market recovers? Will not the purchaser be inclined to believe he is receiving a bargain notwithstanding that he is paying the prevailing market price in view of the drastic drop? And, of course, will any purchaser pause to analyze the facts with the precision of the court?

[44] State v. Krasne, 103 Neb. 11, 170 N. W. 494 (1918); *cf.* State v. Rubin, 1 N. J. Misc. 506 (1923). Constitutional objections have caused little difficulty. State v. Shaengold, 13 Ohio L. Rep. 130 (1915); Jasnowski v. Judge Recorder's Court, 192 Mich. 139, 158 N. W. 229 (1916); Commonwealth v. Reilly, 248 Mass. 1, 142 N. E. 915 (1924).

[45] "Legal prosecution is seldom necessary and occurs in a negligible percentage of the cases handled. Moral suasion is generally sufficient to bring the offending advertiser around to the point of view of the committee." Printers' Ink, Mar. 3, 1921, at 122.

Some newspapers, notably the New York World and the New York Times, pride themselves upon the number of convictions for which they can account and consequently offer suitable rewards for information leading to conviction. See Index Expurgatorius of the New York Times, *infra* note 71.

trade in general. Must he stand by while the product to which is tied his business success is thus discredited?

The case which has normally been regarded as settling the law is *American Washboard Co. v. Saginaw Mfg. Co.*[46] The plaintiff, the sole manufacturer of aluminum washboards, sued to enjoin the defendant from falsely branding zinc boards as made of aluminum, on the theory that by so misbranding his wares, the defendant was diverting the trade of those who desired the genuine product, to the consequent injury of the plaintiff. There was no claim of passing-off and the proofs established that there had been none. An injunction was denied on the ground that the plaintiff had failed to show a violation of his property rights. There is no right of action, it was held, in a tradesman to prevent a fraud or imposition upon the public. The high authority of the court, composed of Taft, Lurton and Day, JJ., deciding the case has given added weight to the decision as a precedent. Under the *Washboard* case, *P* in the hypothetical case would be compelled to suffer in silence.

The decision in the *Washboard* case is predicated upon the view that apart from trademark infringement and passing-off, a tradesman's misrepresentation of his wares works no actionable injury upon his competitors. The clearest case is where a book salesman successfully breaks down sales resistance, as the sales manuals put it, by shrewd puffing and downright misrepre-

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[46] 103 Fed. 281 (C. C. A. 6th, 1900). The false testimonial cases, where *B* makes claim to a testimonial or prize awarded *A*, point in the same direction. Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70 (1872); Batty v. Hill, 1 Hem. & M. 264 (1863); Tallerman v. Dowsing Radiant Heat Co., [1900] 1 Ch. 1; *cf.* Warren v. Karn Co., 15 Ont. L. R. 115 (1907); see National Starch Mfg. Co. v. Munn's Patent Maizena & Starch Co., [1894] A. C. 275; Centaur Co. v. Marshall, 92 Fed. 605, 612 (C. C. Mo. 1899), *aff'd*, 97 Fed. 785, 790 (C. C. A. 8th. 1899). But *cf.* J. F. Rowley Co. v. Rowley, 18 F. (2d) 700 (C. C. A. 3d, 1927); Hoover Co. v. Sesquicentennial Exhibition Ass'n, 26 F. (2d) 321 (D. Pa. 1928). The rule of Batty v. Hill was changed by statute, 26 & 27 VICT. c. 119 (1863), but the limited scope of the legislation is brought out by the Tallerman case, *supra*. Legislation forbidding the appropriation of another's prizes and testimonials has been enacted in some states. PA. STAT. (West, 1920) § 7671; 2 CAL. GEN. LAWS (Deering, 1923) Act 6758; 2 MASS. GEN. LAWS (1921) c. 266, § 90; S. D. REV. CODE (1919) § 4257; 1 MD. ANN. CODE (1924) art. 27, c. 182.

Compare the analogous cases of Goldsmith v. Jewish Press Pub. Co., 118 Misc. 789, 195 N. Y. Supp. 37 (Sup. Ct. 1922); Borden's Condensed Milk Co. v. Horlick's M. M. Co., 206 Fed. 949 (D. Wis. 1913). From the standpoint of the law of disparagement, the latter case is of doubtful authority. *Cf.* George v. Blow, 20 N. S. W. L. R. 395 (1899); James v. James, L. R. 13 Eq. 421 (1872); Liebig's Extract of Meat Co. v. Anderson, 55 L. T. (N. S.) 206 (1886); Thorley's Cattle Food Co. v. Massam, 14 Ch. D. 763 (1880); Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 87 Fed. 203 (C. C. Iowa 1898).

sentation. While such tactics may increase his sales, it does not follow that the honest book seller loses any business or is otherwise injured as a result of the misrepresentation. In fact, it is not beyond the realms of possibility that a clever sales campaign by one book company may create a demand which was hitherto non-existent, redounding to the benefit of more restrained rivals.

But that was not the situation in the *Washboard* case. It requires no elasticity of the imagination to conceive of the probable injury caused by at least some of a rival's misrepresentations. Trademark infringement and passing-off are merely instances, by no means exclusive, of the injury so caused. The infringer attempts to divert his competitor's trade to himself by representing his goods as being the plaintiff's, or vice versa. Is there anything especially significant about the nature of the misrepresentation which produces such injury? So far as the plaintiff is concerned, he is no less hurt where the diversion of his trade is accomplished by other types of falsehoods. Thus, where *A*, the sole producer of aluminum washboards, has created a demand for this product, a loss of business, produced by *B*'s misrepresentations that his boards are made of aluminum in order to sell to those concededly wanting aluminum boards, is no more palatable than when caused by direct misrepresentations that *B*'s boards are *A*'s. A diversion of business, if susceptible of proof, accomplished by a competitor's misrepresentation should ground an action at law and in equity regardless of the precise nature of the falsehood. And this was the view of Learned Hand, J., in *Ely-Norris Safe Co. v. Mosler Safe Co.*,[47] where he writes:

"As we view it, the question is, as it always is in such cases, one of fact. While a competitor may, generally speaking, take away all the customers of another that he can, there are means which he must not use. One of them is deceit. The false use of another's name as maker or source of his own goods is deceit, of which the false use of geographical or descriptive terms is only one example. 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? The false use of the plaintiff's name is only an instance in which each element is clearly shown.

"In the case at bar the means are as plainly unlawful as in the usual case of palming off. It is as unlawful to lie about the quality of one's wares as about their maker; it equally subjects the seller to action by the buyer. . . . The reason, as we think, why such deceits have not been regarded as actionable by a competitor, depends only upon his inability to show any injury for which there is a known remedy. In an open market it is gen-

[47] 7 F. (2d) 603 (C. C. A. 2d, 1925).

erally impossible to prove that a customer, whom the defendant has secured by falsely describing his goods, would have bought of the plaintiff, if the defendant had been truthful. Without that, the plaintiff, though aggrieved in company with other honest traders, cannot show any ascertainable loss. He may not recover at law, and the equitable remedy is concurrent. The law does not allow him to sue as a vicarious avenger of the defendant's customers." [48]

The *Washboard* case thus seems unsound insofar as it negatives liability for the diversion of a rival's trade by misrepresentations other than those involved in trademark infringement or passing-off.

It is not always possible to prove that diversion of business resulted from the defendant's falsehoods. But that injury of some sort is caused in many cases seems undeniable. If Manila hemp is sold as Havana cigars, plated tin as Sheffield silver, Maryland pears as the California variety, a communal or trade good will is impaired, and the trade designations tend to become liabilities rather than assets. The public, in the hypothetical case, instead of becoming linoleum conscious tends to become linoleum shy.[49] Such injury in the long run is no less keenly felt because difficult of direct proof.

Let us suppose that the defendant sells as California pears fruit grown and canned in Maryland,[50] or as Anheuser-Busch beer a beverage prepared according to a different formula.[51] Assuming that these trade designations are open to anyone canning pears in California or brewing beer by the Anheuser-Busch process, as was true in the cases cited, there can be no question of passing-off in the traditional sense, as the marks by hypothesis possess no secondary significance referring to the product of any one canner or brewer. May all or any of those making or vending the true product sue to enjoin the use of the false designation? It would seem not, whether the *Washboard* case or the more liberal views of Learned Hand, J., in the *Ely-Norris Safe* case be regarded as representing the present state of the law, since there was no infringement, passing off, or provable diversion of trade. But while the decisions are not generally known, injunctive relief has been granted on the facts above stated. The false use of geographical terms as in the pear case,[52] or of the

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[48] *Ibid.* 604.

[49] *Cf.* PUBLIC REGULATION OF COMPETITIVE PRACTICES, N. I. C. B. (1925) 132.

[50] Cal. Fruit Canner's Ass'n v. Myer, 104 Fed. 82 (C. C. Md. 1899).

[51] Anheuser-Busch Brewing Ass'n v. Fred Miller Brewing Co., 87 Fed. 864 (C. C. Wis. 1898).

[52] Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 Fed. 608 (C. C. A. 7th, 1898), certiorari denied, 173 U. S. 703, 19 Sup. Ct. 884. *Contra:* N. Y.

names of products,[53] as in the Anheuser-Busch case, has been enjoined at the suit of all or any of those properly using the correct designation, although the cases are not unanimous. The false use of geographical terms, moreover, is now forbidden by statute.[54]

The theory of these decisions is not clearly articulated by the courts. Care is not always taken to distinguish the case at bar from traditional palming-off cases, although from the facts it is clear that there was and could be no passing-off since the term in question did not refer to a single source. The fact that the business of the honest producers was diverted is sometimes stressed, but, it should be noted, it is never possible to trace the loss of the individual tradesman. The probability that the continuance of such falsehoods will discredit the product, destroy consumer confidence, and otherwise affect the reputation of the product and industry sometimes influences the decision.

& R. Cement Co. v. Coplay Cement Co., 44 Fed. 277 (C. C. Pa. 1890), rehearing denied, 45 Fed. 212 (1891); criticized in City of Carlsbad v. Tibbetts, 51 Fed. 852, 856 (C. C. Mass. 1892); see NIMS, UNFAIR COMPETITION (2d ed. 1917) 200 *et seq.*

To be distinguished are the cases where a geographical term, which has acquired a secondary significance referring to the product of a single producer, is falsely used by the defendant. In such cases it is customary to grant an absolute rather than a qualified injunction, as is the case where the geographical term is truthfully used by the late comer in that locality. Here, it should be noted, there is passing-off, and since the defendant has not even the justification of truth, the court does not hesitate to grant more effective relief in the form of an absolute rather than the more usual qualified injunction. Anheuser-Busch Brewing Ass'n v. Piza, 24 Fed. 149 (C. C. N. Y. 1885); Southern White Lead Co. v. Cary, 25 Fed. 125 (C. C. Ill. 1885); Southern White Lead Co. v. Coit, 39 Fed. 492 (C. C. Ill. 1888); Pike Mfg. Co. v. Cleveland Stone Co., 35 Fed. 896 (C. C. Mass. & N. H. 1888); City of Carlsbad v. Kutnow, 68 Fed. 794 (C. C. N. Y. 1895), *aff'd*, 71 Fed. 167 (C. C. A. 2d, 1895); Collinsplatt v. Finlayson, 88 Fed. 693 (C. C. N. Y. 1898); see Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139, 141. In some cases of this type, the same relief is granted the first user, notwithstanding the absence of passing-off. *Cf.* City of Carlsbad v. Schultz, 78 Fed. 469 (C. C. N. Y. 1897). Such cases support the position taken in the text.

[53] Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier, 5 Misc. 78, 24 N. Y. Supp. 890 (N. Y. Super. Ct. 1893). But see Leibig's Extract of Meat Co. v. Walker, 115 Fed. 822, 826 (C. C. N. Y. 1902); Thomson v. Winchester, 36 Mass. 214 (1837). So also, it would seem that after the expiration of a patent, those who produce the article according to the patent could restrain the use of the name of the article to designate a different product. *Cf.* Singer Mfg. Co. v. Hipple, 109 Fed. 152 (D. Pa. 1901).

For somewhat analogous cases, see Boggs v. Furniture Co., 163 Iowa 106, 143 N. W. 482 (1913); Carson v. Ury, 39 Fed. 777 (C. C. Mo. 1889); Estes & Sons v. Frost Co., 176 Fed. 338 (C. C. A. 1st, 1910); Colton v. Deane, 7 N. Y. St. Rep. 78 (1887).

[54] 41 STAT. 534 (1920), 15 U. S. C. § 123 (1926).

Whatever the basis of these decisions, it is clear that the *Washboard* case, despite the high authority of the court by which it was decided, cannot be taken to have established the rule of the common law. Two other views find some support in the cases: (1) that an action at law or a suit in equity may be maintained wherever a rival's misrepresentation has resulted in a diversion of trade, which is capable of proof; and (2) that a suit in equity to restrain future falsehoods, as distinguished from an action at law for damages, can be maintained independent of diversion of business wherever there is reasonable probability of injury to the plaintiff as a member of the trade discredited by the defendant's misrepresentations.[55]

What is the present state of the law? Has there been any authoritative recession from the extreme view of the *Washboard* case?

In *Ely-Norris Safe Co. v. Mosler Safe Co.*,[56] the plaintiff, a manufacturer of safes containing a patented explosion chamber which purported to make the safes burglar-proof, sued in unfair competition for an injunction against the defendant's falsely representing that its safes contained an explosion chamber and against selling safes with a metal band around the door in the place where plaintiff put its chambers, thereby falsely indicating the presence of such a chamber. It was admitted that the defendant's name and address prominently appeared upon its safes and that no customer had ever been given reason to believe that the defendant's safes were of the plaintiff's manufacture. The lower court dismissed the bill on the authority of the *Washboard* case. The Court of Appeals, after referring to the plas-

[55] There is practically no explicit approval of this view in the cases. Where all the members of the trade join in the action against the misrepresentor, as in Pillsbury-Washburn Flour Mills Co. v. Eagle *supra* note 52, the case on its facts can rest on the diversion of trade theory, as all the parties from whom the defendant could possibly divert business are joined as complainants, or in some cases on the traditional passing-off theory, since all the parties truthfully using the designation are seeking to restrain a false use. *Cf.* note 52, *supra*. Such explanation of the cases is not possible where the suit is maintained by some but not all of the privileged to use the term. Anheuser-Busch Brewing Ass'n v. Fred Miller Brewing Co., *supra* note 51; Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier, *supra* note 53.

Unless the plaintiff is a monopoly or unless all the honest tradesmen join as parties plaintiff, the action at law for damages should hardly lie since it is impossible for the single tradesman to prove the extent and nature of the injury suffered. But the mere probability of injury should be enough in the equity suit since all that is demanded is a cessation of the defendant's fraudulent conduct. That the public will be benefited equally with, if not more than, the plaintiffs by such a decree should not militate against its issuance.

[56] *Supra* note 47.

ticity of the law of unfair competition and the liberalization of the law since that decision, construed the bill as alleging that the plaintiff was the sole manufacturer of explosion-chamber safes and hence held that a good cause of action had been stated, since the direct effect of such misrepresentation was the diversion of business that was undeniably destined for the plaintiff. The Supreme Court granted certiorari.

After a careful scrutiny of the bill, the Court, Mr. Justice Holmes writing the opinion, discovered that,

"It is consistent with every allegation in the bill, and the defendant in argument asserted it to be a fact, that there are other safes with explosion chambers beside that for which the plaintiff has a patent. The defendant is charged only with representing that its safes had 'an' explosion chamber, which, so far as appears, it had a perfect right to do if the representation was true. If on the other hand the representation was false as it is alleged sometimes to have been, there is nothing to show that customers had they known the facts would have gone to the plaintiff rather than to other competitors in the market, or to lay a foundation for the claim for a loss of sales. The bill is so framed as to seem to invite the decision that was obtained from the Circuit Court of Appeals, but when scrutinized is seen to have so limited its statements as to exclude the right to complain." [57]

The decree was accordingly reversed. From this excerpt, which constitutes the entire opinion proper, it is quite clear that the Court felt that it was leaving undecided the "broad and interesting question" presented, that it was merely deciding a question of pleading. But, it is to be noted, the court seems to have assumed that the rule of the *Washboard* case and that formulated by the lower court were mutually exclusive, that either a tradesman cannot maintain a suit to enjoin a rival's misrepresentations or that he can maintain such a suit only when the mis-

[57] 273 U. S. 132, 47 Sup. Ct. 314 (1927). The lower court decision is reviewed in Note (1926) 26 COL. L. REV. 199 and (1926) 39 HARV. L. REV. 518. That of the Supreme Court is discussed in Note (1927) 12 CORN. L. Q. 416; (1927) 11 MINN. L. REV. 478. In Armstrong Cork Co. v. Ringwalt Linoleum Works, 235 Fed. 458 (D. N. J. 1916), the plaintiff, a manufacturer of linoleum, sought to enjoin defendant from selling as linoleum a cheap floor covering consisting of saturated felt paper. The trial court dismissed the bill, on motion, on the authority of the Washboard case. The Court of Appeals, feeling that the far reaching commercial questions involved could better be considered upon a full hearing, reversed it, without prejudice to a determination, after final hearing, of the question whether the bill stated a good cause of action. 240 Fed. 1022 (C. C. A. 3d, 1917). The order of reversal was made without prejudice to an application to the Federal Trade Commission for relief, which was subsequently made, resulting in the issuance of a cease and desist order. 1 F. T. C. Dec. 436 (1919).

representation results in a diversion of his trade. By making such an assumption and in reversing for failure to lay the foundation of a loss of sales in the bill, the Court, it is submitted, made a decision upon the merits as well as upon a point of pleading.

This becomes apparent when the various positions that can be taken with respect to the right of competitors to enjoin such misrepresentations are considered. There is, first, the view of the *Washboard* case that there is no right independent of trademark infringement or unfair competition. The court, as indicated, by its decision left the way open to recede from this view. There is, second, the view of Learned Hand, J., that there is a right to equitable and legal relief where the misrepresentation occasions a loss of business to the plaintiff. While not approving this view, the Court found that the bill had not been framed to bring the plaintiff within its ambit. Whatever the Court may have thought it was deciding, since only a producer or dealer with monopolistic powers could frame a bill to meet its requirements, the net effect of the decision is to limit the use of this sanction to monopolies or associations of all the producers in an industry, and to withdraw it from competitive trades. And it should be noted that the question whether the sole producer or monopoly can maintain such a suit was carefully left open. To this extent only is a recession from the *Washboard* case possible.

No consideration was given to the third view, which has support in the cases and which was capable of sustaining the bill as drafted, that a tradesman is entitled to injunctive relief where the misrepresentations are calculated to injure the good will of the trade and to discredit the product. By limiting itself to a choice between the first two views, the Court impliedly rejected the third. This certainly is more than a decision on a point of pleading.

A fourth view is possible. Regardless of whether there be a diversion of business or whether a product or trade be discredited, for one dealer to sell shoddy as wool is unfair to the honest dealer who must meet the price competition of the inferior goods. The fact that the injury in most cases is speculative or remote may be an argument against allowing recovery of damages at law, but not against the issuance of an injunction. Why not permit the competitor to sue as a "vicarious avenger of the public," to maintain a bill in equity as a pseudo *qui tam* action? Of all the members of the community, the competitor is most apt to institute civil proceedings. Whether this extreme view should be adopted depends in the main upon the availability of other effective sanctions against false advertising. Where there are public avengers of the public, where legislation provides for in-

junction suits by governmental or other authorized law-enforcing agencies, there is no need for the private suit, which doubtless can be used to harass and molest honest tradesmen.[58]

It is therefore to be regretted that the potentialities of this sanction were not more fully considered by the court in the *Ely-Norris* case before it was so lightly put to one side and withdrawn from general use. That the far-reaching effects of the decision were never contemplated by the Court seems the inevitable conclusion from the manner in which the case was decided. Perhaps, since these were not contemplated, the Court will feel free, whenever the question is again presented, to consider the problem *de novo*.

FEDERAL TRADE COMMISSION

The Federal Trade Commission, of existing agencies, is best equipped to fill the breach left in the law by such decisions as the *Washboard* and *Ely-Norris* cases. It is not possible within the limits of this paper to gauge adequately the effectiveness of its labors. That it has the power to issue cease and desist orders forbidding false or misleading advertising is now settled.[59] I append in the footnote the cases in which its orders have been reviewed and a sampling of its orders dealing with various types of misrepresentation.[60] It must not be forgotten that its juris-

[58] Another possibility is that the violation of the Printers' Ink statute may be enjoined as an unfair method of competition. See Note (1929) 42 HARV. L. REV. 693; *cf. supra* note 21.

[59] Federal Trade Comm. v. Winsted Hoisery Co., 258 U. S. 483, 42 Sup. Ct. 384 (1922). See (1921) 20 MICH. L. REV. 122; (1921) 21 COL. L. REV. 722; Hankin, *Jurisdiction of the Federal Trade Commission*, 12 CALIF. L. REV. 179, 184 (1924).

[60] *Misrepresentation and misdescription of the quality and character of the goods:* Sears, Roebuck & Co. v. F. T. C., 258 Fed. 307 (C. C. A. 7th, 1919); Royal Baking Co. v. F. T. C., 281 Fed. 744 (C. C. A. 2d, 1922); L. B. Silver Co. v. F. T. C., 289 Fed. 985, 292 Fed. 752 (C. C. A. 6th, 1923); Procter & Gamble Co. v. F. T. C., 11 F. (2d) 47 (C. C. A. 6th, 1926), certiorari denied, 273 U. S. 717, 47 Sup. Ct. 106 (1926); F. T. C. v. Balme, 23 F. (2d) 615 (C. C. A. 2d, 1928); Sea Island Thread Co. v. F. T. C., 22 F. (2d) 1019 (C. C. A. 2d, 1927); Louis Leavitt v. F. T. C., 16 F. (2d) 1019 (C. C. A. 2d, 1926); Indiana Quartered Oak Co. v. F. T. C., 26 F. (2d) 340 (C. C. A. 2d, 1928); (1919) 8 CALIF. L. REV. 48; (1919) 18 MICH. L. REV. 71; Note (1920) 20 COL. L. REV. 328; (1919) 29 YALE L. J. 125; F. T. C. v. Aaban Radium Co., 7 F. T. C. Dec. 15 (1923); F. T. C. v. Standard Education Society, 7 F. T. C. Dec. 20 (1923); F. T. C. v. H. Mailender, 7 F. T. C. Dec. 40 (1923); F. T. C. v. Turner & Porter, 7 F. T. C. Dec. 100 (1923); F. T. C. v. Barrett Co., 7 F. T. C. Dec. 187 (1924). There have been many trade practice conference rulings. See, *e.g.*, TRADE PRACTICE CONFERENCES, F. T. C. (1928) 24, 57, 73, 35, 59, 58.

Misrepresentation of quantity: In re Ozark Creamery Co., 8 F. T. C.

diction is limited to interstate transactions, and thus false advertising incident to intrastate sales is beyond the scope of its powers.[61]

Dec. 377 (1925); F. T. C. v. Mountain Grove Creamery, 6 F. T. C. Dec. 426 (1923); F. T. C. v. Wichita Creamery Co., 6 F. T. C. Dec. 435 (1923); In re Baltimore Paint & Color Works, 9 F. T. C. Dec. 242 (1925). See PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 49, at 136 *et seq.*; TRADE PRACTICE CONFERENCES, *supra* at 10, 35.

Fictitious price reductions: Chicago Portrait Co. v. F. T. C., 4 F. (2d) 759 (C. C. A. 7th, 1924); John C. Winston Co. v. F. T. C., 3 F. (2d) 961 (C. C. A. 3d, 1925), certiorari denied, 269 U. S. 555, 46 Sup. Ct. 19 (1925); F. T. C. v. Henry Lederer & Bros., 6 F. T. C. Dec. 126 (1923); F. T. C. v. Morrison Fountain Pen Co., 7 F. T. C. Dec. 246 (1924); In re Standard Fountain Pen Co., 9 F. T. C. Dec. 226 (1925); F. T. C. v. Waverly Brown, 3 F. T. C. Dec. 156 (1920); In re Grand Rapids Mfrs. Warehouse Ass'n, 9 F. T. C. Dec. 304 (1925); Hankin, *op. cit. supra* note 59, at 196 *et seq.*; REGULATION OF COMPETITIVE PRACTICES, *supra* note 49, at 132.

Misrepresentation of business status: F. T. C. v. Pure Silk Hoisery Mills, 3 F. (2d) 105 (C. C. A. 7th, 1924). It has been held that such a misrepresentation constitutes such unclean hands as will bar relief for trademark infringement. Kenny v. Martin Gillet & Co., 70 Md. 574, 17 Atl. 499 (1889); *cf.* Castroville Co-op. Creamery Co. v. Col, 6 Cal. App. 533, 92 Pac. 648 (1907); Munn & Co. v. Americana Co., 83 N. J. Eq. 309, 91 Atl. 87 (1914). *Contra:* Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595 (1906). See F. T. C. v. North American Fibre Products Co., 5 F. T. C. Dec. 410 (1923); F. T. C. v. Durable Pure Silk Fashioned Hoisery Co., 7 F. T. C. Dec. 426 (1924); In re Beacon Knitting Mills, 10 F. T. C. Dec. 70 (1926); In re Lexington Storage Warehouse Co., 9 F. T. C. Dec. 324 (1925); PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 49, at 127 *et seq.*; TRADE PRACTICE CONFERENCES, *supra*, at 70.

Rebuilt or seconds sold as firsts: Fox Film Corp. v. F. T. C., 296 Fed. 353 (C. C. A. 2d, 1924); (1924) 33 YALE L. J. 885; F. T. C. v. Lasso Pictures Co., 1 F. T. C. Dec. 374 (1919); In re Film Distributors League, 9 F. T. C. Dec. 1 (1925); F. T. C. v. Janes, 1 F. T. C. Dec. 380 (1919); F. T. C. v. Amalgamated Tire Stores Corp., 5 F. T. C. Dec. 349 (1923); In re Samson Rosenblatt, 8 F. T. C. Dec. 400 (1925); TRADE PRACTICE CONFERENCES, *supra*, at 7.

Misrepresentation of geographical origin: Bradley v. F. T. C., 31 F. (2d) 569 (C. C. A. 2d, 1929); Bayuk Cigars v. F. T. C., now pending in the courts; F. T. C. v. Kraus & Co., 6 F. T. C. Dec. 207 (1923); F. T. C. v. King-Ferree Co., 6 F. T. C. Dec. 253 (1923); In re Joseph S. Weinstock, 9 F. T. C. Dec. 116 (1925); In re Abraham Ash Co., 9 F. T. C. Dec. 134 (1925); In re Bardwill, 10 F. T. C. Dec. 117 (1926); TRADE PRACTICE CONFERENCES, *supra*, at 12; Hankin, *op. cit. supra* note 59, at 191; PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 49, at 132.

False claims to testimonials and indorsements: Guarantee Veterinary Co. v. F. T. C., 285 Fed. 853 (C. C. A. 2d, 1922); F. T. C. v. Silvex Co., 1 F. T. C. Dec. 301 (1918); F. T. C. v. Accounting Machine Co., 3 F. T. C. Dec. 361 (1921); In re Glidden Co., 9 F. T. C. Dec. 38 (1925); In re J. L. Heaps, 10 F. T. C. Dec. 207 (1926); TRADE PRACTICE CONFERENCES, *supra* at 45, 47, 72; Hankin, *op. cit. supra* note 59, at 200 *et seq.*; PUBLIC REGULATION OF COMPETITIVE PRACTICES, *supra* note 49, at 124 *et seq.*; *cf.* CHASE & SCHLINK, *op. cit. supra* note 3, at 141-142.

[61] Consequently, with respect to intrastate transactions, the discussion of the Washboard case is far from academic.

The courts have not been altogether well disposed to the commission. In *Ostermoor v. Federal Trade Commission*,[62] the petitioner was charged with misrepresenting in advertisements and labels the character of its mattresses. The misrepresentation consisted in showing a pictorial flare of thirty-five inches when the mattress was partially ripped open, whereas the actual expansion of the cotton felt filling was about three to six inches. The court in annulling the order found that the commission had misinterpreted this pictorial representation.

"The pictures clearly assume to show the final stages in the construction of the mattress; the thickness and resiliency before compression and not afterwards; a mattress in process of manufacture, not one completed and, after some unknown time and unknown use, ripped open again. And there is no testimony that such a representation is a misrepresentation of the unfinished article. . . . Concededly it is an exaggeration of the actual condition; indeed, petitioner asserts that it is not and was not intended to be descriptive, but fanciful. . . . The time honored custom of at least merely slight puffing, unlike the clear misrepresentation of the character of the goods, has not come under a legal ban."

One might well question the wisdom of the commission in apportioning its energies to include a case of such slight proportions, but as has already been indicated, no progress can be made in this movement if the "time honored custom" of puffing, with all its hoary traditions, is forever to be exempted from the operation of every sanction, old and new.

The Trade Commission has performed yeoman service, and, while it has attempted to stem a seeming Niagara, with proper judicial support additional prodigies are not beyond possibility. Perhaps its most effective work can be done in cooperation with trade associations in trade practice conferences.[63] The trade associations have a great opportunity to reveal the possibilities of autonomous group control, but thus far their only contribution has been the formulation of glittering codes of ethics, which frequently are no sooner drafted than ignored.[64]

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[62] 16 F. (2d) 962, 963, 964 (C. C. A. 2d, 1927).

[63] For a description of the conferences and a collection of the submittals, see TRADE PRACTICE SUBMITTALS, F. T. C. (1925); TRADE PRACTICE CONFERENCES, F. T. C. (1928).

[64] A questionnaire circulated by Mr. George Jaffin, a student of the writer's, among the leading associations revealed that very little was being done to raise the standards of trade morals apart from the formulation of codes of ethics. While these codes are handsomely printed, no machinery is established for their enforcement.

BETTER BUSINESS BUREAUS AND NEWSPAPER AND PERIODICAL CENSORSHIP

We must turn to the Better Business Bureaus and the newspapers and magazines for instances of significant non-governmental intervention. The Better Business Bureaus were established in the principal cities of the country to assume responsibility for the enforcement of the Printers' Ink Statute. The local Bureaus cooperate with the National Vigilance Committee of the Associated Advertising Clubs of the world, which is concerned with abuses in national advertising. The membership of a Bureau consists of newspapers and other publications, local manufacturers and merchants, banks, advertising agencies and the like. The Bureau is controlled by its membership, the actual work being performed by an executive committee. There are two main divisions of the Bureau's work of investigation—merchandise and financial advertising. Questionable advertisements are sent to it for investigation by members, newspapers, parties aggrieved, or others, or are discovered by the Bureau itself.[65]

No fetish is made of prosecutions.[66] Reliance is placed upon moral suasion. An attempt is made to convince the advertiser of the evil of his ways and to aid him in the future in the prepa-

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[65] The *modus operandi* after receipt of such information has been thus described, in TRUTH IN ADVERTISING, a pamphlet published by the Bureau:

"In order to give some idea of how a case of suspected retail advertising might be handled, but without making allowance for any peculiar circumstances involved, assume the representation to be: Women's All-Wool Suits $50 Value—$19.75.

"One of the suits so advertised would be purchased for cash by a shopper of the Better Business Bureau. On receipt of the suit at the Bureau's office, all identification marks, such as price tags, brand labels, etc., would be carefully and completely removed. The garment would then be turned over to a Bureau investigator, who would submit it to six or seven local retail authorities, individually, with the following queries:

" 'What, in your opinion, would be a fair retail valuation on this suit, fair both to the customer and the advertiser? Is the suit all wool as represented?'

"No indication of the name of the advertiser or the value advertised would be given the authorities consulted, so that their judgment would be unbiased. At the conclusion of the investigation, the valuations placed on the suit in question would be averaged.

"If the average figure determined as reasonable was materially lower than the value represented in the advertisement, the firm would be interviewed immediately.

"Such average figure would be placed before the store executive, together with a commercial chemist's finding as to wool content. In the great majority of cases the executive is ready and satisfied to accept the verdict. Occasionally he may request further investigation. If he does, the suit is sent to the nearest Bureau city for merchandise appraisal, to be obtained in the same way.

"Submission to out-of-town authorities is usually regarded as an 'appeal' from local findings. The 'appeal,' however, is uniformly made with the best of feeling on both sides, and merely goes to prove that the Bureau is sincere in its aim to be fair, impartial and unprejudiced."

[66] From May, 1920 to May, 1921, the National Vigilance Committee and

ration of accurate copy. Some Bureaus have adopted the policy of compelling the publication of retractions, of which the following is an example:

"On Monday, September 17, we advertised the opening of our store, making the following claims:

" 'This store is one of a chain of stores. We manufacture our own product and sell directly from factory to wearer. Suits and Overcoats $25, $30, $35. These garments bought elsewhere would cost $35, $40, $45.'

"The Better Business Bureau has called our attention to the fact that these claims are incorrect, as follows:

"We do not operate a chain of stores.

"We do not manufacture our own products.

"Some of the suits advertised at $25, $30, $35 as $35, $40, $45 suits elsewhere, are not of this value.

"Anyone who purchased merchandise in this establishment under a misapprehension on account of the advertisement, is invited to return the merchandise and secure refund of the purchase price." [67]

As knowledge of the existence of these Bureaus increases, and with the perfection of organization which comes with time, these agencies promise to become the most important instruments in the reform of advertising practice. Newspapers are increasingly relying upon them, and at the recent Trade Practice Conference of Periodical Publishers, the National Better Business Bureau was selected as "the machinery through which the industry would do its own policing," and was authorized to report to the Trade Commission all violations of the Trade Practice Conference rule.[68]

While all the Bureaus claim to be sure of their facts before preferring any charges, occasional slip-ups seem unavoidable. No matter how carefully they operate, they must inevitably be involved in defamation suits. If the Bureaus were to be clothed with a qualified privilege in the event the bounds of truth were exceeded, they might be more aggressive than otherwise. Such a privilege may eventually become necessary if the Bureaus are to function efficiently. At the same time, it is not to be overlooked that when an accusation by the Bureau is false, great injury is inflicted on the honest tradesman and it may well be questioned whether he should be compelled to bear the loss. Perhaps more equitable means of apportioning the inevitable costs of purging advertisements of falsity can be devised.

the local bureaus investigated 6,815 cases, but were responsible for only 51 prosecutions. Printers' Ink, May 17, 1923, at 19. It is a general policy to proceed against both "big" and "small" business in order to avoid the charge, which has been made, that the small business man alone is harrassed.

[67] TRUTH IN ADVERTISING, *supra* note 65.

[68] Trade Practice Conference, Oct. 9, 1928.

No litigation in which this question was squarely presented has arisen. This undoubtedly is the result of the policy of many Bureaus to prefer discretion to valor, and to avoid statements which will invite litigation. A questionnaire circulated among counsel for the various Bureaus revealed a consensus of opinion against the existence of such a privilege.[69] The closest case that has been found is *Fahey v. Shafer*,[70] where the members of a trade association were held conditionally privileged to prefer charges with the advertising manager of a local paper and with an advertising club with respect to the truth of the plaintiff's advertisements.

Elaborate censorship systems are maintained by many newspapers and periodicals, two of which are described in the footnote.[71] If all publications were as stringent in their require-

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[69] Questionnaire of John Richardson, Esq., Attorney for the Boston Better Business Bureau.

[70] 98 Wash. 517, 167 Pac. 1118 (1917).

[71] 1. The New York Times.

The Times maintains a strict censorship of all advertising copy submitted for publication. Its standards are incorporated in an *Index Expurgatorius*, which frequently appears in its columns and a copy of which follows:

"1. Fraudulent or doubtful advertisements.

"2. Offers of something of value for nothing; advertisements that make false, unwarranted or exaggerated claims.

"3. Advertisements that are ambiguous in wording and which may mislead.

"4. Attacks of a personal character; advertisements that make uncalled-for reflections on competitors or competitive goods.

"5. Advertisements holding out the prospect of large guaranteed dividends or excessive profits.

"6. Bucket shops and offerings of financial prospects.

"7. Advertisements that are indecent, vulgar, suggestive, repulsive or offensive, either in theme or treatment.

"8. Matrimonial offers, fortune telling; massage.

"9. Objectionable medical advertising and offers of free medical treatment; advertising that makes remedial, relief or curative claims, either directly or by inference, not justified by the facts or common experience.

"10. Advertising of products containing habit-forming or dangerous drugs.

"11. Want advertisements which request money for samples or articles.

"12. Any other advertising that may cause money loss to the reader, or injury to health or morals, or loss of confidence in reputable advertising and honorable business, or which is regarded by THE TIMES as unworthy.

"Every advertisement offered to THE NEW YORK TIMES is subject to its censorship and must conform to THE NEW YORK TIMES standards and its ideals of a newspaper's obligations to the public.

"THE NEW YORK TIMES welcomes information from its readers in aid of its efforts to keep its advertising columns absolutely clean.

"Reward of $100 is offered by THE NEW YORK TIMES for information leading to the arrest and conviction of anyone who may have obtained money under false pretenses through the medium of a misleading or fraudulent advertisement published in THE TIMES."

2. Good Housekeeping.

The three phases of censorship of this periodical have been thus described by Mr. Allen R. Dodd, its advertising editor:

"First of all, our policy is that all products offered for advertising in Good Housekeeping must be examined—in some cases, actually tested—before the advertising is accepted. The purpose of this examination is to determine whether or not the product is good value at the price and will give satisfaction to the purchaser. Obviously, this includes a deter-

ments as the *Good Housekeeping Magazine,* we would be well on the way toward a solution. There is no better way of preventing false advertising than by not publishing deceptive copy. The Federal Trade Commission has instituted the practice of joining the publisher with the advertiser in its proceedings against false advertising and of issuing cease and desist orders

mination whether or not the product is actually harmful or undesirable from the point of view of its possible ill effects on the buyer. Kitchen equipment, such as kitchen cabinets, ranges, refrigerators, stoves, sinks, kitchen utensils, electric and gas consuming appliances, and devices of all kinds, must be tested and approved by Good Housekeeping Institute before the advertising is accepted. The Institute is probably at the present time the best equipped testing laboratory for household appliances and equipment in existence. . . .

"Similarly, food products, toilet preparations and drugs must be tested and approved by our Bureau of Foods, Sanitation and Health before they can be advertised in Good Housekeeping These examinations are made for purity and the possible presence of harmful ingredients.

"In the case of both the Institute and the Bureau, disapproved products are absolutely disqualified for advertising in Good Housekeeping.

"Products which do not come within the official scope of the Institute or Bureau testing service are, in many cases, unofficially tested for the information of the Advertising Department. This would include such products as washing compounds, dyes, textiles for fast color, insecticides, etc. Other merchandise is examined as carefully as possible. We usually ask to have samples sent in, or in cases where this is not feasible, send our representative to look into the quality of the product and the reliability of the manufacturer.

"After a product is accepted for advertising in Good Housekeeping, the advertising copy is gone over carefully for the purpose of keeping it as free as possible from misleading or untruthful and exaggerated claims. There is a special department of the Business Department of Good Housekeeping which has charge of this copy censorship. As a matter of regular routine, advertisements which include technical claims are passed on to our various departmental experts for approval or criticism. It might interest you to know that from January to June inclusive of this year, our censorship questioned a total of 504 advertising statements; of these, 84 were explained satisfactorily, 280 were changed at our request by the advertiser and 7 advertisements were cancelled because of the advertiser's refusal to change questionable claims.

"As a final step, we put our own money-back guaranty on all merchandise advertised in Good Housekeeping."

Close cooperation exists between the National Better Business Bureau and newspaper publishers. Eight reports are sent weekly to classified advertising managers of some 700 newspapers. The reports reproduce doubtful advertisements, details about advertisers and their schemes, and the proposed classification of the advertisements. On request, the National Bureau will conduct a special investigation of classified copy. In two years, it received 2,359 inquiries. Careful scrutiny of advertisements appearing in newspapers in key cities is made and investigations of the questionable ones are initiated. During a period of two years 1,608 of these voluntary investigations were conducted. Considerable information is sent out concerning fraudulent, deceptive and misleading advertising.

[72] In re McGowan Laboratories and Womanhood Pub. Co., F. T. C. Dec., June 6, 1927. While the publisher in this case was charged with knowledge of the falsity of the advertisements, the commission apparently intends to proceed against the publisher irrespective of whether he knew of the falsity of the representations. See address of Chairman Humphrey to representatives of periodical publishers, New York, October 9, 1928, *op. cit. supra* note 1; and memoranda prepared for the chairman by attorneys of the commission, published in mimeographed form.

against both.[72] If this is sustained by the courts, which is somewhat doubtful, more rigid censorship can be expected.

The efficacy of newspaper censorship is not readily ascertainable. I have noticed, without sustained investigation, several lapses on the part of papers that purport to censor advertising copy.[73] The researches of Chase and Schlink bear eloquent testimony to the need for a more rigorous censorship. And with all the good will in the world, the difficulty of detecting falsehood before publication is well-nigh insuperable.

An interesting case arose recently in New York raising the question whether a newspaper may refuse to publish deceptive advertising copy when no such privilege was reserved in the advertising contract. Although unnecessary to the decision, the court indicated that such a refusal would not result in liability for breach, notwithstanding the contract.[74] While such an indirect sanction is not highly essential, since the standard advertising contract contains a clause justifying the refusal to publish misleading copy, the case is important as manifesting a more liberal and far-seeing attitude on the part of the courts.

Some periodicals guarantee the truth of the advertisements published. Others though not assuming such responsibility bring pressure to bear, in one fashion or another, upon advertisers to recompense injured customers. The legal effect of such guarantees remains to be authoritatively determined.[75]

UNCLEAN HANDS

An indirect sanction of considerable importance remains to be considered—the ubiquitous doctrine of unclean hands. Where *A*'s trademark misdescribes the product to which it is affixed, as where a laxative is called Xenophon Fig Compound although it contains no figs, it is universally held that *A* has no standing in a court of equity to restrain an infringing use of the mark.[76] The morals of the situations are curious. In order to penalize the plaintiff for his misrepresentation, the defendant is not only allowed to go scot free but in effect is licensed to continue his piracy, for the time being at least. The interest of the public is lost sight of. The practical way of dealing with this situation

[73] A careful investigation by one of the writer's students revealed many discrepancies between professed standards and practice as gathered from the advertisements published.

[74] Amalgamated Furniture Factories v. Rochester Times-Union, 128 Misc. 673, 219 N. Y. Supp. 705 (Sup. Ct. 1927).

[75] *Cf.* Heathcote v. Curtis Publishing Co., 229 Mass. 569, 118 N. E. 909 (1918); De La Bere v. Pearson, [1908] 1 K. B. 280, criticized in (1908) 8 COL. L. REV. 409.

[76] HOPKINS, TRADEMARKS (2d ed. 1924) § 75 *et seq.*; Note (1919) 4 A. L. R. 44, 95.

would be to compel both parties to call a halt to their deception instead of permitting the roguery of one to neutralize that of the other.[77] Or, if this is not possible under our present procedure, the court could at least render a conditional decree, enjoining the defendant's infringement upon the plaintiff's discontinuance of his misrepresentation, the decree taking effect only upon the performance of the condition.[78]

The doctrine of unclean hands has been extended to cases where the misrepresentation is extrinsic to the mark, as where contained in advertisements or labels.[79] The advertiser who is careless of the truth or falsity of the statements made in his advertisements jeopardizes his trademark. Whatever we may think of the wisdom of such a doctrine, its powerful effect as a

[77] In only one case that I have been able to discover has the court adverted to the possibility of enjoining both parties. "It would seem that this rule might be modified so as to permit the court, for the protection of the general public, to enjoin both parties, but so long as it remains the rule of the Supreme Court it is the duty of inferior tribunals to follow it." Coxe, J., in Hilson Co. v. Foster, 80 Fed. 896, 901 (C. C. N. Y. 1897).

The defendant should be enjoined not to vindicate the plaintiff's right to the mark but to protect the public against further deception. If of course, the defendant's use of the mark does not result in deception of the public, then the plaintiff is perhaps properly denied relief in view of his own fraud.

[78] In the vast majority of cases, the bill is dismissed without any indication in the opinion whether or not the dismissal is without prejudice to the commencement of a new action upon the cessation of the plaintiff's misrepresentation. In fact, relief has been denied even though the misrepresentation had ceased before the bill was filed. Castroville Co-Op. Creamery Co. v. Col, 6 Cal. App. 533, 92 Pac. 648; Preservaline Mfg. Co. v. Heller Chem. Co., 118 Fed. 103 (C. C. Ill. 1902). But there is authority to the contrary. Johnson & Johnson v. Seabury & Johnson, 71 N. J. Eq. 750, 67 Atl. 36 (1906); Moxie Nerve Food Co. v. Modox Co., 153 Fed. 487 (C. C. R. I. 1907), *aff'd*, 162 Fed. 649 (C. C. A. 1st, 1907). In the federal courts the practice has developed of dismissing the bill without prejudice and of entertaining a new bill once the plaintiff washes his hands. American Thermos Bottle Co. v. Grant Co., 279 Fed. 151 (D. Mass. 1922), *aff'd*, 282 Fed. 426 (C. C. A. 1st, 1922); Diamond Crystal Salt Co. v. Worcester Salt Co., 221 Fed. 66 (C. C. A. 2d, 1915); Gaines & Co. v. Turner, Tooker Co., 204 Fed. 553 (C. C. A. 6th, 1913), appeal dismissed, 231 U. S. 769, 34 Sup. Ct. 328 (1913); *cf.* Moxie Nerve Food Co. v. Modox Co., *supra*. A conditional decree was granted in Clark v. Clark, 25 Barb. 76 (Sup. Ct. N. Y. 1857). Conditional relief of course cannot be granted where the plaintiff's mark is inherently fraudulent and its very use results in deception. Under such circumstances, the court to protect the public should enjoin both parties.

[79] Preservaline Mfg. Co. v. Heller Chemical Co., 118 Fed. 103 (C. C. Ill. 1902); Channell Chemical Co. v. Hayden Co., 222 Fed. 162 (D. Ohio, 1915); Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964, 973 (C. C. A. 6th, 1907); Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436 (1883); Gaines & Co. v. Turner-Looker Co., 204 Fed. 553 (C. C. A. 6th, 1913); Kenny v. Martin Gillet & Co., 70 Md. 574, 17 Atl. 499 (1889); Pidding v. How, 8 Sim. 477 (1837). But *cf.* Wormser v. Shayne, 111 Ill. App. 556 (1904); Curtis v. Bryan, 36 How. Pr. 33 (N. Y. 1867); Nelson v. Winchell, 203 Mass. 75, 84, 89 N. E. 180, 184 (1909).

deterrent, once it is brought home to the advertiser,[89] cannot be denied.

CONCLUSION

At the beginning of this paper, the reader was promised a tour through the legal domain to inspect the various legal devices that have been and might be used to curtail falsity in advertising. The tour at an end, it must be confessed that we are still far from a solution. Assuming that all the legal devices were used to the fullest possible extent, that the administration of these laws was intelligent and unrelenting, that the courts approached these problems with more sympathy and understanding, would false advertising materially abate? I venture to say that it would not, so long as the psychology generated by a materialistic and commercial age—the psychology which is laid bare in the reports of the Federal Trade Commission and in Chase and Schlink's *Your Money's Worth*, the modern counterparts of the Homeric legends or the later picaresque tales—prevails. Nor can one at present hope for much to come out of Chase and Schlink's persuasive suggestion that the governmental technique of purchasing supplies according to specifications or standards established by the Bureau of Standards be carried over to the field of private marketing. By that it is not meant that these expedients promise little. The legal sanctions can be very helpful. Chase and Schlink's plan would work wonders, if given a chance. Newspaper censorship can weed out the blatant frauds. The Better Business Bureau can effectively work from without. But the solution can only come from within. A new business psychology must be bred. A regard for truth and an aversion for falsity must be inculcated. The purchaser must be educated to demand useful and truthful information. Here is a task for the educator and missionary. Here is the opportunity of the trade associations. The lawyer can do little.

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[89] The work of Printers' Ink in this connection should be noted. Compare the comments upon the recent American Safety Razor Corp. v. International Safety Razor Corp., 26 F. (2d) 108 (D. N. J. 1928), since reversed (opinion not yet reported), and the articles discussing the unclean hands rule. Printers' Ink, May 17, 1928, at 111; May 24, 1928, at 158; June 28, 1928, at 69.