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on the mortgage itself.[50] He also felt that under the statutory scheme the United States was sponsor, financier and owner of the entire project, and the corporations mere fictions created to act as agents for the Federal Government, and as such not taxable.[51]

United States v. City of Detroit,[52] is indicative of the Supreme Court's position that it will not interfere with state taxation of private parties, although they may be engaged in governmental functions. However, it is still true ". . . that possessions, institutions, and activities of the Federal Government itself . . . are not subject to any form of state taxation."[53] The Court of Appeal's decision not to disregard the mortgagor's corporate entity would seem to be in keeping with the current trend, although it is possible that the taxpayers under this arrangement are so closely identified with the Federal Government that the incidence of taxation could be held to fall on the United States.[54]

TORTS

UNFAIR COMPETITION—INJUNCTION FOR BAIT ADVERTISING

"Unfair competition" is a concept which for years has challenged the abilities of courts to define legal relationships.[1] The opportunity was recently presented to the New York Court of Appeals in the case of *Electrolux Corp. v. Val-Worth Inc.*[2] However, the decision handed down does not appear to clarify the concept. Rather, it would seem that there is greater confusion now than ever.

Plaintiff Electrolux accepted old vacuum cleaners in trade on its new models. It would then sell them to defendant at seven dollars apiece. The latter reconditioned them with non-Electrolux parts and sold them as reconditioned Electroluxes. This went on for a period of about five years, during which time Electrolux refused to sell its own parts to defendant. In 1952, defendant inaugurated an advertising program on television offering the rebuilt machines (using the name Electrolux) at $14.95, which was less than their actual cost. When viewers answered the ads, a salesman would be dispatched to the home. Upon gaining entry, he would proceed to "knock" the Electrolux as "a piece of junk" and make other disparaging remarks about it. He would then attempt to sell a new competing brand to the potential customer. If he was pressed

50. Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939); Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374 (1923).
51. Clallam County v. United States, 263 U.S. 241 (1923).
52. 355 U.S. 466 (1958).
53. United States v. County of Allegheny, *supra*, note 49, at 177.
54. See concurring opinion, City of Detroit v. Murray Corp. of America, 355 U.S. 489, 499 (1958); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).

1. Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).
2. 6 N.Y.2d 556, 190 N.Y.S.2d 977 (1959).

the salesman would sell the rebuilt machine but received no commission therefrom, his sole remuneration coming from sales of the other new machines.

In 1953 plaintiff brought an action for injunctive relief and damages. In granting the injunction prohibiting the use of the Electrolux name in advertising, the Supreme Court found that,

> . . . the television broadcasts were calculated to give the impression that a used Electrolux, with Electrolux parts, which retained the quality associated in the public mind with plaintiff's product, was obtainable at a low price, whereas the actual purpose was to discourage purchase of Electrolux and induce the public to buy other expensive makes.

The Supreme Court construed these practices as "bait advertising" and as such, unfair to the public as well as to the owner of the trade mark name.

The Appellate Division reversed the injunction against the use of the name on the ground that for five years plaintiff had sold to defendant whom it knew to be using these methods of distribution. It further found that although there was a "lure," defendants did not in fact refuse to sell the Electrolux machines, having sold five thousand of them during the five year period.[3]

The Court of Appeals, in a 6-1 opinion, reversed in part and affirmed in part, Judge Fuld dissenting without opinion.[4] As to the use of the name Electrolux, the Court agreed with the Appellate Division that plaintiff was estopped by its knowledge and acquiescence.[5] This part of the opinion is consistent with current authority in the field.[6] It reversed, however, in regard to the "bait advertising" complaint. The decision on this point was reached by a consideration of three facts: (1) defendant advertised a rebuilt Electrolux at a very attractive price in order to invite inquiry (2) defendant's salesmen "got their foot in the door" in answer to that inquiry but their purpose was to sell a competing machine, and (3) they then "switched" the transaction by "knocking" the rebuilt machine and introducing the new machine. The question is whether or not these facts constitute "unfair competition" which may be enjoined at the behest of plaintiff. The Court found that it was "unfair competition" and could be enjoined.[7]

The conclusion of the Court is reached by a "quasi-evolutionary" process. Its basic proposition is that although plaintiff is deemed to have consented to the use of its name in the sales of rebuilt Electrolux machines, ". . . this is not to say that plaintiff has consented that its name and trademark be used as a lure in a 'bait and switch' promotion scheme to sell new vacuum cleaners

3. 5 A.D.2d 216, 170 N.Y.S.2d 738 (1st Dep't 1958).
4. *Supra* note 2.
5. Citing Rothschild v. Title Guarantee & Trust Co., 204 N.Y. 458, 97 N.E. 879 (1912); Wm. H. Keller Inc. v. Chicago Pneumatic Tool Co., 298 Fed. 52 (7th Cir. 1923), *cert. denied* 265 U.S. 593 (1924).
6. *Ibid.*
7. *Supra* note 2.

in direct competition with itself."[8] The Court then gave a brief history of the law of "unfair competition," pointing out that although it was originally limited to "palming off," *i.e.* the sale of goods of one manufacturer as those of another,[9] the concept of "palming off" has been extended to situations where the parties are not even in competition.[10]

> Moreover, in 1918, the Supreme Court of the United States refused to limit relief from unfair competition to cases of "palming off" in *International News Service v. Associated Press*,[11] where defendant news gathering service was pirating news gathered and reported by plaintiff to eastern newspapers and then transmitting it, as its own product, to western newspapers in time for publication in the west. The Supreme Court commented that defendant is "endeavoring to reap where it has not sown" and held that plaintiff had property rights in the freshly gathered news which might not be misappropriated by defendant. The principle that one may not misappropriate the skill, expenditures and labor of a competitor has since often been implemented in our courts.[12]

Pointing out that the increasing complexity of business activity with its concomitant opportunities for chicanery requires the courts and the law to keep pace by providing adequate protection, the Court proceeded to the determination of the actual issue at hand. It attempted to define the public policy of the State in regard to "unfair competition" from two statutes. The first, Section 421 of the Penal Law, which deals with false advertising, has recently been interpreted to include false advertising with intent *not* to sell the product advertised.[13] The other statute mentioned is Section 396 of the General Business Law which empowers the Attorney General to bring injunction proceedings against "advertising . . . with intent, design or purpose not to sell the merchandise, commodity or service so advertised." The Court carefully mentioned, however, that it "makes no comment on the applicability of this statute." It then distinguished this situation from "loss-leader" operations on the ground that the customer is "trapped in his own home faced with a choice of the rebuilt machine and a new machine." After pointing out that this sort of operation is hardly within the recognized bounds of business ethics, the Court found a reasonable precedent for its position in *Bourjois Inc. v. Park Drug Co.*[14] There, a drug store advertised plaintiff's products at low prices and when customers came into the store to buy, it was alleged that

8. *Id.* at 567, 985.
9. Citing Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901).
10. Citing cases.
11. 248 U.S. 215 (1918).
12. *Supra* note 2 at 568, 986; citing Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); Dior v. Milton, 9 Misc.2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956); DeJur-Amsco Corp. v. Janrus Camera, 16 Misc.2d 772, 155 N.Y.S.2d 123 (Sup. Ct. 1956); Germanow v. Standard Unbreakable Watch Crystals, 283 N.Y. 1, 27 N.E.2d 212 (1940).
13. People v. Glubo, 5 N.Y.2d 461, 186 N.Y.S.2d 26 (1959), noted 9 BUFFALO L. REV. 129 (1959).
14. 82 F.2d 468 (8th Cir. 1936).

lies were told about the products to switch the sale to another brand. An injunction was there dismissed when the facts alleged could not be proved. In conclusion, the Court of Appeals granted the injunction but denied pecuniary recovery since this is not a trade libel, there being no showing of special damages.

It is recognized that *stare decisis* is not an untouchable doctrine. At the same time, it is felt that the legal profession is entitled to a reasoned elaboration based upon existing principles when an appellate court is passing upon a question of first impression.

The Court seems to feel that *International News Service*[15] gives it *carte blanche* to expand the concept of "unfair competition" to any competitive activity which it feels is unethical. In fact, that case has been so whittled down that it is limited as a precedent to little more than its particular facts. A survey of the cases in which it has been cited bears out this point. In every case where an injunction has been granted, there has been some other factor present, which had been recognized as "unfair competition" prior to the decision in *International News Service,*[16] so that the reference to it was unnecessary. For example, *Carmen v. Fox Films*[17] dealt with the interference with an existing contract; *Hoffman Brewing Co. v. McElligot*[18] with an injunction to restrain criminal prosecution; *Public Ledger v. N.Y. Times*[19] with interference with contract; *Marucci v. United Can Co. Inc.*[20] with imitation of labels. This is, of course, not a complete list but indicates the direction of the cases. The cases where *International News Service*[21] has been held to be inapplicable further exemplify the point. For example, in *Cheney Bros. v. Doris Silk Corp.,*[22] an injunction was refused where defendant had been copying plaintiff's silk designs and underselling him. Judge Learned Hand, in commenting on the inapplicability of *International News Service*[23] stated,

> We think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. . . .[24]

In *Paramount Pictures v. Leader Press,*[25] the Tenth Circuit refused to enjoin the sale of misleading advertising accessories to plaintiff's pictures which brought discredit to plaintiff. They held *International News Service*[26] to be inapplicable since "the bill neither alleges facts which constitute the misappropriation of plaintiff's property nor the passing off of the advertising of

15. *Supra* note 11.
16. *Ibid.*
17. 258 Fed. 753 (S.D.N.Y. 1919).
18. 259 Fed. 321 (S.D.N.Y. 1919).
19. 275 Fed. 562 (S.D.N.Y. 1921).
20. 278 Fed. 741 (E.D.N.Y. 1921).
21. *Supra* note 11.
22. 35 F.2d 279 (2d Cir. 1929).
23. *Supra* note 11.
24. *Supra* note 22 at 280.
25. 106 F.2d 229 (10th Cir. 1939).
26. *Supra* note 11.

defendant as that of plaintiff." In *Reynolds & Reynolds Co. v. Norick*,[27] the Tenth Circuit again stated its position. "The principle underlying unfair trade practice cases is that one manufacturer or vendor is palming off his merchandise as that of another or that he is vending the products of another as his own." As late as 1951, Judge Learned Hand reiterated his position that the case is only authority for the situation there at bar.[28] In short, it would seem that the Court of Appeals in the instant case has misconstrued the scope of the precedent. This is borne out by a consideration of the cases it cites for the principle that a person may not "reap where [he] has not sown."[29] One case deals with the unauthorized radio transmission of baseball games;[30] another with pirating dress designs after an agreement not to copy them;[31] another with selling products bought in Europe and sold in the U.S. when the plaintiff has the exclusive American franchise granted by the manufacturer;[32] and in another an injunction was refused absent a showing of "palming off" when defendant copied plaintiff's business methods.[33] Even the one case which comes close to the Court's position, *Bourjois Inc. v. Park Drug Co.*,[34] is easily distinguishable on the ground that in *Electrolux* the persons approached were never potential customers of plaintiff. Furthermore, to say that they had only a choice between the "disparaged" rebuilt Electrolux machine and the competing expensive brand overlooks the fact that they need not buy *either*.

The relevance of the authority given for public policy by the Court is at best tenuous. The statutes cited[35] would if anything, tend to suggest that the legislature has made a choice to handle the problem by means other than private suits for injunction.

In an attempt to outline the concept of "unfair competition" it has been stated that,

> Where the defendant adopts practices which are calculated to mislead the public or which constitute fraud or deception intended to deprive a rival of custom, he is liable for engaging in "unfair competition," which means that he has exceeded the boundaries of the privilege to compete. This may be done by intimidating plaintiff's customers, by defaming him or his goods, by appropriation of various ways, the plaintiff's custom, good will or reputation, frequently by "passing off" goods of defendant as those of plaintiff.[36]

A perusal of the authorities cited for this proposition seems to indicate that there should be some interference with business relations or "palming

27. 114 F.2d 278 (10th Cir. 1940).
28. National Comics Publication v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951).
29. *Supra* note 12.
30. Mutual Broadcasting System v. Muzak Corp., *supra* note 12.
31. Dior v. Milton, *supra* note 12.
32. DeJur-Amsco v. Janrus Camera, *supra* note 12.
33. Germanow v. Standard Unbreakable Watch Crystals, *supra* note 12.
34. *Supra* note 14.
35. N.Y. PEN. LAW §421, N.Y. GEN. BUS. LAW §396.
36. HARPER & JAMES, THE LAW OF TORTS, § 6.13, p. 519.

off."[37] This is not to say that the acts complained of in the instant case should be condoned. The question, rather, is the *à propos* remedy for protection. Here, for example, Electrolux could have found another outlet for its trade-ins. They could also have brought the situation to the attention of the Attorney General for a possible application of Section 396 of the General Business Law. An application to the Federal Trade Commission might have had a salutary effect. Perhaps none of these would be effective, but nevertheless, as was said by a leading scholar in this area,

> The real need for careful thought arises when a court is asked to enjoin a kind of trade injury, which although novel is bound to arise again and again. Then, if the court goes ahead, it will be undertaking the regulation of competition, and not just stopping objectionable acts by this single defendant. The court will be beginning a permanent job of business management . . . That is what will happen if they consent to enjoin trade practices now unfamiliar to them like false advertising or the piracy of dress designs. So, before the courts start on such a big job, they want to be sure that it can be handled well in private litigation. Moral indignation against the defendant and his "dirty tricks" does not suffice to make the relief wise.[38]

Inasmuch as the instant decision has been handed down, what will be its impact on future cases? It is submitted that it should receive the same treatment accorded the case on which the Court so heavily relies, *i.e. International News Service.*[39] It should be limited in effect to substantially the same fact situation, leaving to the legislature any further regulation of "unfair competition."

SUFFICIENCY OF LIBEL COMPLAINT

A recent case, *Tracy v. Newsday, Inc.*,[40] presented the question of the sufficiency of a libel complaint. The defendant had published in its newspaper an article concerning the failure of an alleged sex offender, Jerome, to appear in court for trial. The article relating the events in the case contained a reference to the effect that plaintiff, who was an investigator for Jerome's attorney, had helped Jerome carry his bags from his hotel four days before the trial, and also that plaintiff was the last person to hear from Jerome who had called him three days before the trial to cancel an appointment to go with plaintiff to the trial. By way of *innuendo* plaintiff claimed that the article identified him as having helped Jerome jump bail and escape the consequences of his criminal action, that the statements are false, and that as a result he had been held up to public contempt, disgrace and ridicule and had been irreparably injured in his calling as a police inspector and criminologist. The Supreme Court

37. Chafee, *op. cit. supra* note 1; *Pound, Equitable Relief Against Defamation and Injuries to Personality,* 29 HARV. L. REV. 640 (1916); Nims, *Unfair Competition by False Statements or Disparagement,* 19 CORNELL L.Q. 63 (1933); see also Chief Justice Hughes in A.L.A. Schecter Poultry Corp. v. United States., 495, 531-2 (1935).

38. Chafee, *op. cit. supra* note 1.

39. *Supra* note 11.

40. 5 N.Y.2d 134, 182 N.Y.S.2d 1 (1959).