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BETWEEN:

A C SPARK PLUG COMPANY.....PLAINTIFF; Sept. 27 & 28

Dec. 5

AND

CANADIAN SPARK PLUG SERVICE, SUPER REFINED MOTOR OILS & TIMOTHY WILLIAM BRAZIL. } DEFENDANTS.

Trade-marks—Spark plugs manufactured by plaintiff reconditioned and sold by defendants—Whether plaintiff's trade-mark infringed by defendants—Whether defendants' conduct an actionable wrong under Unfair Competition Act.

The plaintiff is a manufacturer of spark plugs for use in internal combustion engines and is the owner of a registered trade-mark consisting of the letters "A C". The defendants carry on the business of reconditioning several makes of spark plugs, including those manufactured by the plaintiff, and reselling them at reduced prices. The defendants do not purport to sell the reconditioned spark plugs as new ones, but place the various makes of spark plugs, after reconditioning, in individual cartons, and these into larger cartons in which they are sold. On the outside of all cartons are printed the words "Spark Plug—Reclaimed By—Canadian Spark Plug Service." The plaintiff brought action asking for an injunction restraining the defendants from reconditioning and reselling spark plugs manufactured by the plaintiff. The Court found that the defendants had always acted in good faith; that there was not at any time any attempt by defendants to pass off the spark plugs for anything else than second-hand spark plugs; that defendants never represented the spark plugs as new; that the spark plugs as reconditioned and resold by defendants were not new and could be described only as repaired spark plugs.

Held: That there is no prohibition on the resale of repaired articles to which the trade-mark of the original maker is applied, and for which he has been paid.

2. That there is a distinction between an article repaired and one really reconstructed, and here the defendants do not produce a new article but merely repair an old one and there is nothing in law to prevent them doing so.

3. That the business carried on by the defendants does not contravene s. 11 of the Unfair Competition Act, 1932, 22-23 Geo. V, c. 33, nor is it contrary to honest industrial and commercial usage, since there has been no infringement and no passing off.

ACTION by the plaintiff asking for an injunction restraining defendants from infringing plaintiff's trade mark rights.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

W. J. Beaton, K.C. and *J. A. Wright* for plaintiff.

R. T. Harding, K.C. and *K. Koskey* for defendants.

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The facts and questions of law raised are stated in the reasons for judgment.

The PRESIDENT, now (December 5, 1934) delivered the following judgment:

The plaintiff is the registered owner of a trade mark which may be described shortly as consisting of the letters "A C," and is used in connection with the sale of spark plugs and ignition apparatus for internal combustion engines. It is alleged that the defendants infringe this mark, and contravene sec. 11 of the Unfair Competition Act, in the manner I shall shortly describe. No question arises as to the validity of the plaintiff's trade mark, and it is not questioned that the plaintiff carries on a very extensive business in Canada in the manufacture and sale of spark plugs to which its mark is applied.

Broadly stated the controversy here relates to the matter of the re-sale of second-hand A C spark plugs, with the plaintiff's trade mark still thereon, and which, the defendants claim, have been merely repaired prior to their re-sale, the plaintiff claiming that they have been so reconstructed or altered as to become in reality spark plugs other than A C plugs, and the matter for determination is whether this constitutes infringement of the plaintiff's mark, or such unfair competition as to constitute an actionable wrong under the Unfair Competition Act. It becomes necessary therefore to narrate with some care the principal facts here disclosed. It will be convenient usually to refer to the first named defendant as "Overholt," and to the last two named defendants as "Brazil."

The defendant Brazil, besides dealing in automobile accessories and oils, buys and sells used spark plugs of different makes which have been discarded by motor car owners, and he buys and sells repaired or reclaimed spark plugs of different makes, among them the plaintiff's A C spark plug. The quantity of A C spark plugs so sold by Brazil, or the proportion it constitutes of his total sales, is not of importance. Brazil openly engages in the buying of used spark plugs from many sources; he has advertised in newspapers that he was a buyer of A C and other discarded spark plugs, and he has advertised the sale of A C and other spark plugs, at 29 cents, sometimes at 39 cents, guaranteed to function for 10,000 miles, but without stating in such ad-

vertisements that they were second-hand spark plugs. Prior to the commencement of this action Brazil displayed a sign in front of of his business premises at Hamilton, advertising the sale of A C and other spark plugs, without mentioning in any way that they were second-hand plugs, but since that date the sign was so altered as to indicate that the spark plugs were "reclaimed" plugs. Brazil does not deal in new spark plugs.

The evidence shows that Brazil buys from several sources discarded spark plugs for three cents each, which spark plugs he sells to Overholt at four cents each; the business of the latter seems to be that of buying and reclaiming discarded spark plugs and then selling them to garages and dealers. Brazil purchases reclaimed spark plugs, among them A C plugs, from Overholt at fourteen or fifteen cents, and in turn he sells them to owners of motor cars, at the prices already mentioned, and occasionally to dealers and garages in quantities when a discount is allowed. I do not understand it to be claimed that there is any offence in the mere buying of discarded spark plugs, by any person. Overholt and Brazil occupy different portions of the same building in the conduct of their respective businesses, yet I am satisfied they are not in any way associated together, but even if they were it would not seem to be of any importance here. I might observe that the class of business which I have just described as being carried on by Brazil and Overholt, in spark plugs, has been quite a common one throughout Canada and the United States, for several years past. At the inception of the business of selling reclaimed spark plugs, the plaintiff, in respect of its A C plugs, does not seem to have made any protest, and it was not till 1929, that it began efforts to prevent it, just how we need not delay to consider.

As already stated, it is the plaintiff's contention that the A C spark plugs sold by the defendants are not discarded plugs merely repaired, but that, it is claimed, they have been reconstructed, altered in character and diminished in efficiency, to such an extent, that they are no longer in fact A C plugs, but another spark plug altogether, and put on the market with the plaintiff's trade mark applied thereto. That is a question of fact, and the case was put to me on that footing; consequently it is necessary to inquire briefly

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into the original construction of the A C spark plug, and to ascertain precisely just what is done to the discarded A C spark plugs in the way of repairs, or in the process of reclaiming them, and their condition when re-sold.

The first part of a spark plug to be mentioned is the steel shell, or housing as it is sometimes called, and inside this shell and extending beyond it is a porcelain core insulator which extends from the top to the bottom of the plug; inside the insulator is an electrode wire, called the centre electrode, and that extends from the top to the bottom of the spark plug; on the side of the shell is another wire, called the side or shell electrode, the point of which at the top bends over about at right angles to the centre of the insulator just above the point of the centre electrode, and so positioned and adjusted that a very slight gap separates the points of the two electrodes. If one point is just above the other it is called an "end gap," if one point is on the side of the other it is called a "side gap." The spark plug functions in this way: The electric current comes from the top of the plug down the centre electrode, which is insulated from the shell by the porcelain core, and the spark is made by the electric current jumping from the centre electrode across the gap and over to the shell electrode; in that way the fuel charge in the combustion chamber is fired and the plug has then performed its funtion. That affords a sufficient outline of the construction and functioning of a spark plug. The plaintiff has designed a number of spark plugs, which are distinguished by a letter and a number, such as J-12, each having, it is claimed, definite heat characteristics, determined at the time of construction, but I do not think it necessary to take time to elaborate upon this feature of the A C spark plugs. The efficient life of a new spark plug is limited because of the accumulation of carbon, grease and dirt, and the deterioration of the points of the electrodes; the normal life of a spark plug is said to be 10,000 miles.

Now, what Overholt does to the plug is this: The plug is first put into a cleansing bath, and following that it is mechanically sand blasted. Sand blasting machines designed specially for this purpose, are freely offered for sale to the public, are easily made, and are very generally in use for such purposes by garages, and motor car repair

shops. Thus the rust, any accumulation of carbon, old oil, or dirt, are removed from the spark plug and the electrodes. Then the electrodes are straightened or adjusted, that is, the normal gap between the points of the electrodes is restored if through usage they, the points, have been disturbed or distorted; if the electrodes have been seriously damaged or burned the plug is thrown away, and Overholt states that about twenty-five per cent of the discarded spark plugs he buys are for this reason thrown away. New electrodes or insulators are never placed in old spark plugs by Overholt. In the course of cleaning or repairing spark plugs the position of the shell electrodes may be altered, for example, from the top to the side of the centre electrode, thus giving what is called a side spark instead of an end spark; this would be done in the case of an end gap where the underneath part of the shell electrode had been burned or damaged, but the normal gap between the electrodes is, of course, preserved. This particular operation is a very simple one, quickly performed, and an obvious one if the conditions I have mentioned are found to prevail. Then the points of the electrodes may be so damaged as to require a little filing to smooth them, or the extreme points of the electrodes may have to be clipped off. The proper gap between the points of the electrodes seems to be a matter easily determined, by appropriate measuring instruments, or by the practised eye of those who undertake to repair used spark plugs. After the shell of the spark plug has been lacquered, it is placed in small individual cartons, and these into larger cartons, and in such containers they are sold. On the cartons are printed the words "Spark Plug—Reclaimed By—Canadian Spark Plug Service." The cartons in which A C spark plugs are placed are of a particular colour to distinguish them from other spark plugs. And it is these reclaimed spark plugs that Overholt sells to Brazil, and which Brazil sells to the public. The words "Reclaimed By," appearing on the larger cartons, are in fairly large type and are quite conspicuous. The same words appearing on the cartons holding the individual spark plug are proportionately smaller, and are therefore not as conspicuous as perhaps they should be, but the words are legible, and I do not think bad faith can be imputed to Overholt on this account.

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Considerable evidence was given on behalf of the plaintiff for the purpose of showing that any shortening of the insulators or electrodes, any change in the shape of the lower end of the insulator, any alteration of the position of the points of the electrodes, or any set-back given the insulator, prevented a satisfactory or perfect functioning of the centre electrode, both as an electrical conductor and as a heat conductor. It was contended, as I understand it, that the reclaiming operations which I have described, diminished the length of the insulators and electrodes to such a degree that the spark plug was no longer able to accomplish that degree of efficiency intended by the plaintiff's engineers when designing each particular type of A C spark plugs. It seems to me that this point is much exaggerated and is not entitled here to the weight or importance which the plaintiff attempts to ascribe to it. Some of the insulators may be very slightly shortened owing to the removal, in the cleaning operations, of the accumulated coating thereon, caused by the heat and carbon; and the electrodes may be shortened sometimes but only in a very slight degree. All this goes to a comparison of the efficiency of a reclaimed plug and the theoretical efficiency of a new one. The fact is that used spark plugs are cleaned or reclaimed, in the manner described, by scores of persons, and are again used with considerable satisfaction; the fact that Brazil alone sells about 800 of repaired spark plugs per week and apparently with general satisfaction to his customers, with few replacements being necessary, is evidence that the cleaning and repairing operations extend very materially the useful life of such spark plugs. They may not be as efficient, particularly in the circumstances described by Mr. Gray, as new spark plugs, and I do not understand that this is claimed for them by the defendants. The plaintiff itself sells sand blasting machines for the same purpose for which Overholt and others use them. In an advertisement appearing in a journal called *Canadian Automotive Trade*, a picture of the plaintiff's machine appears and bears the caption "A C Spark Plug Cleaning and Re-Gapping Service," and the advertisement states that "cleaning and re-gapping sells more new plugs than any other sales activity." The method of cleaning and re-gapping spark plugs which

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Overholt pursues must be practically the same, and practically as efficient, as the method pursued by Registered Cleaning Stations which the plaintiff so strongly recommends to its patrons in this advertisement, and the results must be much the same. I have no difficulty in concluding that what is called "reclaiming" of spark plugs, as practised by Overholt, and as exemplified by the spark plugs sold by the defendants, is merely a work of cleaning and repairing, and in no sense can it be fairly said that these spark plugs have been reconstructed; no new element has been added, none has been taken away, and there has been no substitution of new elements for old. I do not think it can be said that those plugs constitute a new plug, or another plug, or that they can be described as being anything else than a repaired spark plug.

Another question of fact is in dispute between the parties, and to this I should refer. Evidence was given by one McGillivray to the effect that he had purchased from Brazil a set of spark plugs, for the car of one Dr. Eaton, and that Brazil on that occasion represented to McGillivray that the insulators and electrodes in the spark plugs, which the latter examined, were new. McGillivray stated that he was aware that the shells of the spark plugs were old, and had been in use. The plugs so purchased from Brazil shortly turned out to be unsatisfactory and had to be replaced. Brazil denies that he made any such representation to McGillivray, and I accept his version of what occurred on that occasion. It is highly improbable that Brazil would make such a representation; Overholt never inserted new insulators or electrodes in the repair of discarded spark plugs, and it is improbable that he was equipped to do this, or that he would even know how to do it; and Brazil never dealt in spark plugs other than those that had been repaired in the manner I have described. Upon the evidence before me I cannot find that any of the defendants, at any time, made representations to any persons, that the A C spark plugs sold by them, were new ones, or that they contained new insulators or electrodes; and I think they were throughout acting in good faith, and under the belief that what they were doing was perfectly proper and lawful and not in contravention of the legal rights of any one. There was not, in my

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opinion, anything such as an attempt to pass off the spark plugs in question as being anything else than what they were, second-hand spark plugs; it was notorious that what the defendants were doing, was being done openly by many others, and the reduced prices at which the spark plugs in question were being sold, in comparison with new ones, would justify the inference that customers expected to receive second-hand spark plugs.

I apprehend it may be asserted safely that any article, the origin of which is indicated by a trade mark, may be lawfully sold, by the owner. That being so, I cannot think that if such article has been repaired that it is in a different position and cannot be sold without infringing. I do not think that trade mark legislation contemplates the prohibition of the re-sale of repaired articles to which the trade mark of the original maker is applied, and for which he has received his price. I am at a loss to discover any principle upon which such a prohibition could securely rest. It is well known that what is complained of here occurs daily in some form or other, and if it were necessary numerous illustrations might be mentioned. The plaintiff itself did not apparently, for a time, regard this practice as an actionable one, and it was only when the practice became widespread and reached large proportions that it commenced actions of the nature here. In a case of this kind, I think, the question always is: Has the article been repaired or has it been so reconstructed that it is in reason and in sense a new one?

Turning now to a consideration of the authorities upon the point under discussion. Practically all the authorities cited at the trial, or which I have been able to discover, are discussed by Kerwin J., of the Supreme Court of Ontario, in an action brought by the plaintiff here, against one Logan, (1). The facts in that case would appear to be practically the same as in this case. Apparently the authorities, in cases of this nature, lay down the principle, that if the trade-marked or patented article has been repaired only, and has not been materially re-built or reconstructed, it may be resold by the owner without infringing. What is a repair, is a question of fact, and may sometimes be difficult to determine. Now this is not a case of refilling trade-marked packages or containers with

(1) 1934 O.L.R. 301.

goods similar to the goods originally there contained. It is probably correct to say that the trade mark, in such cases, should be completely obliterated or removed from the package or container in order to escape infringement. We may therefore disregard the authorities referable to that state of facts. The remark of Lord Halsbury during the argument in *Sirdar Rubber Co. Ltd.*, v. *Wallington, Weston & Co.* (1) was mentioned. This was an action for infringement of a patent which related to a combination of rims and tires for vehicle wheels and it appears that the question raised was whether the defendants infringed by fitting new tires into the plaintiff's rims. It became unnecessary to decide this question because the patent was held invalid, but during the argument upon this point Lord Halsbury interjected this remark:

> The principle is quite clear although its application is sometimes difficult; you may prolong the life of a licensed article but you must not make a new one under cover of repair.

In a somewhat similar state of facts, Kekewich J., in *Dunlop Pneumatic Tire Co. Ltd.* v. *Holborn Tire Co. Ltd.* (2), said the question there was whether the article was honestly a new article, or whether it was an old article repaired. In the case of *Dunlop Pneumatic Tire Co. Ltd.*, v. *Neal* (3), another case of infringement of a patent, the invention related to rubber tires and metal rims of wheels for cycles. Mr. Fletcher Moulton, later Lord Justice Moulton, and who had a very wide experience in patent cases, argued, for the plaintiff, that what the defendant did there was not a mere repair but was equivalent to reconstruction because what the defendant did was to put in everything new except the wires, and he is reported as saying that the sale of a patented article gave a right to use it during its life and fair repairs were allowable. In that case Lord North said:

> Any simple repairs, I think, may be done by a person without any licence from the manufacturer; but when he takes the whole thing and sells what is a new tire with merely the old wires in it, in my opinion there has been no licence to use those old wires for the purpose of putting them into and making up precisely the same combination which is the subject of the letters patent.

(1) (1907) 24 R.P.C. at p. 543. (2) (1901) 18 R.P.C. at p. 226.
(3) (1899) 16 R.P.C. p. 247.

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The case of *Richards* v. *Williamson* (1) was cited, but that, I think, was clearly not an instance of repair, but of reconstruction, and is not at all applicable here; and neither is the American case of *Edison Electric Light Co.* v. *Davis Electrical Works* (2). A careful examination of the case of *Gillette Safety Razor Co.* v. *Franks* (3) will at once reveal a distinction between that case and the one under discussion. The defendant advertised and sold as "genuine U.S.A. Gillette blades" blades of the plaintiff's manufacture which had been used and discarded, and put up such blades for sales in the plaintiff's distinctive wrappers and boxes. The defendant was restrained from selling or offering for sale such blades but it was an obvious case of fraud.

In the American case of *General Electric Co.* v. *Re-New Lamp Co.*, (4), a case of infringement of a trade mark, it was held that burned out electric lamps, manufactured by the General Electric Co., and bearing its trade mark "G.E.," and which were cleaned and repaired and supplied with new filaments and resold with the plaintiff's trade mark thereon, were not "G.E." lamps, but were a new construction, and became substantially new "G.E." lamps, and were not entitled to be resold under the plaintiff's trade mark. From the facts disclosed in this case I should say the lamps were substantially new lamps. A recent English case, *The General Electric Co. Ltd.* v. *Pryc's Stores,* (5) is of interest. Another action was brought against the same defendant by The British Thompson-Houston Co. Ltd., and the two causes were heard together. The two statements of claim were, except in details, the same, but I may be understood hereafter as referring only to the first mentioned case. The plaintiff sought to restrain the defendant from selling or offering for sale any "Osram" electric lamps other than new and unused lamps of the plaintiff's manufacture, and from passing off as or for new or unused lamps of the plaintiff's manufacture second-hand or used lamps of their manufacture. The plaintiff therefore according to the statement of claim, and it is so stated by the learned trial

(1) (1874) 30 L.T. 746.
(2) (1893) 58 Fed. Rep. 878.
(3) (1924) 40 T.L.R. p. 606.
(4) (1904) 128 Fed. Rep. p. 154, (1903) 121 Fed. Rep. p. 164
(5) (1933) 50 R.P.C. p. 232.

Judge, objected altogether to the sale of second-hand lamps. The plaintiff was a large manufacturer of electric and incandescent lamps and they were sold under the trade mark name of "Osram," which mark it owned. A large quantity of second-hand Osram lamps came upon the market because some of the electric supply companies in London had to change over from one system of supply to another, which need not be explained, and accordingly they had to supply to users of electric current, lamps which were suitable for the altered system in exchange for the lamps which had been in use and which were no longer suitable for use, and this in particular seems to have happened to the Westminster Electric Supply Corporation, which sold thousands of lamps to dealers, one of whom seems to have cleaned the glasses and the brass caps and sold a small quantity thereof to the defendant. The defendant sold those lamps, at reduced prices, some of which were in cartons bearing the plaintiff's trade mark "Osram." The cartons were supplied, so far as I can learn from the report of the case, by the Westminster Electric Supply Corporation. It was held that the plaintiff failed to establish that the defendant had sold second-hand lamps as new lamps, but that, being a question of fact, is not of importance here. The important point is, that the Court refused to restrain the defendant from selling second-hand Osram lamps, and held that that sort of trade was quite legitimate, and apparently, notwithstanding the lamps were sold in cartons bearing the plaintiff's trade mark. It does not appear whether the lamps themselves carried the trade mark. I may quote from the judgment of the learned trial Judge, Maugham J., who said:

> The objection of the plaintiffs to the sale of second-hand or used lamps is very natural. It is in evidence before me that there are two objections to the sale of used lamps; first, that after use the filament becomes much more brittle and accordingly the lamp may become useless in the course of its being transported from the shop to the consumer's house or to the purchaser's premises, and secondly, that it is impossible for the ordinary purchaser to know how old the lamp is. Lamps are made with a certain guarantee that they have an average life of 1,000 hours and, of course, if they have been used for any substantial part of that life, they are almost useless to the purchaser. I can, therefore, well understand the objection of the plaintiffs in this case, or in any case, to the trade being carried on in second-hand lamps, but, on the other hand, they have no right to object to such a trade unless it is being carried on dishonestly. I have some sympathy for the very poor purchasers of lamps for lighting their homes, and I do not quite see why they

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should not buy cheaply used electric lamps, whether they come on to the market in the way I have described or through unfortunate people having their homes sold up or moving to other quarters where the old lamps are not suitable. It may very well be that for 9d. poor purchasers may get a lamp which will last more than twice as long as a new lamp and I can see no legal objection to that trading being carried on.

Apparently the learned trial Judge considered that the only possible offence that might emerge from this sort of trading would be in selling second-hand lamps as new lamps. Now, if the sale of second-hand lamps in cartons bearing the mark Osram did not constitute an infringement, or a passing off, still less could it be said of the case presently under discussion. The spark plugs were cleaned, very slightly repaired, and sold in cartons which indicated that they were spark plugs that had been "reclaimed" by Brazil. Further, it is to be remembered that the plaintiff's trade mark does not appear on the cartons in which the spark plugs are sold.

I see no distinction in principle between the patent cases and the trade mark cases. In patent cases, the plaintiff seeks to establish infringement by attempting to show that the thing in question was substantially a new thing, constructed without licence according to the specification of the plaintiff's patent, and the defendant seeks to show that the thing had been repaired only, and that he had a legal right to repair and sell it. It is much the same in trade mark cases. There the plaintiff seeks to establish that the thing in question has been so transformed or rebuilt as to constitute a new article, and that the owner, by selling it with the plaintiff's trade mark applied thereto, is really selling a new article under a trade mark which does not indicate its true origin and purports to represent that the article was one made by the plaintiff, and that therefore there is infringement. The defendant meets this by saying that the article has undergone repairs only, which he claims he has a right to make, and that the article is in fact just what it always was, and that it is not unlawful to sell the same with the plaintiff's trade mark retained thereon. I think the distinction which the authorities draw between an article repaired and one really reconstructed is sound, and it would seem to be a reasonable and practical rule to apply in such cases. In the English electric lamp case it may be said there were no repairs, and that the lamps were merely cleaned on the outside.

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But they were second-hand lamps. I do not think that any real distinction can be drawn between second-hand electric lamps that have been cleaned only, and the spark plugs which have been cleaned and the electrode wires of which have undergone very slight readjustments and repairs.

Mr. Beaton, for the plaintiff, stated that his client would not object to the sale of the A C spark plugs in question if its trade mark were removed before sale, and I am assuming that this could be done. The point is one of interest, as in fact is the whole case. I am not wholly satisfied that the practice of leaving the trade mark on the plug is not the better one if the trading is honestly done; to remove the mark might subject the defendants, and others, to many unfair passing off actions, and that practice might in the end prove more objectionable to all concerned than the present practice. It would still be necessary, I should think, to distinguish in some way, one particular plug from another, because spark plugs are not standardized so far as I know, though A C plugs are, I understand made to fit a number of motor cars.

As I have already stated, the plaintiff contends that the trading complained of here contravenes sec. 11 of the Unfair Competition Act, and this section reads as follows:

> 11. No person shall in the course of his business,
>
> (*a*) make any false statement tending to discredit the wares of a competitor;
>
> (*b*) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;
>
> (*c*) adopt any other business practice contrary to honest industrial and commercial usage.

This section virtually enacts one of the provisions of the Convention of the Union of Paris, referred to in sec. 2 (*a*) of the Act. Inasmuch as I find that there has been no infringement, and no passing off, I cannot see how it can be said that the business carried on by any one of the defendants, offends sec. 11 of the Act, or is contrary to honest industrial and commercial usage.

The plaintiff's action should therefore, in my opinion, be dismissed and costs will follow the event.

Judgment accordingly.