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## Ingenuity of the Infringer and the Courts

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## THE INGENUITY OF THE INFRINGER AND THE COURTS.

*"The principles \* \* \* apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and various as the ingenuity of the dishonest schemer can invent. \* \* \* The fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him."* (Judge GARROUTE in *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142.)

THE PERSON who imitates a trade-mark has by common consent come to be described as a "pirate." At the time the designation was first applied, it was more or less appropriate. The pirate saw and coveted his neighbor's successful business, and like any MORGAN, TEACH, SHARKEY, or L'OLLONIS, sighting a fat galleon laden with plate wallowing in the trade winds, homeward bound from the Indies, he laid himself alongside and took what he wanted. He counterfeited marks and labels as exactly as he could, not as he dared. There was no limit to his impudence. He was deterred only by manual, not by moral, difficulties.

Those who know EXQUEMELIN, Captain JAMES BURNEY, and STEVENSON have an idea of the way in which the real pirate pursued his art. He performed in the open and spared none. His craft was a topsail schooner, the jolly roger was hoisted at the peak, scowling ruffians crowded the decks, singing "fifteen men on the dead man's chest—yo-ho-ho, and a bottle of rum!" They laid her alongside the fated ship; cutlasses between teeth, they swarmed up the side and then—the scuppers ran blood, those who survived the boarding walked the plank, the sharks were fed, the galleon, scuttled and burning, sank and all that was left was a murky cloud aloft and below the circling gulls, a few eddies, from which rose curling wisps of bluish smoke—and then a week's debauch in Port Royal and another foray.

The analogy between the commercial pirate of not so many years ago and the Spanish main variety was exact. The foregoing indicates briefly and without unnecessary harrowing detail how the real thing behaved. He was a thief, of course, but he was a robust one, he risked his hide every time he did a day's work. We all, even the most ladylike of us, must confess to a sneaking admira-

tion for the pirate and the way he did business. The commercial Henry MORGAN also has our grudging admiration, he was an unrefined and direct-acting person who conspicuously lacked finesse and performed with a valorous lack of concern for his own safety. What he wanted he appropriated. His successful rival's trade-mark and label he counterfeited. In doing so he risked a jail sentence or worse just as his maritime colleague risked a hempen cravat.

The punishment following a conviction of trade-mark counterfeiting during the fourteenth, fifteenth and sixteenth centuries was the ferocious kind common at the time. The Edict of CHARLES V of May 16, 1544, decreed cutting off the right hand of any one who counterfeited the marks of the Flemish Tapestry makers.<sup>1</sup> In France, a Royal Edict of CHARLES IX of 1564 classed trade-mark infringers with counterfeiters of coin, whose punishment was death.<sup>2</sup> Later they were condemned to the galleys.<sup>3</sup> In some places where a particular industry flourished, the marks used in it were protected by municipal ordinances. Under some of them counterfeiters were hanged, in others the pillory was the penalty. Infringement of trade-marks was every bit as hazardous an occupation as buccanering.

There doubtless was trade-mark piracy in England in the middle ages, as in other countries, and perhaps a search through the year books and the proceedings of the Livery Companies would disclose the fact, but the first case to get into the reports was in the time of JAMES I<sup>4</sup> and this was probably a common-law action for deceit brought by the defrauded purchaser. No other case seems to have got into the books until 1742. In the century between 1742 and 1842 there was a remarkable development of the judicial conscience. In 1742 LORD HARDWICKE<sup>5</sup> when asked to enjoin one trader from using a mark previously appropriated by another, declined, saying:

"In the first place, the motion is to restrain the defendant from making cards with the same mark, which the plaintiff has appropriated to himself.

And, in this respect, there is no foundation for this court to grant such an injunction.

Every particular trader has some particular mark or

<sup>1</sup> Lucien-Brun, *Les Marques de Fabrique et de Commerce*, Paris, 1897, xvii; Wauters, *Les Tapisseries bruxelloises*, p. 152; Kohler, "das Recht des Markenschutzes," Wurzburg, 1884, p. 50.

<sup>2</sup> Lucien-Brun, xvii; Art. 10, Ordinance of July, 1681.

<sup>3</sup> Art. 43, Declaration of Oct. 18, 1720.

<sup>4</sup> *Southern v. How*; *Popham*, 144; *Cro. Jac.* 471; 2 *Rolle* 28.

<sup>5</sup> *Blanchard v. Hill*, 2 *Atk.* 484, 26 *Full Reprint* 692.

stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another and I think it would be of mischeivous consequence to do it."

\* \* \*

"An objection has been made, that the defendant, in using this mark, prejudices the plaintiff by taking away his customers.

But there is no more weight in this, than there would be in an objection to one innkeeper, setting up the same sign with another."

In 1842, in a case where the proprietor of "Perry's Medicated Mexican Balm" sued a rival producer of a similar article to restrain the use of an imitated label, Lord LANGDALE said:<sup>6</sup>

"I think that the principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

and in the following year the same judge in a similar case<sup>7</sup> remarked:

"It has been very correctly said that the principle in these cases is this—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right

<sup>6</sup> Perry v. Truefitt, 6 Beav. 66, 49 Full Reprint 749.

<sup>7</sup> Croft v. Day, 7 Beav. 84, 49 Full Reprint 994.

to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

The rule of law thus announced by Lord LANGDALE is unquestionably sound, but he was years in advance of the times. It was not fully accepted until 1896<sup>8</sup> that the rule is perfectly general and without exception—that no one has a right to represent his goods as the goods of another—and this is the present state of the law. The means adopted in any particular case are not important, whatever contrivance, however subtle or ingenious, which involves the false representation that one trader's goods are another's is unlawful.<sup>9</sup> It is a question of fact in each case whether or not the false representation is being made,<sup>10</sup> but if it is being made the legal consequences follow and the use of the efficient means of deception, whatever it may be, is enjoined<sup>11</sup> or restricted in such a way as to prevent the accomplishment of the deception.<sup>12</sup> It took a long

<sup>8</sup> *Reddaway v. Banham* (1896) A. C. 199, 13 R. P. C. 218; *Saxlehner v. Apollinaris Co.* (1897) 1 Ch. 893, 76 L. T. (N. S.) 617, 14 R. P. C. 645, 652. Kekewich, L. J.: "Nobody has any right to represent his goods as the goods of somebody else." Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale or otherwise, and, although there are elsewhere to be found learned and useful disquisitions on the facts of the particular case, the application of the law to them and criticism of earlier authorities, there is no departure from what the Lord Chancellor states to be 'the principle of law.' It matters not therefore, how a plaintiff's goods come to acquire a particular value or how a defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow and the plaintiff is entitled to relief against him."

<sup>9</sup> *Powell v. Birmingham Vinegar Brewery Co.* (1897) A. C. 710, 14 R. P. C. 720, 727. *Dyment v. Lewis*, 144 Iowa, 509, 123 N. W. 244, 26 L. R. A. (N. S.) 73. (Valuable note on unfair trading by use of geographical names.)

<sup>10</sup> *Reddaway v. Banham* (1896) A. C. 199, 13 R. P. C. 218, 224; *Viano v. Bacigalupo*, 183 Mass. 160, 67 N. E. 641, 642; *Williams v. Bronnley*, 26 R. P. C. 481, 485; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 137.

<sup>11</sup> *Thompson v. Montgomery* (1891) A. C. 217; *Kaufman v. Kaufman*, 123 N. Y. S. 699; *Comerma v. Gustavino*, 184 Fed. 549; *Ludwig v. Claviola Co.*, 144 N. Y. App. Div. 338; *Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co.*, 105 Minn. 315, 117 N. W. 447; *Van Stan v. Van Stan*, 209 Pa. 564, 58 Atl. 1064; *Portuondo v. Portuondo*, 222 Pa. 116; 70 Atl. 968.

<sup>12</sup> *Powell v. Birmingham Vinegar Brewery Co.* (motion for interlocutory injunction) (1894) 3 Ch. 449, 11 R. P. C. 563, Court of Appeal (1894) 3 Ch. 462, 11 R. P. C. 573 (Trial of action) (1896) 2 Ch. 54, 12 R. P. C. 496, 515; Court of Appeal (1896) 2 Ch. 64; 13 R. P. C. 235, 253, 256, 263; *House of Lords* (1897) A. C. 710, 14 R. P. C. 720; *Royal Co. v. Royal*, 122 Fed. 337, 348; *Hall v. Herring-Hall, Marvin Co.*, 208

time and much labor to arrive at this conclusion. The courts did not hesitate to deal summarily with the counterfeiter of labels, or technical trade-marks, but when it came to the deceptive use or imitation of identifying personal, geographical, or descriptive names, color of labels, form and style of enclosing packages, configuration or visual appearance of the article itself, the use of equivalents or the silent substitution of one article for another, progress was slow, but ultimately relief was accorded. When at last the courts found themselves face to face with the question of stopping a false representation that one man's goods were another's by the use of a name which with reasonable accuracy was a description of both, the hesitancy manifested almost amounted to immovability, but at last the judicial inertia was overcome and it was recognized that fraud is fraud just the same, and it is the fraud, and not the manner of it, which calls for the interposition of the court. This truth once accepted it necessarily followed that the deceptive use of descriptive terms was enjoined.<sup>13</sup>

For want of a better term these cases in this country are compendiously designated cases of unfair competition or unfair trading and in England, passing off. Passing off probably more accurately describes the wrong as at present recognized, but unfair trade seems a preferable term because more comprehensive. The wrong has not been defined and should not be, because like fraud the minute it is defined it is limited.

It must not be assumed that the progress from the state of mind of Lord HARDWICKE in 1742 to the enlightened rule applied by the courts today was a steady and uninterrupted one. Quite the contrary. As a general thing the infringer has always been a little ahead of the courts. By the time the judicial machinery arrives at a place where the pirate was yesterday, ready to deal with him, that elusive person has moved forward and is still a little ahead,—at a place the courts will not reach until tomorrow—and is there engaged in doing something which will enable him to advantage himself at some one else's expense in some manner hitherto unthought of. The various methods briefly outlined of stealing a man's bus-

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U. S. 554; *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141; *Waterman v. Modern Pen Co.*, 197 Fed. 534; *Merriam v. Saalfeld*, 190 Fed. 927, 198 Fed. 369.

<sup>13</sup> *Reddaway v. Banham* (1896) A. C. 199, 13 R. P. C. 218.

Accepted as the law of this country in *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *French Republic v. Saratoga Co.*, 191 U. S. 427, 435.

For the later history of the Reddaway mark (*Camel Hair Belting*) see, *Reddaway v. Ahlers*, 19 R. P. C. 12; *Reddaway v. Stephenson*, 20 R. P. C. 276; *Reddaway v. Frictionless Packing Co.*, 19 R. P. C. 505; *Reddaway v. Trevell*, 23 R. P. C. 621.

iness and good will were very effectively and adequately dealt with by the courts *when they got to them*, but one has only to study the reported cases during even the last twenty years to be convinced that as the judicial conscience has expanded, the ingenuity of the infringer has been correspondingly stimulated. The present rule of law, which has been crystallized into a single sentence—no one has a right to represent his goods as the goods of another—places all cases on a common basis of fact—is the false representation being made? Is the defendant in fact representing his goods as those of a competitor? Wherever this false representation is made, there is unfair trade. At this point the courts have caught up with the parasite and are dealing with him adequately. It seems, however, now to be assumed that unless the false representation, that one trader's goods are the goods of another, is being made, there can be no unfair trade; that no trading is unfair unless it involves the passing off of one trader's goods as and for the goods of another. Unless unfair trade is to be given a broader meaning than mere passing off, the unfair trader will still maintain his lead. At present he is discarding as unscientific and old-fashioned mere passing off and is indulging in other methods of benefiting himself and injuring his rival, usually not involving the element of deception of the public hitherto considered indispensable. Unless, therefore, unfair trading is a broadly comprehensive term and the law still in the course of development and unless it develops rapidly, the business pirate will keep ahead of it.

The following cases must not be considered an exhaustive collection, but are cited to illustrate trade practices which would at once strike the average person as unfair and unsportsmanlike, and which have been held not to transcend the bounds of fair competition.

The proprietor of Mellin's Food sought to enjoin a druggist, who was also proprietor of a competing product, called Dr. Vance's Food for Infants and Invalids, from attaching to the package of Mellin's Food which he sold to customers at his store the following:

"Notice.—The Public are recommended to try Dr. Vance's Prepared Food for Infants and Invalids, it being far more nutritious and healthful than any other preparation yet offered."

It was contended that the pasting of this notice of a competing food upon packages of Mellin's Food was unfair competition and also libelous. It was held by the House of Lords, reversing the judgment of the court of appeal, that the defendant's conduct

amounted to nothing more than the puffing advertisement of his own goods, and that the action would not lie.<sup>14</sup> This decision was apparently based entirely upon the theory that defendant's statements were not libelous. It did not seem to occur to the learned judges that what the defendant was doing was not only in his advertisements to disparage his competitor's goods and to exalt his own at their expense, but to use the competitor's package as a vehicle for such advertisements.

A piano manufacturer of reputation sought to enjoin the advertisement by a retail dealer of plaintiff's pianos at less than cost price, when in fact the dealer had none of the plaintiff's pianos in his possession. One of defendant's advertisements in the Manchester Evening News contained this statement:

"New instruments at Worsleys, a fine upright grand by Ajello, iron frame, check action, trichord, price 15 guineas, or 15s. per month."

Similar advertisements appeared in other issues of the same paper and in other papers. The plaintiff contended that the piano described in defendant's advertisements corresponded with a piano which was sold by him for £23, 10s, and that the announcement that one of these pianos could be purchased at retail at the price of 15 guineas was calculated to do him very serious injury with his customers and with the trade generally. The defendant admitted on cross-examination that the meaning of the advertisement was that he had the new instruments in stock. He further admitted that at the dates of the several advertisements complained of he had no piano of the plaintiff's manufacture in stock. It was established by the evidence that the plaintiff had suffered damage by reason of the advertise-

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<sup>14</sup> *White v. Mellin*, Romer, J., 70 L. T. (N. S.) 775 (1894) 3 Ch. 276, 70 L. T. (N. S.) 776; House of Lords (1896) App. Cas. 154, 72 L. T. (N. S.) 334. Lord Herschell observed: "It was perhaps natural that the respondent should feel annoyed at this action on the part of appellant—that his goods when vended should bear upon them the advertisement of a rival food recommended in the terms which I have read. But the question is whether the act complained of warrants an action by the respondent against the appellant." It was further held that there was no false disparagement of the plaintiff's goods, and that neither damage nor malice had been shown. Lord Shand quoted with approval a portion of the judgment of Mr. Justice Romer of the High Court before whom the case came at first instance: (70 L. T. (N. S.) 775). "Of course it is always very annoying to a man who has a good article to find a person who is puffing a rival article, stating that the rival article is really the best, and it is still more annoying to find that statement upon the goods of the man who complains, but however annoying the form of advertisement may be to the complainant, I come to the conclusion that what has been done by the defendant has not amounted in any true sense to a trade libel as against the plaintiff, and that the plaintiff has no legal remedy in respect of it."

ments, and that certain of his customers, who were retail dealers in pianos, declined to give him any further orders on the ground that they could not sell plaintiff's pianos at the price advertised by defendant. Relief was denied.<sup>15</sup>

Plaintiff was a manufacturer of "Trouville Mourning Prints," "Central Park Shirtings," "Elmora Fancy Prints," and "Ramona Fancy Prints," which were sold at fixed prices. The defendant operating a retail dry goods store in St. Louis, issued the following circular to its customers:

"We beg to call your attention to the following items at prices that cannot be replaced, and request you to order promptly if interested, to secure first selection of styles. Prices for all items subject to change without notice, and orders accepted only for stock on hand." \* \* \*

Trouville mourning prints as long as they last,  $3\frac{1}{4}$ ; Central Park and Boat Club shirting prints, as long as they last,  $2\frac{7}{8}$ ; Elmora and Ramona fancy prints, as long as they last,  $3\frac{1}{2}$ ."

The prices named in the circular for plaintiff's four brands of prints were less than the prices charged by the plaintiff. Defendant had but a small quantity, if any, of the plaintiff's prints in stock. It was alleged that defendant had advertised plaintiff's goods at cut prices maliciously and for the purpose of damaging it. Held, no cause of action by Judges CALDWELL and THAYER, Judge SANBORN dissenting.<sup>16</sup>

<sup>15</sup> *Ajello v. Worsley*, 14 T. L. R. 168. Mr. Justice Stirling said that the owner of any property was entitled to sell or dispose of it for such consideration as he might see fit, and either at a profit or at a loss. The fact that the defendant did not at the time of the insertion of the advertisements have any of the pianos in stock did not make the advertisement fraudulent. "The question then arose, was the damage complained of by the plaintiffs attributable to the misrepresentations of fact contained in them? It appeared to his Lordship that this question must be answered in the negative, for an advertisement such as the defendant might legally have issued would have produced precisely the same consequences and been followed by the same damaging results."

<sup>16</sup> *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 162. "No one can dispute," it was said in the majority opinion, "the right of the defendant to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper."

Judge Sanborn's dissenting opinion is more in accord with a higher commercial morality. "No one," he says, "will dispute the rules of law that the plaintiff in this action had the right to conduct its business of manufacturing and selling prints without the injurious interference of strangers, and that the defendants were subject to the universal rule that they must so use their own property and rights as to inflict no unnecessary injury upon their neighbors. The averments of this petition are that they were not using any of their property or exercising any of their rights for any legitimate trade purpose, but that they were using them for the express purpose of inflicting injury

A producer of Ecclesiastical statuary, reproductions of which were published in a catalogue, sued a producer of similar works, who also published a catalogue in which were copied a large number of cuts from the complainant's catalogue. A statutory copyright was involved, but this covered only a portion of the cuts included in the respective catalogues. As far as the reproduction of copyright cuts was concerned, the court enjoined the further publication, but declined to stop the copying of cuts not covered by copyright. It was contended that the reproduction by the defendant in its catalogue of pictures of statutes not in fact made by it, but made by the complainant, and easily recognizable by the artistic taste and skill which characterized the complainant's works, was unfair competition, and that the reproduction of these cuts was a representation contrary to the fact that the defendant was dealing in complainant's productions, or that complainant's statuary and other objects were produced by defendant in which manner defendant was enabled to avail itself unfairly of the artistic and desirable features of complainant's products which its own products did not or might not possess. A preliminary injunction on this phase of the case was denied.<sup>17</sup> This case involved the converse of the usual false representation in common cases of unfair trade, namely, that the defendant's goods are the goods of the plaintiff. The representation here was that the plaintiff's goods were the defendant's, and thus the defendant was able to attach to its own goods the reputation for excellence which plaintiff's goods had acquired. As if an unknown painter for the purpose of attracting custom should falsely advertise a portrait by CHASE or SARGENT as his own work.<sup>18</sup>

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upon the plaintiff, and that they succeeded in imposing this infliction. These allegations seem to me to bring this case under the general rule of law, and to clearly negative the claim that it falls within the exception. They seem to state a good cause of action. \* \* \* The proposition is sustained by respectable authority; it is just and I believe it is sound—that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as competition in trade.”

<sup>17</sup> *Daprato Statuary Co. v. Giuliani Statuary Co.*, 189 Fed. 90.

<sup>18</sup> It has been held in England that the false advertisement by one trader that a specific article (in this case a tramway) was made by him when in fact it was made by a competitor was unfair and enjoined. *Bullevant v. Wright*, 13 T. L. R. 201.

That such a thing might be done was intimated by Lord Halsbury in *Magnolia Metal Co. v. Tandem Smelting Syndicate*, 17 R. P. C. 477, 485, where he said: "My Lords, something has been suggested as to another and different form of action and a different right being infringed. It is said that there is another form of proceeding which might be taken—that where particular goods are identified as goods of a particular class and that class of goods is manufactured with a high degree of efficiency and perfection by a particular company, if you make statements to the public falsely that yours are identical with the goods which are manufactured with greater skill and greater precision

It is a common enough thing to enjoin the passing off in retail stores of one product in response to requests for another. In a much cited case on the subject this situation existed. Defendant was a retail grocer. He advertised Baker's Cocoa and Baker's Chocolate in the newspapers for sale at his store. The court found that these designations meant the product of Walter Baker and Company exclusively. When people attracted by the defendant's advertisements asked for Baker's Cocoa or Baker's Chocolate, there was passed out without explanation or comment a different product. This passing off was enjoined. In certain cases, however, defendant after having decoyed the customer into the store by the advertisement of "Baker's" goods, instead of actually passing off the spurious product, endeavored to persuade the prospective purchaser to take it on the plea that it was just as good. Relief on this phase of the case was denied.<sup>19</sup> Thus the defendant was enjoined from substituting one product for the other, but was permitted by systematic and meddlesome argument and coming between the complainant and prospective customers to switch those customers to another product and to transform them into customers for another establishment. The injury is the same in either case whether the result is accomplished by fraud or persuasion. A distinguished English judge has held such conduct unfair.<sup>19+</sup>

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and so on, besides the fraud upon the particular person who buys any of these goods under that false impression, there is a right of action accruing also to the persons whose exertions and whose skill have made them known as the persons who make it best (I think that is the only form in which I can put it) and that therefore it is a falsehood which they have a right to bring an action to restrain. My Lords, whether that be so or not I profess to give no opinion."

<sup>19</sup> *Walter Baker & Co. v. Slack*, 130 Fed. 512. Judge Jenkins saying (519): "The purchaser was entitled to that for which he had asked. We do not mean to say that it is not within the province of the seller to represent to the proposing purchaser that another article which he has is superior in excellence to that which is called for, and to induce him by proper argument or statement to purchase that other, but he must not represent such other to be the product which the purchaser had called for." See also *Baker v. Gray* 192 Fed. 921.

<sup>19+</sup> In *Singer Co. v. British Empire Co.*, 20 R. P. C. 313, defendant advertised "Singer Machines" but explained both to callers and correspondents that the machines were not "Singers" and the machines sold were not so marked. Mr. Justice Kekewich said: "Then I am asked to hold that because when the applicant in answer to the advertisement sends for particulars and those particulars do not deceive him, and cannot deceive him, that therefore there is no deceit at all. Now, I take an entirely different view, I think this is a clever device on the part of fraudulent traders having entrapped their victim, having got the man to answer their advertisement, under the notion that he is going to purchase a 'Singer' machine, then they cover themselves with a lot of documents which refer to the 'Empira,' and hope that the 'Singer' part of it will be forgotten and that he will order an 'Empira,' and never consider the 'Singer.' I believe it is all part of a deliberate plan, and I have not the slightest doubt myself, that not only is there deceit, but intended deceit, and as such the court ought to deal with it as severely as it can."

In a recent case<sup>20</sup> the following advertisement was inserted by the defendants in the Yorkshire Evening Press:

“BURBERRY’S SLIP-ON COATS.

Raper and Pulleyn have now added this Manufacture to their Macintosh Department. In appearance the Coats are identical with Burberry’s and the cloth is equal to theirs in every way, being treble proofed. The Firm’s reputation for Macintoshes is itself a guarantee to purchasers. The Price is Two Guineas.”

It appeared that there had been a case of deception, that one man had bought a coat of defendants, thinking he was getting one of complainant’s genuine Burberry Coats. The Court accepted this as an opportunity to dodge the other question, whether the representation “identical with Burberry’s” should be enjoined. An injunction was however granted restraining defendant “from selling any coats not of the complainant’s manufacture under the description of “Burberry,” “Burberry Slip-on” or “Slip-on,” or in any other way passing off goods not of the complainant’s manufacture or merchandise as and for the goods of the plaintiff’s manufacture.” It would seem as if the conduct on the part of the defendant which was both ethically more objectionable and practically more injurious, the unfair attempt to trade on the Burberry reputation by the advertisement that defendant’s goods were “identical with Burberry’s,” was not interfered with.<sup>21</sup>

There are cases scattered through the books which are essentially cases of unfair trade in its broader sense, though obscurely digested under such captions as contracts, torts, injunctions, actions, and the like. With respect to contracts, the following may fairly be deduced from them.

The right to contract is a property right. Business and contracts are property.<sup>22</sup> Inducing the breach of contract is actionable<sup>23</sup> and,

<sup>20</sup> *Burberry v. Raper*, 23 R. P. C., 170.

<sup>21</sup> See in this connection, *Gregory v. Spieker*, 110 Cal. 150; 42 Pac. 576; *Day v. Binning*, C. P. Coop. 489, 1 Leg. Obs. 205, Cox Man. 47.

<sup>22</sup> *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482; *National Phonograph Co. v. Edison-Bell Co.* (1907) 1 Ch. 335, 98 L. T. (N. S.) 291; *Bitterman v. L. & N. Ry. Co.*, 207 U. S. 205; *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322; *Nashville C. & St. L. Ry. v. M’Connell*, 82 Fed. 65; *Walker v. Cronin*, 107 Mass. 555; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125; *Heath v. American Book Co.*, 97 Fed. 533; *West Va. Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591; *Doremus v. Hennessy*, 176 Ill. 608; *Van Horn v. Van Horn*, 52

if repeated, enjoicable.<sup>24</sup> It was formerly held that the person inducing the breach must have acted maliciously, that is to say, with the preconceived intent to injure one of the contracting parties,—with actual malevolence. Without entering upon a discussion of the effect of bad motive upon otherwise lawful act, it may safely be said that at the present time the words “malice” and “malicious-

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N. J. L. 284, 20 Atl. 485; *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934; *Angle v. Chi. St. P. & M. Ry. Co.*, 151 U. S. 1; *Lucke v. Clothing Cutters & T. Assembly*, 77 Md. 396, 26 Atl. 505; *Bar v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894; *O'Neil v. Behanna*, 182 Pa. St. 236, 37 Atl. 843; *Jersey Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Quinn v. Leatham*, L. R. (1901) App. Cases, 495, 85 L. T. (N. S.) 289.

<sup>23</sup> *Glamorgan Coal Co. v. South Wales Miners Fed.* (1903) 1 K. B. 118, 2 K. B. 545, 89 L. T. (N. S.) 393, 2 Mich. L. Rev. 305 et seq.; *West Virginia Transportation Co. v. Standard Oil Co.*, 40 S. E. 591; *Walker v. Cronin*, 107 Mass. 555; *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934; *Benton v. Pratt*, 2 Wend. 585; *Lumley v. Gye*, 2 El. & Bl. 216; *Plant v. Woods*, 176 Mass. 92, 57 N. E. 1011; *Van Horn v. Van Horn*, 52 N. J. Law 284, 20 Atl. 485; *Bowen v. Hall*, 6 Q. B. D. 333; 44 L. T. (N. S.) 75; *Cattle v. Attockston Water Works*, L. R. 10 Q. B. 543, 548, 33 L. T. (N. S.) 75; *Rice v. Manley*, 66 N. Y. 82; *Heath v. American Book Co.*, 97 Fed. 533, 535; *Read v. Friendly Society* (1902) 2 K. B. 732, 736; *Moran v. Dunphy*, 177 Mass. 492, 59 N. E. 125; *Hartman v. Platt*, 142 Fed. 606; *Angle v. Chicago etc. R.*, 151 U. S. 1, 10.

<sup>24</sup> *Doremus v. Hennessy*, 176 Ill. 608, 613; *Hunt v. N. Y. Cotton Exch.*, 205 U. S. 322; *L. & N. Ry. v. Bitterman*, 128 Fed. 176, 144 Fed. 34, 28 Sup. Ct. 91, 207 U. S. 205; *National Phonograph Co. v. Edison-Bell Co.*, 23 T. L. R. 189 (1907) 1 Ch. 335, 98 L. T. (N. S.) 291, *London Times*, Dec. 19, 1907; *Exch. Tel. Co. v. Gregory* (1896) 1 Q. B. 147, 74 L. T. (N. S.) 83; *Nashville, etc. R. Co. v. McConnell*, 82 Fed. 65; *Board of Trade v. Christie Co.*, 198 U. S. 236; *Exchange Telegraph Co. v. Central News* (1897) 2 Ch. 48; 76 L. T. (N. S.) 591; *Kinner v. L. S. & M. S. Ry. Co.*, 69 Oh. St. 339, 69 N. E. 614; *American Law Book Co. v. Ed. Thompson Co.*, 84 N. S. 225; *Penna. R. Co. v. Beekman*, 30 Wash. L. Rep. 715; *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *Sperry & Hutchinson Co. v. Mechanics Clothing Co.*, 128 Fed. 800, 1015; *Sperry & Hutchinson Co. v. Brady, et al.*, 134 Fed. 691; *Sperry & Hutchinson Co. v. Temple*, 137 Fed. 992; *Sperry v. Hutchinson Co. v. Weber*, 161 Fed. 219; *National Telegraph News Co. v. Western Union Tel. Co.*, 119 Fed. 294; *Flaccus v. Smith*, 199 Pa. St. 128, 48 Atl. 794; *Carroll v. Chesapeake & Ohio Coal Agency*, 124 Fed. 305, 312; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Board of Trade v. Cella*, 145 Fed. 28; *Board of Trade v. McDermott*, 143 Fed. 188; *Knudson v. Benn*, 123 Fed. 636; *Martin v. McFall*, 65 N. J. Eq. 91, 55 At. 465; *Angle v. Ry. Co.*, 151 U. S. 1; *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591; *Walker v. Cronin*, 107 Mass. 555; *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934; *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; *Lumley v. Gye*, 2 El. & Bl. 216; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485; *Bowen v. Hall*, 6 Q. B. D. 333, 44 L. T. 75; *Cattle v. Attockston Water Works Co.*, L. R. 10 Q. B. 453, 458, 33 L. T. 475; *Hartman v. Platt*, 142 Fed. 606; *Wells & Richardson Co. v. Abraham*, 146 Fed. 190, Affd. Cir. Ct. App. 2nd Circuit, November 20, 1906; *Jones v. E. Van Winkle Gin Co.*, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848; *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201; *Iron Moulders Union v. Allis-Chalmers Co.*, 166 Fed. 45; *Hitchman Coal Co. v. Mitchell*, 172 Fed. 963; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 196 U. S. 644; *Ill. Cent. v. Caffery*, 128 Fed. 770; *Ry. Co. v. McConnell*, 82 Fed. 65; *Penn. Co. v. Bay*, 138 Fed. 203; *Dr. Miles Medical Co. v. John D. Park Co.*, 220 U. S. 373, 394.

ly" are little more than legal billingsgate and mean no more than knowledge of the relation and a disregard of it,<sup>25</sup>—foreseen or even less than that.<sup>26</sup>

Inducing the breach of a valid and subsisting contract relation is not however the only wrong of this character for which the law affords relief. It is unlawful to interfere and prevent the formation of contract relations. A man has a right to enter into contracts and it is unlawful for another, without a valid excuse to intermeddle and prevent it.<sup>27</sup>

A trader has certain other rights with respect to his business. Every man has a right to carry on his private business in his own way. He may deal with whom he pleases. He may refuse to deal with any individual or group of individuals for any reason or for no reason.<sup>28</sup> Attempts by outsiders to coerce, control or interfere with the exercise of these rights are unlawful. The courts will not compel a man to deal with one with whom he does not choose to deal, or to sell goods to one on as favorable terms as they are sold to others

<sup>25</sup> *Glamorgan Co. v. New South Wales Federation* (1903) 1 K. B. 118, 2 K. B. 545, 89 L. T. (N. S.) 393, 397; *Louisville & Nashville v. McConnell*, 82 Fed. 65, 71; *Quinn v. Leatham* (1901) A. C. 495, 85 L. T. (N. S.) 289; *Heath v. American Book Co.*, 97 Fed. 533; *Temperton v. Russell* (1893) 1 Q. B. 715; *Bowen v. Hall*, L. R. 6 Q. B. 333; *Raymond v. Yarrington*, 73 S. W. 800; L. & N. Co. v. *Bitterman*, 207 U. S. 205.

<sup>26</sup> *Aikens v. Wisconsin*, 195 U. S. 194, 203.

<sup>27</sup> *Van Horn v. Van Horn*, 52 N. J. Law 284, 20 Atl. 485. Complainant was a dealer in fancy good at Newark, whose business was to receive and sell goods consigned. Defendants for the purpose of ruining the complainant in her business, persuaded persons who were in the habit of consigning goods to her to refrain from doing so. Held actionable.

*Cooley's Torts*, 2nd Ed., p. 328; *Angle v. Railway Co.*, 151 U. S. 1; *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; *Jackson v. Stanfield*, 137 Ind. 592, 37 N. E. 14; *Thomas v. Ry. Co.*, 62 Fed. 818; *Green v. Button*, 2 C. M. & R. 707; *Chipley v. Atkinson*, 23 Fla. 206; *Hartnett v. Assn.*, 169 Mass. 229, 47 N. E. 1002; *Snow v. Judson*, 38 Barb. 210; *Paul v. Halferty*, 63 Pa. St. 46; *Moran v. Dunphy*, 177 Mass. 487, 59 N. E. 126; *Walker v. Cronin*, 107 Mass. 555; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96; *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492; *Martens v. Reilly* (Wis.) 84 N. W. 840.

<sup>28</sup> *Tanenbaum v. New York Fire Ins. Exch.* 68 N. Y. S. 342; *Payne v. Railroad Co.*, 81 Tenn. 507; *C. C. & St. L. v. Jenkins*, 174 Ill. 398, 404; *Hunt v. Simonds*, 19 Mo. 583, 586; *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505; *Live Stock Com. Co. v. Live Stock Exch.*, 143 Ill. 210, *Bailey, C. J.* (234), 18 L. R. A. 190; *Anderson v. U. S.*, 171 U. S. 604; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981; *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151; *Robinson v. Texas Pine Land Assn.*, 40 S. W. 843; *Schulten v. Bavarian Brew. Assn.*, 96 Ky. 224, 28 S. W. 504, 505; *Baker v. Ins. Co.*, 23 Ky. L. Rep. 1174, 64 S. W. 913, 967, 52 L. R. A. 271; *McCune v. Norwich Gas Co.*, 30 Conn. 521, 524; *N. Y., Chicago & St. L. Ry. v. Schaffer*, 65 Oh. St. 414, 62 N. E. 1036, 62 L. R. A. 931; *People v. Klaw*, 106 N. Y. S. 341; *People v. Flynn*, 100 N. Y. S. 31; *Collister v. Hagman*, 183 N. Y. 250, 76 N. E. 20; *Collins v. American News Co.*, 69 N. Y. S. 638; *Whitwell v. Tobacco Co.*, 125 Fed. 454; *Union Pac. Coal Co. v. U. S.* 173 Fed. 737.

or on any terms at all,<sup>29</sup> and this whether he is acting with a proper motive, with reason or merely for caprice.

The converse of the proposition is also true, a man having a right to deal with whom he chooses, if he choose to deal with certain persons who are willing, it is unlawful for another to interfere and come between them and thus hinder or prevent the exercise of the right,<sup>30</sup> and it has also been held that it is unlawful to establish or

<sup>29</sup> *Whitwell v. Continental Tob. Co.*, 125 Fed. 454; *Platt v. N. A. R. D.*, 1 Ill. Circuit Court Rep. 1; *People v. Klaw*, 106 N. Y. S. 341; *Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151; *Sharp v. Whiteside*, 19 Fed. 156.

<sup>30</sup> *Evenson v. Spaulding*, 149 Fed. 913, 150 Fed. 517, 9 L. R. A. (N. S.) 904. Complainant was a manufacturer of wagons, maintaining traveling agents in Washington who took a number of vehicles and drove through the country selling chiefly to farmers. Defendant, an association composed of local dealers, entered upon a systematic course of interference with the business of complainant by employing men to follow each of its agents, stopping at the same hotels and stables, starting out when he started, following him throughout the day to every prospective customer and interfering with the conversation. They took with them no goods and generally offered none in competition, their sole purpose apparently being to interfere with and prevent sales by breaking in on conversations, disparaging complainant's goods and treatment of its customers and by molestation to drive complainant out of business. Enjoined as an unlawful attempt to destroy complainant's business. Similar cases are *Standard Oil Co. v. Doyle* 118 Ky. 662, 82 S. W. 271; *The Lloyd Central v. Cubicciotti*, 159 Fed. 191.

The doctrine of these cases is by no means novel. *Keeble v. Hickeringill*, 11 Mod. 74, 3 Salk. 9, Holt, 14, 17, 19, 11 East. 574 n. Plaintiff declared that he was possessed of a close called Minott's meadow, a decoy pond, to which wildfowl used to come. Plaintiff had prepared decoy ducks, nets and other apparatus and enjoyed the benefit of taking them. Defendant knowing this, and with intent to fright away the wildfowl and deprive plaintiff of his profit did resort to the head of said pond and discharged six guns "laden with gunpowder and with the noise and stink of the gunpowder did they drive away the wildfowl then being in the pond." It was alleged that defendant did this on three separate days. Not guilty was pleaded. Holt, C. J., held an action lay, saying: "I am of opinion that this action doth lie. It seems to be new in its influence, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2ndly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. \* \* \* But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie; because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market to which he hath toll for horses sold; a man is bringing his horse to market to sell; a stranger hinders and obstructs him from going thither to the market: an action lies because it imports

damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7, 8; 21 H. 6, 31; 9 H. 7, 7, 14 Ed. 4, 7; Vide Raftal, 662, 2 Gro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service."

Carrington v. Taylor, 11 East 571, was a very similar case. The Court relying on Keeble v. Hickeringill held that an action would lie. Plaintiff was awarded 40 s. damages.

Tarleton v. M'Gawley, Peake, 205 (1793). Plaintiffs were the owners of a ship called the Tarleton, engaged in trade with the natives on the coast of Africa. Plaintiffs also owned a smaller vessel, the Bannister, which had been sent by the captain of the Tarleton loaded with proper articles for trading to another part of the coast. While she was lying off Cameroon for the purpose of trading with the natives there, a canoe with some natives on board put off from the shore and came to the Bannister for the purpose of trading, and went back toward the shore. Defendant, master of a ship called the Othello, fired a shot at the canoe, hitting it and killing one of the natives, whereby the natives on that coast were hindered and deterred from trading with the plaintiffs. Lord Kenyon said (273): This action is brought by the Plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the Defendant the natives were prevented from trading with the Plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will." The Plaintiffs had a verdict, and the parties agreed to refer the damages to arbitration.

Clifford v. Brandon, 2 Camp. 356. This was an action for assault and false imprisonment. In the year 1809, Covent Garden Theatre, London, was rebuilt. When it was opened to the public, the proprietors increased the price of admission and reserved certain of the boxes for subscribers, much to the disgust of the theatre's patrons. To express their disapproval of the new order of things, the audience began hissing and yelling, springing rattles and ringing bells, so that the noise and disorder completely drowned the voices of the performers on the stage. Plaintiff in this action attended the play on one of these uproarious nights. He did not encourage the disorder, but sat quietly in his seat. His only participation in the demonstration was to place in his hat, at the request of a person in the audience, a card bearing the letters "O. P." signifying "Old Prices." On his way from the theatre he was arrested by a constable at the instigation of the door-keeper and taken before a magistrate, but as nothing was proved against him except that he bore the placard in his hat, he was discharged. Sir James Mansfield, C. J., in charging the jury, said (368): "It appears that for a great many nights there were riots there of such a nature as go to put an end altogether to dramatic representation. I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessaries of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go, and the proprietors will be ruined, unless they lower their demands. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage. It is said, if the prices asked are considered too high, people have a right to express their disapprobation in the tumultuous manner they have adopted. From this doctrine I must altogether dissent." The jury found for the plaintiff.

Gregory v. Duke of Brunswick, 6 Man. & Gr. 205, 6 Scott (N. R.) 809, 1 Car. & K. 24, 13 L. J. C. P. 34, affirmed, 3 C. B. 481, 16 L. J. C. B. 35. Plaintiff was an actor and was to perform Hamlet at the Covent Garden Theatre. The declaration alleged that for the purpose of ruining plaintiff and making it impossible for him to continue in his profession, defendant hired two hundred persons to attend the performance and "to hoot, hiss, groan and yell at and against the plaintiff, and to make a great outcry, uproar, and riot at and against the plaintiff during his performance of the said character on the occasion aforesaid." Tindal, C. J., held that an action would lie. See also: Temperton v. Russell, 62 L. J. (N. S.) 412; Garrett v. Taylor, 2 Cro. Jac.

conduct a rival business for the sole purpose of destroying a competitor.<sup>31</sup>

If the law has not yet arrived at that point, the next step in advance should be that a trader is entitled to be protected not only against any device by which the good will of his business or any part of it is being stolen away from him, but that he is also entitled to the custom which would naturally come to him, and that he should be protected against any unfair interference with his business by means of which this custom is diverted or prevented. He should be protected against any acts by which his customers are taken away from him by fraud, actual or constructive, by force, intimidation, threats or by meddlesome persuasion, and further, that his good will and business and the things that he has created in which they are embodied should be secured to him against unfair (though not necessarily fraudulent) appropriation by others in any way that will diminish their value to their original creator.<sup>32</sup>

567; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Doremus v. Hennessy*, 62 Ill. App. 391, 176 Ill. 608; *Trollope v. London Ry. Co.*, 72 L. T. R. 342; *Lyons v. Wilkins*, 67 L. J. Ch. 383, 78 L. T. R. (N. S.) 618; *Mogul Steamship Co. v. McGregor*, 66 L. T. R. 1 (1892) A. C. 25; *Quinn v. Leatham*, 85 L. T. R. 289 (1901) A. C. 495; *Bradford Corp. v. Pickles*, 73 L. T. B. 353; *Mineral, etc., Society v. Booth*, 57 L. T. R. 573; *Read v. Friendly Soc. of Stonemasons*, 86 L. T. R. 593, 87 L. T. R. 493; *Giblan v. National Amal. Union*, 89 L. T. R. 386; *Glamorgan Coal Co. v. New South Wales Miners Federation*, 89 L. T. R. 393, Aff. 92 L. T. R. 710; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630; *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588; *Hanchett v. Chiatovich*, 93 Fed. 727, 96 id. 681, 101 id. 742; *Reinecke Coal Co. v. Wood*, 112 Fed. 477; *Southern Ry. v. Local Union*, 11 Fed. 49; *Otis Steel Co. v. Iron Molders Union*, 110 Fed. 698; *Allis-Chalmers v. Reliable Lodge*, 111 Fed. 264; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 57 N. E. 1011; *Corns v. Chrystie*, 53 N. Y. S. 668; *Lewin v. Welsbach Light Co.*, 81 Fed. 904; *Mackall v. Ratchford*, 82 Fed. 41; *U. S. v. Haggerty*, 116 Fed. 510; *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152; *Herzog v. Fitzgerald*, 77 N. Y. S. 366, 74 App. Div. 110; *Union Pacific v. Ruel*, 120 Fed. 102; *Beaton v. Tarrant*, 102 Ill. App. 124; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Foster v. Retail Clerks Assn.*, 78 N. Y. S. 860, 39 Misc. 48; *Knudsen v. Benn*, 123 Fed. 636; *Master Horseshoers Prot. Assn. v. Quinlavin*, 82 N. Y. S. 288, 83 App. Div. 459; *Martin v. McFall*, 65 N. J. Eq. 91, 55 Atl. 465; *Beattie v. Callinan*, 81 N. Y. S. 413, 82 App. Div. 7; *Carroll v. Chesapeake & Ohio Coal Agency*, 124 Fed. 305; *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L. R. A. 753, 97 N. W. 633; *W. P. Davis Mach. Co. v. Robinson*, 84 N. Y. S. 837, 41 Misc. 329; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588; *Ferd. Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691; *Ertz v. Exchange Co.*, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90; *Graham v. St. Charles Co.*, 47 La. 214, 16 So. 806, 27 L. R. A. 416; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271; *People v. Petheran*, 64 Mich. 252; 31 N. W. 188; *Heath v. American Book Co.*, 97 Fed. 533.

<sup>31</sup> *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946; *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263.

<sup>32</sup> That relief may be accorded against the unfair appropriation of business property by other means than by fraud alone is shown by *Fonotopia Co. v. Bradley*, 171 Fed. 951,

where, the duplication of uncopyrighted talking machine records was enjoined. Judge Chatfield saying: "We therefore, reach the broad question of the power of a court of equity to secure to an individual by injunction the full enjoyment of both corporeal and incorporeal rights in property created by him or at his expense, and capable of a taking by another, where such taking either diminishes or destroys the enjoyment of those rights by the owner and diverts a part of the enjoyment or profits from the rights to the one complained of." \* \* \* "No case cited and decided strictly upon the question of unfair competition, so far as called to the attention of the court, has ever granted relief in instances outside of imitation or deception, and where the public would be likely to be misled by the points of similarity involved; but equity has granted relief in certain typical lines of cases where the doctrine of unfair competition seems to have been the guide to the decision, but where the basis upon which the relief was granted was the unfair taking of the complainant's property, rather than the deception of the purchaser, or the imitation of a patented or copyrighted article, or a registered trade-mark or trade-name." \* \* \* "The principle involved is far-reaching, especially in that it carries the scope of equitable jurisdiction into matters frequently considered to be purely the result of business competition, and which, even if in themselves morally or financially wrong, are supposed to be without remedy where no contractual relations have existed from which suits for damages could arise. Various statutes have been passed in an attempt by legislation to protect certain classes of rights, such as the recording acts of the various states, and the lien laws of different jurisdictions. The patent, trade-mark, and copyright laws of different governments and the history of legislation as well as law, prove that where an act is admittedly wrong in the eyes of the public, and where the interests of individuals are being interfered with by commissions of the acts in question, legislation in the appropriate jurisdiction usually follows, and a legal remedy is created; but such legal remedies must be with relation to a specific class of acts. The jurisdiction of a court of equity has always been invoked to prevent the continuance of acts of injury to property and to personal rights generally, where the law had not provided a specific legal remedy, and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured may properly, in certain kinds of cases, be protected by legislation, but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply." See also the recent case of *Press Publishing Co. v. Levi Bros. & Co.* (Supreme Court New York. Not yet officially reported) 3 Trade-Mark Rep. 59.

*Warren Mills v. New Orleans Seed Company*, 65 Miss. 391, 4 So. 298. The plaintiff was a large buyer of cotton seed. It distributed its sacks, bearing its name, throughout the country for the purpose of having them filled with cotton seed and shipped to the company at New Orleans. The defendant, a smaller concern, also distributed bags bearing its name in the same way. Defendant procured a large number of complainant's sacks, which it was in the habit of piling up together with a few of its own sacks on top and at the bottom, to make it appear that all the sacks were its own. Thus the defendant, a competitor, used sacks owned by the plaintiff against the plaintiff's frequent objections. Held, on demurrer, actionable.

The following cases are illustrative of the modern tendency of courts of equity to protect property against unfair appropriation. The property involved cannot be said to have been either literary or artistic and so to fall under the recognized rules with respect to such things. (*Ticker News*). *National News Co. v. Western Union Tel. Co.*, 119 Fed. 294. (*Market Quotations*) *Board of Trade v. Christie Co.*, 198 U. S. 256; *Exchange Tel. Co. v. Gregory* (1896) 1 Q. B. 147; *Exchange Tel. Co. v. Central News* (1897) 2 Ch. 48, 76 L. T. (N. S.) 591; *Board of Trade v. Thompson Com. Co.*, 103 Fed. 902; *Board of Trade v. Hadden-Krull Co.*, 109 Fed. 705; *Board of Trade v. Cella Co.*, 145 Fed. 28; *Board of Trade v. McDermott*, 143 Fed. 188; *Illinois Com. Co. v. Cleveland Tel. Co.*, 119 Fed. 301; *Cotton Exch. v. Hunt*, 144 Fed. 511, 205 U. S. 322; (*Building Information*) *Dodge v. Construction Information Co.*, 183 Mass. 62; (*Confidential Price Lists*) *Simmons Co. v. Whitel*, 1 So. Dak. 488, 47 N. W. 814; (*Information Concerning a bread route*) *Smith v. Kiernan*, 8 Ohio Dec. 32, 5 Wkly. L. Bull. 145.

Relief in these cases ought not to be made to depend upon principles of law evolved in past centuries concerning contracts, trademarks, literary property and the like, when conditions were different, affairs less complex, and when parasitic ingenuity was less highly developed, but should frankly be accepted as a thing made necessary by modern conditions. As was said by the Circuit Court of Appeals of the Seventh Circuit,<sup>33</sup>

“Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. \* \* \* It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day as business life grows more complicated, such inadequacy would be increasingly felt. \* \* \* Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent.”

EDWARD S. ROGERS.

CHICAGO, ILLINOIS.

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<sup>33</sup> Grosscup, C. J., in *National Telegraph News Co. v. Western Union Telegraph Co.*, 119 Fed. 294, 299.