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Trademarks—Use of Similar Trademark, Not Calculated to Produce Confusion, Not Enjoinable

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The rebottler of another manufacturer's product may no longer hide behind *Prestonettes v. Coty*,[9] for the Court has correctly pointed out that the Supreme Court was not concerned with our statute in this case. It involved the effect of a trade mark as a property right, and although the brief of counsel mentioned Section 2354, the Court chose to ignore it in its opinion.

D. R. K.

USE OF SIMILAR TRADEMARK, NOT CALCULATED TO PRODUCE CONFUSION, NOT ENJOINABLE

The Court ruled that questions of trade mark infringement are to be determined on the particular facts of each case when in *Dell Pub. Co. v. Stanley Pub., Inc.*[10] it held that the use of the name "Modern Confessions" was not an infringement of the registered trade mark, "Modern Romances."

Appellant, Dell Publishing Company, sought reinstatement of an injunction which had been set aside by the Appellate Division[11] on the law and facts, as there was an insufficient offer of evidence to warrant a finding of a reasonable tendency to cause confusion. The word in question, modern, was a descriptive word, which had not acquired a secondary meaning through association with the appellant's product. They based their findings on, among others, the following facts: that there were approximately 61 publications whose registered titles contain the word modern; that the content of the two magazines were not the same; that the quality of the paper, the sale price, the letterhead, and the "blurb lines" were not the same. The confusion which the trade mark and unfair competition laws were meant to preclude was nonexistent in this case.

The Court of Appeals accepted this reasoning, pointing out that the law of trademarks is merely a portion of the broader law of unfair competition, and that it is intended to prevent one from palming off his goods and/or their origin as the goods of another.[12] Precedents furnish generalizations which provide a criterion for the determination of disputes involving trademark infringements. These disputes require pragmatic action, with each case being decided in the light of its own particular facts.[13]

The Court, after concluding that all past cases were decided on their own particular facts, articulated the test to be applied. *"The test as in unfair competition, is the likelihood of confusion, regardless of evidence of actual confusion."*[14] In this view, it is apparent that had the use of the word modern been calculated to cause confusion, in spite of a complete lack of evidence of confusion, it would constitute an infringement. The basis for such

9. 264 U.S. 359 (1924).
10. 9 N.Y.2d 126, 211 N.Y.S.2d 393 (1961).
11. 11 A.D.2d 112, 201 N.Y.S.2d 1008 (1st Dep't 1960). The injunction had been issued by the supreme court in 18 Misc.2d 437, 188 N.Y.S.2d 605 (Sup. Ct. 1959).
12. Supra note 10 at 133, 211 N.Y.S.2d at 398.
13. See Palmer v. Gulf Pub. Co., 79 F. Supp. 731, 737 (S. D. Calif. 1948).
14. Supra note 10 at 134, 211 N.Y.S.2d at 399.

a finding, of likelihood of confusion, must be founded on a true similarity, and not merely incidental business competition.

The Lanham act,[15] which added to the scope of trade mark infringement, allowing descriptive words to be registered if they were so indicative of their owner as to have acquired a secondary meaning, does not go so far as to prohibit the use of a portion of that title, by another, when it itself is descriptive of content. "In order to establish a trade mark it must be shown that 'the primary significance of the term in the minds of the consuming public is not the product but the producer'."[16] It is evident that here the word modern has not become so identified in the minds of the public, as to warrant a finding that use by another would be unfair competition. The Court pointed out that if a buyer went to a newstand and asked for a "Modern" he very likely would not receive it.

D. R. K.

WORKMEN'S COMPENSATION

Compensation Award for Death Caused by Emotional Stress

Does the New York Workmen's Compensation Law provide benefits for worrying yourself to death over your job? Purportedly, the Court of Appeals has answered this question affirmatively in the case of *Klimas v. Trans Caribbean Airways, Inc.*[1] It is this writer's belief, and this note will seek to show, that the jury is not in yet.

Edward Klimas was maintenance supervisor for the defendant airline. When one of the defendant's two airplanes was grounded by the Civil Aeronautics Authority for wing corrosion in November 1955, Klimas was publicly blamed and chastised for the incident by the defendant's president. From then until the time of his death, March 10, 1956, he was under great pressure to get the plane back in the air. The testimony was that he suffered great emotional and mental anxiety because of the twin burdens of the threat to his job and the responsibility for the plane. His deadline was the end of February 1956. On March 3, 1956, the plane was still not ready; so, Klimas went personally to expedite the repair effort. At this time he was handed a bill for $266,000 (representing 25% of the plane's value). From March 3rd until his death, he worked all day and into the night in an effort to get the bill reduced as well as to speed the plane's repair. His efforts were unsuccessful in both respects and the testimony of those who were there with him at this time was

15. 15 U.S.C. §§ 1051-1127 (1958).
16. Supra note 10 at 137, 211 N.Y.S.2d at 402.

1. 10 N.Y.2d 209, 219 N.Y.S.2d 14 (1961). The order of the referee, reviewed and affirmed by the Board, awarding death benefits to the plaintiff, the widow of decedent, was reversed by the Appellate Division, 12 A.D.2d 551, 207 N.Y.S.2d 72 (3d Dep't 1960), on the ground that no physical strain or exertion was shown.