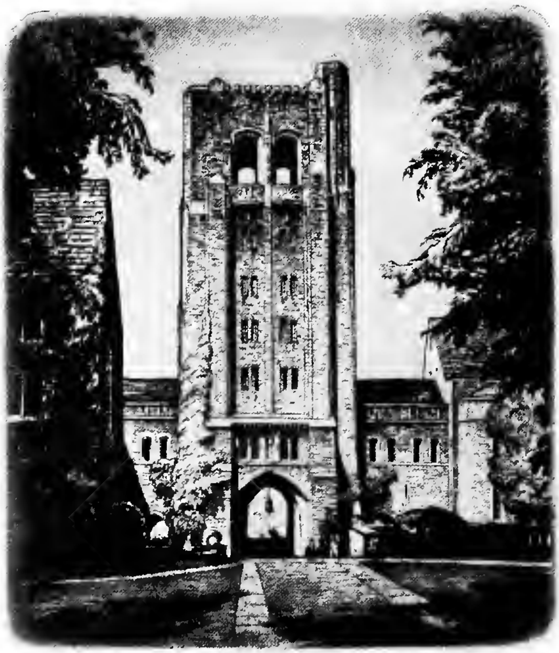

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MEMORANDUM

ON

UNFAIR COMPETITION AT THE COMMON LAW

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CONTENTS.

UNFAIR COMPETITION AT THE COMMON LAW.

Section 1. Introductory.

The purpose of this memorandum is to show competitive acts or practices, the legality of which has been passed upon under the common law, without assuming to determine whether such acts are unfair methods of competition within the meaning of the Federal Trade Commission act. In numerous cases, brought both at law and in equity, it has been urged that the acts complained of were only such as any trader might lawfully do in competition with another, and the courts have therefore been called upon to decide whether competition is a justification for such acts. Notwithstanding such attempted justification, they have frequently held certain acts unlawful in the sense that they infringed another's legal rights, and in declaring them actionable have characterized them as "unfair competition," or "unlawful competition," or have stated that they do not constitute "legitimate competition." While the term "unfair competition" has for years been applied in this country to the passing off of the goods or business of one man as that of another, the courts have latterly given it a much wider scope. Among the acts or practices which have thus been described as unfair competition are (1) inducing breach of competitors' contracts, (2) betrayal of confidential information, and (3) intimidating a competitor's customers by threats to sue them for infringement of patents. Such expressions, however, as not "fair competition," not "honest competition," "not an act of fair trade competition," not "legitimate competition," not "lawful competition," not "legitimate and lawful competitive methods," not "proper competition," "inequitable competition," "unfair conduct," "unfair dealing," "unfair means," "unfair trading," "unfair business methods," "unfair in the business world," "unfair advantage," "unfair mode of trading," and "unfair and unjust practices and methods," have been frequently used by the courts in referring to various other acts or methods which have been held not to be justified by competition. This memorandum, therefore, shows various competitive methods which have been held unlawful, even though the courts have not characterized them in terms as "unfair" competition.

Where a particular form of competition, such as inducing a breach of competitors' contracts, or disparagement of competitors' goods, has been frequently before the courts, it has been possible to classify the cases and to give a sufficient number to establish definitely the legality or illegality of the method involved. In such instances practically all of the cases have been used, or at least cited, where competition was urged in defense or where it appeared that the parties were competitors. The methods thus covered are discussed in the following order: (1) Inducing breach of competitors' contracts; (2) enticing employees from the service of competitors; (3) betrayal of trade secrets; (4) betrayal of confidential information; (5) appropriation of values created by a competitor's expenditures; (6) defamation of competitors and disparagement of competitors' goods; (7) misrepresentation by means other than words; (8) misuse of testimonials; (9) intimidation of competitors' customers by threats of infringement suits; (10) combinations to cut off a competitor's supplies or to destroy his market; (11) intimidation, obstruction and molestation of a competitor or his customers; (12) contracts for exclusive dealing; (13) bribery of employees; (14) competing with purchaser after the sale of business and good will; (15) passing off the goods or business of one manufacturer or dealer as those of another; (16) conspiracies to injure competitors.

There are some ingenious competitive devices or practices that have been apparently little used, or the illegality of which was perhaps doubtful, and these have been before the courts only in isolated cases. Miscellaneous cases of this character have been collected at the end of this memorandum.

The cases under the common law which are presented in this chapter include not only those decided by courts in the United States, but also those decided by courts in England and other countries which have the English common law.

Section 2. Inducing breach of competitors' contracts.

It has been a common practice for manufacturers or dealers, public-service corporations, and others to induce the patrons of their competitors to break their contracts for supplies, goods, or service and to take their own instead. A number of controversies have arisen regarding the practice, and the courts have been called upon to decide whether competition constitutes a legal justification for inducing a violation of a competitor's contractual rights. In discussing the facts and the relations of the parties to the controversy, the courts have in some instances referred to the practice of inducing the violation of a competitor's contractual rights as "unfair competition," have stated that it was not within the domain of "fair competition," or have characterized it in similar terms. Thus in Sperry & Hutchinson *v.* Pommer [1] the Federal district court stated

[1] 199 Fed., 309, 314 (1912).

that the "right to compete in business does not justify 'unfair' competition in business or trade, or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party"; and the Federal circuit court of appeals in Lewis *v.* Bloede,[1] which was an action for damages for fraudulently preventing a competitor from securing a contract, said that "it will hardly be contended that the means charged to accomplish the wrong, prompted by the motive charged, brings the conduct of defendants within the domain of fair competition for trade." In an earlier case the Federal circuit court,[2] referring to the offer by defendant to indemnify the plaintiff's customers who violated their contracts and patronized defendant, states that such conduct "transcends the rights of the law of competition." The Supreme Court of New York[3] refers to inducing a breach of competitor's contracts as a step "in the same scheme of unfair competition"; and the Supreme Court of Oklahoma,[4] in the course of an opinion which involved inducing the violation of plaintiff's contracts, says that "unfair competition is, and always has been, frowned upon by the law, and the trend of decisions from Lumley *v.* Gye,[5] to the present time seems to sustain the proposition that it is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." The Supreme Judicial Court of Massachusetts, in a recent case, said: "It is manifest that to knowingly and maliciously induce another to break a contract * * * is not justified by fair trade competition.[6]

AMERICAN DECISIONS.

The decided cases in this country may be divided into the two broad classes:

(1) Breach of contract induced by means of fraud, coercion, intimidation, misrepresentation, or other unlawful means.

(2) Breach of contract induced by the offer of lower prices, superior goods, larger consideration, or other similar means.

INDUCING BREACH BY FRAUD, COERCION, OR OTHER UNLAWFUL MEANS.—It is very generally held by Federal and State courts that it is an actionable wrong to induce a breach of contract if fraud, coercion, intimidation, misrepresentation, or other unlawful means

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[1] 202 Fed., 7, 24 (1912).

[2] Citizens Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 171 Fed., 553 (1909).

[3] American Law Book Co. *v.* Edward Thompson Co., 41 Misc., 396 (1903).

[4] Schonwald et al. *v.* Ragains, 122 Pac., 203 (1912).

[5] 2 El. & Bl., 216.

[6] Wheeler-Stenzel Co. v. American Window Glass Co., 202 Mass., 471 (1909).

be employed to effect the breach.[1] The leading case in the United States Supreme Court is Angle *v.* Chicago, etc. Ry. Co.[2] In this case the United States had granted lands to the State of Wisconsin in aid of the construction of railways. The State of Wisconsin had granted a portion of these lands to the defendant company for the purpose of constructing a particular railway. It had also granted other lands to another company, the Portage Co., to construct another and somewhat competing railway; this latter railway was to be completed within a certain time. This could not be done and the State of Wisconsin extended the time for completion. The Portage Co. then employed the plaintiff to complete the line, and he was actively prosecuting the work when the defendant company, conspiring with certain officials of the Portage Co., induced the State of Wisconsin to revoke the concession to the Portage Co., whereby the plaintiff lost his employment. He accordingly brought an action, and the court held that the defendant company was liable to plaintiff. This case has been followed repeatedly by the Supreme Court and by the State courts. In the Angle case, however, and in a large number of other cases in Federal and State courts which sustain the general principle that to induce a breach of contract is unlawful if fraud, coercion, misrepresentation, or similar unlawful means be employed, the parties to the action were not business competitors and the question, therefore, whether competition constitutes a justification for inducing a competitor's customers to violate their contracts was not present in the case either as a matter specifically urged in defense or by reason of the surrounding facts. In a number of cases, however, the parties were competitors for the same trade and in seeking to supplant a rival, one of them, subsequently made the defendant, induced his rival's customers to break existing contracts and to purchase his goods or services.[3]

The complainant in Sperry & Hutchinson *v.* Pommer[4] was engaged in selling to merchants trading stamps which were in turn given by the merchants to their customers with purchases. When a customer

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[1] Angle *v.* Chicago, St. Paul, Minneapolis & Omaha Railway Co., 151 U. S., 1 (1894); Bitterman *v.* Louisville & Nashville Railroad, 207 U. S., 205 (1907); Sperry & Hutchinson Co. *v.* Pommer, 199 Fed., 309 (D. C., 1912); American Malting Co. *v.* Keitel, 209 Fed., 351 (C. C. A., 1913); American Law Book Co. *v.* Edward Thompson Co., 41 Misc., 396 (N. Y Supreme Court, 1903); Sumwalt Ice Co. *v.* Knickerbocker Ice Co., 80 Atl., 48 (Md. Court of App., 1911); Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md., 556 (1908); Rice *v.* Manley, 66 N. Y., 82 (1876); Benton *v.* Pratt, 2 Wend., 385 (1829); Schonwald *v.* Ragains, 122 Pac., 203 (Okla. Supreme Court, 1912); Dr. Miles Medical Co. *v.* Parks, 220 U. S., 373 (1911); Perkins *v.* Pendleton et al., 38 Atl., 96 (Supreme Court of Me., 1897); Morgan *v.* Andrews, 64 N. W., 869 (Mich. Supreme Court, 1895).

[2] 151 U. S., 1.

[3] Sperry & Hutchinson *v.* Pommer et al., 199 Fed., 309 (1912); Lewis *v.* Bloede, 202 Fed., 7 (C. C., 1912); American Law Book Co. *v.* Edward Thompson Co., 41 Misc., 396 (N. Y. Supreme Court, 1903); Sumwalt Ice Co. *v.* Knickerbocker Ice Co., 80 Atl., 48 (Md. Court of Appeals, 1911); Rice *v.* Manley, 66 N. Y., 82 (1876); Benton *v.* Pratt, 2 Wend., 385 (1829); Schonwald *v.* Ragains, 122 Pac., 203 (Okla. Supreme Court, 1912).

[4] 199 Fed., 309, 314 (1912).

had accumulated a sufficient number they were redeemed by the complainant company in merchandise, termed by the company "premiums." Complainant had contracts with merchants binding them to use his stamps exclusively. The defendants were engaged in the same business as complainant, and, it was alleged, had by false representations and statements, maliciously made, induced merchants to break their contracts with complainant and to replace its stamps with those of defendants. Defendants denied that they had made any false statements or representations, but contended that they had a right to offer merchants their stamps, and if they elected to break their contracts with complainant and to distribute defendants' stamps the defendants were guilty of no legal wrong. On motion for a preliminary injunction the court granted an order restraining defendants from soliciting or inducing merchants, "by any illegal means or method," to break their contracts with complainant. Regarding the right to induce the customers of a competitor to violate existing contracts, the court said:

> If it shall appear on the trial that defendants or either of them have maliciously interfered with lawful and valid contracts between complainant and its customers, the merchants referred to, or any of them, and are liable to continue so to do, and that the damages will be difficult of ascertainment, and that a multiplicity of actions will be necessary to remedy such threatened wrongs, a permanent injunction can be issued. * * *
>
> Of course, the right to compete in business does not justify "unfair" competition in business or trade, or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to violate a valid contract.

In Lewis *v.* Bloede[1] the defendant, an unsuccessful bidder for a Government contract, by fraud and collusion prevented the consummation of plaintiff's contract and secured the adoption and use of its own goods after plaintiff's bid had been accepted and the latter had been informed that he would be given the contract. In holding that an action for damages would lie for fraudulently preventing the consummation of the contract, the court said in part:

> We are not inadvertent to the principle, sustained and illustrated by numerous cases, that fair competition in trade, although resulting in loss to the injured party, does not give a right of action. It is equally well settled that if unlawful methods are resorted to and the motive to injure be shown it is an actionable wrong. It will hardly be contended that the means charged to accomplish the wrong, prompted by the motive charged, brings the conduct of the defendants within the domain of fair competition for trade.

The New York Supreme Court in American Law Book Co. *v.* Edward Thompson Co.[2] held that for a publishing house to make inten-

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[1] 202 Fed., 7, 24 (C. C. A., 1912).

[2] 84 N. Y. S., 225 (1903).

tional false statements regarding the relative merits of its own and a rival publisher's works for the purpose of inducing the latter's subscribers to break their contracts and take the books of the former, and to agree to indemnify the subscribers so violating their contracts in the event of suit, was unlawful and ground for an injunction. The court said in part in this case:

> Whether the subscribers are in each instance actually led by the defendant's misrepresentations to break the particular contracts is not important and is not an essential element of the complaint. Intentional false statements made with a view to obstruct the plaintiff's business and to divert it to the defendant are charged, and the solicitation of the subscribers' breach of contract is but a more active step in the same scheme of unfair competition.
>
> The fraudulent intent followed to fruition in the actual inducement of persons dealing with the plaintiff to break their contracts for the intended benefit of the defendant and to the intended injury of the plaintiff is the basis of the defendant's wrong, a wrong which our system of remedial justice recognizes as the subject of relief.

In Sumwalt Ice Co. *v.* Knickerbocker Ice Co.[1] it was held that for the defendant to compel the plaintiff to violate a contract to supply ice in order that the defendant might secure the business was an actionable tort. The plaintiff had contracted with defendant (manufacturers and wholesalers) for its supply of ice, and had agreed to purchase ice exclusively from defendant. Plaintiff also had a valuable contract with a dairy company to supply it with ice, and defendant, being desirous of securing the dairy company's business, demanded that plaintiff cease to supply the company on pain of having its supply of ice cut off by defendant. Ice was scarce, and in fear of losing its supply plaintiff acceded to defendant's demands, but subsequently brought action for damages. The court said in part:

> The plaintiff had a right to carry on its business under the contract with the Gardiner Dairy Co., and it was the legal duty of the defendant to refrain from the use of intimidation, force, coercion, threats, or any other illegal means with a view of preventing it from doing so, and, if with the purpose and by the means stated in the declaration it prevented the plaintiff from fulfilling its contract with the dairy company, and thereby the plaintiff was damaged, as alleged, the defendant's liability for such damage or loss can not be doubted. The gist of the action is the wrongful and unlawful interference with the business relations of the plaintiff by the means and for the object alleged.

Two early New York cases[2] held that fraudulently to induce a breach of contract of purchase or sale in order that the person so inducing might secure the benefit which the other party to the contract would have enjoyed but for its violation was actionable, notwithstanding the fact that the contracts were unenforcible by reason of not being in writing, the evidence establishing beyond question

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[1] 80 Atl., 48 (Md. Court of Appeals, 1911).

[2] Benton *v.* Pratt, 2 Wend., 385 (1829); Rice *v.* Manley, 66 N. Y., 82 (1876).

that the contracts would have been fulfilled but for the false and fraudulent representations of the defendant.

That the Oklahoma courts take the same general view is shown by the recent case of Schonwald et al. *v.* Ragains.[1] In the winter of 1905 one James G. Ragains harvested and stored a large amount of ice, intending to enter the retail ice business the following summer. He also made contracts to supply ice to a large number of consumers, and actually began to deliver ice under these contracts. One Schonwald, general manager of a rival ice company, acting in conjunction with other ice companies, represented to persons with whom Ragains had contracted for the sale of ice that he was not a member of the association of ice dealers, and for this reason could not purchase sufficient ice with which to supply his customers, and that if they continued to purchase ice from Ragains they, the competing dealers, would not sell them when Ragains' supply of ice was exhausted, and the said customers would thereafter be unable to procure any ice. Schonwald and his associates, in pursuance of the threats, did refuse to sell to any person buying from Ragains or under contract to buy from him unless they promised to disregard their contracts and not to accept further delivery from him. As a result of these representations the persons under contract with Ragains refused to purchase or accept further delivery from him. He instituted an action for damages and had a verdict and judgment in the lower court. On appeal to the Supreme Court of Oklahoma the judgment was sustained, the court holding that for thus wrongfully inducing a breach of the existing contracts between Ragains and his customers the defendants must answer in damages. The following is from the opinion of the court:

> * * * In the instant case had the conduct of Schonwald and the ice company been directed and governed solely by the desire to legitimately eliminate Ragains's retail ice business by fair competition no action could have been maintained against them, but it is plainly evident that they were not so limited, directed, or actuated. The threats, coercions, and intimidating statements made by them to the customers of Ragains had for their sole and primary object not the building up of their own legitimate business, but the destruction of Ragains's business, and that, too, by the most unreasonable, unfair, coercive, and unjustifiable methods. The only legitimate result of their conduct, as is plainly shown by the testimony, from the commencement of the troubles between them was to injure unfairly, and without sufficient excuse or justification, the business of Ragains. They did not sell their ice cheaper. They did not claim to have a better grade or quality of ice. They did not offer better delivery facilities. They did not offer any inducement by way of credits or time in payment of accounts. They did not show by any legitimate or reasonable or justifiable method that the customers by patronizing them would obtain better results or better service than Ragains could furnish, and their sole and only excuse was that they enjoyed a monopoly of the ice business in Blackwell and

[1] 122 Pac., 203, 210 (Supreme Ct. of Okla., 1912).

vicinity, and thereby controlled the ice market, and that unless the customers who had contracts with Ragains would forthwith break and violate those contracts they could not have or purchase any ice from said defendants in case Ragains's ice supply for any reason should become exhausted; and they further informed said customers that Ragains could not, in the event of his supply becoming exhausted, purchase ice from any other person who supplied said city with ice on account of combinations and understandings had by said defendants with other ice companies, the benefits of which said combinations were denied Ragains, and that, therefore, the said customers would be unable to procure any ice at all. There was no possible excuse or justification for such conduct. The actions of defendants without doubt were malicious and unwarranted.

In a number of other cases it has been held that to induce a breach of contract by fraudulent or other unlawful means is actionable. But the parties to the actions were not competitors and the question whether competition is a justification for the acts in such cases was not directly passed on,[1] and in several cases hereinafter referred to, where such unlawful means were not present, the courts have stated that the use of such methods would render actionable the inducement of a breach.

Inducing breach by lawful means.—In the cases so far noticed, inducing a breach of contract has only been condemned where fraud, coercion, intimidation, or other unlawful means have been employed to accomplish the violation of contractual obligations. But the use of these means is usually actionable if damage result therefrom. A more difficult question appears to be whether it is actionable for a dealer to induce his competitor's customers to violate their contracts by offering them superior goods, or lower prices, or by other "fair" means, where none of the unlawful elements already discussed are present in the transaction.. The proposition is stated and answered in the negative in a dictum of the Federal circuit court in Sweeney *v.* Smith,[2] as follows:

> * * * Take the case of two trade competitors: One makes a contract with a customer; the other, knowing that the contract has been made, persuades the customer by fair and legitimate arguments that his wares are better than his rivals, and thus induces the customer to cancel the contracts. In such a situation I am not aware of any decision that would support a suit against the second merchant, although he has unquestionably interfered actively to supplant his rival. But if the pending bill states a cause of action against Smith & Co., as soon as the second merchant knew of the contract with the customer he could not present the merits of his own goods except at the risk of being sued for interference if his presentation should be successful.

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[1] Bitterman *v.* Louisville & Nashville Railroad Co., 207 U. S., 205 (1907); American Malting Co. *v.* Keitel, 209 Fed., 351 (C. C. A., 1913); Boyson *v.* Thorn, 98 Cal., 578 (1893); Krigbaum *v.* Sbarbaro et al., 138 Pac., 364 (District Court of App. of Cal., 1913); Perkins *v.* Pendleton et al., 38 Atl., 96 (Me. Supreme Court, 1897); Morgan *v.* Andrews, 64 N. W., 869 (Mich. Supreme Court, 1895).

[2] 167 Fed., 385 (1909).

Damages have been awarded in a number of Federal cases for procuring a violation of contractual rights, or an injunction granted restraining the further inducement of a breach of contract where, from the report of the case, apparently, no unlawful means have been employed. A comparatively early case of this class is Heath et al. *v.* American Book Co.,[1] where it was held, on demurrer, that the defendants, publishers of school books, were liable in damages for inducing county school-book boards to adopt their books in lieu of those of plaintiff where the latter had contracts with the boards to supply books for a term of five years. The court in this case said, in part:

> In this case we think it can not be denied that the damage complained of was the result of the defendant's act in submitting its book to the schoolbook boards, and urging them to adopt it in lieu of the plaintiffs' books, which resulted in supplanting the plaintiffs' books by the schoolbook boards, and their use dispensed with in the schools, and that, when the contract was entered into between the schoolbook boards and the defendant, such was contemplated by both parties to it.

In Sperry & Hutchinson *v.* Associated Merchants' Stamp Co.[2] a similar result was reached. The complainant in this case manufactured and sold trading stamps and had entered into contracts with merchants for the purchase of its stamps exclusively and for their use by the merchants and their customers in a specified manner. Being fully aware of the nature of complainant's contracts, defendants solicited the purchase and use of their own trading stamps by merchants under contract with complainants, and in some instances succeeded in inducing them to take defendant's stamps in violation of their contracts with complainant. A preliminary injunction was issued restraining defendants, among other things, from in any wise interfering with complainant's subscribers and from soliciting and inducing said subscribers to break their contracts with complainants. It was provided, however, that the injunction should not be construed so as to prohibit defendant from soliciting subscribers to contract for their stamps upon the termination of complainant's contracts by lapse of time or by notice of the sort specified in such contract. The court said in part:

> I can not resist the conclusion that the defendant, with full knowledge of the situation, has in several instances successfully solicited subscribers of complainant to break their contracts. Under many authorities that is a trespass upon complainant's rights which a court of equity will enjoin.

In several other decisions the Federal courts have enjoined parties from inducing a breach of contract in any way. Among these are Dr. Miles Medical Co. *v.* Platt[3] and Wells & Richardson Co. *v.*

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[1] 97 Fed., 533, 536 (C. C., 1899).
[2] 208 Fed., 205 (D. C., 1913).
[3] 142 Fed., 606 (C. C., 1906).

Abraham et al.[1] In the first of these cases the petition alleged certain fraudulent or unlawful means, but the preliminary injunction granted by the court restrained defendants from "in any way" inducing a breach of plaintiff's contracts. In Wells & Richardson Co. *v.* Abraham the complainants were manufacturers of a medical compound which they sold only to wholesalers and jobbers who had agreed that they would sell at prices and discounts fixed by complainants and only to such dealers as had contracts with complainants covenanting to sell for consumption at prices fixed by complainants and that they would not sell to dealers who had not entered into similar contracts with complainants. The defendants induced dealers to sell them the compound in violation of these contracts, and complainants sought to restrain them from further acts of this sort. No allegation of fraud or deceit in inducing the dealers to break their contracts was made, but the court held that to induce the breach was unlawful and granted a preliminary restraining order. However, in neither of these cases were the contending parties competitors, and competition was therefore not urged in justification.

In accord with the decisions of the Federal courts on this point are several State courts, which in very recent cases have held that competition is not a justification for inducing a violation of contractual obligations regardless of the fact that only "fair means" are employed. Among these are the decisions in Knickerbocker Ice Co. *v.* The Gardiner Dairy Co.,[2] Beekman *v.* Marsters,[3] Cumberland Glass Manufacturing Co. *v.* De Witt,[4] and Wheeler-Stenzel Co. *v.* American Window Glass Co.[5]

The Gardiner Dairy Co. entered into a contract with the Sumwalt Ice Co., by the terms of which the latter was to supply the dairy company with ice not to exceed 20 tons per day at a specified price. The Sumwalt Co. was at the time purchasing its ice from the Knickerbocker Ice Co., which was engaged in the manufacture of ice. The latter company, learning of the contract between the dairy company and the Sumwalt Co. and being itself desirous of supplying the dairy company with its requirements, notified the Sumwalt Co. that it would not sell it any more ice unless it refrained from supplying the dairy company. The Sumwalt Co., being compelled by existing market conditions to purchase its supply from the Knickerbocker Co., yielded to its demand and violated its contract with the dairy company. The latter subsequently brought an action against

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[1] 146 Fed., 190 (C. C., 1906).
[2] 69 Atl., 405 (Md. Court of App., 1908).
[3] 80 N. E., 817 (Supreme Court of Mass., 1907).
[4] 87 Atl., 927 (Md. Court of App., 1913).
[5] 202 Mass., 471 (1909).

the Knickerbocker Co. for inducing or compelling a breach of its contract with the Sumwalt Co.[1] The trial court overruled a demurrer to the declaration, and on appeal the Maryland Court of Appeals sustained the action of the lower court on this point, holding that the act of the Knickerbocker Co. in compelling the Sumwalt Co. to break its contract with the plaintiff was for the purpose of procuring plaintiff's trade for itself and was unlawful. In the course of a rather lengthy opinion the court said:

* * * It is not altogether easy to lay down general rules as established by the cases, but some principles are quite well settled by them. It may be safely said that, if wrongful or unlawful means are employed to induce the breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort. While lawful competition must be sustained and encouraged by the law, it is not lawful, in order to procure the benefit for himself, for one to wrongfully force a party to an existing contract to break it, and a threat to do an act which would seriously cripple, if not ruin, such party, unless he does break it, is equivalent to force, as that term is used in this connection. We say "wrongfully" force, because the procurer would not be liable if he had the right to compel the party to break his contract. For example, if the contract between the Knickerbocker Co. and the Sumwalt Co. prohibited the latter from selling ice to any customer of the former, and the Gardiner Co. was a customer within the meaning of the contract, it would not necessarily be wrongful for the Knickerbocker Co. to refuse to deliver ice to the Sumwalt Co. for the Gardiner Co. In other words, it has the right to protect its own contracts, and merely because its action in that respect would result in the Sumwalt Co. not being able to furnish the Gardiner Co. would not make the Knickerbocker Co. liable to the latter; but if the object of the Knickerbocker Co. was merely to procure the trade of the Gardiner Co., and for that purpose threatened to refuse to furnish the Sumwalt Co. with ice unless it violated its contract with the Gardiner Co., although there was no contract between the Knickerbocker Co. and the Sumwalt Co. which prohibited the latter from selling to the Gardiner Co., then the Knickerbocker Co. would be liable to the Gardiner Co. for injury sustained by it for breach of the contract by the Sumwalt Co. so procured. That is an illustration of what is meant in the South Wales Miners' Federation case, supra, where it is said that "procuring a breach of contract is an actionable wrong, unless there be justification for interfering with the legal right." Again, the mere fact that a party acts from a bad motive, or maliciously, does not necessarily make him liable. If he has the right to act, his motive in acting can not of itself make his act wrongful; but if he has no right to procure a breach of contract, and resorts to unlawful means in doing so, he is liable to the injured party. We say "unlawful means," because a party may be the means of causing a contract to be broken, and still not be liable. To illustrate: A may advertise his goods for sale at such a low rate as to result in a breach of contract by B, who was under contract with C to buy at a higher price, but that would not make A liable to C; or, to make the illustration more apt, if the Knickerbocker Co. had simply refused to furnish the Sumwalt Co. with ice, the Gardiner Co. would not for that reason alone have a remedy against the Knickerbocker Co. Such action would not necessarily be unlawful or wrongful, but if the Knicker-

[1] Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 69 Atl., 405, 409 (Md. Court of App., 1908).

bocker Co. refused to furnish the Sumwalt Co., if it furnished the Gardiner Co., although it knew it was under contract to do so, in order to get the business of the Gardiner Co. for itself on its own terms, then it was unlawful to thus interfere with the contract between the Sumwalt Co. and the Gardiner Co.

The facts in Cumberland Glass Manufacturing Co. *v.* De Witt[1] were briefly as follows: The plaintiff was a dealer in bottles, and had entered into a written contract with the Mallard Distilling Co. of New York to supply it with 1,000 gross of bottles, and had also a verbal agreement to furnish the company an additional 1,000 gross. The defendant, with knowledge of the existing contract, sent its agent to visit the Mallard Co., and by offering lower prices procured the company to rescind their contracts with the plaintiff. Plaintiff brought his action, and had judgment against defendants, which was affirmed on appeal, the court holding that competition does not justify one knowingly and deliberately, for his own benefit or advantage, inducing the breach of a contract by offering lower prices. Concerning the justification of competition set up by defendant, the court said in part:

> Now, what is the justification upon which the defendant relies to exonerate itself from responsibility? It is the right of competition in trade. It asserts this proposition: That the right of competition justifies the defendant in knowingly and deliberately, for his own benefit or advantage, inducing a breach of contract by offering lower prices. No cases have been cited to support this contention. Counsel for appellant have cited a number of cases bearing upon the right of competition in trade or business. But this is altogether different from the right which one has to be protected from interference with his rights under existing contracts. * * *
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> * * * We, therefore, hold that the right to compete furnishes no justification to the defendant in this case.

The complainant in Beekman *v.* Marsters[2] had obtained from the Jamestown Hotel Corporation, conducting a hotel within the grounds of the Jamestown Exposition, a contract whereby he was made their exclusive booking agent in the New England States. The defendant, knowing of the contract, induced the hotel corporation to enter into a contract with him whereby he was given the same right as the complainant. Complainant prayed and the court awarded an injunction restraining the defendant from directly or indirectly acting as agent of the hotel corporation within the New England States, and from preventing or seeking to prevent, directly or indirectly, the complainant from acting as exclusive agent of the hotel corporation for that territory. In the course of the decision the court said:

> The result of the findings of the master must be taken to be that the defendant induced the hotel corporation to break its contract with the plaintiff, but that it did not do this to spite the plaintiff or for the purpose of injuring him, but for the purpose of getting for himself (the defendant) business which

[1] 87 Atl., 927, 932 (Md. Court of App., 1913.)

[2] 80 N. E., 817 (Supreme Judicial Court of Mass., 1907).

the plaintiff alone was entitled to under the contract with the hotel corporation; that is to say, to get business which the defendant could not get if the hotel corporation kept its agreement with the plaintiff. * * *

No case has been cited which holds that the right to competition justifies the defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights.

In Wheeler-Stenzel Co. *v.* American Window Glass Co.[1] the plaintiff was a member of the National Window Glass Jobbers' Association, which appears to have been an organization of jobbers for the collective buying of window glass, and under the rules and regulations of the association and the plaintiff's contract with it, was entitled to receive 200,000 boxes of glass per year from the association. The plaintiff alleged that, with knowledge of the contract, the defendant, a manufacturer of window glass, induced the association to refuse to permit the plaintiff to have any of the glass to which it was entitled. The defendant urged in support of a demurrer that the contract between the plaintiff and the association was in restraint of trade and in violation of the Sherman law and the common law, and that what they did was justified as "fair-trade competition." The demurrer was overruled, the court holding that the contract was not in restraint of trade and that to induce its violation was actionable, saying:

It is manifest that to knowingly and maliciously induce another to break a contract with the plaintiff is not justified by fair-trade competition.[2]

There are other State decisions sustaining the general principle that inducing a breach of contract is actionable, regardless of the means employed. In most instances, however, the parties to the action were not competitors, and trade competition was not urged in justification of the defendant's acts,[3] though in cases involving the discharge of nonunion men at the instance of labor unions it has been pleaded in defense.[4]

Opposed to the principle that competition does not justify inducing a violation of a competitor's contracts with third parties, even though the violation be accomplished only by the offer of better prices, superior goods, or other similar means, are several decisions by the Federal courts and a number by State courts. A decision by a Federal circuit court[5] holds that merely to solicit the business of a party under contract with a competitor is privileged in the interest of freedom of competition. Several leading opinions by State courts

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[1] 202 Mass., 471 (1909).

[2] See also Tubular Rivet & Stud Co. *v.* Exeter Boot & Shoe Co., 159 Fed., 824 (C. C. A., 1908).

[3] Raymond *v.* Yarrington et al., 73 S. W., 800 (Tex. Supreme Court, 1903); Bowen *v.* Speer, 166 S. W., 1183 (Tex. Court, Civ. App., 1914).

[4] Berry *v.* Donovan, 188 Mass., 353 (1905).

[5] Citizens Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 171 Fed., 553 (1909).

also hold that a trader may persuade another to purchase his goods, though knowing that he is under contract with a competitor, or, conversely, may induce another to sell him that which he is under contract to sell to a competitor. These opinions appear to be based on the principle that competition in trade is desirable; that the rights of the contracting parties are sufficiently protected by their liability to each other in an action for a breach of contract; and that no action should lie against the rival trader who induces a breach unless fraud, coercion, intimidation, or other unlawful means be employed.

A well-considered Federal case on the point is Citizens' Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co.[1] Both the complainant and defendant in this case were engaged in furnishing light, heat, and power in the city of Montgomery, Ala. The complainant sought an injunction restraining the defendant from, among other things, inducing complainant's customers to violate their contracts. It was alleged that the defendant had offered to indemnify complainant's customers, in the event of suits, if they would disregard their contracts and patronize the defendant. The court held that a party may solicit from a trader under contract with another, and that such solicitation is privileged, but that he may not actively induce a breach of contract by promising to indemnify the trader breaking the contract. In the course of the opinion the court said:

> The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have a correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition. Were the law otherwise, the first person occupying the field of public service in many localities, by procuring long contracts to take water, light, and the like from him, might intrench himself in a monopoly there for years, because another thereafter could not solicit customers, thus bound to change their patronage to him, and thereby enable a rival enterprise to enter the field. The faithful observance of contracts, however, is as essential to the public welfare as the right of competition. Property rights, public and private morality, and liberty itself are insecure when the law encourages the nonobservance of contract obligations. Hence, while the law allows the trader by mere solicitation to persuade customers to change their business relations, without actionable liability therefor, though a broken contract is the result, it does not permit such a solicitor, even in the interest of competition, to go further, intervening actively between the contracting parties, as a dominant agency in producing a breach by promise of indemnity to one of them to induce the breach. When the solicitor knowingly and intentionally goes beyond mere solicitation to induce another man's customer to do business with him, and promises to hold that other man's customer harmless for breach of contract with him, he transcends the rights of the law of competition, has no "sufficient justification,"

[1] 171 Fed., 553, 560 (C. C., 1909).

and thereby becomes liable to him whose customer is taken over. Such conduct is an unlawful interference with another man's rights, for which he may maintain an action and recover nominal damages, although the contract be not actually breached in consequence of the solicitation.

A substantially similar result was had in New York Phonograph Co. *v.* Jones,[1] where the court held, on demurrer to the petition, that the defendant could not by a money consideration induce the complainant's licensor to violate a contract with complainant, by which the latter was to have the exclusive privilege of selling phonographs within a specified territory.

In Sweeney *v.* Smith et al[2] the court held that no action would lie against the purchaser of certain bonds though the purchaser knew at the time that the vendor was under contract to sell them to another. The facts in this case were briefly as follows: The complainant had entered into a contract with a committee representing the bondholders of the Bay Shore Terminal Co. by which he was to acquire a controlling interest in the company's bonds and stock, no time limit being fixed within which the respective engagements of the parties were to be fulfilled. In the following year the bondholders' committee entered into a substantially similar agreement with the defendant, which was carried out. The complainant then brought his suit to compel the defendant to account to him for the profit made on the bonds, on the ground that defendant knowing of his contract to purchase them, should account for the profit of which he had deprived the complainant. There was no allegation of fraud, bad faith, or other unlawful means employed by defendant in inducing the breach of complainant's contract. On demurrer to the bill the court held that the mere knowledge of complainant's contract did not render defendant liable for its breach by the terminal company, but that in order to be held liable he must have induced the breach or have persuaded the company to abandon the contract. The court said in part:

* * * The complainant's cause of action does not rest upon contract, for he had no such relation with Smith & Co. It must be founded on a tort, on a wrong done by Smith & Co., and must be supported by the proposition that it is an actionable wrong to make a second contract with a promisor if he is known to have had a prior contract upon the same subject with another promisee. In my opinion, this proposition is not sound. The promisor may have excellent reasons for declining to be bound by the earlier contract, and these he need not disclose. If he chooses to take the risk of breaking the first agreement, that is his own affair, which may make him liable on that agreement, but imposes no obligation on the second promisee. It is enough for the second promisee that the agreement is now offered to him without his own procurement or persuasion. If he has done nothing to bring the situation about, the mere

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[1] 123 Fed., 197 (C. C., 1903). [2] 167 Fed., 385 (C. C., 1909).

fact that he knew of the first contract is no bar to his entering upon the second. Mere knowledge of the first does not make the second an actionable wrong; he is under no legal obligation to insist upon being told why the promisor declines to carry out the first contract, and is not bound to weigh these reasons and decide at his peril whether they are good or bad. Before he can be called to account some legal ground of liability must appear; he must participate in the breach before he can be held to blame; and the mere knowledge that the promisor intends to break the contract with the promisee is not wrongful in itself and does not disable the second promisee from making the subsequent contract. To be blameworthy he must take some active step to bring about the breach. At the least, he must induce or persuade the promisor to abandon the earlier agreement, and even this he may sometimes do with impunity, unless the decisions in several jurisdictions are to be regarded as erroneous.

Two leading cases in the Supreme Court of Kentucky holding competition to be a justification for inducing violation of contractual relations, in the absence of fraud, coercion, or other unlawful means in the inducement, are Bourlier Bros. *v.* Macauley[1] and Chambers et al. *v.* Baldwin.[2] In the first of these cases the plaintiffs, who were owners of a theater in Louisville, Ky., made a contract with the manager of Mary Anderson, a dramatic performer of great popularity, to perform upon certain dates at their theater. Plaintiffs had complied with the contract in every particular and had at great expense made all necessary preparation for the performance. Defendant was owner of a rival theater, and with notice of the contract with plaintiffs, and, it was alleged, maliciously intending to injure the reputation of the plaintiffs and their theater as a first-class place of amusement, induced the said Mary Anderson to refuse to perform at plaintiff's theater, but to perform at his theater instead on the dates covered by the plaintiff's contract. A demurrer to the declaration was sustained and the case appealed. The judgment was affirmed, the supreme court holding that an action would not lie in such a case for inducing a breach of contract, and that the plaintiff's remedy was a suit against the party to the contract, who willfully violated it. The facts in this case are strikingly similar to those in Lumley *v.* Gye,[3] but the court, after considering that case, declined to follow it.

The plaintiffs in Chambers et al *v.* Baldwin,[4] who had contracted with one Wise for the sale and delivery of the latter's crop of tobacco, alleged that the defendant, with full knowledge of the existence of the contract, from malice and ill will toward plaintiffs, and to injure them and benefit himself, procured Wise to break his contract and to sell and deliver the tobacco to the defendant. Judgment was for the defendant in the lower court and on appeal was affirmed, the appel-

[1] 91 Ky., 135; 11 L. R. A., 550 (1891).
[2] 91 Ky., 121; 11 L. R. A., 545 (1891).
[3] 2 El. & Bl., 216 (Q. B., 1853).
[4] 11 L. R. A., 545, 548, 550 (1891).

late court holding that inducing another to break his contract did not render one liable to the other party to the contract if no fraud or force were employed. The court said, in part:

> * * * But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his will and for his own benefit. And his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, can not seek redress elsewhere than from him. * * *
>
> Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant Chambers, or by a stranger, though he might have profited by the purchase to the damage of the appellants, for competition in every branch of business being not only lawful, but necessary and proper, no person should or can upon principle be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a preexisting contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other. Nor, the right to buy existing, should it make any difference in a legal aspect what motive influenced the purchaser. Competition frequently engenders not only a spirit of rivalry, but enmity; and if the motive influencing every business transaction that may result in injury or inconvenience to a business rival were made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased and the sale or an exchange of commodities very much hindered.

In addition to those already discussed, there are a number of cases where the element of competition is absent, which lay down the general principle that inducing a breach of contract is not actionable unless unlawful means be employed.[1]

ENGLISH DECISIONS.

It appears to be an established principle of English law that it is actionable knowingly to induce the violation of a valid, enforceable contract. Some expressions of opinion are to be found in the cases to the effect that it may not in all cases be actionable and that instances may be imagined where no action would lie, but in all of the cases so far reported, where the question has been directly raised and it has been satisfactorily proved that a breach of contract other than a contract at will has been procured, it has been held actionable.

Lumley *v.* Gye[2] is the first important English case holding it to be an actionable wrong maliciously to induce or procure the violation of a valid contract, other than where the relation of master and servant, strictly speaking, existed between the contracting parties. Johanna

[1] Boyson *v.* Thorn, 33 Pac., 492 (Cal. Supreme Court, 1893); Swain v. Johnson et al., 65 S. E., 619 (N. C. Supreme Court, 1909); Jackson *v.* Morgan et al., 94 N. E., 102 (Ind. Appellate Court, 1911); Ashley *v.* Dixon, 48 N. Y., 430 (1872); Glencoe Sand and Gravel Co. *v.* Hudson Bros., etc., 40 S. W., 93 (Mo. Supreme Court, 1897).

[2] 2 El. & Bl. 216, 231 (Q. B., 1853).

Wagner, an opera singer, had contracted to perform at the Queen's Theater exclusively for a period of three months. The defendant, who conducted a rival theater, with knowledge of the agreement, induced and procured her to violate it and not to sing at the theater, and the court, by Judges Crompton, Erle, and Wightman (Coleridge dissenting), held that the defendant must answer in damages to the injured contracting party. Erle, J., said in part:

If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle and ought not to be extended beyond the cases heretofore decided and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theater, therefore they are no authority for an action in respect of a contract for such performance, the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrongdoer and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. * * * He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract.

The accuracy of the decision in this case was before the court of appeal in 1881.[1] The plaintiff had entered into a contract with one Pearson to make bricks and tile exclusively for him for a period of five years, according to a secret process known only to Pearson, and at prices specified in a list set out in the contract. Defendant Hall induced Pearson to leave the exclusive employment of the plaintiff and to make for him bricks, tile, etc., such as he had contracted to make for plaintiff. Plaintiff claimed damages for thus inducing Pearson to violate his contract, and the court held, approving the decision in Lumley *v.* Gye, that the action would lie. Considering Lumley *v.* Gye the court (per Brett, L. J.) said in part:

* * * The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of Ashby *v.* White.[2] If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It

[1] Bowen v. Hall, L. R. (1881), 6 Q. B. Div., 333, 337. [2] 1 Smith's L. C., 264.

has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in Vicars *v.* Wilcocks[1] requires this doctrine for its support, it is in our opinion wrong.

This case was followed in 1893 by Temperton *v.* Russell et al.,[2] in which the facts were as follows: Defendants were members of a joint committee of three trade-unions connected with the building trade in Hull. A firm of builders, Meyers & Temperton (Temperton being the brother of the plaintiff in this case), refused to be bound by the rules of the society, and an effort was made to compel them to do so by withdrawing workmen. This failing, the unions took steps to cut off their supply of lime, brick, and other building materials by exerting pressure on those who dealt with them not to supply the materials. The plaintiff, who had been supplying Myers & Temperton, refused to acquiesce in the demands of the union. Thereupon the joint committee representing the unions passed a resolution to the effect that the members of the unions would not use any lime or artificial stonework supplied by any merchant who was supplying builders working contrary to the rules of the union. It was not disputed that the resolution was directly aimed at the plaintiff. It was not alleged, however, that the plaintiff had himself broken any rules of the trade-union. Later the joint committee summoned before them one Brentano, a builder who was under contract with plaintiff to take certain materials from him, and informed Brentano that they would not allow their men to work on this material. Brentano subsequently secured the goods from a firm designated by the committee and refused to perform his contract with plaintiff and thereafter took no material from him. Similar dealings were had by the committee with others under contract with plaintiff with like results. It was proved at the trial that plaintiff lost a substantial sum by reason of the breach of existing contracts and that his business had fallen off considerably in consequence of the action taken by the defendants. In the trial court the following questions were submitted to the jury:

(1) Did the defendants or any of them maliciously induce the persons named, or any of them, to break their contracts with the plaintiff?

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[1] 8 East, 1. [2] L. R., 1 Q. B., 715 (Court of Appeal).

(2) Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with plaintiff, and were such persons thereby induced not to make such contracts? The jury found for the plaintiff. An appeal was taken and the verdict sustained, the appellate court holding that an action was maintainable for maliciously procuring breaches of the contracts of plaintiff with builders, and also for maliciously conspiring to injure him by preventing persons from entering into contracts with him.

Inducing a breach of contract was alleged in Allen *v.* Flood,[1] which was decided in the House of Lords in 1894, but, as the employment of the men whose discharge was procured and whose contracts of hiring were alleged to have been broken was from day to day and they were not let out until the close of the day's work, it was held that no contractual obligation was violated. This decision made it unnecessary to pass upon the illegality of inducing a breach of contract for a definite period, and three of the lords expressly reserved their decision on the point. The next case in the House of Lords in which the question was considered was Quinn *v.* Leathem.[2] The facts in the case were as follows: Leathem was a butcher at Lisburn, Ireland, and had for years sold meat to one Andrew Munce, at Belfast. Leathem had in his employ as assistants several nonunion men at weekly wages. The appellants (defendants below) were officers or members of the Belfast Journeymen Butchers' and Assistants' Association, which desired the plaintiff to employ none but union labor. Wishing to keep his men then in his employ, some of whom had been with him a number of years, Leathem offered to pay all fines, debts, and demands of the association against his men, and asked to have them admitted to the union. This the defendants were unwilling to do, but declared plaintiff's men should leave his employ and walk the streets for a year. The plaintiff refused to discharge his men, saying he would not turn them out to walk the streets. In order to compel him to accede to their wishes they compelled Munce, by a threat to call out his men, to cease buying meat from the plaintiff. They also blacklisted persons dealing with the plaintiff, as a result of which he lost trade, and ultimately induced his employees to leave him, in one instance, at least, in violation of his contract of employment.

The declaration alleged that the defendants had "wrongfully and maliciously and with the intent to injure the plaintiff" (1) procured Munce to break contracts he had made with Leathem; (2) published black lists; (3) intimidated Munce and other persons into breaking their contracts; (4) coerced the plaintiff's servants to leave him; and

[1] A. C. (1898), 1, 2.

[2] A. C. (1901), 495, 510, 535.

the fifth count charged that the defendants unlawfully and maliciously conspired together and with others to do the various acts complained of in the first four counts with intent to injure the plaintiff in his trade and business and that by reason of the conspiracy he was injured and damaged in his business.

According to the statements of Lord Shand (p. 512) and Lord Brampton (p. 521), the case was disposed of in the court below under instructions of the judges on the fifth count alone; that is, the conspiracy count. The following questions, however, were submitted to the jury: (1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff to refuse to deal with him? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants not to deal with the plaintiff or not to continue in his employment, and were they induced not to do so? (3) Did the defendants, or any of them, publish the black lists with intent to injure the plaintiff and was he so injured? The jury answered all three questions in the affirmative and assessed the damages. The case was taken to the court of appeal and subsequently to the House of Lords, and affirmed by both tribunals.

Lord Macnaghten, in this case, expressed the opinion (at p. 510) that Lumley *v.* Gye was rightly decided:

> * * * Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

This appears to be the first time that the principle declared in Lumley *v.* Gye had been expressly approved in a decision of the House of Lords. Lord Lindley also expressed the opinion that Lumley *v.* Gye and Temperton *v.* Russell were rightly decided, but he would apparently ground the decision in the former case on broader principles than including a breach of contract. His language follows:

> If the above reasoning is correct, Lumley *v.* Gye was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it can not be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. Temperton *v.* Russell ought to have been decided and may be upheld on this principle. That case was much criticized in Allen *v.* Flood, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in Allen *v.* Flood. But in Temperton *v.* Russell there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

Again, in 1905, the question of the unlawfulness of procuring a breach of contract was before the House of Lords.[1] In this instance the question was largely disassociated from other difficult or conflicting issues, and the opinions are devoted almost entirely to a discussion of this single point. The South Wales Miners' Federation was formed to consider trade and wages of the coal miners in South Wales, to protect the workmen and regulate the relations between them and their employers, and to call conferences. The wages were paid on a sliding-scale agreement, rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the price of coal would be reduced and the rate of wage fall proportionately, resolved to order a "stop day"; that is, to order the men to cease working for a day. The order was obeyed by over 100,000 men. In October and November, 1901, the council ordered four stop days for the same reason as before, and the men took a holiday on each of these days. By a clause of the sliding-scale agreement between the mine owners and the miners' federation it was provided that all notices to terminate contracts on the part of employers as well as employed should be given only on the first day of any calendar month and to terminate on the last day of the same month. By ceasing to work, therefore, on the four stop days ordered by the federation the men broke their contract of employment with the mine owners and the latter brought this action against the miners' federation, its trustees and officers, claiming damages for thus inducing a breach of contract between plaintiffs and their employees. It was found as a matter of fact at the trial that the federation and council acted honestly, without malice or ill-will toward the employers, and with the object only of keeping up the price of coal by which the wages were regulated. The trial judge rendered a judgment for the defendants. This decision was reversed by the court of appeal, which entered judgment for the plaintiff. The case was appealed to the House of Lords and the judgment of the court of appeal affirmed, the decision being to the effect that an action for damages would lie by the employers against the federation and its officers for inducing the breach of contract, no legal justification for their action being shown.

Halsbury, L. C., said in part:

To combine to procure a number of persons to break contracts is manifestly unlawful. This is found as a fact to have been done here, and is also found to have caused serious damage to the persons who were entitled to have these contracts performed. * * *

We start, then, with the infliction of an unlawful injury upon the persons entitled to have the services of their workmen. It follows that this is an actionable wrong unless it can be justified.

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[1] South Wales Miners' Federation et al. *v.* Glamorgan Coal Co. et al., 1905, A. C., pp. 239, 244.

Now, it is sought to be justified, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the cocontractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your cocontractors.

An entirely different set of facts from any above stated appears in a recent case in the court of appeal.[1] The plaintiff was a distributor of phonographs and records, and sought an injunction against defendant and damages for inducing a breach of plaintiff's contracts with dealers. In order to secure uniformity in prices the plaintiff had sold its goods upon certain conditions specified in contracts with the dealers. Its contracts with wholesale dealers or factors provided that such dealers should not sell to retail dealers except upon certain discounts; that they should not sell to any retail dealer who had not signed a contract with the plaintiff, and that they should not sell to any person whose name was on the plaintiff's "suspended list." Retail dealers before purchasing from wholesalers were compelled to sign a form supplied wholesalers by plaintiff which bound the retailer not to sell to anyone at less than current list prices and not to sell to any dealer on plaintiff's suspended list. The plaintiff particularly desired to prevent the defendant from securing plaintiff's machines for the reason that defendant was the plaintiff's chief competitor both in the sale of machines and records, and sold its own records at substantially less than plaintiff's prices for its records. It was alleged that if defendant secured plaintiff's machines and sold them, those purchasing from it would naturally buy their records from the same dealer and would be induced by defendant to take its own records in preference to plaintiff's, from which great loss would result to plaintiff company. The defendant had been placed on the plaintiff's suspended list, but had succeeded in securing plaintiff's machines in two ways: (1) By inducing a retail dealer, one Ell, who had signed a retailer's agreement, to procure the machines for defendant from a wholesaler who had also signed an agreement, the retailer thus procuring them not charging the defendant anything for the service, but passing them on at the regular price to the trade. The retailer thus securing the machines for defendant apparently thought that defendant had a right to them, and, so far as the facts show, there was no misrepresentation or fraud practiced on this dealer. (2) By having two of its employees, Hughes and Leach,

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[1] National Phonograph Co. *v.* Edison-Bell Phonograph Co., L. R., 1 Ch. Div., 335, 355–357 (1908).

secure machines from wholesalers by falsely representing themselves to be retail dealers and signing fictitious names to dealers' agreements presented them by the wholesalers.

The lower court held that plaintiff could not recover as to either of the methods of procuring goods which the defendant had employed. Appealed and reversed in part, the appellate court holding that as to the machines procured through Ell no action would lie, because (1) the record disclosed no fraud or misrepresentation employed by defendant in securing those machines, and (2) Ell, believing defendants entitled to the machines, had not committed an actionable wrong in selling them. As to the machines secured through the false representation of their employees, Hughes and Leach, by the impersonation of retail dealers, the plaintiff was, however, entitled to damages, the instruments having been procured by fraud and misrepresentation.

Lord Alverstone, C. J., said in part:

It is, in my opinion, clearly established that an illegal act causing injury to a person or to his rights or property is an actionable wrong and affords a ground for an action on the case. * * * The defendants were competitors in trade with the plaintiffs—I think it may not unfairly be said the principal competitors of the plaintiffs. The sale of phonographs carries with it, to a very large extent, the sale of goods for use on the instruments, and I can see no reason why the plaintiffs are not entitled to say: We will take all legitimate means in our power to prevent our instruments from being sold by our competitors, as we know that if they are in a position to sell our instruments they will, to a large extent, interfere with the sale of the records which are to be used with such instruments. * * * In these circumstances the factors having purchased goods upon the terms, as I have already said, that they should not be sold to the defendants—because there is no doubt that the defendants' name was on the suspended list; the action of the defendant shows that it was, and that they knew it—the defendants, by fraud, induced the factors to sell instruments to them. Now, I pause to say that it is, to my mind, a practical commentary on that which I have said that the plaintiffs' competitors in trade knew that they could not get these goods by going openly to the defendant's [plaintiffs'] agents They wanted them for the purpose of competition, and they adopted fraudulent means to get them. In my opinion, if such fraudulent action has caused injury to the plaintiff's trade or is likely to cause injury to the plaintiffs' trade, an injunction ought to be granted to put a stop to such a practice, and, if damage is proved, then there ought to be an inquiry as to damages.[1]

INDUCING BREACH BY FRAUD, COERCION, OR OTHER UNLAWFUL MEANS.—The construction placed by the court of appeal in Bowen *v.* Hall [2] on the decision in Lumley *v.* Gye was that inducing a breach of contract, to be actionable, must be accompanied by some wrongful

[1] See also Read *v.* The Friendly Society of Operative Stone Masons of England, etc., L. R. (1902), 2 K. B., 732 (Ct. of Appeals) ; Denaby & Cadeby Collieries (Ltd.) *v.* Yorkshire Miners' Assn. (1906), App. Cases, 389; Smithies *v.* National Association of Plasterers, L. R. (1909), 1 K. B. 310; New Kleinfontein Co., (Ltd.), *v.* Superintendent of Labourers (1906), Transvaal Law Reports, S. C., p. 241.

[2] 6 Q. B. Div. (1881), 333, 338.

act in the inducement, or that the inducement must be for the indirect purpose of injurying the plaintiff or of benefiting the defendant at the expense of the plaintiff. The following is from the opinion in that case:

We are of opinion that the propositions deduced above from Ashby *v.* White are correct. If they be applied to such a case as Lumley *v.* Gye, the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it can not be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley *v.* Gye, and which is complained of in the present case is therefore because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff.

This reasoning was apparently accepted by the court in Temperton *v.* Russell,[1] where the master of the rolls, in deciding whether it was actionable to induce persons not to enter into a contract, said:

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff, and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate, it appears to me that on the principle acted on in the case of Gregory *v.* Duke of Brunswick,[2] where defendants conspire or combine together maliciously to injure the plaintiff by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable. * * *

The reasoning of the decision in Lumley *v.* Gye, as set forth by the court in Bowen *v.* Hall, and of the master of the rolls in Temperton *v.* Russell, was subsequently considered in the opinions of some of the lords in Allen *v.* Flood.[3] While, as already pointed out, the question whether inducing a breach of contract was an actionable wrong was not before the House of Lords in this case, and Lords Herschell, Macnaghten, and Shand reserved their opinion on the general proposition, the question, "What is a malicious act?"

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[1] L. R. (1893), 1 Q. B. 715, 728 (Court of Appeal).
[2] 6 Man. & Gr. 205 and 953.
[3] L. R. (1898), A. C. 1, 108, 119.

was before the tribunal, and several of the lords expressly rejected the theory that an act, otherwise lawful, would be rendered malicious, and therefore unlawful, if it be done with the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff. Lord Watson said:

I do not think it necessary to notice at length Temperton *v.* Russell,[1] in which substantially the same reasons were assigned by the master of the rolls, and Lopes, L. J., as in the present case. It is to my mind very doubtful whether in that case there was any question before the court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the court had to consider were (1) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in Lumley *v.* Gye. According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiff, by means of unlawful conspiracy—a clear ground of liability, according to Lumley *v.* Gye, if, as the court held, there was evidence to prove it.

Lord Herschell said in part:

The former of these cases (Bowen *v.* Hall) was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised for the first time in the court of appeal the question whether Lumley *v.* Gye[2] was rightly decided. The master of the rolls (then Brett, L. J.) delivered the judgment of the court, in which the late Lord Selborne concurred, the late lord chief justice dissenting. The law was thus laid down in the judgment of the majority of the court: "Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second case put by Coleridge, J., but if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it can not be doubted that a malicious act such as is above described is a wrongful act in law and in fact."

This case was followed, and the view of the law thus expressed was reasserted by the master of the rolls in Temperton *v.* Russell. It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is in law and in fact a wrong act, and therefore a wrongful act. I am not sure that I quite understand what is meant by saying that it is "in fact" a wrong act as distinguished from its being so "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I can not agree that all persuasion where the object

[1] L. R. (1893), 1 Q. B., 715.

[2] 2 El. & Bl., 216.

is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion which is of constant occurrence in the affairs of life would not be regarded by anyone as reprehensible. The judgment is grounded almost wholly upon the presence of this element—that the purpose of the inducement is to injure the plaintiff or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter which without this element would not be a wrong act or an act wrongful, and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action. In Temperton *v.* Russell the further step was taken by the majority of the court, A. L. Smith, lord justice, reserving his opinion on the point of asserting that it was immaterial that the act induced was not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff or to benefit the defendant at the expense of the plaintiff was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why if an action lay for maliciously inducing a breach of contract it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this: That in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it, whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered. He would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.

I think this was an entirely new departure A study of the case of Lumley *v.* Gye has satisfied me that in that case the majority of the court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration; but I do not think the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had willfully and knowingly procured a breach of contract. * * *

Upon a review, then, of the judgment in Lumley *v.* Gye I am satisfied that the procuring what was described as an unlawful act, namely, a breach of contract, was regarded as the gist of the action. I think the judgment would have been precisely the same if instead of the word "maliciously" the words "willfully and with notice of the contract" had been found in the declaration. Every word of the reasoning of the three learned judges would have been equally applicable in that case.

From the above quotations it appears that Lords Watson and Herschell regarded the gist of the action for inducing a breach of contract to be the procuring of an unlawful act, namely, the violation of the contract by one of the parties and not the animus or ill will of the party procuring it nor the fact that it was procured for the purpose of benefiting the defendant at the expense of the plaintiff. Moreover, as to inducing a person not to enter into a contract being actionable, Lord Watson points out that the part of the judgment in Temperton *v.* Russell concerning this principle was grounded on the illegal means, namely, conspiracy, used to prevent the consummation of the contract, and not on the fact that the act procured was itself unlawful. Lord Herschell reached the same conclusion.

This reasoning was approved in Quinn *v.* Leathem. In the Glamorgan case, which was subsequently before the House of Lords, no fraud, misrepresentation, or other unlawful means were present, nor was there any animus or ill will between the parties. The defendants were, nevertheless, held liable, apparently on the single ground of inducing or procuring a violation of contractual obligations. Subsequently the court of appeal, in National Phonograph Co. *v.* Edison-Bell Phonograph Co. (supra, p. 27), was careful to follow the ruling of the House of Lords, declining to hold the defendant liable for inducing a breach where no unlawful means were employed and where the party violating the contact did so innocently and under a mistake of fact, but awarding damages where fraud was employed in the procurement, though the breach, so far as the party to the contract was concerned, was innocently made. The result of these decisions of the House of Lords and the court of appeal appears to be that no fraud, coercion, misrepresentation, or other unlawful means need be present to render inducing a breach of contract actionable if the breach is such as would give rise to an action on the contract against the party violating it, but that unlawful means employed in the inducement may render it actionable in any case.

Nature of contract.—The early English cases were confined to enticing away or harboring one's servant, but in Lumley *v.* Gye[1] the court held that a contract with an opera singer was sufficiently within the rule of master and servant or employer and employed to sustain the action. In Bowen *v.* Hall[2] the contract was for the making and sale to the plaintiff exclusively of bricks and tile, and in Temperton *v.* Russell[3] the contracts violated were for building materials. It appears, therefore, that at the date of this last case the English courts had extended the rule to cover not only contracts of hire but contracts for materials as well. In the House of Lords, in 1897, Lord Herschell stated that "the law laid down in Bowen *v.* Hall in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference. * * *"[4]

Later the House of Lords held that to induce a breach of contracts to supply meat was actionable,[5] and in National Phonograph Co. *v.*

[1] 2 El. & Bl., 216 (1853).
[2] L. R. (1881), 6 Q. B. Div., 333.
[3] L. R. (1893), 1 Q. B., 715.
[4] Allen v. Flood, L. R. (1898), A. C., 1, 126.
[5] Quinn *v.* Leathem, L. R. (1901), A. C., 495.

Edison-Bell Phonograph Co.[1] the court applied the rule to contracts respecting the sale of phonographs and records. The distinction, therefore, between contracts of hiring or for personal services and ordinary commercial contracts seems to have disappeared from the English law.

Section 3. Enticing employees from the service of competitors.

It is a well-established principle of law that to induce a breach of contract of hiring is actionable[2]; and this apparently whether unlawful means be employed in the inducement or not.[3]

So far as appears from the reported cases, inducing a competitor's employee to leave his service and take employment with a rival has been little resorted to as a competitive method.[4] A few cases have arisen, both in this country and in England, where in an effort to cripple a rival his employees have been induced to leave his service, but such instances are rare outside of the operations of labor unions.

AMERICAN DECISIONS.

In a leading case in Massachusetts the plaintiffs alleged that the defendant unlawfully and without justifiable cause molested, obstructed, and hindered plaintiffs in their business as shoe manufacturers by wilfully persuading and inducing a large number of persons who were in their employ as bottomers of shoes to leave said employment, whereby the plaintiffs lost their services and the profits which would otherwise have resulted therefrom. The third count alleged that the plaintiffs had in their employ one Temple, under contract to make for them certain boots and shoes, and that defendant induced the said Temple to leave the plaintiffs' service and to refuse to perform his contract. The defendant demurred to the declaration,

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[1] L. R. (1908), 1 Ch. Div., 335.

[2] Perkins *v.* Pendleton, 90 Me., 166; Thacker Coal & Coke Co. *v.* Burke, 59 W. Va., 253; Globe & Rutgers Fire Insurance Co. *v.* Firemen's Fund Insurance Co. et al., 29 L. R. A. (N. S.), 869 (Sup. Ct. Miss., 1910); Jackson *v.* Morgan, 94 N. E., 1021 (Ind. App. Ct., 1911).

[3] Walker *v.* Cronin, 107 Mass., 555 (Sup. Judicial Ct. of Mass., 1871); Brown Hardware Co. *v.* Indiana Stove Works, 96 Tex., 453; Bixby *v.* Dunlap, 56 N. H., 456; Haskins v. Royster, 70 N. C., 601; Daniel *v.* Swearengen, 6 S. C., 297; Huff *v.* Watkins, 15 S. C., 82. But see DeJong *v.* Behrman Co., 148 N. Y., App. Div., 37; Jackson *v.* Morgan, 94 N. E., 1021.

[4] The record in United States *v.* American Tobacco Co. et al. discloses considerable evidence showing that the defendant, in its efforts to drive an independent dealer out of business, had enticed its employes to leave it and enter the service of the defendant and had attempted also to cause strikes in its factories. (United States *v.* American Tobacco Co. (Circuit Court, Southern District of New York), vol. II, record, p. 631; same case, Government's brief, in the Supreme Court (1910), p. 254). See also People's Tobacco Co. *v.* American Tobacco Co., 170 Fed., 396, 400 (C. C. A., 1909).

In Hamilton Manufacturing Co. *v.* Tubbs Manufacturing Co. et al., 216 Fed., 412 (1908), the inciting of strikes was charged among other things, but the evidence was conflicting and not sufficiently clear to justify the granting of the relief prayed for.

the court sustained the demurrer, and the plaintiffs appealed. The appellate court reversed the ruling of the lower court and held that the demurrer should be overruled.[1]

The employing printers of Atlanta, Ga., formed a club or association called the Employing Printers' Club, the purposes of which were to fix a minimum scale of prices, to prevent all competition in bidding on job printing by making the estimate by the first printer to whom a job was submitted the minimum bid for that job, and to apportion among themselves the public printing for the city of Atlanta and fix the prices therefor. The Dr. Blosser Printing Co. became a member of the club, without knowledge of all its rules and purposes, and subsequently becoming dissatisfied because of a fine imposed on it for underbidding a member, resigned. Later, on being assured that the club had been reorganized on a legal basis, it resumed membership, but further trouble arising because of a bid on the same work over which the original disagreement arose it again resigned. The club thereupon had the Typographical Union call out the union men in the Blosser Co.'s shop under threat that if the unions did not comply with this demand the club members would declare "open shop." The Blosser Co. thereupon sought an injunction to restrain defendants' interference with its employees, and damages for the injury caused. An injunction was granted and the printing club appealed. The Georgia Supreme Court sustained the lower court, holding that the Blosser Co. was entitled to an injunction restraining the printing club from "interfering with the plaintiff's business as a printer engaged in competitive trade, and from unlawfully influencing the labor organization from [sic] obstructing its business."[2] While a conspiracy was alleged the court expressly stated that the liability for maliciously interfering with the plaintiff's contracts with its employees was independent of the conspiracy.

The Globe & Rutgers Fire Insurance Co. brought an action for damages against the Firemen's Fund Insurance Co. and a number of other companies, evidently acting together for certain purposes in the insurance business, such as fixing commissions to be paid agents, etc., charging that the defendants had conspired to injure the plaintiff and put it out of business by maliciously and unlawfully persuading and intimidating the plaintiff's agent, one Lawrence, to leave its service under threat to drive him out of business as an insurance agent unless he yielded. The lower court dismissed the bill and the

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[1] Walker *v.* Cronin, 107 Mass., 555 (Sup. Ct. Mass., 1871).

NOTE.—It does not appear from the facts in this case whether the employees were induced to leave the plaintiffs' service because of labor difficulties, whether it was a rival manufacturer who induced them to leave, or whether it was simply a case of willful interference with another's business.

[2] Employing Printers' Club *v.* Dr. Blosser Co., 122 Ga., 509 (1905).

plaintiff appealed. The ruling of the lower court was reversed, the appellate court stating that the declaration disclosed a cause of action. The opinion of the court is in part as follows:

Under the facts alleged in the declaration, it may have been perfectly permissible for the defendants to have employed the agent of plaintiff, and to pay him better for his services. They might employ him, or any number of plaintiff's agents similarly in the employ of plaintiff, without violating any principle of lawful right, if the object of the employment was in the honest furtherance of their own business enterprises. But the facts stated in the declaration show a determination to destroy and drive plaintiff out of business, and the declaration alleges a conspiracy for this purpose. * * *

For an association of persons to conspire together for the sole purpose of destroying one's business certainly transcends legitimate and lawful competitive methods. Every person must be free to ply his own calling. If he may be interfered with by having his employees driven from his service by fraud, misrepresentation, intimidation, obstruction, or molestation, and in this way have his business destroyed, the effect upon his business operations and progress is as deadly as if the law permitted an incendiary to burn or a mob to destroy. If his business is to be destroyed, it can make little difference in result whether it be by the unlawful use of fire or unlawful intimidation or molestation. Legitimate competition he must meet, or surrender; but legitimate competition only means that all may make the best lawful use of their faculties and their means. If in so doing their competitor's business is destroyed as a mere incident of his inability to successfully contend against superior skill or means, that is but the hardship of legitimate warfare. The world is always in search of improved methods and reduction of cost. * * *

* * * The gist of this action is the malicious and unlawful interference with plaintiff's business, to his damage. The action would lie as well against one as against all the defendants; * * *

* * * But it is argued on the part of appellees that there was no contract for any definite period of time between plaintiff and Lawrence, and therefore there could be no interference which would justify the action. We do not think, under the authorities, that it makes any difference whether there was a contract between plaintiff and Lawrence for a definite period of time or not. There was a service and a quasi contract, and plaintiff had a right to have this service to continue free of malicious interference.[1]

The Brown Hardware Co. in an action against the Indiana Stove Works Co. alleged that it had employed one Nash as a traveling salesman under contract that he should serve the plaintiff exclusively, and that the stove company, engaged in the same line of business, with knowledge of the contract, induced Nash to sell its goods as well. The arrangement had continued for five years, resulting, it was alleged, in a large loss of trade to the plaintiff and thousands of dollars damages. The defendant demurred to the declaration and the demurrer was sustained. On appeal, the Supreme Court of Texas held, reversing the lower court, that an action would lie for

[1] Globe & Rutgers Fire Insurance Co. *v.* Firemen's Fund Insurance Co. et al., 29 L. R. A. (n. s.), 869, 873, 874 (Sup. Ct., Miss., 1910).

thus inducing an employee to violate his contract, and that the demurrer should have been overruled.[1]

The Scarborough Map Co. had employed one Kinney as an agent and local manager for the sale of maps. Subsequently differences arose and Kinney left the employ of the Scarbrough Co. and entered the service of a rival concern. He also induced one employee of the Scarbrough Co. to violate his contract of employment and enter the service of his new employer and was attempting to entice other employees away from the Scarbrough Co. when the latter began suit, praying, among other things, an injunction restraining Kinney from inducing its employees to leave its service in violation of their contracts. An injunction was granted and the action of the lower court affirmed on appeal, the court saying, in part:

> Furthermore, there was evidence tending to show that the defendant had sought to induce his successor in the employment of the plaintiff to violate the contract of employment with the plaintiff and to join him in the new employment, and that he boasted that he had induced some of the plaintiff's employees to leave its service and take positions with the new employer. As if to emphasize the fact that the plaintiff had no adequate remedy at law for the injuries thus done the defendant proceeded to go into voluntary bankruptcy. Aside from the question of restraint of trade involved in the preceding discussion, such conduct on the part of a trusted employee furnished sufficient basis to authorize a temporary injunction as to this matter.[2]

A recent New York case held that an action would not lie for enticing away a competitor's employee unless fraudulent or otherwise wrongful means were employed. The defendant, a business rival of the plaintiff, had induced several of the latter's employees to leave him in violation of their contracts of service. The plaintiff brought an action for damages, and the court held that in such a case damages could be recovered only if unlawful means had been employed. The court reviewed Lumley *v.* Gye[3] and declined to follow it.[4]

A very recent Federal opinion having some bearing on the question, but not directly in point, is Weegham et al. *v.* Killifer et al.[5] In this case the complainant had induced the defendant, a professional ball player, under contract with the Philadelphia National League Club, to repudiate his contract and to sign a contract with the complainant at an increased rate of pay. The defendant had subsequently agreed to abandon this contract and again contracted with the Philadelphia club to play with it. The complainant sought an injunction to restrain the defendant from playing with the Phila-

[1] Brown Hardware Co. *v.* Indiana Stove Co., 96 Tex. Civ. Apps. (Tex. Sup. Ct., 1903).
[2] Kinney *v.* Scarbrough Co., 74 S. E., 772 (Ga. Sup. Ct., 1912).
[3] 2 El. & Bl., 246.
[4] DeJong *v.* B. G. Behrman Co. et al., 131 N. Y. Supp., 1083 (Sup. Ct., App. Div., 1911)
[5] 215 Fed. Rep., 168 (Dist. Ct., 1914).

delphia club in accordance with his contract last entered into. An injunction was denied, the court saying that the conduct of both parties was unconscionable and that the complainant, not coming into court with clean hands, would be given no relief. An excerpt from the opinion is as follows:

> Knowing that the defendant Killifer was under a moral, if not a legal, obligation to furnish his services to the Philadelphia Club for the season of 1914, they sent for him, and by offering him a longer term of employment and a much larger compensation induced him to repudiate his obligation to his employer. In so doing, a willful wrong was done to the Philadelphia Club, which was none the less grievous and harmful because the injured party could not obtain legal redress in and through the courts of the land. Can it be doubted that if the plaintiffs had not interfered Mr. Killifer would have carried out his agreements with the Philadelphia Club in honesty and good faith? The plaintiffs and Killifer both expected to derive a benefit and a profit from their contract, and both knew that such contract, if performed, would work a serious injury to the Philadelphia Club. The conduct of both is not only open to criticism and censure, but is tainted with unfairness and injustice if not with actionable fraud. To drive a shrewd bargain is one thing and to resort to unfair and unjust practices and methods in order to obtain an advantage over a business rival or competitor is another. Courts of equity may protect and enforce the former, but will not sanction nor lend their aid to the latter.[1]

In a comparatively recent Federal case the complainant alleged that the defendant, who had formerly been the manager of its Chicago office but had subsequently entered the same line of business for himself, had enticed its staff of employees to leave the complainant and take employment with the defendant. The defendant submitted an affidavit of each employee alleged to have been so enticed, denying explicitly that there had been any solicitation on the part of the defendant. In this state of the case the court was of opinion that there was no sufficient evidence upon which to base an order for the complainant.[2]

ENGLISH DECISIONS.[3]

The legality of enticing away a competitor's employees to cripple him in competition was before the English courts at least as early as 1774. The plaintiff alleged, in a case decided in that year, that the

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[1] See also Hooker, Corser & Mitchell Co. *v.* Hooker (92 Atl., 443, Supreme Court of Vermont, 1914), where the former directors of a corporation were held liable for enticing away the employees of the corporation where the plans and agreements to induce the employees to leave were made while the defendants were still occupying the fiduciary position of director.

[2] Proctor & Collier Co. *v.* Mahin et al., 93 Fed., 875 (C. C., 1899).

[3] For cases involving the enticement of employees of others than competitors, see Quinn v. Leathem L. R. (1901), A. C., 495; Read *v.* Friendly Society of Operative Stonemasons, 87 L. T., 493 (1902); Lumley *v.* Gye, 2 El. & Bl., 216 (1853); South Wales Miners Federation et al. *v.* Glamorgan Coal Co. et al. L. R. (1905), A. C., 239. See also II Blackstone's Commentaries, 142.

defendant had enticed several of his servants, who worked for him as journeymen shoemakers, to leave his employment and enter that of the defendant. The employees so enticed to leave the plaintiff were not hired for a determinate time, but worked by the piece, and they each left a pair of shoes unfinished. Judgment was entered for the plaintiff, Lord Mansfield saying in part:

> What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeyman. It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master; but the gist of the present action is, that they were attached to this particular master.[1]

A piano manufacturer invited a rival's workmen to dinner, and after causing them to become intoxicated, induced them to sign contracts of employment with him. The workmen were not employed by their original master for a determinate period, but worked by the piece. In an action to recover damages for thus enticing his workmen to leave him the court was of opinion that the plaintiff had made out his case and the jury allowed the plaintiff £1,600 damages, this amount being the value of the profits of his business for two years. The defendants moved for a new trial on the ground that the damages were excessive. A rule for a new trial was refused, however, the court saying in part:

> Lord Chief Justice Dallas: "* * * The defendants clandestinely sent for his workmen, and, having caused them to be intoxicated, induced them to sign an agreement to leave him and come to them, by which the plaintiff was nearly, if not absolutely, ruined. I am by no means dissatisfied with the verdict the jury have found, as the conduct of the defendants, in point of fact, amounted to an absolute conspiracy, and I therefore think the court can not now be called on to interfere by granting a new trial."
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> Mr. Justice Richardson: "This was an action for seducing and enticing away the plaintiff's servants. The measure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period. It appears, too, that the defendants combined to allure them from his service, and I do not think the court ought now to infer that two years' profit is too much for the plaintiff to recover."[2]

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[1] Hart *v.* Aldridge, 1 Cowper's Reps., 54, 56 (1774).

[2] Gunter *v.* Astor et al., 4 Moore, C. P., 12, 14 (1819).

NOTE.—But that to induce a breach of contract at will is not actionable unless unlawful means be employed; see Allen *v.* Flood, L. R. (1898), A. C., 1.

In Lumley *v.* Gye,[1] the facts of which are set forth at length at page 21, ante, it was held actionable to entice an opera singer under contract to sing for a rival to violate her obligation and to sing for the defendant instead. And in Bowen *v.* Hall,[2] enticing a person under contract to make bricks by a secret process exclusively for the plaintiff to make bricks also for the defendant was held actionable.[3]

In De Francesco *v.* Barnum,[4] the plaintiff had entered into agreements with five girls to perform in the ballet for him at specified salaries during the pantomime season 1889–90. They subsequently entered into agreements for like service with the defendants. Learning of the contracts with the defendants, the plaintiff notified them of the prior existing agreements with him, but the defendants, nevertheless, continued the girls in their service. The plaintiff thereupon instituted an action for damages for enticement. Lord Justice Fry assessed the damages at £40, and gave judgment for that amount with costs. The following is taken from the opinion of the court:

> It is suggested that the doctrine can not be applied except in the strict case of master and servant. But it is to be observed in the case of Lumley *v.* Gye the strict relation of master and servant did not exist, and the court nevertheless held that the doctrine of enticement did apply and was actionable, although the relation of master and servant might not have existed. It appears to me plainly to follow that, inasmuch as it has been now held that in the cases where it is not master and servant the doctrine of enticing will apply, the law is the same in the case of continuing in employment after notice and has been settled to be this, that you can maintain an action either for enticing away a servant or person employed or for continuing to employ a person, a servant, or employee after notice.

Section 4. Betrayal of trade secrets.

A branch of equity jurisdiction which has grown up entirely from the efforts of persons unfairly and inequitably to compete with others, is that relating to the protection of trade secrets. There are numberless secret processes, machinery, formulæ, etc., employed in various lines of industry. The large profits resulting from their use have aroused the cupidity of employees familiar with them, who have attempted to set up rival enterprises and to employ therein the knowledge gained through their former employment; or less successful competitors have induced employees familiar with trade secrets of rivals to take service or to embark in business with them and in this way obtain a knowledge of the valuable methods of a competitor.[5]

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[1] 2 El. & Bl., 216.

[2] 6 Q. B. Div., 333. See p. 22.

[3] See also Hewitt *v.* Ontario Copper Lightning Rod Co., 44 Upper Canada Reps., 287 (1879).

[4] 63 L. T., 514 (1891). See also Blake *v.* Lanyon, 6 Durnf. & E., 221 (1795), and Fred Wilkins & Bros. Ltd. *v.* Weaver, L. R. (1915) 2 Ch. 322.

[5] The same result has been obtained through the bribery of the employees of a competitor. In this connection see the Prevention of Corruption Act, and the interpretation placed upon this statute by the English courts.

A New York court in the course of an opinion involving the use of secret processes by former employees of a concern observed that "this is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is contra bonos mores and constitutes a breach of trust which a court of law—and, much more, a court of equity—should not tolerate."[1] A similar expression is found in another decision of the New York courts,[2] and in a still later decision it was said, in a like connection, that "fair competition is always encouraged, but a man can not, through deceit * * * enter the household of his benefactor and steal his belongings."[3]

A trade secret has been defined by an Ohio court as follows:

> A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it, in order to apply it to the uses for which it is intended. It is not protected by patent, for the secret then is made public, and the inventor is protected by letters patent from infringement thereof; while, as soon as anyone fairly and honestly discovers a trade secret, either by examination of the manufactured products sold or offered for sale to the public, or in any other honest way, that person discovering it has full right to use the same.[4]

The Supreme Court of Pennsylvania in a recent decision says:

> The character of the secrets, if they be peculiar and important to the business, is not material. They may be secrets of trade or secrets of title, or secret processes of manufacture, or any other secrets important to the business of the employer.[5]

These definitions serve to give a general idea of what may be included in the term "trade secret." More specifically the courts have protected as trade secrets the use of a peculiar process in tanning leather, in manufacturing bells and photographic supplies, a peculiar method of making a health food, the ingredients and processes used in making oils, greases, etc., ingredients in patent medicines, and secret machinery.[6]

It is apparently established that a court of equity will restrain the disclosure or use of a trade secret by one who has acquired knowledge of it through confidential employment, or by one who has acquired it with knowledge that the person from whom it was obtained had, by reason of the manner in which it had come into his possession, no right to divulge it.

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[1] Eastman Kodak Co. *v.* Reichenbach, 79 Hun, 183 (1894).

[2] Little *v.* Gallus, 4 N. Y., App. Div., 569 (1896).

[3] Eastern Extracting Co. *v.* Greater New York Extracting Co., 126 N. Y. App. Div., 928 (1908).

[4] National Tube Co. *v.* Eastern Tube Co. et al., 23 Ohio C. C. (N. S.), 459, 462 (1902).

[5] Macbeth *v.* Schnelbach, 239 Pa., 76 (1913).

[6] 12 L. R. A. (N. S.), 102.

A manufacturer made and sold to the public generally a rotary pump, his own invention, but unpatented. It was designed to pump both hot and cold liquids, and both brass and iron were used in its construction. As these metals expand and contract unequally under the effects of heat and cold, allowance had to be made for this in constructing the pumps and for the unequal shrinkage of the castings in cooling. Patterns for the construction of the pump could not be made from the pieces of the completed device. The manufacturer had by experimentation drafted a set of patterns which made the proper allowance for this unequal expansion and contraction. They had been kept secret, but while they were in the possession of one Walz to be repaired he surreptitiously made a duplicate set for another. The court granted an injunction restraining the manufacture of pumps or the use of the patterns so made. In considering whether the patterns constituted a trade secret the court said, in part:

But the completed pump was not his only invention, for he had also discovered means, or machines in the form of patterns, which greatly aided, if they were not indispensable, in the manufacture of the pumps. This discovery he had not intentionally published, but had kept it secret, unless by disclosing the invention of the pump he had also disclosed the invention of the patterns by which the pump was made. The precise question, therefore, presented by this appeal, as it appears to us, is whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the world. The pump consists of many different pieces, the most of which are made by running melted brass or iron in a mold. The mold is formed by the use of patterns, which exceed in number the separate parts of the pump, as some of them are divided into several sections. The different pieces out of which the pump is made are not of the same size as the corresponding patterns, owing to the shrinkage of the metal in cooling. In constructing patterns it is necessary to make allowances, not only for the shrinkage, which is greater in brass than in iron, but also for the expansion of the completed casting under different conditions of heat and cold, so that the different parts of the pump will properly fit together and adapt themselves, by nicely balanced expansion and contraction, to pump either hot or cold liquids. If the patterns were of the same size as the corresponding portions of the pump, the castings made therefrom would neither fit together, nor, if fitted, work properly when pumping fluids varying in temperature. The size of the patterns can not be discovered by merely using the different sections of the pump, but various changes must be made, and those changes can only be ascertained by a series of experiments, involving the expenditure of both time and money. Are not the size and shape of the patterns, therefore, a secret which the plaintiff has not published, and in which he still has an exclusive property? * * * Even if resort to the patterns of the plaintiff was more of a convenience than a necessity, still, if there was a secret, it belonged to him, and the defendant had no right to obtain it by unfair means or to use it after it was thus obtained. We think the pattern was a secret device that was not disclosed by the publication of the pump, and that the plaintiff was entitled to the preventive remedies of the court.[1]

[1] Tabor *v.* Hoffman, 23 N. E., 12 (N. Y. Court of Appeals, 1889).

In another case it appeared that a corporation was engaged in the manufacture and sale of kodak cameras and materials and apparatus used in the art of photography. It employed certain secret processes and appliances, which two of its employees, who had either discovered the processes while in the company's employ or to whom they had necessarily been disclosed while occupying a confidential relation to the corporation, sought to make use of in the manufacture and sale of similar articles. The employees, upon entering the service of the corporation, had agreed in writing to transfer to the company all inventions, discoveries, and improvements in photography which they might make, discover, or invent while in its employ, and there was also evidence to show that they had understood that they should not disclose the secrets of the business. In a suit to restrain them from using the processes and appliances in question it was urged in defense that the plaintiff had no trade secrets in them, as all of the agencies employed to produce them, and the particular properties of the agencies, were known to the scientific mind, and it was argued that nothing could be invented which was in existence, nor could anything be discovered the existence of which was already known; but the court held that certain processes and appliances were proper trade secrets and granted an injunction restraining their use. In the course of the opinion the court said:

> * * * Here is a party which, by the expenditure of vast sums of money and the exercise of much skill and ingenuity, has built up a large and prosperous business, the capital of which consists largely in certain inventions and discoveries made by its officers, servants, and agents. The world at large knows nothing of these inventions and discoveries, because they are locked within the brain of those who conceive them. The defendants, who have been largely instrumental in perfecting them, and while under both an express and implied contract to give the plaintiff the benefit of their inventive genius, propose now to disregard their legal and moral obligations by creating a new establishment where these inventions and discoveries may be employed to plaintiff's serious injury. This is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is contra bonos mores and constitutes a breach of trust which a court of law—and much more a court of equity—should not tolerate. It follows, therefore, that the plaintiff is entitled to the relief sought by this action * * *.[1]

A manufacturer of typewriter ribbons owned certain processes, appliances, and formulæ which had been invented or discovered either by himself or his employees. These processes, etc., had proven very valuable and had been kept a profound secret. Two employees, whose positions made it necessary that the secret processes, appliances, and formulæ should be disclosed to them, and who had been frequently informed and well understood that they were permitted to learn the secrets because of the manufacturer's reliance upon their

[1] Eastman Kodak Co. *v.* Reichenbach, 79 Hun, 183, 194 (1894).

fidelity as his confidential servants, resigned and proceeded to manufacture and sell ribbons of the same character and after the same manner as those of their former employer. In a suit to restrain the use or disclosure of the secret processes, etc., the appellate court held the facts to be sufficient to warrant an injunction, reversing the lower court, which had dismissed the bill on its merits.[1]

The president of the Macbeth-Evans Glass Co. had by his own study and experiments, combined with those of a chemist, perfected a formula for semitranslucent glass. This formula was turned over to the company's superintendent, Harry Schnelbach, to make the necessary experiments in the factory furnaces. A satisfactory glass was produced, but in the course of the experiments Schnelbach demonstrated that the desired results could only be had by melting the glass a specified time. Having discovered this, Schnelbach claimed that the secret belonged to him and not to his employers. In an action to restrain Schnelbach, or the company that employed him on his resigning from the Macbeth company, from manufacturing glass by this formula, it was held that the process belonged to the latter, and that Schnelbach, by reason of his confidential employment, was under an implied contract not to disclose it or make use of it in any way. The defendants appealed and the judgment was sustained, the court in the course of the opinion saying:

* * * To be entitled to equitable relief the burden was on the appellee to show (1) that there was a trade secret, or, as in the case at bar, a secret process of manufacture; (2) that it was of value to the employer and important in the conduct of his business; (3) that by reason of discovery or ownership the employer had the right to the use and enjoyment of the secret; and (4) that the secret was communicated to Schnelbach while he was employed in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others or to make use of it himself to the prejudice of his employer. * * *

* * * These tests demonstrated that in melting the glass a proper length of time, not too long, not too short, was required before taking down the stopper and working the glass. When the glass is taken out too soon, it is more opaque than alba glass should be; when opened up too late, it is objectionable, because its transparency affects the translucent quality of the glass. Hence the necessity of melting to a proper point and working the glass at a proper time. Schnelbach claims to have discovered how to do these things during the course of the four trials made by him, and that the secret is his and not that of Macbeth or his company. This position ignores the whole trend of events leading up to the final result, and disregards the essential element in the making of alba glass, namely, the secret formula. So far as the testimony discloses, alba glass can not be made without using the ingredients of the secret formula. The glass may be melted to the point required; it may be opened up and worked at the proper time; everything may be done exactly as Schnelbach testified it should be done, but if the batch does not contain the essential ingredients of the secret formula, alba glass can not be made. The formula is the basis of the secret

[1] Little *v.* Gallus et al., 4 N. Y. App. Div., 569 (1896).

process upon which the manufacture of this particular quality of glass depends. The mixing of the batch and the melting of the glass are the mechanical means employed to accomplish the results produced by the secret formula. We have reviewed the points in controversy at length in order to determine just what the real secret was which the courts are asked to protect, and have concluded that it was the formula containing the essential ingredients required in the manufacture of alba glass. This formula belonged to the Macbeth company; it was communicated to Schnelbach by Macbeth for the purpose of making a particular quality of glass for the use and benefit of the appellee. * * *[1]

Where a complainant used a peculiar mixture of metals to compound a bell metal and had by experimentation determined the forms, sizes, and weights necessary to produce satisfactory bells from this metal, the combination of metals, together with the forms, sizes, and weights of the bells was held, on preliminary hearing, to be a trade secret, and a former employee who had learned it in the capacity of foreman for the complainant was restrained from communicating it.[2]

In another case it appeared that the complainant, a manufacturer of depilatories, or preparations for removing hair and wool from skins and hides, had by long experimenting produced a satisfactory article for this purpose, the ingredients of which were known to defendant corporation, but the methods of mixing not being known to it, a satisfactory article had not been produced. One Goss, joined as a defendant, who had been in the employ of complainant and had thus learned his method of mixing the ingredients, left the complainant's employ and entered that of defendants and disclosed to them the complainant's methods and machinery, which they were about to put into use when complainant began proceedings for an injunction. A decree was entered in the lower court enjoining the employee Goss from divulging the secret process and the corporation to which he had communicated it from using the same, and on appeal the decree was affirmed. Regarding the nature of the secret and the right of the complainant to have it protected, the appellate court said, in part:

The ingredients used in the manufacture of Stone's depilatories were well known and had been used for that purpose for years before the XXX and XXXX were put upon the market, and the same ingredients were used by the Grasselli Chemical Co. in the manufacture of a depilatory. It is urged that the only advantage possessed by the complainants arose out of skill in handling and not out of a secret process, and that there was no secret, either in the ingredients or in the method of compounding them. The complainant combined the ingredients by a different method from any other in use, and the result was a product of a different character. The complainant's process of manufacture was considerably more complicated than that of the Grasselli Chemical Co.

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[1] Macbeth *v.* Schnelbach et al., 239 Pa., 76, 87 (1913).

[2] Cincinnati Bell Foundry Co. *v.* Dodds et al., 10 Ohio Dec., Reprint, 154 (Superior Ct. of Cincinnati, 1887).

The secret consisted in a knowledge of the proper method of mixing the ingredients and treating them in order to produce a product of proper consistency. * * *

An injunction should not be refused, because the process was such that it would probably have been discovered by independent experiments in the manipulation of the ingredients, of which the products of both parties were alike composed. The Grasselli Chemical Co., by its own conduct, has put itself in such a position that it may even lose the advantage of future independent experiments. It would be quite impossible hereafter to decide how much of the improvement in a product of the Grasselli Chemical Co. would be attributable to its own indepeudent efforts and how much to the knowledge of Stone's process fraudulently acquired by it. Every doubt must be resolved against the parties to a fraudulent act. If the defendant thereby suffers, it suffers only by reason of having been a party to Goss's fraudulent disclosure of the secret.[1]

One Peabody, who had perfected machinery and a process for manufacturing gunny cloth from jute butts, employed an engineer, who contracted that he would not give any person information in regard to the machinery, and that he would "consider all of said machinery as sacred, to be used only for the benefit of said Peabody or his assigns," and would prevent, so far as he could, others from securing such knowledge of the machinery as would enable them to use it. Subsequently, it was alleged, the engineer resigned and made arrangements to construct for others a factory similar to Peabody's, and to impart to them the latter's secret process and to furnish them with machinery built on Peabody's models. It was further alleged that the engineer had taken the originals or copies of certain drawings. On demurrer to a bill setting out the above and praying an injunction restraining the communication of the secret processes and machinery and for the return of the drawings, it was held, overruling the demurrer, that an injunction should issue.[2] Again, where a defendant was in the employ of a company engaged in the manufacture of fly paper, and the conditions under which the business was carried on and the precautions taken that neither the public nor other employees should become familiar with the processes showed that both plaintiff and defendant regarded the latter's relations to the plaintiff as confidential, an injunction was issued restraining the defendant from communicating the secret processes.[3]

The National Paper & Supply Co., engaged in the manufacture of paper bags, employed one Taggart and furnished him the necessary help and material to complete a machine for use in the manufacture of paper bags, which he had begun under an agreement that the machine, if perfected, should constitute a trade secret and should belong to the manufacturer, and that Taggart should not make any such machines for any other person. After the machine had been com-

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[1] Stone *v.* Goss and the Grasselli Chemical Co. et al., 65 N. J., Eq., 756, 760 (1903).
[2] Peabody *v.* Norfolk, 98 Mass., 452 (1868).
[3] O. & W. Thum Co. *v.* Tloczynski, 38 L. R. A., 200 (Michigan, 1897).

pleted and its value demonstrated, Taggart contracted with Westervelt & Westervelt to build duplicates for them, the company knowing at the time the nature of the contract between Taggart and the National Paper & Supply Co., and that the construction of the machine was a secret, for which the latter had paid. An injunction to prevent Taggart from manufacturing the machines for other parties was granted.[1] Likewise, where it appeared that a defendant had entered the employ of complainant, and after remaining only two days, during which time he learned complainant's secret process of extracting alcohol from empty whisky barrels, left and organized a corporation to engage in the same business, an injunction was granted restraining him from using the secret process.[2]

In Simmons *v.* Simmons[3] the complainant corporation had purchased from Dr. M. A. Simmons, the defendant's father, a secret recipe for making a liver medicine. The defendant had subsequently entered the employ of the complainant under contract not to divulge its secret recipe and not to make or sell in certain specified territory any medicine made by complainant or any liver medicine on which the name "Simmons" was used. Subsequently he began to make and sell in complainant's territory medicine similar to complainant's, and when suit was brought urged that he was not using the complainant's recipe, but a different one, which had been confided to him by his mother. The court, however, found, as matter of fact, that the medicine was practically the same as the complainant's and held that, as the formula had been sold to the complainant by Dr. M. A. Simmons, equity would not permit him, by himself or through a member of his family, to disclose it, and defendant would be restrained from its use. Also, where secret formulæ or processes for the manufacture of ink, discovered by a defendant while president of a corporation whose assets, including the formulæ, were subsequently sold by a receiver of the corporation, and the formulæ had been exhibited by the defendant while managing the business during the receivership as a part of the assets, it was held that they could not subsequently be sold or used by defendant, his whole course of conduct implying that the formulæ and processes were the property of the defunct corporation, and that they passed to the complainant at the receiver's sale.[4]

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[1] Westervelt & Westervelt *v.* National Paper & Supply Co., 57 N. E., 552 (Sup. Ct. of Ind., 1900).

[2] Eastern Extracting Co. *v.* Greater New York Extracting Co. et al., 126 N. Y. App. Div., 928 (1908).

[3] 81 Fed., 163 (C. C., 1897).

[4] Pomeroy Ink Co. *v.* Pomeroy, 77 N. J. Eq., 293 (1910). Other cases are White Dental Manufacturing Co. *v.* Mitchell, 188 Fed., 1017 (1911); Philadelphia Extracting Co. *v.* Keystone Extracting Co., 176 Fed., 830 (1910); Union Switch & Signal Co. *v.* Sperry, 169 Fed., 926 (C. C., 1909); G. F. Harvey Co. *v.* National Drug Co., 77 N. Y. Supp., 674 (1902).

It has been held, however, that a formula or process for making soap did not constitute a secret process where the "method consisted in the exercise of great care in the selection of well-known materials previously in use in the trade, and their combination and mixture in certain proportions, also approximately observed by other manufacturers, by means of appliances also more or less known to others."[1]

So also, where an employee possessed of great mechanical ability assisted his employer in perfecting machinery, but was not employed for the purpose of making inventions, and subsequently set up in the same business, an injunction was denied, it appearing from the evidence that the employee had not constructed or used any machines, processes, or formulas in which his former employer had any exclusive proprietary right. "No obligation rested upon him," said the court, "to forego the exercise of his inventive powers, even if they were incited because of knowledge necessarily derived from the performance of his contractual duties. It was legitimate for him, under these conditions, to invent and perfect improvements which were embodied in new machines of greater capacity and efficiency."[2]

Likewise, where the evidence showed that strangers were frequently allowed to go through a factory and to see the machinery; that the general principles of the machines were well known to machinists and they had been merely adapted to the complainant's particular use; and, finally, that no secrecy had been enjoined on the employees, but all were allowed freely to see the machines, the court declined to enjoin the defendant from using similar machinery constructed from information imparted by former employees of the complainant.[3] So where the combined efforts of the employees of a tube mill had resulted in a certain individuality in the patterns and castings, but the employees were not under contract not to use elsewhere the ideas developed in the work and it appeared from the evidence that approximately the same mills could be constructed by any competent engineer, without the complainant's patterns, the court directed the return of patterns surreptitiously taken by an employee for use in constructing a mill for the defendant, but refused to direct the destruction of the castings made from the patterns.[4]

Agreement not to disclose secrets implied.—The earlier attempts to prevent the disclosure of trade secrets were usually based on an express contract by the employee not to divulge his

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[1] Bell & Bogart Soap Co. *v.* Petrolia Manufacturing Co., 54 N. Y. Supp., 663, 664, 665 (N. Y. Sup. Ct., 1898).

[2] American Stay Co. *v.* Delaney, 211 Mass., 229 (1912). See also Mahler *v.* Sanche, 223 Ill., 136 (1906).

[3] Hamilton Manufacturing Co. *v.* Tubbs Manufacturing Co., 216 Fed., 401 (apparently decided in 1908, but not reported until 1914).

[4] National Tube Co. *v.* Eastern Tube Co. et al., 3 Ohio C. C. (N. S.), 459 (1902); affirmed by Ohio Supreme Court Dec. 8, 1903.

employer's secret methods. Although the validity of such contracts has sometimes been questioned on the ground that they are in restraint of trade, they have very generally been upheld. In certain instances where the restraint imposed was clearly broader than was necessary for the protection of the employer, and where the contracts, if enforced, might have prevented the employee from earning a livelihood at his trade or business, courts have refused to enforce them. Instances of agreements which have been valid, and enforceable by injunctive process, are found in Harrison *v.* Glucose Sugar Refining Co.,[1] S. Jarvis Adams Co. *v.* Knapp,[2] Simmons *v.* Simmons,[3] Stone *v.* Goss et al.,[4] and Peabody *v.* Norfolk.[5] In the first-named case an employee who covenanted to serve the glucose company for five years, and during that time not to engage in any capacity in the same business within a radius of 1,500 miles from the city of Chicago, was enjoined from violating the agreement and from disclosing any information, trade secrets, methods, or processes of his employer. In Adams Company *v.* Knapp, a covenant, for valuable consideration, not to engage in any capacity in the manufacture or sale of certain castings for a period of 10 years in certain specified territory, and not to disclose or use in any way the processes or methods employed in the manufacture of such castings (apparently for a like period and within the same territory) was enforced by injunction. In Stone *v.* Goss, an express contract not to disclose a secret process for compounding a chemical preparation, was enforced, and in Peabody *v.* Norfolk, a contract not to divulge or use a secret process and secret machinery, was held valid and enforceable. Other cases are to the same effect.[6] On the other hand, where an employee contracted not to divulge "any information of any nature now known to him, or hereafter acquired by him during the term of this agreement, relating to or regarding any process of steel making or molding or treating steel that may have been, is now, or may be hereafter during the term of this agreement, used in the works of the Taylor Iron & Steel Co., and that he will at all times hold inviolate the treatments, processes, and secrets known to or used by him in the works of the said Taylor Iron & Steel Co.," a New Jersey court declined to grant an injunction as broad as the terms of the contract on the ground that it was in excessive restraint of trade.

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[1] 116 Fed., 304 (C. C. A., 1902).
[2] 121 Fed., 34 (C. C. A., 1903).
[3] 81 Fed., 163 (C. C., 1897).
[4] 65 N. J. Eq. 756 (1903).
[5] 98 Mass., 452 (1868).
[6] Fralich *v.* Despar, 165 Pa. St., 24 (1894); Westervelt & Westervelt et al. *v.* National Paper & Supply Co. 57 N. E., 552 (Sup. Ct. of Ind., 1900); Simmons *v.* Simmons, 81 Fed. Rep., 163 (1897).

"The contract," said the court, "not only forbids Nichols to disclose any secret of the complainant's, but also any knowledge he might have relating to the process of making steel that may have been used in the complainant's works, whether matter of common knowledge or not, whether known to him before he entered their employment or not; and it also requires him to hold inviolate not only the secrets of the complainant, but his own secrets, if he had any, and treatments or processes, whether secret or not. The necessary result of the enforcement of the contract would be that Nichols must either work for the complainant or remain idle; and, since the restraint is unlimited in point of time or place, he might, at the option of the complainant, after the expiration of five years be without employment for the rest of his life at the only trade he knows."[1]

While in a number of cases express contracts have been the basis of the suits, it is established that a court of equity will raise an implied promise not to divulge trade secrets where from the facts it appears that the method, process, formula, machinery, etc., sought to be protected is a trade secret; that the person divulging or using it occupied a position of trust and confidence; and that the secrets were imparted to or came to him in the course of his employment. In this connection the Supreme Court of Indiana said:

It is evident from the authorities cited that if a person employs another to work for him in a business in which he makes use of a secret process or of machinery invented by himself, or by others for him, but the nature and particulars of which he desires to keep a secret, and of which desire on the part of the employer the employee has notice at the time of his employment, even if there is no express contract on the part of the employee not to divulge said secret process or machinery, the law will imply a promise to keep the employer's secret thus intrusted to him; and any attempt on his part to use the secret process or machinery, or to construct machinery for his own use as against the master, or to communicate said secret to others, or in any manner to aid others in using the same or in constructing machinery will not only be a breach of his contract with his employer but a breach of confidence and a violation of duty which will be enjoined by a court of equity.[2]

On the same point a New York court declared:

By a careful reading of the various decisions upon this subject it will be seen that some are made to depend upon the breach of an express contract between the parties, while others proceed upon the theory that where a confidential relation exists between two or more parties engaged in a business venture the law raises an implied contract between them that the employee will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets thus acquired is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene.[3]

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[1] Taylor Iron & Steel Co. *v.* Nichols, 69 Atl., 186 (N. J. Court of Errors and Appeals, 1908).

[2] Westervelt & Westervelt *v.* National Paper & Supply Co., 57 N. E., 552 (Sup. Ct. of Ind., 1900).

[3] Eastman Kodak Co. *v.* Reichenbach, 79 Hun. 183, 193 (N. Y., 1894).

In a leading case on this subject the Supreme Court of Michigan observed:

It is argued in this case that there is no express contract shown, and that an implied contract is not such a one as will be enforced. We think the testimony discloses very clearly an express agreement between the employer and the employed, but if it may be conceded that the only agreement is an implied one, growing out of oral statements taken in connection with the facts and circumstances surrounding the business, the parties, and their acts, still, if it is clearly established by all that was said and done that the secrets confided to the defendant were not to be disclosed by him to others and were not to be used by him except when he was in the employment of those who imparted to him the secret or their legal representatives, and that was one of the conditions of his employment, we do not think it would make any difference in the principle involved.[1]

In New York the same principle is clearly set forth in the following language:

The facts in this case differ somewhat from those in the Reichenbach case, in that there was no written agreement entered into between these parties by which the employees undertook to give to their employers exclusive right in or control over any invention discovered by or disclosed to the former, but we are unable to see how this strengthens the defendants' contention. In the case cited there happens to be an express contract, but, nevertheless, it is asserted in the opinion of the court—and such is unquestionably the correct rule—that the law raises an implied contract that an employee who occupies a confidential relation toward his employer will not divulge any trade secrets imparted to him or discovered by him in the course of his employment. * * *[2]

Other cases sustain the same proposition.[3]

Parties who may be enjoined.—Courts will enjoin the use or disclosure of trade secrets not only by the employee but also by anyone coming into the possession of the information with knowledge of or means of knowing its confidential nature or of the confidential character of the employment of the person from whom it was secured.[4] It has been held, however, that if a secret process has been acquired in good faith without any knowledge of another's prior right thereto, or of any facts which would put the person so acquiring the secret on notice thereof, the use of the process or formula will not be enjoined. Thus where the owner of a secret formula for compounding an opium cure sold the same to plaintiff and contracted not to use it or to communicate it to anyone else, but nevertheless subsequently sold it to defendant, it was held that the

[1] O. & W. Thum Co. *v.* Tloczynski, 38 L. R. A., 200 (1897).

[2] Little *v.* Gallus, 4 N. Y. App. Div., 569, 574 (1896).

[3] Stone *v.* Goss et al., 65 N. J. Eq. 756 (1903); H. B. Wiggins Sons' Co. *v.* Cott-A-Lapp Co., 169 Fed., 150 (1909).

[4] Tabor *v.* Hoffman, 23 N. E., 12 (1889); Eastman Kodak Co. *v.* Reichenbach, 79 Hun, 183 (1894); Westervelt et al. *v.* National Paper & Supply Co., 57 N. E., 552 (1900); Eastern Extracting Co. *v.* Greater New York Extracting Co. et al., 126 N. Y. App. Div., 928 (1908); Peabody *v.* Norfolk, 98 Mass., 452 (1868); Stone *v.* Goss et al., 55 Atl., 736 (1903); Macbeth *v.* Schnelbach et al., 239 Pa., 76 (1913).

latter should not be enjoined from using it, there being no evidence to show that he had any knowledge of plaintiff's prior purchase of the formula or right to manufacture the preparation.[1] So where a plaintiff had been given certain secret formulæ by the administrator of one Dr. Spencer, and the gift had subsequently been ratified by his administrator de bonis non, and the latter had afterwards conveyed the secret formulæ to the defendant, an injunction restraining defendant from using the formulae was denied.[2] On the same state of facts an injunction was refused at the prayer of defendant in the earlier case to restrain the former plaintiff from using the formulæ.[3]

Section 5. Betrayal of confidential information.

Closely related to the law of trade secrets, if not part of it, and based on the same principles of equity, is the protection of confidential information of any character communicated to or acquired by an employee in the course of his employment, though the information may not relate to secret processes, formulæ, machinery, etc. As in the case of disclosure of trade secrets, the courts have said that competition of this character is "unfair" or "inequitable." Thus, in New York, where an employee resigned, entered the service of a competitor, and proceeded to solicit the business of those persons whom he had solicited in his former employment, the court said:

> In recent years there has been developed, by the adjudication of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition, and if we correctly interpret these decisions, a court of equity stands ready to restrain such acts.[4]

In a later case, involving practically identical facts, the same court said:

> It is unfair for the defendant to take advantage of knowledge imparted to him in confidence and use the knowledge to destroy plaintiff's business. * * * The defendant's use of confidential communications, communicated to him by plaintiff for its benefit, for a purpose and with an intent to secure plaintiff's customers as the customers of the plaintiff's rival and competitor, is so grossly unfair and unjust and the injury and damage inflicted upon plaintiff's property rights are so incapable of being ascertained, the conclusion is necessarily reached that plaintiff is entitled to the judgment and decree of this court * * *.[5]

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[1] Stewart *v.* Hook, 63 L. R. A., 255 (Georgia Sup. Ct., 1903). Cf Morrison *v.* Moat, p. 68.

[3] Covell *v.* Chadwick, 153 Mass., 263 (1891). See also Watkins *v.* Landon, 54 N. W., 193 (Minn., 1893).

[4] Witkop & Holmes Co. *v.* Boyce, 112 N. Y. Supp., 874, 878 (1908) ; affd. 115 N. Y. Supp., 1150.

[5] Witkop & Holmes Co. *v.* Boyce, 118 N. Y. Supp. 461, 465 (1909).

And again, by the same court, on similar facts:

This is a case not of malicious interference with contracts where equity refuses to interfere unless the services are of a unique and special character, but of unfair competition.[1]

AMERICAN DECISIONS.

A case in the Cincinnati Circuit Court in 1880 involves substantially the following facts: The complainant owned a bakery of established reputation, the chief product being a "salt-raising bread" called "Domestic," and employed one of the defendants, Kernan, to manage the business for her. The complainant alleged a conspiracy, in pursuance of which Kernan and all of her employees—bakers, drivers, hostler, and office boy—left her service in a body and started a rival establishment; that they held themselves out as making the same bread formerly made by her, and used her trade-mark "Domestic;" that the drivers formerly in the employ of the complainant who had driven her wagons on established routes and sold bread to regular customers known to the drivers but unknown to complainant were now selling the defendants' bread to complainant's customers. Complainant sought an injunction restraining the defendants from, among other things, interfering with her customers. At the preliminary hearing a demurrer was entered and overruled, the court holding that the complainant was entitled to an injunction restraining the defendants from taking her established business bodily from her in this manner. The decision in this case was based principally on two unreported cases in the same court, in the first of which a driver of a milk wagon who had left his employer and hired to a rival, was restrained from soliciting the patronage of the customers of his former employer on the same route over which he had driven for him, and in the second of which an injunction was granted to prevent an employee of one newspaper from selling its subscription list to a rival paper. After discussing these cases, the court said, in part:

It is an important question, and feeling clear upon principle that there is a right here which ought to be protected, I shall follow the decisions to which I have referred and leave it to the court of final resort to pass upon the question. I therefore find that the demurrer is not well taken; that the complainant * * * is entitled to have the defendants enjoined from using her trade-mark, and also from attempting to carry bodily from her to the rival establishment of Kernan, who, as I said, was a quasi partner at least, the business of the concern.[2]

A manufacturer of proprietary remedies employed as a confidential bookkeeper and clerk one Loven, under contract that he would not divulge any of the secrets of the business, the lists of customers, or

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[1] Witkop & Holmes Co. *v.* Great Atlantic & Pacific Tea Co., 124 N. Y. Supp., 956, 958 (1910).

[2] Smith *v.* Kernan, 8 Ohio Dec., Reprint, 32 (1880).

any other information. In the course of his employment Loven became familiar with the names of customers and the advertising and sales system, and on being discharged because of his threat to set up a rival business unless he were paid a larger salary he began the sale of medicines under names strikingly similar to those used by his former employer and to the latter's customers. At the suit of his former employer an injunction was granted restraining Loven from, among other things, "communicating the fact, in the sale of medicines, that he had been in the employ" of the complainant "and from pretending that he knew the ingredients of complainant's medicines, and from in any manner corresponding with complainant's agents or customers or soliciting them to buy defendant's medicines of any kind." In a subsequent proceeding to punish Loven for contempt for violating the injunction he was committed to jail, and on appeal to the Supreme Court of Illinois the judgment was sustained. It was contended on appeal that the injunction only prohibited the defendant from opening a correspondence with complainant's customers, and that if the customers initiated the correspondence defendant could carry it on and sell the medicine; but the court held that the injunction prohibited him from corresponding in any manner. It was pointed out, however, that the fact that defendant had already initiated correspondence with complainant's customers when the original injunction was granted might have influenced the form of the injunction. The prohibition from communicating in any manner with the customers thus put an end to sales to parties with whom he had commenced business in fraud of the plaintiff.[1]

In Vulcan Detinning Co. *v.* American Can Co.[2] the controversy centered around a secret process, but the case was ultimately decided on the principle that, aside from the question of the absolute secrecy of the process and the property therein it was inequitable for the defendants, who had learned the process while occupying fiduciary or confidential relations to the complainant, to use this process in competition. The complainant had purchased a secret process of detinning from a German concern, the Electric Tinfabriek Co., and organized two corporations to engage in the detinning business. One Assman, a defendant, had been a director in the complainant corporation, and while occupying this position secured a copy of the formula. He subsequently resigned and became president and a director of the defendant corporation, which erected two plants and engaged in the detinning business, these plants being erected and conducted by other individual defendants, former employees of the complainant corporation, who obtained a knowledge of the process during the course of their employment. It was contended by the defendants

[1] Loven *v.* The People ex rel. Fahrney & Sons Co., 158 Ill., 159 (1895).
[2] 67 Atl., 393, 396, 397 (N. J. Court of Errors and App., 1907).

that the process employed by complainant and themselves was not the property of the Tinfabriek concern, from which complainants had purchased it, but of one Goldschmidt, a German manufacturer, from whom the Tinfabriek company had fraudulently obtained it. Subsequent to the filing of the original bill, which was demurred to, but prior to the filing of the supplementary answer the defendants purchased the secret process from Goldschmidt for a nominal sum and urged this title in defense of the suit. On these facts the New Jersey Court of Errors and Appeals held that, even if the complainant might not have acquired a title to the process that was good as against the original discoverer, and even if the process itself might not be absolutely secret, the plaintiff was entitled to restrain its trustee and confidential employees and others charged with notice from using this process in competition with it. The following is an excerpt from the opinion of the court:

What I wish to point out is that the real gravamen of the complainant's bill, as amplified in the proofs, is not that the defendants are threatening to destroy the value of an absolute secret process by imparting it to the public, but that the defendants, while keeping the secret of the process to themselves, are making a use of it that is inequitable as to the complainant. In fine, the main and immediate need of the complainant, as shown by the testimony, is to be protected from the inequitable competition to which it had been exposed by a breach of confidence. Incidental to this relief and resting upon the same equitable jurisdiction is the restraint of the defendants from publishing the process itself, of which, however, there is no proof of any present threat or intention. Indeed, as long as the present state of affairs exists such publication would be equally injurious to both parties, and for the same reason, namely, because of the competition to which it would expose the business in which each is at present engaged. I am not suggesting that the complainant is not entitled to an injunction enjoining publication, for I think that it is; but I am now saying that the main ground for relief disclosed by the complainant's case is the existence of inequitable competition arising from a breach of trust, and hence referable to general principles of equity and not to those special doctrines by which unpatented secrets are protected. In the application of these general principles the secrecy with which a court of equity deals is not necessarily that absolute secrecy that inheres in discovery, but that qualified secrecy that arises from mutual understanding and that is required alike by good faith and by good morals.

* * * * * * *

The conclusion to which the foregoing considerations lead is that, entirely aside from the technical secrecy of the process or the abstract question of property therein, the complainant is entitled to have its trustee, his associates, and their servants restrained from using against the interests of the complainant the very process with which its trustee was intrusted for its benefit.[1]

Again, where a defendant, after making arrangements to start a rival business, had remained in the complainant's employ until he learned all their sources of supplies of manufactured products, made the acquaintance of all their salesmen, obtained a list of retail merchants under contract with them, and immediately on resigning proceeded to use this information to secure the complainant's busi-

[1] Cf. Lamb *v.* Evans, p. 69.

ness, a preliminary order was issued restraining the defendant from using the lists of merchants under contract with complainant, or from approaching any merchant on said list in conducting any competing business, and from approaching or interfering with salesmen of the complainant. On final hearing the restraining order was approved and continued in force for 10 months from the time it was first issued.[1] The defendant was also enjoined from using the complainants' catalogue or from copying it into its own catalogue.

A restraining order has also been issued at the prayer of a complainant engaged in the business of making loans, which it was alleged, required a unique, technical, extraordinary, special, and peculiar knowledge, as well as methods and forms for its conduct, enforcing an agreement by a former employee not to divulge anything "concerning the system, forms, or methods" of the business and enjoining defendant from sending letters to complainant's customers "relative to such matters" pending final determination of the case.[2]

In a case which came before a Federal court the plaintiff corporation had purchased the business of the New Haven Register Co., of which the individual defendants had been employees. Upon the purchase by plaintiff the defendants conceived the idea of forming a corporation and securing business formerly enjoyed by the New Haven company. One of the defendants, Hayes, who was still in the employ of the plaintiff, was instructed by it to call on a customer for the purpose of completing negotiations for a very large contract and was given the necessary facts regarding the transaction. Instead of calling on the company immediately, as directed, he temporized, and finally secured the contract for his own company then being organized. The plaintiff brought an action seeking, among other things, to recover the profits made by defendants on this contract, and judgment was entered for plaintiff on the ground that the information secured by Hayes in the course of his employment was the property of the plaintiff, which Hayes had no right to use for his own benefit.[3] On appeal the judgment of the lower court was sustained.[4]

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[1] Merchants' Syndicate Catalog Co. *v.* Retailers' Factory Catalog Co. et al., 206 Fed., 545 (D. C., 1913).

[2] Tolman *v.* Mulcahy, 103 N. Y. Supp., 936 (App. Div., Sup. Ct., 1907). See also Oxypathor Co. *v.* De Cordero et al., 149 N. Y. Supp., 513 (App. Div., 1914).

[3] International Register Co. *v.* Recording Fare Register Co. et al., 139 Fed., 785 (C. C., 1905).

[4] 151 Fed., 199 (C. C. A., 1907). Compare Debnam *v.* Simonson et al., 92 Atl., 728 (Md., 1914). In this case, the plaintiff had employed the defendant, Simonson, who was an architect, to prepare plans for an apartment house, and in the course of the employment had disclosed to him in confidence the particular piece of real estate upon which he proposed to build. While still in the plaintiff's employ, but before the latter had commenced negotiations for the purchase of the land in question, Simonson, acting in concert with the other defendants, himself purchased it. In spite of this breach of confidence on his part, the court sustained a demurrer to the complaint on the ground that it failed to allege that the plaintiff had commenced negotiations looking toward a purchase of the land.

Three comparatively recent cases, each brought by the Witkop & Holmes Co. and involving practically identical facts, have been decided by the New York courts. The plaintiff in these cases was engaged in retailing teas, coffees, etc., in Buffalo and other cities. The business was conducted principally by a house-to-house canvass by wagon, the drivers each being assigned a route over which they solicited business, delivered goods, and collected money. They were also furnished with trading stamps, and customers were supplied with blank books. With each purchase a number of stamps was given the customer, and when a book was filled it was redeemable in merchandise of specified value. The facts are given in more detail in the second of this series of cases. From the opinion in this case it appeared that the defendant, Boyce, entered the employ of the plaintiff, was assigned a route, and the former driver went over it with him, giving him minute instructions regarding the conduct of the business. A list of some 400 customers was also turned over to him. After about a year defendant resigned, returned to the company the card list of customers without keeping any memoranda or copy thereof, and entered the service of the Great Atlantic & Pacific Tea Co. in a like capacity. Immediately thereafter he began to solicit for his new employers the custom of persons with whom he had dealt while in plaintiff's employ. Wherever he could induce them to change their patronage he took up the partially filled stamp books issued by the plaintiff and in lieu thereof gave a like number of stamps of the Great Atlantic & Pacific Tea Co., thus saving the customers from loss in stamps by reason of the change. For several days he devoted his entire time to soliciting, the deliveries being made by other employees. In this case an injunction was granted restraining the defendant from calling upon those customers named on the lists or cards furnished by the plaintiff and used by the defendant for trade purposes. The court said in part:

From the foregoing brief recital of the essential facts established by the mass of testimony upon this trial, it clearly appears that the defendant has used for the benefit of others than the plaintiff information imparted to him by the plaintiff for the sole use and purpose of being used by the defendant for the plaintiff's benefit. There can be no escape from the conclusion that the names and addresses of this large list of customers of plaintiff residing in a well-defined, accessible territory, were placed in defendant's possession for the sole and only purpose of being used for plaintiff's benefit. They were part of the plaintiff's assets and business. These names and addresses were plaintiff's property. The plaintiff originated, made up, and secured these lists of names, and the trade naturally to follow the continuation of the business relations established by the intercourse of months and years between plaintiff and these customers was the property of the plaintiff. The trading-stamp books of the plaintiff that had been delivered to the plaintiff's customers having been partially filled with trading stamps furnished by reason of previous sales, and when completely filled redeemable at plaintiff's store in valuable merchandise, were of value to the plaintiff as an assurance of further trade and custom, and the names and residences of the persons holding such books were the property of the plaintiff and could not rightly be used by the defendant for his own benefit or the benefit of another. The defendant had no right, even though he is an infant, to use such information thus imparted to him in a confidential manner for the benefit of the plaintiff's competitor and to the plaintiff's damage. The obligation of an employee not to divulge or use confidential knowledge gained in the course of his employment to the prejudice of his employer is the foundation of every contract of hiring. It is unfair for the defendant to take advantage of knowledge imparted to him in confidence and use that knowledge to destroy plaintiff's business. The defendant furnished an employee of plaintiff's competitor with information of plaintiff's customers for the purpose, and which was used by such employee in making deliveries for such competitor, and he claims a right to personally go over the route, call upon each customer of the plaintiff whose name and address had been furnished him for the purpose of plaintiff's business, solicit orders for plaintiff's competitors, take up plaintiff's trading-stamp books from such customers, and issue a trading book of like stamp value to the customer furnished by plaintiff's competitor. If such conduct must be approved and adjudged to be right, proper, and lawful, there would seem to be no limitation upon the gross betrayal of confidence by an unscrupulous employee. The defendant's use of confidential communications communicated to him by plaintiff for its benefit, for the purpose and with the intent to secure plaintiff's customers as the customers of plaintiff's rival and competitor, is so grossly unfair and unjust, and the injury and damage inflicted upon plaintiff's property rights are so incapable of being ascertained, the conclusion is necessarily reached that plaintiff is entitled to the judgment and decree of this court permanently restraining the defendant from calling upon those customers named on the lists or cards furnished by the plaintiff and used by the defendant in October, 1908, for trade purposes.[1]

In the previous case[2] the facts are given in less detail, but appear to have been substantially the same as with those in the case just stated; and it was held that the plaintiff was entitled to an injunction restraining the defendant from interfering with the trade, custom, or good will of the plaintiff, and from making use of the knowledge or information gained from or contained in plaintiff's original list of customers, and from canvassing and soliciting orders from the plaintiff's former customers.

Finally, the Witkop & Holmes Co. sought to restrain the competing company from hiring drivers away from plaintiff for the purpose of having them solicit for defendant the patronage of plaintiff's customers formerly served by them.

The court was of opinion that an injunction should be granted, both on the equitable principles on which the Boyce cases were grounded and under the New York statute making it a penal offense to secure lists of customers of another. The court said, in part:

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[1] Witkop & Holmes Co. *v.* Boyce, 118 N. Y. Supp., 461, 464 (N. Y. Sup. Ct., 1909).

[2] Witkop & Holmes Co. *v.* Boyce, 112 N. Y. Supp., 874 (N. Y. Sup. Ct., 1908); affd. 115 N. Y. Supp., 1150.

It follows that defendant tea company and its officers and agents will be restrained from obtaining the benefit of plaintiff's lists of customers by hiring drivers away from the plaintiff for the purpose of having them canvass and solicit trade from the plaintiff's customers formerly served by them. That this was done in the case of Wahl and other drivers admits of no doubt.

The defendant tea company undoubtedly has the right to solicit the trade of plaintiff's customers and to obtain a list thereof by using opportunities for observation open to all. Plaintiff had no vested property rights in the trade of such customers. The vice of defendant's position is that it obtained the lists or copies thereof by hiring the drivers and made the lists of value to itself by sending the drivers to transfer, if possible, the trade from their former employer to their new employer. In other words, although the end might be lawful, the means adopted were unlawful. This is a case not of malicious interference with contracts, where equity refuses to interfere unless the services are of a unique and special character, but of unfair competition. * * * The conduct of defendants amounts to an unlawful obtaining and use of a trade list,[1] a carrying to a business rival the benefit of business secrets acquired while in the employ of plaintiff, and as such should be enjoined.[2]

A laundry conducted in some respects on the same lines as the tea business described above has also been protected by the courts from similar methods of competition. The company hired one Lozier to drive one of its wagons over an established route, supplying him with names and addresses of customers. Within a few months Lozier left plaintiff's employment taking with him the list of customers, and proceeded to solicit their patronage for a competitor. The driver was enjoined from in any manner soliciting or receiving laundry from any of the persons who were at the time defendant left its employ customers of plaintiff along the route worked by defendant, and on appeal the decree was affirmed by the Supreme Court of California.[3]

But in an early case in New Jersey the court of chancery refused to enjoin former employees of a plaintiff from violating a contract not to divulge to anyone where or from whom plaintiff purchased his materials and to whom he sold his goods or the prices at which he bought or sold, the court saying that an agreement of this nature might well be regarded, in the absence of anything to the contrary in its terms, as limited in its application to the time of the employment.[4]

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[1] Consolidated Laws (Penal Law, c. 40), sec. 553, subds. 6, 7.

[2] Witkop & Holmes Co. *v.* Great Atlantic & Pacific Tea Co., 124 N. Y. Supp., 956, 957 (N. Y. Sup. Ct., 1910).

[3] Empire Steam Laundry Co. *v.* Lozier, 130 Pac., 1180 (Sup. Ct. of Cal., 1913).

[4] Saloman *v.* Hertz et al., 40 N. J. Eq., 400 (1885). Compare Gorham Manufacturing Co. *v.* Emery-Bird-Thayer Dry Goods Co. et al., 92 Fed., 774, C. C., 1899; aff'd, 104 Fed., 243 (C. C. A., 1900). This was an action in form to restrain the defendants from passing off inferior silverware as that of the complainants' manufacture. At the trial, however, it appeared that the real purpose of the action was to prevent the defendants from selling the complainants' silverware at lower prices than those maintained by retail jewelers, and with this end in view several of the defendants' employees were asked, on cross-examination, from whom they purchased goods of the complainants' manufacture. The witnesses refused to answer, and their action in so doing was upheld on the ground that the information requested was a trade secret and that its disclosure was not essential to the proper maintenance of the complainants' suit.

A recent case which illustrates the principle that only information as to customers which is confidential in character will be protected is Boosing *v.* Dorman.[1] There the plaintiff, a wholesale dealer, sought to enjoin a former salesman from soliciting the trade of customers whose names and addresses and whose individual preferences and characteristics the latter had learned while in the plaintiff's employ. It appeared, however, that the customers in question were retail dealers in dairy products and were listed in a city directory, and also that they were not exclusive customers of the plaintiff, but dealt more or less constantly with the plaintiff's competitors. Upon these facts the court held, distinguishing Witkop & Holmes Co. *v.* Boyce,[2] that no injunction should issue, saying, as to the point under discussion:

> It is perfectly apparent that the 107 customers of the plaintiff whom the defendant had served while in his employ were prospective customers for any wholesale dealer in butter and eggs, and that their names and addresses were readily ascertainable from the public directory or from the public display of their business places.
>
> I can not see, therefore, how a list of such customers can be classified as a trade secret. The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated trade secrets which an employee is prohibited from using for his own benefit, after the termination of his employment, in the absence of an express contract.

Shortly before this the appellate division of the New York Supreme Court had refused to grant an injunction pendente lite, on the ground that it was not clearly shown that the information in question had been acquired in confidence.[3]

From the foregoing it will be seen that an important question in these cases is whether an employee can be enjoined from making use of knowledge of an employer's customers which he retains in his memory, or whether his obligation is merely not to use lists or copies thereof which he has in his possession in tangible form. In Witkop & Holmes Co. *v.* Boyce,[4] supra, the defendant, who had surrendered the list of customers and subsequently relied upon his memory in soliciting for a competitor, was nevertheless restrained from calling upon those customers named on the list which he had used as the complainant's employee. In like manner, in Stevens & Co. *v.* Stiles[5] and in Empire Steam Laundry *v.* Lozier,[6] although the defendants had in their possession copies of lists of their former employer's

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[1] 148 N. Y. App. Div., 824, 827 (1912). Cf. Lamb *v.* Evans, p. 69, and Louis *v.* Smellie, p. 70.

[2] 112 N. Y. Supp., 874 (1908) ; 118 N. Y. Supp., 461 (1909).

[3] Peerless Pattern Co. *v.* Pictorial Review Co., 132 N. Y. Supp., 37 (1911).

[4] 118 N. Y. Supp., 461.

[5] 29 R. I., 399 (1909).

[6] 130 Pac., 1180 (Sup. Ct. of Cal., 1913.)

customers, the decrees entered were sufficiently broad to prevent the use of any knowledge of these customers, regardless of the form in which it had been retained; but in Grand Union Tea Co. *v.* Dodds[1] the Supreme Court of Michigan announced a contrary rule. There the defendant, on leaving the complainant's employ, erased the names of the latter's customers which were on a list in his possession and refused to furnish another list to the complainant. It was held that, while the defendant should be compelled to supply the complainant with a list of its customers and should be enjoined from using any list or copy thereof which he might have made or retained, he should not be restrained from soliciting such of the complainant's customers as he might remember. On the latter aspect of the case the court said:

> We are of the opinion, however, that he (the defendant) can not be restrained from selling his commodities for himself or for any employer in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made. So far we think ourself well within equity jurisdiction, on general principles. The statute precludes an injunction restraining the defendant from soliciting any one to purchase his wares, notwithstanding he may remember that they were his patrons while he was employed by the complainant.[2]

The refusal of the court in this case to enjoin the defendant from soliciting the persons he had served for his former employer, being based on statute, the decision is probably not to be regarded as at variance with those in the New York and California cases except in the result.

There is also some difference of opinion among the courts as to whether an employee may be restrained from soliciting business from customers of a former employer, which customers he himself has obtained through his own efforts and industry. In the California and New York cases above noticed the view is taken that all customers which are obtained by an employee constitute a part of his employer's property. Thus, in Empire Steam Laundry *v.* Lozier, *supra*, where it appeared that the defendant while in the plaintiff's employ as a soliciting agent had added several names to the list of customers which had been turned over to him by the plaintiff, he was restrained from soliciting or receiving orders from any of the persons who were customers of the plaintiff at the time he left the plaintiff's employ and who were on the route formerly covered by him. As to the defense that he had obtained some of the customers himself, the court said:

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[1] 164 Mich., 50, 54 (1910).

[2] The statute referred to provides as follows: "All agreements and contracts by which any person, copartnership, or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession, or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void." (Public Acts, 1905, act 329, sec. 1.)

There can be no question, under the findings here presented, but that the defendant's agency was one of trust and confidence. His duties were to serve well the customers of the plaintiff, to increase the business of the plaintiff, to solicit new business and keep a complete and confidential list of all the customers. This list, even though in part prepared by him, was the absolute property of the plaintiff and was a valuable part of its property.

And in Witkop & Holmes Co. *v.* Boyce,[1] although it does not appear from the statement of facts that some of the customers in question were obtained by the defendant, such seems to have been the case, for the court said:

It is contended that the customers named in the complaint are the defendant's customers and not the customers of the plaintiff. In this view we can not concur. The contract with the defendant was one of hiring. He was employed and agreed to enter the plaintiff's service as a salesman, canvasser, collector, and delivery man, such employment to be at all times under the direction and supervision of the plaintiff. It does not need argument to show that, under such circumstances, every customer procured was a customer of the plaintiff, and not of the defendant.

The mere fact, moreover, that a confidential list of customers has in the first instance been compiled by an employee will not justify his disclosing it after his employment has terminated. Thus, in Stevens & Co. *v.* Stiles,[2] it was held immaterial that the only customers whose names had been copied by the defendant employee were those whom he as an optician had personally examined and whose visits he had himself recorded, the court saying:

Particular stress is laid upon the claim that the only names copied from the complainant's lists were those of customers whom the respondent personally examined, and it is argued to copy and use such a list of names is not a breach of trust or a breach of confidence. The argument does not commend itself to us. It is elemental that what is done by the agent in the course of his employment is in a legal sense done by the master himself. The respondent could have no more right to copy records made by himself while acting for the complainant than he would have to copy any other records of the complainant to which he had access.[3]

On the other hand, a different rule apparently prevails as to the obligation of general insurance agents as distinguished from that of ordinary agents or employees. Thus, where it appeared that such an agent had acquired a knowledge of those insured by his employer, not from the latter, but by reason of the fact that the policies had been secured by his own efforts, and that he was subsequently employed in a like capacity by a competitor, the court held that he should not be restrained at the instance of his former employer from soliciting its policyholders to transfer their insurance to the competitor. In reaching this conclusion the court observed:

The relation of Stein to the association was not a confidential one in the sense that he, by reason of it, acquired a knowledge of any business secrets.

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[1] 112 N. Y. Supp. 874, 880 (1908).
[2] 29 R. I., 399, 402 (1909).
[3] Cf. Martin *v.* Brown, pp. 71, 72.

The business had been largely built up by him and his employees, and that knowledge of the policyholders which would be useful to him, in the event of his representing, as agent, another company, was not confided to him by the association, if derived from it at all. Persons may have taken out policies in the association on account of personal friendship for Stein or confidence in his integrity, and there is no reason why he should not be allowed to solicit their business for another company which he represents, his agency for the association having been terminated. If this injunction was proper, then any insurance general agent whose contract as such had terminated could be restrained from further pursuing, in the interest of another company, the business of his calling among those with whom he might be able to do the best work, those whom he secured as policyholders in the company he first represented. Under this injunction Stein could not solicit, upon any ground or for any reason, the transfer of business from the plaintiff association to another company, though he had not so agreed in his contract with the association and though that contract was at an end; and that, too, in a case where he relied upon no information which had been communicated to him in confidence as a business or trade secret.[1]

To the same effect, upon substantially similar facts, is American Insurance Co. *v.* France.[2]

A case which illustrates the distinction made between general insurance agents and agents or employees in other lines of business and points out the basis upon which it rests is National Fire Insurance Co. *v.* Sullard.[3] The facts in this case were substantially as follows: In 1900 the defendant, Sullard, was acting as a general agent for several fire insurance companies, and while so acting received from one of the companies a book known as an "Expiration Register" which contained appropriate columns for entering policy numbers, names and addresses of policy holders, dates of expiration of policies, and the names of companies with which the policies were placed. In August of that year the defendant transferred his business to one Shipman, who became the agent of the plaintiff company and represented other companies as well. The plaintiff required Shipman to make out daily reports, on blanks supplied by it, of all business done for the company. By permission of the plaintiff's special agent, Shipman kept copies of these daily reports in permanent form in a "Daily report case." It appeared, however, that Shipman also entered in the expiration register information regarding policies written for the plaintiff as well as for other companies and that this information was commingled. About three years later Shipman sold his insurance business to the defendant, Sullard, including the good will thereof, the expiration register, the daily reports above referred to, and the "Daily report case." The plaintiff, however, refused to appoint Sullard its agent and demanded the duplicate daily reports

[1] Stein *v.* National Life Association, 105 Ga., 821, 826 (1899).

[2] 111 Ill. App., 382 (1903). But see Scottish Union and National Ins. Co. *v.* Daugaix, 103 Ala., 388 (1893).

[3] 97 N. Y. App. Div., 233 (1904).

and all other property belonging to the company. This being refused, this action was brought. On appeal from the judgment of the trial court the Appellate Division held that the plaintiff was entitled to possession of the duplicate daily reports and other printed or written memoranda belonging to it except the expiration register, and to an injunction restraining the defendant from using any information obtained exclusively from these documents in soliciting business from policyholders in the plaintiff company. The expiration register was held to be the property of the defendant, and as to this the plaintiff was not entitled to any relief. Regarding the nature of the business of a general agent for fire insurance companies and the ownership of the expiration register, the court said, in part:

The uncontradicted evidence tends to show, and the custom is so universal that the court may take judicial notice, * * * that the business of a fire insurance agent, at least in the smaller cities and towns, is to represent contemporaneously several insurance companies, and consists in soliciting persons to permit the agent to place insurance for them, or in being solicited by those desirous of being insured, for the same purpose. Only in rare cases do those who seek insurance express preference for any one fire insurance company over another or request that their insurance be placed in any particular company. The proof in this case tends to show that for the three and one-half years Shipman was the agent of the plaintiff and other companies he was rarely, if ever, requested to place insurance with any particular company, but exercised his own judgment in determining with which of the insurance companies he represented he would place the insurance. * * *

The only fair inference in this case is that the expiration book was originally manufactured for the purpose of enabling fire insurance agents, for their own purposes and not for the benefit of the insurance companies they represent, to keep track of their customers and the business of those customers with themselves. It was given to this defendant before he sold out to Shipman, six or more years ago, and contained a ruled column prepared for inserting the name of the insurance company with which the several policies of insurance were placed. This very circumstance seems to me to negative an intent upon the part of the insurance company which presented him with the book and an intent on the part of either the defendant or Shipman that the register was to be kept for any other purpose than the personal legitimate memorandum of the agent. * * *

* * * The point that the respondent makes, that Shipman kept this expiration register pursuant to instructions received from the plaintiff, is not well taken, for the reason that the instruction was to keep such a "report," to which attention had been called. * * *

It can not be said from any facts proved in the record and from the customary manner in which fire insurance agents conduct their business that such insurance companies have property rights in the renewal of the policy by the customer after the expiration of the term, nor did Shipman or the defendant at any time undertake with the plaintiff that they or either of them would renew policies which they had written for the plaintiff in the same company. The policyholder was free to renew with any company he might see fit or not to renew his policy at all. Shipman procured the insurance for the plaintiff in the first place from customers or patrons of his own. It is entirely lawful for the defendant, so long as he does not use for that purpose the information gathered exclusively from the plaintiff's property, to solicit these customers and patrons in behalf of any insurance company he may see fit, the plaintiff or any other, so long as he does not abridge the enjoyment by the plaintiff of his beneficial interest in existing contracts of insurance by inducing improper cancellations.

The same general principles appear to be recognized in Proctor & Collier Co. *v.* Mahin et. al. The complainant company, which conducted an advertising agency, had employed the respondent as the manager of its Chicago office. Prior to this the respondent had been engaged in the same business in Chicago, and on entering the complainant's service brought with him a large clientele. After about two years the business connection between the complainant and respondent was dissolved and the respondent, having reentered business for himself, solicited the patronage of advertisers with whom he had contracted on behalf of the complainant while in its employ and who were still under contract with that company. The court held that he had the right to solicit the patronage of clients whom he had solicited for the complainant, saying in part:

> The complainant charges that Mahin has enticed away its clients and has been procuring them to cancel contracts with the complainant not yet fully performed. As to this part of the charge, I hold that it was within Mahin's right, after the connection ceased, to not only receive, but to solicit, the patronage of these clients. Whether he could rightfully advise them to break existing contracts with complainant is another question. * * *
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> This bill is not analogous to those in which agents have been restrained from disclosing or making use of information obtained by virtue of their agency. The personality of the clients was not disclosed to Mahin by complainant. The clients were brought to complainant by Mahin. It may be an unfair advantage that Mahin is taking, but it is not an advantage to which he obtained access only through the avenues of his agency. It is, indeed, the character of advantage that rivals in business everywhere avail themselves of.[1]

The obligation not to disclose or make use of confidential information obtained in the course of employment has been held applicable to a director of a corporation. In Heminway *v.* Heminway[2] it appeared that the plaintiff was a stockholder and director in the M. Heminway & Sons Silk Co. and had also been engaged in organizing and was active in the management of a rival corporation. He had obtained the letter file of the former company and was engaged in taking memoranda from it when he was requested by the defendant, who was secretary of the company and in charge of its papers, to return the file. He refused to do so, whereupon the defendant forcibly took it from him, inflicting some personal injury, but using no more force than was necessary. In an action for assault the court held that the defendant was justified, and that the plaintiff as

[1] Proctor & Collier Co. *v.* Mahin et al., 93 Fed., 875, 876, 877 (C. C., 1899).

[2] 58 Conn., 443, 445 (1890).

director had no right to use his official position for the benefit of anyone except the corporation. The court by Andrews, C. J., said in part:

When the plaintiff was using the letter file for the benefit of his rival company, he was misusing his power and betraying his trust as a director of the M. Heminway & Sons Co. His being a director in that company, so far from being an excuse to him for refusing to return the letter file upon request, was an imperative reason why he should have complied with the request.

A similar doctrine was applied in Funck *v.* Farmers' Elevator Co. et al.,[1] where it was held that a corporation could lawfully refuse to transfer stock on its books to a purchaser who was a party to a conspiracy to boycott the business of the corporation and who desired to become a stockholder for the express purpose of discovering its sources of supply.[2]

The obligation not to disclose or make use of confidential information does not extend to ordinary business skill or knowledge which an employee may acquire during the course of his employment. These can not be taken away from him and he is free to use them as he sees fit.[3]

In Gossard *v.* Crosby [4] the court said:

The employee leaving an employer's service can not leave experience or knowledge there acquired, and, saving the matter of trade secrets already mentioned, these are legitimate additions to her personal equipment which she has a perfect right to use for her own benefit.[5]

ENGLISH DECISIONS.

The distinction between confidential information of a general character and technical trade secrets is not sharply drawn in England.

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[1] 142 Iowa, 621 (1909). See also Vulcan Detinning Co. *v.* American Can Co., 67 Atl., 393 (supra, p. 53).

[2] The following from the Report of the Commissioner of Corporations on the Petroleum Industry, Pt. I, p. 153, shows that this method of acquiring a competitor's secrets is not unusual:

"In the case of the United States Pipe Line Company, the Standard obtained the minority of the stock, and has been able to secure representation upon the directorate, so as to be familiar with the business secrets of its competitor."

See also brief for the United States in United States *v.* American Tobacco Co. et al., where it was urged that "one use of 'supply' companies was to obtain through them information about the business of competitors. The Mengel Box Co., for example, was required to report monthly the number of boxes which it sold to independents. (R. II, 663)." (On appeal from the Circuit Court of the United States for the Southern District of New York, p. 217.)

Cf. Gorham Manufacturing Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 92 Fed., 774, 779 (C. C. 1899), where the complainant sought to ascertain from the directors, managers, and officers of the defendant company the names of those from whom they purchased goods manufactured by the complainant, the object being to enable it to refuse to sell to defendant's vendors. The court ruled that such questions need not be answered for the reason that it was a trade secret, and the development of the fact was not essential to the proper maintenance of the complainant's suit. And see Jones *v.* Goode, 28 Ohio C. C. 475 (1906).

[3] Rogers Manufacturing Co. *v.* Rogers, 58 Conn., 356; 20 Atl., 467 (1890).

[4] 132 Iowa, 155 (1906).

[5] And see Boosing *v.* Dorman, p. 59.

Trade secrets and information regarding an employer's business imparted to employees or associates in confidence or necessarily acquired by them in the course of their employment are both protected by the English courts. The cases have not always been grounded on the same legal theory, but the result of the more modern cases has usually been to restrain the use or further communication of trade secrets or confidential information where to permit such use or disclosure would be in violation of an express or implied contract or would be a breach of trust or confidence. Thus Lord Justice Turner, in Morison v. Moat,[1] says:

> That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have, indeed, been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence; meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces, against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred. But upon whatever ground the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

In an opinion handed down in 1817 the court appears to have doubted its jurisdiction to restrain a party from violating a contract not to disclose a secret formula for medicine, regarding it as in the nature of a decree for the specific performance of the contract, but avoided deciding the question by stating that if the secret were already disclosed, the injunction would be of no use, and as to the threat to disclose it the defendant insisted that what he had to disclose was not a secret.[2] Three years later (1820), however, Lord Chancellor Eldon granted an injunction to protect secret methods of compounding veterinary medicines. The plaintiff had employed the defendant under an agreement by which he was to be paid a salary and be instructed in the general knowledge of the business, but was not to be taught the method of compounding the medicines. Subsequently when the defendant left the plaintiff's employ and started business for himself, the plaintiff discovered that he had surreptitiously copied the recipes from his book while in his employ and was compounding and selling the medicines with printed instructions apparently identical with the plaintiff's. An injunction was granted restraining the defendant from making use of or communicating the recipes and from publishing the instructions, the injunction being granted on the ground of a breach of trust and confidence by the defendant.[3]

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[1] 20 L. J. Ch. 513, 522 (1851).
[2] Williams v. Williams et al., 3 Merivale, 157 (1817).
[3] Yovatt v. Winyard, 1 Jacob & Walker, 394 (1820).

In the leading case of Morison *v.* Moat,[1] James Morison, the inventor and sole proprietor of certain medicinal preparations the formulas of which he had communicated to no one except his son John, entered into a partnership agreement with T. Moat for the manufacture and sale of the medicines. Contemporaneously with the partnership agreement each party entered into a bond in the penal sum of £5,000, the condition of Moat's bond being that he would not at any time divulge the secret of compounding the medicine, and the condition of Morison's that he would not divulge the secret to any person except such as he or Moat might introduce into the partnership under the partnership deed, or such person as Morison might introduce into foreign partnerships in which Moat had no interest. Subsequently James Morison introduced into the partnership his son John and one Alexander, the plaintiffs in this suit, and the defendant, a son of T. Moat, succeeded to his share in the business. After the death of T. Moat a deed of partnership was entered into between James Morison and the plaintiffs of the one part and the defendant of the other part, whereby the defendant became a sleeping partner, the Morisons to have the entire management of the business and the defendant to be allowed to inspect the books periodically. The deed contained a covenant that neither party would reveal any of the secret prescriptions, and in the event of so doing liquidated damages of £10,000 were specified. Subsequently James Morison died, bequeathing the recipe and prescriptions to his sons for life, directing their sale and disposition in a specified way after their death, and requiring them and everyone who should become entitled to the recipe under the bequest to give bond to his executors for £10,000 not to disclose it. Shortly after the expiration of the partnership the defendant began to make and sell the medicines under the name of "Morison's Universal Medicine," prepared by Mr. Moat, partner of the late Mr. Morison, the hygeist. The plaintiffs filed a bill seeking to restrain the use of the prescriptions, alleging that the secret had been communicated to the defendant by his father, T. Moat, in violation of his contract, and that defendant when he received the communication well knew that it was in violation of his contract; that the secret was never communicated to defendant by any of the plaintiffs, nor was he knowingly allowed to learn it while connected with the business, and if he did so learn it it had been done surreptitiously. The court found as a matter of fact that the defendant's claim that he acquired a knowledge of the secret recipe and formulas while a partner in the business was disproved, and it having been communicated to him by his father in breach of contract and trust, an injunction was granted restraining

[1] 20 L. J. Ch. 513, 527 (1851).

the defendant from selling any medicine manufactured by him under the title of "Morison's Universal Medicine" and from compounding any medicine according to the secret recipe, and from in any manner using the secret or any part thereof. After considering the evidence at great length the court said:

The case, then, in this stage stands thus: The defendant admits that the secret was communicated to him by T. Moat. His allegation that he acquired a knowledge of it by acting as partner in the concern is disproved; and it is shown that if he did so, he did so surreptitiously. The question, then, is whether there was an equity against him; and I am of opinion that there was. It was already a breach of faith and of contract on the part of T. Moat to communicate the secret. The defendant derives it under that breach of faith and of contract, and I think he can gain no title by it. * * * The cases of Tipping *v.* Clarke and Prince Albert *v.* Strange shew that the equity prevails against parties deriving their knowledge under the breach of contract or duty. It might, indeed, be different if the defendant was a purchaser for value of the secret, without notice of any obligation affecting it; * * *.[1]

One Darley sold to Hagg his business of manufacturing "Government carbolic disinfectants," covenanting not to disclose the process, which was secret, or engage in such business for 14 years. Subsequently Darley established a similar business under the name of "The Old Government Sanitary Co." In a suit by Hagg to restrain Darley from carrying on the business, the covenant was held to be reasonable and enforceable.[2]

An employee of a company engaged in the manufacture of typewriter ribbons and carbon papers covenanted, among other things, that he would not "at any time after the termination of this agreement * * * use for his own benefit or communicate any of the formulæ or processes used by the company in the manufacture of its products or the secret machinery used by them to any person, firm, or corporation," and would not "within the British Empire or the Continent of Europe * * * directly or indirectly * * * as agent or employee enter into or be engaged" in the same business for a period of five years after he left the employment of the company. On proof that he had entered the employ of another company engaged in the same business and that he had in his possession a drawing of his former employers' secret machine, memoranda of their cost of production, etc., an injunction was granted in the words of the covenant.[3] Likewise where an employee of a company engaged in manufacturing amber size by a secret process had been informed on entering the service of the company that the process was secret, but on acquiring an imperfect knowledge of it entered the employ of a competing concern and was attempting to use the process and to secure the parts with which he was not familiar from the original inventor

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[1] Cf. Stewart *v.* Hook, p. 51.
[2] Hagg *v.* Darley, 47 L. J. Ch., 567 (1878).
[3] Caribonum Co. (Ltd.) *v.* Le Couch, 109 L. T., 385, 587 (1913).

who had sold it to the plaintiff, an injunction was issued, the court not being satisfied that the defendant did not know the process within small limits of error.[1]

A company engaged in the manufacture of fire engines employed a draftsman, who, just prior to leaving their employ, made a table of the dimensions of the engines manufactured by the complainant, which he took with him to his new employers. An injunction was granted restraining the former employee from publishing or communicating the table or its contents, the decree also requiring a statement from the new employers, named as defendants, disclaiming any intention of publishing or using the table.[2] So, former employees of the publisher of a trade directory, consisting principally of classified advertisements, have been restrained from using, when subsequently employed by a competing company, blocks or cuts and other materials made up while in the employ of the plaintiff and for his use.[3]

Kay, L. J., said in this case:

> I think therefore that the doctrine does extend to every case in which a man has obtained materials—and I use that word advisedly, because it would be very difficult to grant an injunction to prevent a man using his knowledge—while in the position of agent for another, and which were obtained by him in the course of that agency, and to use for the purposes for which his principal had employed him. In such case it is not going too far to say that he shall not use those materials for any other purpose than the purpose for which he was employed to obtain them; and the employer, if he can make out that the intended use is one which would tend to damage him, has a distinct right to an injunction against the agent. * * *
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> Even if it were established that the principal could not prevent anybody else in the world from publishing or using these materials which the plaintiff wishes to prevent the defendants from using, that would be no answer to the plaintiff's claim for an injunction against the defendants, because the defendants, from the position in which they were, are put under a duty toward the plaintiff not to make this use of the materials.

Where the owner of a game farm employed a manager under contract that he would not disclose any information concerning the construction of the hatcheries, etc., and that he would treat everything in connection with the business as confidential, the court ordered the manager to return copies of his former employer's lists of customers, which he had surreptitiously taken when leaving to set up in a similar business for himself, and gave judgment for £150 damages for the injury caused by the use of the lists.[4]

In Louis *v.* Smellie,[5] the plaintiff, a process server, was granted an injunction restraining a former employer who entered the same busi-

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[1] Amber Size & Chemical Co. *v.* Menzel, L. R. (1913), 2 Ch., 239.
[2] Merryweather & Sons *v.* Moore, 61 L. J. Ch. Div., 505 (1892).
[3] Lamb *v.* Evans, 62 L. J. Ch. Div., 404, 412 (Court of Appeal, 1892).
[4] Robb *v.* Green, L. R. (1895), 2 Q. B. Div., 1, 315.
[5] 73 L. T. 226 (1895).

ness "from making use of any copies or extracts from the plaintiff's register of agents, or index, or any memoranda made or obtained by the defendant when in the plaintiff's employ relating to any person named in those books or either of them." Discussing the limit to which the injunction should go, Lindley, J., said: "That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do so."[1] The injunction also prohibited the defendant from using copies of plaintiff's forms taken while in his employ. In Hamlin *v.* John Houston & Co.[2] the defendant, a competitor of the plaintiff, was held liable in damages for bribing the latter's employee to supply him with confidential information regarding his employer's business where he was under contract not to disclose such information.

In a recent case the facts were substantially as follows: One Boyce had entered the service of the complainant, dealers in mineral and aerated waters, as a traveling solicitor under a written contract that he would not "at any time hereafter, without the complainant's consent, disclose any of the trusts, secrets, accounts, or dealings of or relating to the business of the company." After about three years complainant gave him 30 days' notice that his services would be discontinued, and he thereupon opened correspondence with a competing house looking to employment, advising them of towns he had covered for complainant and stating that he could introduce some excellent accounts. This correspondence was followed by an interview, with the result that two days after Boyce left complainant's employ he started on the road for the rival company. He immediately supplied his new employer with the complainant's discounts and the names and addresses of their customers secured from memorandum books taken when leaving complainant's employ, and by circular and personal solicitation secured the trade of many of these customers. Complainant brought suit against Boyce and his employers, and it was proven at the trial that the latter had notice of Boyce's contract with the complainant. An injunction was granted commanding the defendants to deliver up the memorandum books containing the names and addresses of complainant's customers and restraining them from using the same or parting with them except to complainants. Damages were also awarded against both Boyce and his employers.[3]

In Prince Albert *v.* Strange[4] the defendant, who had in some unknown manner acquired a collection of certain etchings made by the plaintiff and Her Majesty, the Queen, and of which they had im-

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[1] Cf. Boosing *v.* Dorman, p. 59.
[2] L. R. (1903) 1 K. B., 81.
[3] Summers *v.* Boyce et al., 97 L. T., 505 (Ch. Div., 1908).
[4] 1 Macnaughton & Gordon, Ch. Repts., 25 (1849).

pressions made for their own private use, was enjoined from making engravings or copies of the etchings and from publishing or selling a descriptive catalogue of them. The decision in this case is grounded chiefly on the plaintiff's property in the unpublished etchings, but the court said that the "case by no means depends upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiffs to injunction." And where a defendant, being employed by the complainants to make copies of a drawing for them, surreptitiously made copies for himself also and sold them in competition with the complainant, it was held that he was entitled to an injunction and damages for the breach by the defendant of a covenant, implied in his contract to do the work, not to make copies of the drawings for himself or to sell in competition with the owner.[1] In Abernathy *v.* Hutchinson[2] the defendant was restrained from publishing in his periodical the Lancet what purported to be verbatim reports of the plaintiff's lectures on surgery, on the ground that the defendant could only have procured the lectures through a breach of contract by some pupil not to publish for profit, and therefore in fraud of complainant's rights.

The character of the information, the disclosure of which was made the basis of an action in the Canadian courts, is of especial interest. The Copeland-Chatterson Co. was the manufacturer of what was known as "the loose-leaf business systems of book and account keeping." Certain former employees of the company organized a competing concern and, in order to procure subscriptions for stock in the new company, communicated to other of the plaintiff's employees and others information regarding the rate of profit in Copeland-Chatterson business and its cost of production; they also used patterns and measurements of blank sheets or leaves taken from its books. The company instituted suit for an injunction and damages. The court directed an inquiry into the amount of injury sustained by reason of the defendants having communicated to any other person or persons the plaintiff's rate of profit or its cost of production obtained by defendants while in the plaintiff's employ, and also by reason of the use by the defendants of patterns of sheets and records of sizes of blank sheets taken from the plaintiff's factory.[3]

The plaintiff in Martin *v.* Brown[4] had been employed by the defendants, Brown & Bigelow, to represent them exclusively in certain territory in Canada. The agency was to continue until January, 1910. While so employed the plaintiff prepared a mailing list of customers and prospective customers in his territory, to whom he sent

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[1] Tuck & Son *v.* Priester, L. R. (1887), 19 Q. B. Div., 629.
[2] 3 L. J. Ch., 209 (1825).
[3] Copeland-Chatterson *v.* Business Systems (Ltd.), 8 Ontario W. R., 888 (1906); 10 Ontario W. R., 819 (1907). Cf. Louis *v.* Smellie, *supra.*
[4] 14 Western Law Reporter, 237 (K. B., Manitoba, 1910).

defendants' advertising matter and whom he canvassed in the interest of the defendants. He also compiled a card index of 500 or 600 names for the same purpose, and purchased from the defendants' agent in another territory a similar list prepared and used by him for the same purpose. In addition to these he had prepared a list of probable purchasers in all parts of Canada. He also kept a ledger in which he entered the names of all persons from whom he obtained an order for the defendants, with particulars of prices, etc. Learning that the plaintiff was making arrangements to leave their employ, the defendants entered his office during his absence and removed the mailing list for the plaintiff's territory, both card indexes and the ledger, and destroyed the general mailing list for all Canada. The plaintiff brought an action for damages for the trespass, the destruction of the general mailing list and the conversion of the ledger and indexes. The court held that all of the records except the general mailing list belonged to the defendants, and therefore awarded damages for the destruction of the general mailing list only.

Section 6. Appropriation of values created by a competitor's expenditures.

A particularly subtle form of competition is the appropriation of the value created by a competitor's expenditures. Thus information as to current happenings and transactions, such as market quotations or the results of races, collected by telegraph companies for dissemination, has been protected by the courts from appropriation and sale by rival companies; and the making of phonograph records from the commercial records of another company has also been enjoined. These and other instances of appropriation of the results of another's expenditures and efforts are collected in the cases set out below.

AMERICAN DECISIONS.

The Western Union Telegraph Co. collected news at various points relating to current prices of securities, grain, etc., race-track, baseball, and other events, and delivered this news by rapid service to its patrons on an instrument commonly known as a "ticker." The National Telegraph News Co. had a ticker system of its own in the offices of its patrons and had been taking the news from the Western Union Co.'s tape and redistributing it, with the loss of only a few moments, to its own patrons. In an action by the Western Union Co. to enjoin this appropriation of its news the National Telegraph News Co. contended that the appearance of the news of appellees on its own ticker in the places of its patrons constituted such a publication as dedicated the news to the public and deprived the appellee of any further monopoly therein. The lower court, however, granted an injunction restraining the National Telegraph News Co. from using the matter copied from the Western Union Co.'s tape for a period of one hour from the time it appeared. On appeal the judgment of the lower court was affirmed, the circuit court of appeals holding that the Western Union Co.'s property in the news, which consisted largely in making it available within the shortest possible time after its happening, was entitled to the protection of a court of equity. The opinion of the appellate court is in part as follows (Grosscup, J.):

It is obvious also that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape and distribute the same instantaneously to their own patrons as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news as a business enterprise would cease altogether. Appellee could not in the nature of things procure copyright under the act of Congress upon its printed tape, and it could not against such unfair conditions, without some measure of protection, compete with appellants upon prices to be charged their respective patrons. And in the withdrawal of appellee from this business there would come death to the business of appellants as well, for without the use of appellee's tape appellants would have nothing to distribute. The parasite that killed would itself be killed, and the public would be left without any service at any price.

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Is service like this to be outlawed? Is the enterprise of the great news agencies or the independent enterprise of the great newspapers or of the great telegraph and cable lines to be denied appeal to the courts against the inroads of the parasite for no other reason than that the law, fashioned hitherto to fit the relations of authors to the public, can not be made to fit the relations of the public to this dissimilar class of service? Are we to fail our plain duty for mere lack of precedent? We choose rather to make precedent, one from which is eliminated as immaterial the law grown up around authorship, and we see no better way to start this precedent upon a career than by affirming the order appealed from.[1]

The Chicago Board of Trade collected at its own expense quotations on grain and provisions for future delivery and gave the information to the telegraph companies, the latter contracting to furnish it only to concerns approved by the board of trade, and who, furthermore, would enter into a contract with the telegraph companies and the board of trade not to supply the information to others. The Christie Grain & Stock Co., which, it was alleged, was the owner of bucket shops, succeeded in securing the quotations from outside sources. The board of trade instituted suit to restrain the Christie Co. from using and distributing the quotations, and on appeal the Supreme Court of the United States held that the complainant was entitled to an injunction as prayed.[2]

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[1] National Telegraph News Co. *v.* Western Union Telegraph Co., 119 Fed., 294, 296 (C. C. A., 1902).

[2] Board of Trade *v.* Christie Grain & Stock Co., 198 U. S., 236 (1905). See also Hunt *v.* New York Cotton Exchange, 205 U. S., 322 (1907); Board of Trade *v.* Hadden-Krull Co. et al., 109 Fed., 705 (C. C., 1901); Illinois Commission Co. et al. *v.* Cleveland Tel. Co. et al., 119 Fed., 301 (C. C. A., 1902); Board of Trade *v.* Cella Commission Co. et al., 145 Fed., 28 (C. C. A., 1906); Kiernan *v.* The Manhattan Quotation Telegraph Co., 50 How. Prac., 194 (1876).

Fonotipia (Ltd.) was the manufacturer of records for use on Victor and Columbia machines (talking machines and graphophones) and had contracts with opera singers and musicians to sing or play for them for the production of original matrices from which the commercial records were made. It had expended large sums in building up its business and in extensive advertising. The Continental Record Co. manufactured records made from a matrix produced by them from the commercial records of the Fonotipia Co. The Continental records were therefore copies of the original records, but were not duplicate originals in the sense of being made from the original Fonotipia matrices on which were recorded the sound waves of the singer at the time the song was sung. The Continental Co. advertised for sale records by the artists under contract with the Fonotipia Co. at greatly reduced rates and asserted that these records were identical with the original records. It was proved also that the records sold by the Continental Co. were not impressed upon as good material as those of the Fonotipia Co. and that slight imperfections appeared in the former company's records that were not apparent in the originals. An injunction was granted restraining the Continental Co. from selling copies of the Fonotipia Co.'s records, the court holding it to be a wrongful appropriation of the property of the latter concern. The following is an excerpt from the opinion of the court:

> * * * There would seem to be no doubt that property rights in connection with material objects may exist, and consist of incorporeal rights to enjoyment of the material object, and that equity will protect such incorporeal rights as property, and the same principle is involved in all copyright and patent litigation.
>
> 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 acquired 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 him only and diverts a part of the enjoyment or profits from the rights to the one complained of.
>
> *   *   *   *   *   *   *
>
> It can not now be determined how far such appropriation of ideas could be prevented; but it would seem that where a product is placed upon the market, under advertisement and statement that the substitute or imitating product is a duplicate of the original, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief.[1]

In another case the complainant manufactured acetylene gas, known as Prest-O-Lite for illuminating purposes on automobiles, which it sold in tanks of peculiar construction. Through contracts with dealers in automobile supplies, complainant had established

[1] Fonotipia (Ltd.) et al. *v.* Bradley, 171 Fed., 951, 960 (C. C. 1909). Cf. Victor Talking Machine Co. *v.* Armstrong et al., 132 Fed. 711 (C. C. 1904).

depots in all towns in the United States of over 2,000 inhabitants, where the purchasers of its tanks could, for a nominal sum, exchange them for others charged with gas. The excellence of this service, and the certainty that, no matter where the automobilist might be, he could readily exchange his exhausted tank for a charged one, made the complainant's article very desirable, and its sales at the time of the suit had grown to large proportions. A dealer had empty Prest-O-Lite tanks filled with Searchlight gas, made by a rival manufacturer, and sold them to customers or supplied them in exchange for empty Prest-O-Lite tanks. Although the refilled tanks were labeled in such a manner that the purchaser could discover that the tanks did not contain Prest-O-Lite, the labels were so designed and placed as to indicate that it was not the purpose that the purchaser should readily discover this fact. An injunction was granted which apparently restrained the defendants from filling and selling Prest-O-Lite containers without first obliterating therefrom the complainant company's name, the word Prest-O-Lite, and other marking identifying the container with the complainant company. The court said in part:

> The purchaser from the complainant gets more than the tank itself. He buys a right and opportunity to participate in the business system complainant has, at great expense, established and maintained. The especial value the tank has is its exchangeability, when empty, for a full tank essentially the same as the other. The popularity of Prest-O-Lite is without doubt due to this fact. By furnishing dealers in all parts of the country with charged tanks for exchange for its empty tanks, and advertising in many ways, an enormous demand has been created by complainant for its tanks and gas. This system of exchange is necessarily highly profitable to the complainant and, in a smaller measure, to the dealer, and performs a service to the user of the greatest importance. This service and the general knowledge that it may be had is the very life of complainant's business. To the tank, the title of which has passed from the complainant, is attached a quality—the quality of exchangeability practically anywhere in the United States. This quality the complainant has created and it belongs to the complainant and is a valuable asset in its business. * * *
>
> Fair competition between the two systems is excellent, but the acts complained of do not involve competition between the two systems. They involve a use by the defendants in the furtherance of their competitive business, and the appropriation, of something of value which actually belongs to their competitor. Instead of using their own system in competition with complainant's system, they actually make complainant's system the very medium through which their gas was introduced to complainant's customers.
>
> Clearly, it was not contemplated by the complainant and a purchaser in its business system that that system should itself be used to further the business of complainant's competitor; and it is equally clear that, if such use is permitted, the result would be a total destruction of the complainant's business system, for anybody anywhere could, by the use of Prest-O-Lite tanks, introduce Searchlight gas or any other similar illuminant, and eventually break down the complainant's business. This, not through the introduction of or the intent to introduce, a competing business system, but by using complainant's

system for its own destruction. The result of this would be not only disastrous to the business system built up by complainant, but necessarily destructive of any other similar system.[1]

In F. W. Dodge Co. *v.* Construction Information Co. et al.[2] the plaintiff was engaged in the business of collecting advance information in regard to the proposed erection of buildings, both public and private, the construction of sewers, waterworks, and other public works. This information was distributed daily to its customers in various lines of business, each customer receiving the information of value in his particular business. The subscribers for this service were thus early enabled to take the necessary steps to obtain contracts to do the work or furnish supplies. The plaintiff's contracts with its subscribers provided that the latter should hold all information furnished them in strict confidence. The defendant had been purchasing the information from the plaintiff's subscribers and selling it in competition. The court held that the plaintiff had a property in the information gathered by it at great expense, and that furnishing it to its subscribers did not constitute such a publication as to destroy the property therein.

In Simmons Hardware Co. *v.* Waibel et al.[3] the complainant, a wholesale dealer in hardware, distributed to its customers an illustrated catalogue. A similar catalogue was supplied its traveling salesmen, but for this purpose the catalogue was marked by a secret-code system, showing the cost and selling price of the articles. The defendant induced a traveling salesman of the complainant to let him have a copy of the salesmen's catalogue and transferred the secret code into his copy of the catalogue issued to retail dealers by the Simmons Co. After demand, the defendant returned to the complainant the two copies referred to above, but before doing so surreptitiously transferred the code and key into a third copy of the catalogue, which he secured from another concern. The principal object of the suit was to compel the surrender of this latter catalogue. The original order required that it be delivered to a receiver appointed by the court. This order was subsequently modified over the complainant's objection and the receiver directed to return the catalogue to the defendant. On appeal the latter order was reversed, the court holding that an injunction would be inadequate, as it would restrain the use of the information only within the jurisdiction of the court, and that to give complete relief the court could properly take the copy of the catalogue into its possession through a receiver.

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[1] Prest-O-Lite Co. *v.* Davis et al., 209 Fed., 917, 922 (D. C., 1913); affirmed 215 Fed., 849 (C. C. A., 1914).

[2] 183 Mass., 62 (1903).

[3] 11 L. R. A., 267 (S. Dak., 1891).

In another case the plaintiff, a manufacturer of steel cars, etc., delivered blue prints to customers for their information and use and also for the purpose of enabling them to order repair parts. The defendant company, organized by former employees of the plaintiff to engage in a competing business, secured copies of these blue prints from various railroads and was using them in the manufacture of cars. A court of equity compelled the defendant to surrender all copies of such prints to the plaintiff corporation.[1]

The Kellogg Toasted Corn Flakes Co. issued advertisements consisting of the picture of a young lady and the words "Wink at the grocer and see what you will get. K. T. C." The purpose of this advertising was to excite curiosity and attract attention to subsequent advertisements that would disclose the character of the goods advertised and the name of the manufacturer. Before the Kellogg Co. issued such explanatory advertisements, others were circulated by the American Rice Co. in such form as to create the belief that its goods were those referred to in the advertisements first issued. Justice Maddox, in the special term of the supreme court in Brooklyn, granted a preliminary injunction,[2] but the case was not carried to a final hearing.

A similar case was decided by the St. Louis Court of Appeals in 1913.[3] It was alleged that in accordance with an agreement with the Westminister Laundry Co., whereby that company was to have the exclusive use of the word "Stopurkicken," the D'Arcy Advertising Co. published that word upon signboards and printed cards, and that before the laundry company had time to determine upon a proper supplement to such advertisement to disclose its own name and identity, the Hesse Envelope Co., well knowing the word "Stopurkicken" was being used in the manner mentioned, printed and distributed a large number of cards bearing that word, followed by the name of the envelope company. Because of this use of the word the laundry company claimed damages from the Hesse Envelope Co. In reversing a judgment on a verdict awarding the plaintiff $1 damages the court said in part:

> It is obvious the petition states no cause of action against defendant, unless the word "Stopurkicken" is either a trade-mark in which the plaintiff enjoys a proprietary right or is possessed of a secondary meaning which by user has become a part of the good will of plaintiff's business; otherwise the word is publici juris and available to every person desiring to employ it identically as is the original phrase of which it is a contraction. From the affirmative averments of the petition it is entirely clear plaintiff enjoyed no trade-mark in the word under consideration. Indeed, the cause does not proceed upon that theory.
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[1] Pressed Steel Car Co. *v.* Standard Steel Car Co., 210 Pa. St., 464 (1904).

[2] Not reported.

[3] Westminister Laundry Co. *v.* Hesse Envelope Co., 156 S. W., 767, 768, 769.

Unfair competition consists in passing off or attempting to pass off upon the public the goods or business of one person as and for the goods or business of another.

* * * * * * *

The petition shows on its face that plaintiff had never used the word "Stopurkicken" in connection with the output of its laundry but, on the contrary, only employed it on billboards and cards otherwise blank as an attraction to arouse the curiosity of the public with a view of revealing the name of the advertiser (plaintiff) thereafter. It is clear enough that though defendant interposed and used the same word on cards bearing its name, as it did, no unfair competition appears when considered in the sense of the law on the subject, and, until plaintiff had obtained a right thereto by actual user in connection with the product of its laundry, the contracted word "Stopurkicken" must be regarded as publici juris and available to all who desired to employ it identically as was the original phrase "Stop your kicking." It is certain the D'Arcy Advertising Co. had no superior right to either the phrase or the contracted word, and that it could confer none upon plaintiff by its contract to employ it as a means of arousing the curiosity of the public for plaintiff's benefit. Though persons who have acquired a right in respect of words and phrases by user as above indicated may assign or contract such right to another in conjunction with the good will of the commodity the identity of which they point, it is obvious that an advertising agent may not appropriate any word or phrase he chooses by merely seizing it out of our vocabulary and confer an exclusive right thereto on another by a contract to employ it in aid of his business. We are advised of no principle of our jurisprudence on which the judgment in this case may be sustained, and the counsel for plaintiff have omitted to file a brief suggesting one.

ENGLISH DECISIONS.

Two comparatively recent cases in which the courts have protected the common-law right of property in certain classes of information are Exchange Telegraph Co. *v.* Gregory & Co.[1] and Exchange Telegraph Co. *v.* Central News Co. et al.[2] In the first of these cases the plaintiff had purchased the sole privilege of obtaining quotations on stocks and bonds from the floor of the London Stock Exchange. This information was sold by the plaintiff to subscribers to whom it was transmitted by telegraphic communication and reported on a tape in their offices, the plaintiff's contract with its subscribers providing that the latter would not sell or communicate the information to nonsubscribers. The same information was later printed in the plaintiff's newspaper called "The Exchange Telegraphic Company's Stock Exchange News." The defendant, who was an "outside broker," had formerly been one of the company's subscribers; but the stock exchange objecting to outside brokers having the information, the plaintiff declined to continue him as a subscriber. The defendant thereafter secured the information from one of the plain-

[1] L. R. (1896), 1 Q. R., 147. [2] L. R. (1897), 2 Ch. Div., 48.

tiff's subscribers and posted it in his office. That part of the injunction based on the plaintiff's common-law right in the information restrained the defendant from obtaining the same from the plaintiff's tapes or sheets of letter press and from continuing to induce any subscriber of the plaintiff to supply the information in violation of their contract.

In Exchange Telegraph Co. *v.* Central News Co. et al.[1] the defendants had obtained from one of the plaintiff's subscribers, under contract not to communicate it, telegraphic information regarding the results of horse races collected by the plaintiff company, and sold generally to such hotels, clubs, and news rooms as would subscribe for it. An injunction was granted restraining the defendant, the Column Printing Telegraph Syndicate, from surreptitiously obtaining or copying the information from letterpress sheets, tapes, or other documents of the plaintiff and from communicating the information so obtained. The proof against the other defendant appears to have been insufficient to warrant an injunction.

Section 7. Defamation of competitors and disparagement of competitors' goods.

The reported cases show that it is not unusual for one competitor to attempt to injure another by means of slander or libel or by disparaging his goods, and that this conduct has frequently interfered seriously with the business of the rival who has been attacked. Such practices, in connection with others, have been enjoined by the Federal courts in enforcing the Sherman law, and this method of injuring another engaged in a similar business has been in terms described as "unfair competition." Other courts, in addition to declaring such methods unlawful, in the sense that they constitute an infringement of the legal rights of another, have described the practice in substantially similar terms. Thus, Brett, J., referring to an alleged libel published by a newspaper concerning a rival, left it to the jury to determine whether one of them had not "gone beyond fair fighting and done that which brings him within the law";[2] and Vice Chancellor Malins referred to a manufacturer "practicing an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious."[3] Earlier in the same proceeding, referring to the untrue statements complained of, he said, "Is that fair trading?" and "That is unfair dealing."[4] He also referred to the proceeding as one

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[1] L. R. (1897), 2 Ch. Div., 48.
[2] Latimer *v.* Western Morning News Co., 25 L. T., 44, 46 (1871).
[3] Thorley's Cattle Food Co. *v.* Massam, L. R. (1880), 14 Ch. Div., 763, 780.
[4] L. R. (1877), 6 Ch. Div., 587.

"to prevent unfair trading, to prevent the issuing of a falsehood to the detriment of another."[1]

In Helmore *v.* Smith,[2] Lord Justice Cotton expressed the opinion that "no fair competition would justify * * * sending round a copy of the report in the Times, which, if taken alone, would lead the customers to think that the business was in a failing state or would shortly fail." Continuing, he said that "the issue of the circular was not an act of fair trade competition, but was done for the purpose of producing a false impression." Referring to the same facts, Bowen, L. J., observed: "It is contended that the business when under the management of a receiver and manager was no more entitled to protection from such fair competition than the business carried on by the original firm. If the acts complained of merely amounted to such fair competition, the argument would be unanswerable. But when I examine the facts I come to a different conclusion." The Supreme Court of Georgia was of the opinion that a certain publication exceeded the bounds of "legitimate competition," stating further that "it is not always easy to draw the line between what would be considered legitimate competition and a libelous publication,"[3] and a Federal circuit court was of opinion that an advertisement complained of exceeded "proper competition."[4]

The cases readily fall into three broad classes—(1) those in which the words complained of constitute a personal attack on another, imputing crime, dishonorable conduct, inefficiency, etc., or reflect injuriously on another's credit; (2) where the attack is made ostensibly upon the quality or value of goods, but in such a manner as to reflect also upon the character or conduct of the manufacturer or dealer; (3) where there has been no attempt to cast personal discredit upon a rival, the objectionable language being used solely in disparagement of his goods. Although this is not strictly speaking defamation, it is sometimes though inaccurately termed "trade libel," and it is often difficult to determine whether the words complained of are susceptible of a meaning which would bring the action within the rules applicable to the law of libel and slander.

AMERICAN DECISIONS.

PERSONAL DEFAMATION.—Certain publications alleged to have been made by a number of butchers in the Texarkana Independent, one charging a competitor with selling diseased and unwholesome meat and another containing what purported to be the evidence taken in

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[1] L. R. (1877), 6 Ch. Div., 588.
[2] L. R. (1887), 35 Ch. Div., 449, 454–456.
[3] Holmes *v.* Clisby, 118 Ga., 820, 824 (1903).
[4] Continental Insurance Co. *v.* Board of Underwriters, 67 Fed., 310, 323 (1895).

a complaint against the plaintiff for selling such meat, on which examination he had been discharged, were held libelous per se.[1]

The Union Associated Press brought an action against the Associated Press for libel, alleging, among other things, that the defendant sent to a large number of newspapers throughout the United States an article which charged, in effect, that the plaintiff and a certain named stockholder stole news from the defendant by tapping its wires, and that the said stockholder was a notorious wire tapper. The plaintiff recovered, and the judgment was satisfied. It was subsequently held that this judgment, which was based on the sending of the article, did not constitute a bar to another action brought by the same plaintiff against the editor of one of the newspapers which published the article.[2]

A company manufacturing cigar molds claimed damages on account of the publication by a competitor of an article in which the plaintiff company was charged with being a "trust." A verdict and judgment for the plaintiff were affirmed on appeal.[3]

An agent of the National Cash Register Co. caused the following article to be published in certain newspapers:

Mr. Charles H. Behre is no longer connected with the National Cash Register Co., and has not been since August, 1893. Any contracts made by him for the company will be void.

(Signed) J. Block, *Agent,*
National Cash Register Co.

Behre, who was engaged in the business of selling cash registers, brought an action against the National Cash Register Co.,[4] alleging that the publications were made for the purpose of injuring him in his business by bringing him into discredit by making the public believe that he was undertaking to act as the agent of the defendant, when, in fact, he was doing nothing of the kind. The declaration was dismissed on demurrer and the plaintiff appealed. The court held that the demurrer should have been overruled as to the paragraphs referring to the libel complained of, and said, in part:

The impression created upon the mind of anyone reading this notice is that the plaintiff is seeking to impose himself upon the trading public as the agent of the defendant, and that through that means he is attempting to defraud the persons with whom he comes in contact in connection with the sale of the goods of the character sold by the defendant.

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[1] Young et al. *v.* Kuhn, 71 Texas, 645 (1888); cf. Mowry *v.* Raabe et al., p. 91; and Blumhardt *v.* Rohr, 70 Md., 328 (1889).

[2] Union Associated Press *v.* Heath, 63 N. Y. Supp., 96 (1900).

[3] Sternberg Manufacturing Co. *v.* Miller, Du Brul & Peters Manufacturing Co., 170 Fed., 298 (C. C. A., 1909); cf. American Malting Co. *v.* Keitel, 209 Fed., 351 (C. C. A., 1913).

[4] Behre *v.* National Cash Register Co., 100 Ga., 213, 215 (1896).

An action was brought by Michael Davey against his brother to recover damages on account of alleged libelous statements made with respect to plaintiff's business methods. The facts were stated by the court as follows:

The defendant carried on the grocery and tea business at No. 2295 First Avenue, and the plaintiff thereafter opened a similar business at No. 2331 First Avenue. The defendant threatened that, if the plaintiff opened a rival establishment near the defendant's store, he would break up the business of the plaintiff; and after the latter opened the store the defendant caused to be printed and distributed broadcast 5,000 circulars, in which, after eulogistically describing the superiority of his wares and the advantage the public would derive by patronizing him, he said, of and concerning the plaintiff and his business methods, "that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood, advertises 'Davey's teas and coffees' with a view to deceive the public, and may sell an inferior article."

There was a verdict for the plaintiff, and the defendant moved for a new trial, which was ordered conditionally, because of excessive damages. With respect to the publication, the court said, in part:

The words, though cunningly devised and put together, taken in their plain and popular sense, that in which the readers were sure to understand them, bear the construction that the plaintiff was an unprincipled grocer; that he was dishonest in his business, for he advertised Davey's teas and coffees with a view to deceive the public; and that he sold inferior articles, this being one of the characteristics of unscrupulous traders. While the defendant had the undoubted right to praise his own wares, he had no right to single out the plaintiff and not only denounce his wares, but, in connection therewith, impugn his business integrity. Such a publication could have but one purpose, namely, to injure the plaintiff in his business, and it is, therefore, clearly libelous per se.[1]

An art dealer sold a certain painting and received part of the purchase price. A competitor subsequently informed the customer that the painting was not an original, stated that he could procure precisely the same painting for considerably less money, and that the customer had been "roped in." The customer returned to the store and refused to take the painting. The dealer brought an action for slander and brought error to review a judgment of nonsuit. In reversing the judgment the court said in part:

* * * It must be remembered that the plaintiff had been in the art business seven years, and that, therefore, it may be reasonably assumed that he knew the difference between an original painting and a copy. Regard must be had also to the rule that words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed. * * * Having regard to these considerations, I think the words spoken would naturally convey an imputation of fraud and dishonesty on the part of the plaintiff in effecting the sale of the painting. Even if the words themselves did not impart this imputation upon the plaintiff, the pleader has attached to the words such meaning by way of innuendo.[2]

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[1] Davey *v.* Davey, 50 N. Y. Supp., 161 (1898).
[2] Freisinger *v.* Moore, 65 N. J. L., 286, 288 (1900).

In Robinson *v.* Eau Claire Book & Stationery Co. et al.[1] it was alleged that the plaintiff was engaged in publishing a directory of the city of Eau Claire; that the defendants published in certain newspapers and in a circular letter an article, alleged to be false and defamatory, headed, "A warning," to the effect that "certain unscrupulous parties, in making a pretended canvass of the city for a directory, persisted in falsely representing" that the defendant company did "not intend to publish a directory"; that "these untruthful adventurers" knew full well that it was possible for them to secure business only on the basis of "misrepresentation"; that the defendants had repeatedly assured the public, through the press and otherwise, that they should continue to publish the city directory, and that their new volumes would be ready about the 1st day of the next July, after the annual moving season; that the people of the city had experience with "wandering fakirs, whose only capital" was "glowing promises and only object to capture their money"; that the people wanted the best directory, and that that would be the one issued by them; that it was "folly to pay money to irresponsible directory schemers," when they could be sure of a reliable work at the same or less cost. There was a verdict and judgment for the plaintiff, and the defendants appealed.

Although a new trial was granted because of errors in the trial the court observed that—

> * * * While the defendants were at liberty to inform the people of the city that they intended to publish a city directory, any representations to the contrary notwithstanding, yet that did not give them the privilege to publish an article tending to impugn the integrity, the truthfulness, and the honesty of the plaintiff in his trade and business. Such an article published under such circumstances is not privileged.

An action for libel was brought by the publisher of a certain newspaper against the publisher of another on account of an article charging the plaintiff with being a party to a secret conclave in which he sold the support and advocacy of the former newspaper to certain corporations for a large sum of money. A judgment given for the defendants on demurrer was reversed. The court said, in part:

> * * * Suppose the proprietors of the Call and Bulletin had announced in the columns of those papers that they had changed their course, and had negotiated a sale of their support and advocacy to the railroad corporations named in the complaint for the sum of thirty-odd thousand dollars; would such an announcement have exposed the proprietors to contempt or ridicule or have tended to injure them in their occupation? If not, there is no libel in the article complained of. If yea (and of this there can be no doubt), the article is foundation for an action.[2]

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[1] 85 N. W., 983 (Wis. Sup. Ct., 1901).
[2] Fitch *v.* De Young, 5 Pac., 364 (Sup. Ct. Cal., 1885).

A corporation publishing a trade journal brought an action against the owners of a rival journal on account of the publication of an article entitled "Hints to advertisers. This is from the fake Implement Trade paper published at St. Louis," followed by certain statements respecting the circulation of the plaintiff's paper. It was held that the use of the word "fake" necessarily tended to prejudice the plaintiff's business and was libellous per se.[1]

Hennessey & Bro. were insurance agents in Vicksburg, representing several companies. Helion Dickson represented several other companies, including the Traders Insurance Co. Mrs. Enright, the owner of a dwelling, insured the building through Hennessey & Bro. and the personal property was insured by the Traders Insurance Co. A fire occurred about 11 a. m., and in the afternoon Hennessey called upon the insured and an agreement was reached whereby the building was to be repaired at the expense of the company. A contract was immediately made with a carpenter who was to go to work at once. Two days after the fire Hennessey & Bro. published the following notice in a local paper:

> Quick settlement. Mrs. Enright's house was damaged by fire at 11 a. m. Tuesday; the insurance was settled at 5 p. m. same day through P. L. Hennessey & Bro., agency.

Two days later Dickson adjusted his portion of the loss, and thereupon published the following article:

> Loss paid in cash. We note card of Messrs. P. L. Hennessey & Bro., "Quick Settlement," of Enright loss, stating loss was "settled" same day as fire. We covered the furniture in this dwelling, and paid our loss cash without discount to-day, Saturday, May 19, as per receipt in full from Mrs. Enright, which we hold. Up to latest account the money for the Hennessey agency loss has not shown up. Moral: Insure in the Traders. Losses paid promptly, not "settled." Helion Dickson, general agent, Traders Insurance Co. * * *

Hennessey & Bro. brought an action[2] for libel, and appealed from a peremptory instruction to find for the defendant. This judgment was affirmed, the court saying, in part:

> By no construction, even the most strained, can we possibly hold the publication complained of to be libelous. While phrased in a misleading way, it nevertheless stated substantially the truth. * * * It was an advertisement, sharp and unfair probably, but certainly not libelous.

In an action for libel[3] a book dealer alleged that he advertised extensively throughout the United States, using the phrases "Millions of books, thousands of titles," "A trainload of books," "Books at the price of paper and printing," and "Bankrupt book bargains," as tending to show the number of books dealt in by him and the

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[1] Midland Publishing Co. *v.* Implement Trade Journal et al., 108 Mo. App. 223 (1904).
[2] Hennessey & Bro. *v.* Traders Insurance Co., 87 Miss., 259, 260, 264 (1905).
[3] Clarkson *v.* Book Supply Co. et al., 170 Ill. App., 86 (1912). Cf. Hubbock & Sons (Ltd.) *v.* Wilkinson, Heywood & Clark, p. 123.

low prices at which he sold the same. It was further alleged that the defendants, who were competitors, issued a catalogue containing such expressions as "There is no attempt to mislead," "We do not make impossible reductions from boosted, fictitous publishers' prices. We do not advertise books at the price of paper and printing, because it would not be true." The name of the plaintiff was not expressly mentioned. A judgment sustaining a demurrer to the declaration was affirmed by the appellate court, which failed to see how the words complained of could possibly be stretched so as to be held defamatory of the plaintiff. In this connection it was said:

To do so would subject any merchant advertising articles for sale as "genuine" or "well made" to an action for libel by other merchants, on the ground that the advertiser intended to charge them with selling articles which were imitations and poorly made. To do so would be to enlarge the meaning of words far beyond their natural and ordinary meaning and give them a meaning beyond that of which they are reasonably capable.

In a recent decision by the Court of Appeals of the District of Columbia[1] it appeared that James O'Donnell, a retail druggist, advertised Durham Duplex Demonstrator razors, ordinarily sold for 35 cents, for sale for 31 cents, and that other dealers reported this price cutting to the manufacturer. The latter, after an unsuccessful effort to induce O'Donnell to maintain prices, sent him a telegram threatening suit. This message was published by O'Donnell as a part of another advertisement again offering "Durham Duplex Demonstrator razors" at 31 cents. The advertisement contained also an illustration of a razor bearing the words "Durham Duplex," the name given by the manufacturer to a higher grade razor, which was sold in a case with a stropping attachment and several blades for the sum of $5. Subsequently the razor company published a facsimile of the O'Donnell advertisement, followed, in large type with the words "The above ad is a fraud," and, in smaller type, the following:

O'Donnell is not selling a Durham Duplex razor for 31 cents, as the wording on the handle indicates, but he is selling a working model known as the Durham Demonstrator for 31 cents. This demonstrator is put out by the Durham Duplex Razor Co. to demonstrate the exceptional qualities of its product—principally Durham Duplex blades—and it is sold for 35 cents to the public. This price does not pay the expense of manufacturing and handling. The Durham Duplex Razor Co. loses money on every sale of these demonstrator razors.

O'Donnell is not stating a fact when he says that the 31 cents is a fair price. A fair margin of profit is allowed each dealer, with the understanding that he advertise and demonstrate the qualities of the Durham Duplex razor, and any statement that O'Donnell makes to the effect that he is reducing the "cost of living" by saving you 4 cents on an article that is already sold at a figure below

[1] The Washington Post Co. and Durham Duplex Razor Co. *v.* O'Donnell, 43 Washn. Law Rep., 146 (1915).

the cost of production is merely a bid for your patronage and is evidently like the change he has made on the demonstrator handle—a palpable fraud.

Below is a list of legitimate dealers who have taken these demonstrators to advertise the qualities of our standard razors and blades.

(Here followed the names of five dealers.)

At the trial of an action for libel brought by O'Donnell, the court charged the jury, in part, as follows:[1]

Taking those two together, taking the picture and all together, the public could not be misled by saying it is intended to sell a $5 article for 31 cents, this only attempting to sell a 35-cent article for 31 cents, and the article is described as the "Durham Duplex demonstrator razor." So the court says that the defendants here had no right to publish an advertisement as this with reference to an advertisement such as O'Donnell had put in the paper.

* * * * * *

* * * The whole difficulty seems to have arisen, the whole trouble with the defendant, the Durham Duplex Co., over the fact that O'Donnell was cutting prices. It grew out of that rather than that he, purporting to sell an article that was worth $5 for 31 cents, which some of the evidence tends to show was the claim made. So that the court has taken the responsibility of telling you that this document as published is a libel, which, on its face, entitles the plaintiff here to some recovery.

A judgment on a verdict of $10,000 was affirmed by the court of appeals.

A commission merchant who had been in partnership with a minor sold his interest in the business to the latter and subsequently reentered the business as a competitor. He then sent postal cards to the customers of his former partner, reading as follows:

I drop you a line to let you know A. M. Hays, my successor in business, is not legally responsible for his contracts, as he is yet a minor under 21 years of age. A word to the wise is sufficient. * * * Store No. 118 South Water Street I shall occupy and do business. Would be pleased to hear from you. (Signed.)

In holding that this was actionable, the Appellate Court of Illinois observed:

When what was previously said is followed by the significant and proverbially precautionary words—"A word to the wise is sufficient"—the idea is at once conveyed that plaintiff is * * * wanting in honor and integrity as a business man and that those who should deal with him would suffer loss. That such publication was calculated to injure the plaintiff's character in business there can be no doubt, and that it did is specially averred in the declaration.[2]

A milk dealer in Milwaukee alleged that the defendant, a rival, wrote to a shipper who supplied him (the plaintiff) with milk, advising him to "look out" for the plaintiff, "as he does not pay any of his shippers anything and sells the milk and cream for about what it costs him, and the shippers are the losers." A judgment for the

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[1] Record, pp. 47, 48.

[2] Hays *v.* Mather, 15 Ill. App., 30 (1884).

plaintiff was affirmed by the Supreme Court of Wisconsin, which said, in part:

It does not appear that the defendant had any legitimate interest in the business conducted by the plaintiff, nor in the purchases made by him from the person to whom the letter was addressed, nor was he under any obligation or duty to make the communication, nor was the communication made in the interest of the public or good morals, but, on the contrary, the defendant wrote and published the letter as a mere volunteer, acting from motives of personal gain to be secured through the injury of a rival in business.[1]

An article was printed in two editions of the Omaha Daily Bee asserting, in substance, that the World-Herald had been maintaining for some time a precarious existence; that it was no longer able to meet its financial obligations; and that it was tottering, bankrupt, and about to pass out of existence. The story was told with much detail and was well calculated to convince the reader that the corporation owning the paper referred to was about to collapse. The World-Herald brought an action for the alleged libel and recovered.[2]

A light and power company engaged in business in Alabama filed a bill in a circuit court of the United States praying, among other things, that the defendant, a competitor, be enjoined from making, or giving out, for the purpose of injuring the credit and financial standing or business of the complainant, any statement to the effect that the complainant is insolvent, or in great financial straits, or on the verge of bankruptcy, or that it will very soon be out of business, or in the hands of a receiver, or that there are dissensions among its managing officers, or that it will not be able long to furnish electricity to its customers. The injunction was denied on the ground that the court was without power to enjoin slander.[3]

A merchant at Key West brought an action against a competitor, alleging that the latter, intending to harass, oppress, and ruin the plaintiff in his trade and business, falsely and maliciously stated that he had failed and gone into bankruptcy. A judgment for the plaintiff was affirmed.[4]

In Dudley *v.* Briggs[5] it was alleged in substance that the plaintiff had for many years compiled and published directories of various cities, towns, and counties, and had, after great labor and at great expense, acquired a large number of subscribers for the Bristol County Directory, which he published biennially; that he had acquired a valuable list of advertisers in said directory; and that according to his usual custom he would have published the directory

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[1] Brown *v.* Vannaman, 85 Wis., 451, 456 (1893).

[2] Bee Publishing Co. *v.* World Publishing Co., 82 N. W., 28 (Sup. Ct., Nebr., 1900).

[3] Citizens' Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 177 Fed., 553 (1909).

[4] Wolkowski *v.* Garfunkel, 65 Fla., 10 (1913). See also Newell *v.* How, 31 Minn., 235 (1883); Simons *v.* Burnham, 102 Mich., 189 (1894).

[5] 141 Mass., 582, 585, 587 (1886).

in 1885 but for the fact that the defendant and his canvassers and agents, in order to injure him, falsely and fraudulently represented to many persons, and particularly to the advertisers in plaintiff's directory and to subscribers thereto, that the plaintiff had gone out of business, that he had sold out to the defendant, and that the said canvassers and agents were compiling the materials for the plaintiff's directory the same as formerly, and thereby deceitfully and wrongfully induced the plaintiff's patrons to give the defendant their advertisements and subscriptions. It was further alleged that the plaintiff had thereby been prevented from compiling, publishing, and selling his directory in 1885, as he had always done, and that he had lost the profits he would otherwise have made, and had been put to great expense in preparing for the said compilation and publication until he learned of the acts complained of. A demurrer to this declaration was sustained and the judgment was affirmed on appeal. The court, by Field, J., said in part:

If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this, that he intended to publish a directory for 1885 whereby he expected to make profits, but by reason of the acts of the defendant he abandoned such an intention and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property.

* * * * * * *

The fatal objection to the present case is that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts, but this upon the principle stated in Bradley *v.* Fuller, ubi supra, and the cases therein cited, is not sufficient to support an action.[1]

Rucker & Co., representatives of certain fire insurance companies which were members of the Board of Fire Underwriters of the Pacific, caused the following advertisement to be inserted in the San Jose Mercury:

Have you a policy in any of the following companies? Home, of New York; Phœnix, of Hartford; Northwestern National; Continental, of New York; Franklin, of Pennsylvania; Williamsburg City, N. Y. If you have, bring them to our office without delay, as we have authority to cancel and rewrite them at any rate necessary to get the business.

(Signed) Rucker & Co.

It was claimed that this was a competitive retaliation for the act of the agent of the Continental Insurance Co. in cutting rates and soliciting the owners of a certain store in San Jose to cancel the policies of the "board" companies represented by Rucker & Co. A

[1] Cf. Sheppard Publishing Co. *v.* Press Publishing Co., p. 105; and Debnam *v.* Simonson et al., p. 55*n*.

restraining order directed against such advertisements was continued by McKenna, circuit judge, who observed that "the advertisement exceeds proper competition and advertises to the public that which is not true, to wit, that said Rucker & Co. had the right to cancel policies issued by plaintiff.[1]

A fire insurance company brought an action against a former employee, who it was alleged entered the service of a competitor and falsely represented to the plaintiff's policyholders that it had "gone out of the farm-insurance business," intending thereby to deceive the policyholders and induce them to cancel their contracts. It was further alleged that policyholders had surrendered their policies for cancellation and that the plaintiff was damaged by being compelled to pay out certain money in refuting the false statements, etc. The defendants filed a demurrer which was sustained. In affirming the judgment the court said in part:

> In neither count is it averred that the retention of said policies in force was of any pecuniary value to the plaintiff, or that upon said cancellations being perfected plaintiff would be compelled to return any part of the premium received therefor, or that their cancellation would result in any damage or pecuniary loss to it. We can not assume that the risks covered by the policies in question were desirable or that the premiums paid in consideration of their issue made them so or that profits and benefits would have been derived therefrom if continued in force. While the counts aver that plaintiff was entitled to the enjoyment of all the profits and benefits to be derived therefrom and that the defendant intended to deprive the plaintiff thereof, there is not any direct and positive averment that plaintiff was enjoying any benefit or profit therefrom or that it was deprived of the loss of such benefit or profit. Although it may be that from the fact as averred, that plaintiff paid out money to keep said policies in force, it can be inferred that their continuance in force was a pecuniary benefit and profit and their cancellation a corresponding detriment or loss, this we think is insufficient.[2] * * *

A corporation engaged in manufacturing school seats brought an action against a competitor to recover damages alleged to have been caused by reason of the publication of false and malicious statements to the effect that the defendants had brought suit in the United States court against the plaintiff for an infringement of a patent, had secured an injunction against it, and closed it up. It was alleged that the defendants published such statements in the newspapers and had caused such papers to be circulated among persons likely to purchase plaintiff's goods; that letters to the same effect had been mailed broadcast throughout the country to every person whose name they could learn and who was negotiating with the plaintiff for the purchase of its goods. The trial court directed a verdict for the defendants. On

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[1] Continental Insurance Co. *v.* Board of Underwriters of the Pacific et al., 67 Fed., 310, 312, 323 (C. C., 1895).

[2] American Insurance Co. *v.* France, 111 Ill. App., 382, 386 (1903).

appeal the judgment was reversed and a new trial ordered. The court observed that—

words spoken or written injurious to a person in his business, and false and malicious, are actionable per se, and special damages need not be proved. The declaration alleges both general and special damages, and some testimony was given on the trial tending to prove both.[1]

In Green *v.* Davies[2] it was charged that the defendants entered into an agreement to injure the plaintiff in his good name and reputation for the purpose of destroying him as a competitor in business by causing customers of the plaintiff to believe that he was insane and not capable of attending to his business or affairs, and that he was an irresponsible person and ought not to be at large. Demurrers to this complaint were held properly overruled.[3]

The unsuccessful bidder for a contract to build an ice machine wrote to the company awarding the contract urging a reconsideration of the matter, and among other things referred to the successful competitor as a "second-hand dealer," using inferior material and running a "scab establishment," without a mechanic in the shop. On appeal from a verdict and judgment for the complainant it was held that the letter was libelous per se.[4]

The proprietor and vender of "Brandreth's Vegetable Universal Pills" complained that Lance, a former employee who had opened a rival establishment, had caused to be printed and intended to distribute a pamphlet entitled "The Life, Exploits, Comical Adventures, and Amorous Intrigues of Benjamin Brandling, M. D. V. P. L. V. S., a distinguished pill vender, written by himself," etc. The pamphlet represented the author as having passed through the various and successive grades of sailor, confectioner, painter, brass founder, peddler, jeweler, bagman, to a pill vender, money broker, author, poet, and dramatist; until he had risen to the rank of a wholesale manufacturer of that rare medicine upon which the smiles of fortune had been so freely bestowed. It is averred that this was a false, malicious, and highly injurious libel upon the complainant, and was intended to libel him and bring him into public disgrace and contempt, although in the title page the person whose life it purported to be was called Brandling instead of Brandreth. Complainant prayed for a perpetual injunction restraining the publication of such pamphlet or any part thereof. A demurrer interposed by the

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[1] Haney Manufacturing Co. *v.* Perkins et al., 78 Mich., 1, 10 (1889).

[2] 83 N. Y. App. Div., 216 (1903).

[3] See also Southwick *v.* Stevens, 10 Johns., 443 (N. Y., 1813), where the editor of the Albany Register recovered damages in an action against the editor of the Ontario Messenger, based on an article which appeared in the latter paper to the effect that Southwick was insane and had recently been restrained by his friends.

[4] Penna. Iron Works Co. *v.* Henry Voght Machine Co., 96 S. W., 551 (Ky. Ct. of Appeals, 1906).

defendant was sustained by Chancellor Walworth on the ground that the court of chancery had no jurisdiction to restrain the publication of a libel as such. The court said in part:

As the publication of the work, * * * which is sought to be restrained, can not be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. * * *[1]

DISPARAGEMENT OF GOODS AS AN INDIRECT ATTACK ON MANUFACTURER OR DEALER.—With respect to this form of defamation it was observed in the House of Lords by Halsbury, L. C., that "it is quite possible to make a reflection, which by the mere form of expression, would seem to be only a criticism of goods, but nevertheless would involve a reflection upon the seller or maker. Could it be gravely argued to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel on him in the way of his trade; and, if so, would it not be a mere juggle with language to alter the form of that declaration and to say that all the fish in A's shop is decomposed; or to say of a bakery that such a baker's bread is always unwholesome? In each of these cases you could adopt a form of speech which would seem only to deal with the articles sold or manufactured, but in each case it would tend to, and probably would succeed in, destroying the trade of the person thus referred to."[2]

A druggist brought an action for an alleged libel, published by competitors, consisting of an article stating in effect that certain oil sold by the plaintiff was not genuine; that he had caused the genuine oil and wrappers to be counterfeited and then sold the spurious article as genuine. This article was held libelous.[3] It may be observed, however, that the objectionable publication not only disparaged plaintiff's goods but also directly charged personal misconduct in business.

Members of a butchers' union in California issued circulars readings as follows: "Protect yourself and family. Don't sow the seeds of disease and spread pestilence and death by buying Chinese pork and lard." The circulars further stated that one Mowry (who was not a member of the union) sold Chinese pork and lard, and advised the public to buy meats only where they saw the union sign. Mowry brought an action against members of the union, alleging that by these circulars the defendants intended to, and did, charge that the plaintiff was selling his customers pork and lard which contained the

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[1] Brandreth *v.* Lance et al., 8 Paige Ch., 24, 27 (1839).

[2] Linotype Co. (Ltd.) *v.* Typesetting Machine Co. (Ltd.), 81 Law Times Reps., 331; s. c. 15 Times Law Reps., 524 (1899); see also Hamilton *v.* Arbuthnot, 16 Morrison's Dec., 13923; Burnet *v.* Wells, 12 Mod., 420; Macrae *v.* Wicks, 13 Sess. Cases (4th Series), 732; and Marino *v.* Di Marco, 41 App. D. C., 76.

[3] Kimm et al. *v.* Steketee, 12 N. W., 177 (Mich. Sup. Ct., 1882).

seeds of disease and spread pestilence and death. A verdict of $300 was held not excessive.[1]

In Henkle v. Schaub et al.[2] each of the parties kept a stallion for breeding purposes. It was alleged that the defendant falsely and maliciously stated that the plaintiff's stallion was nothing but a grade horse and therefore worthless as a breeder and was neither imported nor registered. The declaration, which was based not only on the disparagement of the horse but on the slander of the character and credit of the plaintiffs in their business, was held to state a cause of action.[3]

In Holmes v. Clisby[4] the plaintiff, a shoe dealer, alleged that he had advertised for sale a quantity of perfect first-quality shoes of a certain brand and that the defendant, a business rival, inserted in a newspaper a notice, signed by the manufacturer, to the effect that the defendant was their only authorized agent in that city; that they sold damaged shoes to certain dealers under an agreement that they should be sold as imperfect goods; and that those who bought from other dealers would have themselves to blame for any disappointment or loss that might ensue. It was further alleged that the defendant intended by the article, and that it was understood by those who read it to mean, that plaintiff was pretending, without authority, to sell the genuine shoes of this brand and thereby to mislead the public and secure trade by false and fraudulent means; that the plaintiff's shoes had latent defects; that the plaintiff was unworthy of confidence; and that customers should beware of him, etc. It was held that the writing complained of was susceptible of the construction which the plaintiff put upon it and that a cause of action was stated.

The Supreme Court of Massachusetts, in passing upon a very similar state of facts, held that the language complained of contained no imputation upon the plaintiff's character.[5] In an action against the Shaw Stocking Co. to recover damages for an alleged libel, it appeared from the evidence of the plaintiff, who was a tradesman in Waltham, that a representative of the defendant called at his place of business and represented that he had a large stock of navy-blue first-quality Shaw-knit stockings to sell; that they were in such size that the defendant would sell them cheap, as it desired to reduce its stock; that plaintiff examined samples of the goods offered, which were first-quality navy-blue Shaw-knit stockings, and, after being assured that the stock was like the samples, the plaintiff purchased 100 dozen pairs for $118.75; that he received the stockings, and upon

[1] Mowry v. Raab et al., 89 Cal., 606 (1891).
[2] 54 N. W., 293 (Sup. Ct., Mich., 1893).
[3] See Wier v. Allen, 51 N. H., 177 (1871).
[4] 118 Ga., 820 (1903).
[5] Boynton v. Shaw Stocking Co., 15 N. E., 507 (1888).

examination they appeared to be of first-quality navy blue; and that he advertised them for sale at 12½ cents a pair. It was alleged that subsequently the defendant caused the following advertisement to be inserted in a Waltham newspaper:

Caution.—An opinion of Shaw-knit hosiery should not be formed from the navy-blue stockings advertised as of first quality by Messrs. S. W. Boynton & Co. at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dyehouse.

(Signed) SHAW STOCKING CO.

The plaintiffs submitted evidence tending to show that the stockings had not been damaged in the dyehouse, and that they were not damaged in any other respect, but were of first quality, which the defendant well knew. On this evidence the court ruled that the action could not be maintained, and instructed the jury to return a verdict for the defendant, and the plaintiff excepted. In overruling the exceptions, the Supreme Court of Massachusetts, by C. Allen, J., said in part:

No doubt a case might be imagined where, from peculiar circumstances, as, for example, from the nature of the article offered for sale, or from the long-continued habit of selling goods of a different character or quality from that represented, it would be a natural inference from a charge otherwise like that which is the subject of this action that the party was practicing fraud or imposition, or was guilty of trickery or meanness. In the present case, such an inference does not naturally arise, and the object of the defendants' advertisement, judging from its language, appears to have been rather to uphold and maintain the character of their goods, than to attack the plaintiff's character.

The Supreme Court of Georgia, in Holmes *v.* Clisby, supra, referred to this decision, and, while admitting that it was very closely in point, declined to follow it, saying:

Notwithstanding the very high respect which we entertain for the distinguished court which rendered those decisions,[1] we are unwilling to allow them to influence us to make a decision which in our judgment would be unsound.

A stove dealer alleged that a competitor published an article purporting to be a letter from a satisfied customer stating, in substance, that he had purchased of another dealer in that city a stove which he claimed was new and one of the best in the market, but that after only three years of careful usage the stove was wrecked beyond repair. The writer concluded by saying that it may be that the American people like to be humbugged and that some dealers think so, but the great majority prefer a square deal. It was averred that by this publication the defendants intended to assert, and were understood as asserting that the plaintiff in his business was a humbug engaged in dishonest practices, and not giving his patrons a square

[1] Boynton *v.* Shaw Stocking Co., supra, and Boynton *v.* Remington, 3 Allen, 397.

deal; that said article was scandalous and defamatory; and that plaintiff was greatly damaged in his reputation and credit and deprived of profits, etc. Although the plaintiff's name was not mentioned, it was shown that the plaintiff and the defendant were the only persons who handled stoves in that town. The defendants urged, among other things, that the article was merely a disparaging criticism of one dealer upon the goods of his competitor, and that the interest of the defendants as competing dealers refuted the presumption of malice and made the communication in a sense privileged. In affirming an order overruling the defendants' demurrer, the court observed that—

> The use of the language * * * clearly indicates that the defendants intended to charge the dealer referred to as being guilty of deception in his business and in effect charges the plaintiff, not only with deception in the conduct of his business, but that he was guilty of unfair dealing. * * *
>
> The contention of respondent that the publication of the article constituted a privileged communication is, in our opinion, without merit.[1]

Disparagement of competitors' goods.—A comparison of the following with the English cases hereafter discussed[2] will show that actions based on statements, oral or written, merely in disparagement of a trader's goods have not only been brought less frequently in the United States than in England, but that in this country the plaintiffs in such actions have generally failed to recover damages. This appears to be due partly to the fact that the pleadings have in many cases been drawn on the theory that the words referred to the plaintiff personally, or in the conduct of his trade, and were actionable per se, which probably accounts for the absence of necessary averments of special damage.

One of the earliest cases decided in the United States involving the disparagement of goods was brought in New York in 1830 in the form of an action for slander.[3] The plaintiff, the manufacturer of "S. J. Tobias's & Co.'s patent lever watches," averred that the defendant, who dealt in watches manufactured by M. J. Tobias and Robert Roskell, intending to defame and slander the plaintiff and to injure and prejudice him in the use and exercise of his trade and business, falsely and maliciously spoke and published of and concerning the plaintiff in his trade and business the following words:

> (1) Tobias's watches are bad; (2) S. J. Tobias & Co.'s watches are bad; (3) S. J. Tobias & Co.'s watches are inferior watches; (4) Tobias's watches are inferior watches; (5) this watch (meaning a watch which he held in his hand, and which had been manufactured by plaintiff) is not a good watch; (6) this watch is an inferior watch; (7) this watch is a bad watch; (8) S. J. Tobias's watches are inferior to M. J. Tobias's and to Roskell's.

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[1] Ramharter v. Olson et al., 128 N. W., 806 (Sup. Ct. S. Dak., 1910).
[2] Page 113, et seq.
[3] Tobias v. Harlan. 4 Wendell, 537, 540.

The plaintiff further averred that he had been greatly damaged and prejudiced in his trade and business, and that divers citizens had since refused to purchase his watches.

Judgment on demurrer for the defendant. The court, by Marcy, J., said in part:

The words charged do not directly impeach the integrity, knowledge, skill, diligence, or credit of the plaintiff. They only relate to the quality of the article which he manufactures or in which he deals. The words in both sets of counts which relate to a particular watch, and those which are obviously mere comparisons, are clearly not actionable. No instance can be found, I believe, where an action has been sustained on words for misrepresenting the quality of any single article which a person has for sale, unless special damages are alleged and proved. * * *

I do not find that even an attempt has been made to sustain an action on words of comparison. To say that the watches manufactured by the plaintiff are inferior to those made by any other particular manufacturer can never be held actionable where no special damages result therefrom, without embarrassing the freedom of judgment in matters of private concern, and making errors of opinion in relation to the common and necessary transactions of life a fruitful source of litigation.

An action was brought in the Federal courts by the Nonpareil Cork Manufacturing Co. against a competitor for an alleged libel.[1] It was alleged that in a letter written by the defendants to one Atkinson the following words were used, "You recommend something which the experience of all practical men demonstrates is a fraud," and that in the same letter there was set forth an alleged statement by a certain customer of the plaintiff relative to the character of the "covering" manufactured by the plaintiff in these words:

That it is a short-lived affair; that it warps, twists, chars, and becomes generally disintegrated, useless, and dangerous as a nonheat conducting cover to be applied to steam pipes.

It was claimed that this statement imputed that the plaintiff, in the conduct of its business, was guilty of fraudulent, corrupt, and dishonest practices.

A circular letter complained of contained disparaging statements with respect to cork generally, as used for steam pipe and boiler covering. This letter was alleged to impute that the covering manufactured by the plaintiff was inferior to other coverings, and especially to that manufactured by the defendants; that it was unsuited for the purpose for which it was sold; and that the use thereof was dangerous. There was no allegation of special damage. In giving judgment for the defendant on demurrer the court (Dallas, circuit judge) said:

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[1] Nonpareil Cork Manufacturing Co. *v.* Keasbey & Mattison Co. et al., 108 Fed., 721, 722 (C. C., 1901).

It will be observed that it is only the matter contained in the letter to Atkinson which is averred to be libelous of the plaintiff personally. This, and this alone, it is claimed, touches its character or reputation. But, although the innuendo attributes to it a personal application, I do not think it is capable of such interpretation. In the absence of the word "fraud" it would be impossible to construe the language of the Atkinson letter to be in any sense defamatory of the plaintiff; and it seems to be clear that that word when read in the light of the context could not reasonably be so construed. It relates, not to the plaintiff, but to the "covering," and the statement is, not that it is a fraud, but that the experience of practical men demonstrated it to be so; and, upon reading further, we find precisely what is meant by this, for the statement from a customer of the plaintiff which is quoted is that it (the covering) is a short-lived affair, etc.; and thus we have the word "fraud" defined as descriptive of a thing which is short-lived, etc., and this definition accords with the sense in which, as a colloquial corruption, that word is sometimes used. The action is, in other respects, not strictly an action of libel, but a special action on the case for disparaging the plaintiff's goods; and with reference to this view of it, I deem it necessary only to repeat what was said by Lord Denman in Evans *v.* Harlow:[1] "A tradesman who offers goods for sale exposes himself to observations of this kind, and it is not by averring them to be false, scandalous, and malicious and defamatory that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action."

From the whole declaration it plainly appears that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor. But such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts. Judgment for defendant.

It does not appear that the plaintiff alleged any special damage. In view of the fact that the court relied largely upon the judgment of Lord Denman in Evans *v.* Harlow it may be observed that in that case, as reported in The Jurist, Lord Denman and Patterson and Wightman, J J., each commented on the absence of an allegation of special damage.[2]

This case and that of the Victor Safe & Lock Co. *v.* Deright[3] appear to be the only actions involving the mere disparagement of goods that have been brought in the Federal courts. In the latter case the defendant, who was engaged in the sale of safes, wrote to one Holland a letter containing the following:

> We have heard that you had placed order for a Victor Screw Door. We are somewhat surprised at this and feel that you have been misled. The Victor plate safe is very cheaply constructed, and can be easily burglarized. The Victor, so-called, manganese steel safe is weaker still, and can be opened inside of a vault or anywhere else in a few moments time.

It was held that this language must be regarded as merely in disparagement of the plaintiff's safes, and therefore was not actionable

[1] 5 Q. B., 624.

[2] P. 114.

[3] 147 Fed., 211 (C. C. A., 1906).

in the absence of special damage, which was not alleged in the petition.

The court, by Van Deventer, circuit judge, said in part:

The sole question presented for our consideration is: Is the language of the letter libelous per se; that is, actionable without special damage? As by the law of libel defamatory language is actionable without special damage when it contains an imputation upon one as an individual, or in respect of his office, profession, or trade, but is not actionable when it is merely in disparagement of one's property or of the quality of the articles which he manufactures or sells, unless it occasions special damage, it is essential to consider whether the language of the letter contains an imputation upon the plaintiff or is merely in disparagement of the quality of its safes. [Citing cases.] The letter does not mention the plaintiff. It does not say that Holland's order for a Victor Screw Door was given to the plaintiff or that he was misled by the plaintiff. Nor is it implied that the plaintiff had any connection with that order, because consistently with all that is said Holland may have placed the order with some dealer other than the plaintiff wholly uninfluenced by any act or representation on its part. These considerations persuade us that the language of the letter must be regarded as merely in disparagement of the quality of the plaintiff's safes, and therefore as not actionable in the absence of special damage, of which there is no allegation in the petition. [Cases cited.]

There is nothing necessarily immoral or reprehensible in the manufacture and sale of safes which are cheaply constructed, and not designed to be burglar proof or difficult of opening. They may be useful and salable in the market for the purpose of placing what is put into them beyond the reach of fire, and possibly for other purposes.

The following paragraph appears in West Virginia Transportation Co. *v.* Standard Oil Co. et al.:[1]

There is one charge in the first count which presents a cause of action, and that is that defendants wickedly and maliciously, to injure the plaintiff, represented to "various persons," customers of the plaintiff, that the plaintiff's pipe lines and appliances were unsafe and dangerous to transport and store petroleum.

The court was of opinion that the defendants were entitled to particulars. The first count as a whole was held bad on demurrer, and this point was not mentioned except as above indicated.[2]

A somewhat unique method of disparaging the goods and workmanship of another was disclosed in Everett Piano Co. *v.* Maus.[3] As stated by the court:

This suit was brought for alleged unlawful interference with complainant's sales of pianos. Complainant averred that it had for years manufactured and sold pianos under the trade name of Everett, and had not only established the name as a trade-mark, but had also, in 1905, caused the name to be registered according to the laws of the United States. The interference averred is, in substance, that defendant, while engaged in buying and selling pianos other than

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[1] 50 W. Va., 611, 622 (1902).
[2] Cf. Hamilton v. Walters, pp. 131, 132.
[3] 200 Fed., 718 (C. C. A., 1912).

the Everett, was advertising and representing to the public, and to prospective purchasers of pianos, that defendant was able to procure from the factories of complainant new Everett pianos, and to sell them at a price far below their real or market value; that to deceive the public and prospective purchasers, and to injure, damage, and discredit the reputation and standing of, and the demand for, Everett pianos, as also to injure complainant's reputation and business, defendant keeps at his place of business an Everett piano, which he has permitted to become and remain in an "untuned and poorly voiced condition, so that the music produced from said piano is greatly inferior in quality and tone to the music of an Everett piano in good condition"; that he represents the condition, quality, and music of all Everett pianos to be similar in such respects to this one, which he also represents "to be a new Everett piano, just recently received from complainant's factory"; and that defendant knows all of such advertisements and representations to be false. The relief prayed is an injunction and damages. Demurrer was filed, stating as grounds that the court had no jurisdiction of the subject matter, and that the bill does not set forth facts sufficient to constitute a cause of action or to entitle complainant to the relief prayed. The demurrer was sustained and an appeal taken.

We think that the bill states nothing more than a trade libel, and consequently that it does not state a case for the interposition of a court of equity. The bill, in its averments, fails in a number of particulars respecting well-known grounds for equitable interference. It does not state a case of unfair competition, because it is not averred that defendant has attempted to palm off any other kind of piano as that of complainant. It does not state a case of infringement of complainant's trade-mark nor a case of boycott, as abundantly appears in the case relied on in that behalf. It falls far short of stating a case of the class to which Emack *v.* Kane belongs, or Commercial Acetylene Co. *v.* Avery Portable Lighting Co. A multiplicity of suits is not threatened or at all probable, nor is any showing made that the wrongs averred can not be redressed in a court of law.

The decree below[1] is affirmed with costs.

It may be noted that the court, in making use of the term "unfair competition" referred to the passing off of the goods of one manufacturer as those of another, and that although the plaintiff sought equitable relief, there was no showing made "that the wrongs averred can not be redressed in a court of law."

The Hopkins Chemical Co. brought an action against the Read Drug & Chemical Co.,[2] alleging in substance that it was the manufacturer of "A. C. Reynolds Tooth Paste," and that the defendant or its agents, while endeavoring to sell another dentifrice, falsely and maliciously stated that the plaintiff's paste (which was guaranteed under the pure food and drugs act) was nothing else but grit, very harmful to the gums, and would take the enamel off the teeth. Other statements to the same effect were also complained of. No special damage was alleged. A demurrer to the declaration was

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[1] For defendant. Cf. Spalding & Bros. *v.* A. W. Gammage (Ltd.), p. 270. See also Hughes *v.* McDonough, 43 N. J. L., 459 (1881), p. 133.

[2] Hopkins Chemical Co. *v.* Read Drug & Chemical Co., of Baltimore City, 92 Atl., 478, 480 (Md. Ct. Apps., 1914).

sustained, and this judgment was confirmed on appeal. The court said in part:

The defamatory words were here spoken in disparagement of the quality of an article of dentifrice manufactured by the plaintiff. By the law of libel and slander defamatory language is actionable without special damage when it contains an imputation upon one in respect of his office, profession, or trade. But it is not actionable at all when it is merely in disparagement of one's property or of the quality of the articles which he manufactures or sells, unless it occasions special damage.

A number of actions have been brought on account of disparaging statements made by parties who were not business rivals. Although these actions also have failed, because of the absence of averments of special damage, it would appear that the courts recognized the plaintiff's right to recover when such allegations are made and sustained.

An action of this description was brought in Massachusetts as early as 1849,[1] on account of an alleged libelous publication reflecting injuriously on certain books of which the plaintiff was the author and proprietor. The court, by Fletcher, J., said in part:

The action, * * * whatever it may be called, is in fact a special action on the case for disparaging the plaintiff's books. Now, the gist of such an action, and the only ground on which it can be maintained, is special damage, which must be distinctly and precisely set out in the declaration and established by the proof.

In Wilson *v.* Dubois[2] the complainant, a horse dealer, alleged that he owned a race horse which was for sale, and that the defendant, the proprietor of a newspaper, falsely and maliciously published a statement that the horse was 21 years old, thereby intending to hinder the sale of the horse. A demurrer to the complaint was sustained, and the plaintiff appealed. Affirmed. Held: that in an action for false and malicious statements disparaging an article of property, it is necessary to allege a loss of sale to some particular person, and in the absence of such allegation the complaint does not state a cause of action.

In Kennedy *v.* Press Publishing Co.[3] the proprietor of a concert hall at Coney Island complained of an article purporting to describe various saloons at that resort and their frequenters. There was no mention of the plaintiff save that there appeared a picture of the interior of a saloon with the words "In Kennedy's" beneath. It was held that the article referred to the place and not to the plaintiff, and as the complaint averred no special damage, it failed to state a cause of action. The court, by Cullen, J., said:

[1] Swan *v.* Tappan, 5 Cushing, 104.
[2] 35 Minn., 471 (1886).
[3] 41 Hun, 422, 423 (1886).

It is settled by authority that a libel on a thing is not actionable unless the owner of the thing alleges and proves that he has sustained pecuniary loss as a necessary or natural consequence of the publication.

A somewhat similar case was stated in Bosi *v.* New York Herald Co.,[1] where it was alleged that the defendant published a statement that anarchists were seen at plaintiff's restaurant and boarding house, and had printed a picture of his place of business over the words "Resort favored by New York anarchists." In an action for libel it was held on demurrer that the complaint did not state a cause of action since it charged a libel on the plaintiff's place of business, and not on the plaintiff, and did not sufficiently allege special damage.

In Dooling *v.* Budget Publishing Co.[2] the objectionable publication stated that a dinner which had been served by a caterer on a public occasion was "wretched" and was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile and the wines not much better." It was held that there was no libel on the plaintiff in the way of his business; that the language amounted only to a condemnation of the dinner, which was not actionable in the absence of proof of special damage.

Owing to the absence of decisions on the merits in cases of this character, it is impossible to determine the extent to which a manufacturer or tradesman in this country may disparage the goods of a competitor without rendering himself liable. This branch of the law, however, has been developed to some extent in England as will appear hereinafter.[3]

ENGLISH DECISIONS.[4]

Personal defamation.—In a recent copy of the Law Journal (Sept. 26, 1914, p. 542) it is reported that "Mr. Justice Sankey lately granted an injunction to a firm of providers to restrain a competing firm, their agent and servants, from speaking or publishing words to the effect that the plaintiff company or their directorate were composed of Germans, and that by purchasing their commodities the public would be assisting the enemies of Great Britain. (J. Lyons & Co., Lim., *v.* Lipton, Lim.)." It is further stated that "an interim injunction has also been granted this week on an ex parte application by the receiver of the London branch of Bechstein's pianoforte business against the president of the Piano Manufacturer's Association

[1] 68 N. Y. Supp., 898 (1901).
[2] 144 Mass., 258 (1887).
[3] See p. 113.
[4] Acts passed in England in 1854 and 1873 conferred on the courts of common law and chancery power to grant injunctions in all personal actions of contract or tort, with no limitation as to defamation.

for a trade libel of a similar character affecting his conduct of the business. (Berridge *v.* Billinghurst.)"[1]

The facts in Helmore *v.* Smith,[2] as stated by Cotton, L. J., are as follows:

This is an appeal from an order of Mr. Justice Kay, made on the application of the defendant, for the committal of the son of the plaintiff to prison for contempt of court in interfering with the receiver and manager appointed by the court. The action was brought to set aside the purchase by the defendant of the plaintiff's share of the business which they had been carrying on in partnership. Vice Chancellor Bacon declared that the purchase was invalid, and that the partnership was still subsisting at the commencement of the action, and he ordered a dissolution of the partnership and the appointment of a receiver. The defendant appealed against this judgment, and made an application to this court to stay proceedings in the action until the hearing of the appeal. On the hearing of that application we considered it desirable for the defendant, and also for the benefit of the plaintiff, that the business should be kept alive as a going concern until the appeal could be heard. It seemed to be better for all parties that if the business was sold it should be sold as a going concern. Therefore we made an order that, on the undertaking of the defendant to manage the business in the ordinary way, and to give satisfactory security, he should be manager of the business till the hearing of the appeal. On the day after that order was made the son of the plaintiff, who had taken an active part both in the business and in the dispute between his father and the defendant, sent around this circular to all the customers of the firm, with the report from the Times of the judgment of the vice chancellor:

"Helmore *v.* Smith. Sir: I beg to inclose you report of the above case from the Times of November 9, 1886. The defendant, Charles Smith, is appealing from such judgment, and pending the hearing of such appeal has been appointed receiver on giving adequate security.

"As your esteemed orders have for the most part come under my personal supervision while manager of the firms of Helmore & Smith and Charles Smith & Co., I beg to submit to your notice my present prices, and to inform you that

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[1] See Hambourg *v.* The London Mail (Ltd.), Law Journal, Oct. 31, 1914; and Coleman *v.* Southwick, 9 Johns., 44, where the editor of the New York Evening Post, in 1812, recovered damages for a libel appearing in the Albany Register, the effect of which was to cause it to be believed, among other things, that the plaintiff was under the influence of an unprincipled devotion to Great Britain and promulgated treasonable sentiments.

See also Marais *v.* The Volksstem Co., 3 O. R., 66 (1896), where the following words which appeared in the Volksstem, under the heading "British intervention," were held by the high court of the South African Republic to constitute a libel:

"This is the actual state of affairs, which widely differs from the view of the Star, of Land en Volk, Cape Times, Argus, and other hired Rhodes's organs.

"Many of the colonial newspapers, among others the South African Telegraph and de Zuid Afrikaan, agree with our views; but what can we say of papers in the employ of Mr. Rhodes which exist in this country, such as the Star, Advertiser, Land en Volk, which throw their weight against the true interests of their country in favor of a foreign power?"

It was alleged that as Rhodes was considered by the burghers to be an enemy of the State, the plaintiff's paper was brought into contempt, and he suffered serious and irremediable damage through the withdrawal of subscriptions.

In 1905 the United Flexible Metallic Tubing Co. brought an action against one Crowther, alleging that he had slandered their goods by stating that they were made in Germany and not in England. The defendant offered a perpetual undertaking, which was accepted. (Crowther *v.* United Flexible Tubing Co. (Ltd.), 22 R. P. C., 551.)

[2] L. R. (1887), 35 Ch. Div., 449, 454, 455, 456 (C. A.).

should you favor me with any orders they will receive the same attention and care as formerly.

"Thanking you in anticipation, I am, yours obediently, Henry W. Helmore * * *."

Mr. Justice Kay considered that the act of the appellant in sending round the circular was a contempt of court, as an interference with the receiver and manager appointed by the court. It is true that the exact case is a novel one. Counsel on neither side have been able to discover a case at all like it in its facts. In all the cases reported on the subject of committal there has been either some personal interference with the receiver or with his reception of some definite debt or thing which, as receiver, he was entitled to receive,[1] and it was argued in this case that the good will of a business was not a definite, tangible thing which the receiver could sue for and that all that the appellant had done was done in fair competition. If it had been fair competition, that argument would have had to be dealt with. But in my opinion this was not a case of fair competition. No fair competition would justify the act of the appellant in sending round a copy of the report in the Times, which, if taken alone, would lead the customers to think that the business was in a failing state or would shortly fail. This would be the effect produced by the circular on the mind of any reasonable man. But he also added in the circular that Smith had appealed, and that he had been appointed receiver pending the appeal. That was not a true representation. The fact was not that Mr. Justice Kay had appointed Smith receiver, but that the court of appeal had determined that it was best that Smith should manage the business on its old lines, so as to keep it alive till it had been decided whether the judgment of the vice chancellor was correct. I must come to the conclusion that the appellant knew all these circumstances, and was aware of the fact that Smith was to act as manager of the business and that the issue of the circular was not an act of fair trade competition, but was done for the purpose of producing a false impression. The circular was, in fact, a libel on the business which this court had directed the defendant to manage, and in my opinion, though the case is a new one, amounted to a contempt of court.

Bowen, L. J., was of the same opinion. With respect to the conduct of the appellant, he observed:

It was argued that this is a novel case, and that in all the reported cases of committal for interference with a receiver there has been some personal interference or an interference with the receipt of some definite, tangible thing,[1] and that the sending out of this circular was merely such competition as the business would have been liable to experience in ordinary course; and it is contended that the business when under the management of a receiver and manager was no more entitled to protection from such fair competition than the business carried on by the original firm. If the acts complained of merely amounted to such fair competition, the argument would be unanswerable. But when I examine the facts I come to a different conclusion. The appellant had been in the employment of this firm. He then became, in the course of his employment, intrusted with certain information, namely, the names of the customers of the firm, which was reduced to a list for the purpose of collection. This list he carried away with him as if it had been his own property. The question we have to decide does not turn on that act, but as it has been suggested to the court that this act was justifiable, I think it right to say, lest it should be thought that the judges countenanced such acts, that it must not be assumed that such conduct was honest or legal; nor could I sit by and allow it to go

[1] See Berridge v. Billinghurst, pp. 100, 101.

forth to the world that I countenanced the doctrine that the confidential information received by a servant to advance his master's business may be used afterwards by him to advance his own business to the injury of his master's interests. It is part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage.

But I pass to that about which there can be no question, namely, the intent and meaning of this circular. It can only mean one thing—that the business carried on by the firm was in troubled waters, that its management was in a disturbed condition through the appointment of a receiver, and that there was a good opportunity for some one outside the firm to step in and catch its falling trade. That was, in fact, a libel on the business, a libel tending to prejudice the management of the business under the order of this court. If there had been any doubt or question as to the meaning of the circular, it might be proper to leave the parties to another remedy, so that it might be submitted to a jury, who might take a different view of the meaning of the document; but there is no question as to that, and it is a clear wrong done to the owners of the business and calculated to injure the property under the management of the court.

In Loog *v.* Bean [1] the plaintiffs, who dealt in sewing machines, obtained an injunction restraining a former employee from stating to their customers that they were about to stop payments or were in difficulties or insolvent, or making statements of like effect, and from in any manner slandering the plaintiffs in their business, and also from giving notice to any of the plaintiffs' customers not to pay the plaintiffs any money due or owing them in respect of hire of machines or otherwise. The evidence showed that statements such as were prohibited had been made by the defendant.[2]

An engineer and boilermaker doing business under the name of Ratcliffe & Sons brought an action against the proprietor of a newspaper because of a published statement to the effect that the plaintiff had ceased to carry on said business and that the firm of Ratcliffe & Sons no longer existed. The article was treated in the pleadings as a defamatory statement or libel, but the jury found that the words did not reflect upon the plaintiff's character, and were not libelous, but that the plaintiff's business suffered injury to the extent of £120. Judgment was entered for the plaintiff for that sum and costs. The verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. An appeal by the defendant was dismissed, Bowen, L. J., saying in part:

* * * That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally

[1] 53 L. J. Eq., 1128 (Court of Appeal, 1884).

[2] See Robinson *v.* Sugarman, 17 Ontario Practice Reps., 419 (1897).

done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred.

The only proof of damage at the trial consisted of evidence of general loss of business without specific proof of the loss of any particular customers or orders. This evidence was held admissible and sufficient to support the action.[1]

A partnership doing business under the name of Arthur & Co. was dissolved and the good will was divided between the partners. One of them brought his part of the good will into a new partnership and carried on business under the name of Arthur. A part of the stock of the late firm was bought by another company, which advertised the goods at reduced prices, stating that Arthur & Co. were retiring from business. The new partnership, doing business as Arthur, sought to restrain them from offering or representing that they were carrying on the business formerly carried on by Arthur & Co., and now carried on by the plaintiffs, or that such business had been transferred to the defendants. The court, by Eve, J., held that although the circular was untrue in stating that Arthur & Co. were retiring from business, and there was sufficient evidence to lead the court to the conclusion that the circular was in law issued maliciously and that it was calculated to keep customers away, the evidence of damage was not sufficiently specific and the action would therefore be dismissed.[2]

An action for damages for slander was brought by an insurance company against a lawyer who was alleged to have actively circulated a statement that the plaintiff company was about to be taken over with all its business by a rival company.[3] It was averred that the statement was highly injurious; that it implied that the separate organization of the company was to be given up and the agencies terminated; that the effect was to diminish and divert to other channels the efforts of agents of the company; and that the statement was also calculated to induce a belief in the minds of the insuring public that the company had not been successfully carried on and was in a weak condition financially. It was held that the action was irrelevant, and an issue was refused.[4]

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[1] Ratcliffe *v.* Evans, L. R. (1892), 2 Q. B. D., 524.

[2] Concarls *v.* Duncan & Co. (1909), Weekly Notes, 51.

[3] General Accident Assurance Corporation (Ltd.) *v.* Miller, 9 Scots Law Times, 510 (1902).

[4] In Scotland an issue in law is brought out either, first, as preliminary or in the shape of a question of relevancy; or, second, as resulting from admitted or proved facts; or, third, as arising out of a special verdict, bill of exceptions, or reserved question of law. When the controversy between the parties is upon matters of fact, and it is to be determined by a jury trial, the case is usually presented to the jury in the form of an issue, which is a concise statement of the question to be answered by the verdict.—Watson's Bell's Dictionary and Digest of the Law of Scotland.

In rendering judgment Lord Low said, among other things:

* * * I do not think that the issue can be allowed, because, supposing that the defender actually said all that there is in the issue (both statement and innuendo), it would not amount to a slander, although it might be injurious to the business.

In regard to the averment that the statement was calculated to induce the belief in the minds of the insuring public that the pursuers' business had not been successfully carried on and it was in a weak condition financially, it is perhaps sufficient to say that the pursuers have not proposed an innuendo to that effect. I may say, however, that I am not satisfied that such an innuendo would be justified. No doubt the statement that one insurance company is to be taken over by another is likely to give rise to speculation as to the reason, but I do not see why it should induce the "belief" in the public mind that the company to be amalgamated was in a weak condition financially. I shall therefore refuse an issue.[1]

The Jarrahdale Timber Co. were importers of Australian jarrah wood for street paving, and Temperley & Co. imported both jarrah and karri wood. The latter advertised in a trade journal that they were "the only importers of both timbers in the United Kingdom," whereupon the Jarrahdale Co. sought to restrain this form of advertising, contending that it would be understood to mean that the defendants were the only importers of either kind of wood. Mr. Justice Day enjoined the issuance of advertisements such as the one objected to or any other stating directly or indirectly that the defendants were the only importers of jarrah timber. On appeal the judges were divided in opinion, Baron Pollock being of the opinion that it was not a truthful advertisement, and that it had, at all events, a tendency to deceive.

Mr. Justice Grantham was of opinion that this was a far weaker case than had ever been before the courts. The statement was simply that the plaintiffs did not import karri timber, and that did not appear to be disputed. He did not think, therefore, that this was a case for an injunction, but withdrew his judgment. The appeal was therefore dismissed.[2]

In Sheppard Publishing Co. *v.* Press Publishing Co.[3] it appeared that the plaintiff, the proprietor of a paper called the Toronto Saturday Night, also published and sold to newspaper publishers throughout Canada an annual Christmas or holiday number. This had been issued for many years, and it was claimed to be an important and lucrative part of the business. One Tibbs, who had been employed

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[1] See also decree in United States *v.* Central West Publishing Co. et al.; Haney Manufacturing Co. *v.* Perkins et al., p. 89; Continental Insurance Co. *v.* Board of Underwriters of the Pacific et al., p. 88; and American Insurance Co. *v.* France, p. 89.

[2] Jarrahdale Timber Co. (Ltd.) and McLean Bros. (Ltd.) *v.* Temperley & Co. and Elliot & Sons, 11 T. L. Reps., 119 (Q. B. D., 1894). Cf. Davis *v.* New England Railway Publishing Co. et al., p. 134.

[3] 10 Ontario Law Reps., 243, 250 (1905).

as a salesman, and was personally acquainted with the plaintiff's customers, left their service and entered that of the defendant, the Press Publishing Co. It was claimed that the latter decided to issue a similar publication, under the name Christmas Number, and to sell the same to newspaper publishers; that Tibbs was sent out as its salesman much earlier in the year than it was the custom of the plaintiff to send out its salesman; that he solicited orders from customers from whom he had formerly solicited business on behalf of the plaintiff, and to induce them to give their orders to the defendant falsely and maliciously made certain statements, intending thereby to injure the trade of the plaintiff.

The statements complained of were to the effect that the defendant company had taken over the business of the plaintiff, or that part relative to the publication of the Christmas Annual, and that the plaintiff was going out of that branch of the business.

On the answers to questions submitted to the jury the trial court gave judgment against Tibbs for damages, granted an injunction against him, and dismissed the action against the defendant company. The plaintiff appealed to the divisional court and a cross-appeal was brought by Tibbs. Held that both the company and Tibbs were liable. The court, by Clute, J., after referring to Ratcliffe *v.* Evans and Riding *v.* Smith, said in part:

> The present action is, in my judgment, not slander, but an action on the case for false and malicious statements made in reference to the plaintiff's business and resulting in loss to the plaintiff. I can see no reason in principle why a corporation should not be held liable in such case for the acts of its servant or agent acting within the scope of his authority.[1]

In Davis & Sons *v.* Patterson et al.,[2] decided by the Supreme Court of the Cape of Good Hope in 1912, it appeared that the plaintiffs had been appointed agents for the Raleigh Cycle Co. in certain parts of that colony, including Kimberly, where plaintiffs established an agency, and that Ryan & Co., for whom Patterson acted as manager, opened a shop about 100 yards distant and advertised that they were the agents for the Raleigh Cycle Co. Upon the application of Davis & Co. it was held that the respondents should be restrained from representing themselves as being the agents of the said company in any part of the colony covered by the plaintiff's agreement.

On the occasion of an agricultural show at Guilford an article was published by the proprietor of the Western Morning News, stating that an audacious attempt to obtain money by false pretenses had been detected and exposed; that a certain newspaper of limited circulation had inserted, without authority, columns of ad-

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[1] Cf. Dudley *v.* Briggs, p. 87.
[2] 12 Cape Times Reps., 252.

vertisements referring to the implements on view at the show, copied from other newspapers to which the advertisements had been given or from papers of a year ago; and that the object of these proceedings was to swell the number of advertisements and to inveigle the manufacturers into paying for the spurious advertisements. Another article expressly charged the Western Daily Mercury with inserting advertisements without orders.

Brett, J., in his charge to the jury, said, in part:

The question before you will be this: Whether the proprietors of these two newspapers, after having done that which in law they were perfectly justified in doing, viz, to praise themselves as much as they possibly could in order to obtain the support and custom of the public—for I know of no law against self-laudation—whether one of them has not gone beyond fair fighting and done that which brings him within the law.

The jury found for the plaintiff, being of opinion that both articles imputed personal misconduct to the plaintiff.[1]

The proprietors of the Army and Navy Gazette brought an action against the publisher of the Broad Error for an alleged libel, consisting of the following:

An "Old Salt" has evidently never been beguiled by the advertisements of usurers which the Army and Navy Gazette parades before its readers weekly for a valuable consideration; he would otherwise realize the fact that usury in mess traps is not the only usury of which poor officers have cognizance. The paper we have named takes other advertisements cheap, on a third of their scale, for instance, to induce respectable advertisers to appear in the usury and quack doctor page.

The jury found for the plaintiffs.

Bramwell, B., was of the opinion that the article was defamatory, and said, in part:

The words "beguiled," "usurers," "parades," "quack columns" have a distinctly defamatory meaning, and it can not be doubted that it is discreditable for a journal to have a quack's column.[2]

In Saxby *v.* Easterbrook & Hannaford it appeared that the parties were rival manufacturers of railway signals and that the plaintiff had applied for a patent, which application had been refused. The defendants, who had previously obtained a patent covering their device, published an advertisement stating, among other things, that Saxby's application was canceled by the Crown on the ground of piracy from Easterbrook. By innuendo the plaintiff alleged that the meaning of the statement was that he had dishonestly and improperly presented his petition, well knowing that he was not the first and true inventor, and that he had dishonestly and improperly pirated the same from an invention by Easterbrook. The plaintiff

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[1] Latimer *v.* Western Morning News Co., 25 L. T. Rep., 44, 46 (1871).
[2] Russell et al. *v.* Webster, 23 Weekly Reporter, 59, 60 (Exch., 1874).

was awarded 40s. damages and a perpetual injunction to restrain the publication of libels of the nature complained of.[1]

An injunction was granted restraining Kerr & Jubb, merchants and mill furnishers at Halifax, from selling cotton belting of other manufacturers and representing it as the product of one Gandy. It appeared that the defendants had acted as agents for the sale of Gandy's belting, but that in consequence of his failure to supply a sufficient quantity they were compelled to substitute other belting. In most instances they informed the customers that the articles supplied were not manufactured by Gandy, but in some few instances they inadvertently omitted to state this fact. Subsequently Gandy published an advertisement in a trade journal entiled "A caution to users of belting," stating in substance that Gandy's success had caused unprincipled makers to imitate his belting and to issue misleading figures relative to the strength of the belts they sell; that these figures were incorrect and misleading; that they represent a solitary piece of belting made for that test; that the belting that is sold is not more than two-thirds that strength. It was further stated that eight pieces had been purchased at different dates and tested. The public was cautioned against fraud, and it was stated that these unscrupulous people induced buyers to take the imitation as the genuine Gandy belt. Reference was made to the previous litigation, and it was claimed that an injunction had been granted against Kerr & Jubb "for selling large quantities of spurious belting as and for the belts of Gandy," and that there was reason to believe that this was still being done. Kerr & Jubb complained of similar advertisements in the shape of handbills and as forming part of price lists, aggravated in some instances by the addition of particulars of alleged tests of pieces of belting alleged to have been purchased from them, showing that they were capable of bearing a comparatively small strain. An action was brought to restrain the publication of the alleged libelous statements and for damages. The injunction was granted and damages were assessed at £500.[2]

Richard Hayward, formerly a member of Richard Hayward & Sons, engaged in business as a competitor under the name of Richard Hayward & Co. Subsequently the original firm brought an action against Richard Hayward, claiming, among other things, an injunction to restrain him from representing that he was connected with Richard Hayward & Sons. Although the court was satisfied that he had never made any such representation and had repudiated such conduct on the part of one of his agents, he voluntarily gave an undertaking that he never would make such a representation and agreed to have this undertaking appear in the judgment. Hay-

[1] Saxby v. Easterbrook & Hannaford, L. R. (1878), 3 C. P. Div. 339.
[2] Kerr v. Gandy, 3 Times Law Reps., 75 (Ch. Div. 1886.)

ward & Sons thereupon distributed circulars stating that they were the original firm, and, after referring to the former litigation, stated further that Hayward & Co. had been "ordered" to undertake not to represent that his firm is, or that their firm is not, the original firm of Richard Hayward & Sons, and that the latter "finding that serious misrepresentations were in circulation to their prejudice, felt themselves obliged to bring the above action." Under these circumstances Richard Hayward & Co. brought an action against the original firm for libel and was held entitled to an injunction and nominal damages.[1]

The owner of a Scottish newspaper, in publishing a comment on the manner in which a rival newspaper had secured a contract for certain public printing, said:

> This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract.

The successful bidder thereupon brought an action,[2] claiming, by innuendo, that the statement meant that he obtained the contract by dishonest and improper means. It was held that the statement would bear the innuendo put upon it, and the plaintiff was allowed an issue.[3]

Another Scottish case is that brought by the British Legal Life Assurance & Loan Co. against the Pearl Life Assurance Co. to restrain the circulation of handbills entitled "Scandalous revelations," which represented the plaintiffs as conducting their business in a scandalous and improper way, as having defrauded a woman who was insured with them by paying her 40s. instead of £20, and of having withheld payment of money legally due under their policies. An injunction was granted and an appeal was refused by the court of sessions, all concurring.[4] It was stated by counsel for appellant that it would be the first time that the Scottish courts had granted an injunction under such circumstances.

Thomas Russell & Sons, watchmakers, brought an action for libel, alleging in substance that they sold both English and Swiss watches; that the latter were marked "Thomas Russell & Sons," and not with the said name and designation of "Chronometer makers to the Queen," this being used to distinguish the English watches; and that the defendant, knowing the premises, falsely and maliciously published the following articles in divers newspapers:

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[1] Hayward & Co. *v.* Hayward & Sons, L. R. (1886), 34 Ch. Div., 198. Cf. order entered in Tallerman *v.* Dowsing Radiant Heat Co., p. 140*n*; see also Hillsdon & Hillsdon *v.* Hillsdon, 18 Cape Times Law Reporter, 108 (1908).

[2] Waddell *v.* Roxburgh, 21 Session Cases (4th series), 883 (1894).

[3] See footnote 4, p. 104.

[4] British Legal Life Assurance & Loan Co. (Ltd.) *v.* Pearl Life Assurance Co. (Ltd.), 14 Session Cases (4th series), 818 (1887).

The American Watch Co. takes pleasure in calling the attention of the Canadian public to the steadily growing reputation for accuracy and reliablity among the Canadian people of the American watch. Interested parties availed themselves for a time of a not unnatural prejudice against the watches, but this has had its day. Now, the watches stand fairly before the public on their merits, and in every instance where tried they have been found infinitely superior to the uncertain, cheap Swiss or Coventry hand-made watches with which the market has so long been flooded under fictitious names and reputations. In proof of this may be pointed out certain watches which are largely advertised throughout the Dominion under the attractive caption of "Chronometer makers to the Queen." A large proportion of said advertised watches are merely Swiss ancres imposed upon the public by an appeal to their loyalty as genuine London watches at more than twice or thrice their true value. By such means the public can not long be deceived.

* * * * * * *

Caution! The excellent reputation of the celebrated American watch has induced certain unprincipled dealers, some of whom we could name, to place upon the Canadian market a worthless Swiss counterfeit of our watches, having our trade-marks in whole or in part. All purchasers of the American watch should insist on our printed certificate of genuineness. Swiss ancres, whether sold as the manufacture of chronometer makers to the Queen or as genuine American-made watches at far more than their value, are a fraud upon the public, which deserves to be exposed.

On demurrer, the above, with proper innuendoes, was held to state a cause of action.[1]

The Ontario Copper Lightning Rod Co. brought an action against one Hewitt,[2] a competitor, for a libel consisting of the following:

To railroad companies, corporations, farmers, and the public generally: The undersigned will furnish any kinds of lightning rods manufactured by the Ontario Copper Lightning Rod Co., of Hamilton, at from 7 cents to 10 cents per foot with fixtures complete. Farmers and others should beware of these so-called agents who are hawking lightning rods about the country in the interest of this Hamilton company, and charging therefor from 37 cents to 42½ cents per foot, when the undersigned can furnish the same rod and even better from 7 cents to 10 cents per foot. The undersigned having a thorough knowledge of the lightning-rod business, feels that it is an imposition practiced on the part of the Hamilton company on the public when they can be sold at the above low-mentioned prices. Anyone wanting rods will please address S. Hewitt. * * *

The publication proved to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the sums named by the defendant only included the price of the rod, although the publication, as the jury found, was intended to convey the meaning that they included the cost of erection also. A verdict of $4,000 was considered excessive, and the court directed a new trial unless the plaintiffs would consent to reduce the verdict to $1,000.

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[1] Russell et al. *v.* Wilkes, 27 Upper Canada, Q. B., 280 (1868).

[2] Ontario Copper Lightning Rod Co. v. Hewitt, 30 Canada C. P., 172, 181 (1879).

Galt, J., said in part:

It is hardly possible to conceive a publication better calculated to injure the plaintiffs in their trade than the one in question. * * *

There can be no doubt if this statement was intended to induce the public to believe that the defendant could perform the same service—that is, could not only provide the rod but erect it in the same manner—it was untrue, and was calculated and intended to injure the plaintiffs in their business. It contains also an averment that the plaintiffs were guilty of practicing an imposition on the public in so doing.[1]

The Winnipeg Steel Granary & Culvert Co. manufactured corrugated steel plate culverts, which were used principally by municipalities in the construction of highways. In 1912 this company sent the following circular to municipal officers in Manitoba and adjoining Provinces:

* * * DEAR SIRS: At a recent meeting of our directors it was decided, owing to recent legislation, to renew no contracts direct with any secretary-treasurer or councilor of any municipality.

We are absolutely prohibited from paying any commission direct to you for any future sales made to your municipality, and the law is as emphatic in regard to you not taking any commission.

We are inclosing two contracts. We would ask you to have the same signed by a business associate or friend who is prepared to represent us.

We are leaving to you the selection of this agent, which we trust will be satisfactory to you. Have contracts signed, witnessed, and returned to us. * * *

This circular in some way came to the knowledge of the Canada Ingot Iron Culvert Co., a competitor, who attached a criticism of the above to copies of the circular and mailed them to the officers of various municipalities. The criticism was headed "Bribery! Bribery!! Bribery!!!" and called the attention of the readers to the difficulty that an honest rival would have in competing with one who used such a circular or who did the acts which the circular suggests. It also contained the following statement:

Let it be recorded that hundreds of honorable secretary-treasurers and councilors in western Canada have spurned the graft. Remember the name of the company.

This document was the subject of an action of libel, and from a judgment in favor of the plaintiffs the defendants appealed.[2] The appeal was allowed and a new trial ordered, the court holding that the sending of the circular was within the defendants' privilege in the absence of express malice. Howell, C. J., said, in part:

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[1] See also Sloman *v.* Chisholm, 22 Upper Canada Q. B., 20 (1862), and Cohen *v.* Bell (1910), Transvaal Leader Law Reps., 331.

[2] Winnipeg Steel Granary & Culvert Co. (Ltd.) *v.* Canada Ingot Iron Culvert Co. (Ltd.) et al., 7 Dominion Law Reps., 707 (Manitoba Ct. of Appeal, 1912).

No one can read the plaintiffs' circular without coming to the irresistible conclusion that in the past the plaintiffs had contracts "direct" with secretary-treasurers and councilors for the sale of goods to the municipalities of which they were officers, and paid these officers a commission on such sales, and further, that they proposed to continue that same practice in the future "indirectly"; and to do that indirectly it was in the circular proposed that a friend or business associate of such officer should be the agent and receive the commission.

It certainly looks to me as if the attention of the plaintiffs had been called to section 161 of the Criminal Code,[1] and that they proposed still to act in violation of that code by hereafter doing it "indirectly."

Quite aside from the Criminal Code, one would think that the plaintiffs might hesitate in sending such a circular as that on the grounds of common honesty. A great deal was said, apparently, at the trial, and a good deal was argued before this court, that what both parties intended to refer to in this matter was the secret commission act, 1909;[2] but it seems to me it makes little difference, in my view of the case, what particular statute the parties had in view. The defendants find their business interests imperiled by the unlawful acts of a rival, and seek to call the attention of their common customers to the astonishing statements in the plaintiffs' circular.

At the trial it does not seem clear whether the learned judge ruled on the question of privilege or not. I have no doubt, as a matter of law, that the defendants, in the conduct of their business, and in the pushing and protection of their trade, had a right to comment to municipalities who might be their customers upon this extraordinary circular of the plaintiffs.

DISPARAGEMENT OF GOODS AS INDIRECT ATTACK ON MANUFACTURER OR DEALER.—As noted above,[3] a libel may contain a disparagement of goods and at the same time reflect upon the conduct of the manufacturer or dealer. Such a case was Thorley's Cattle Food Co. *v.* Massam,[4] where the defendants were enjoined from representing that the cattle food manufactured by the plaintiffs is spurious. Malins, V. C., who issued the injunction, observed that the defendants' claim that they were alone possessed of the secret for compounding the cattle food "is an untrue statement, and an untrue statement ought not to be made for the purpose of pushing trade." Later he said that he did not entertain the least doubt that it is right and proper for the court where "it sees that one trader is practicing an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious, that that is so calculated to injure the business of another that this court, seeing it is a wrong which ought not to be repeated, will prevent it by injunction." This decree was affirmed in the court of appeals.

Likewise an article published by the Linotype Co. reflecting on certain typesetting machines manufactured by a competitor was objected to as imputing that the manufacturers were unskillful and in-

[1] Canada Rev. Stats., 1906, ch. 146, sec. 161, relating to municipal corruption.
[2] 8–9 Edw. VII, ch. 33, sec. 3.
[3] P. 91, and see p. 130.
[4] L. R. (1880), 14 Ch. Div., 763 (1880).

competent in manufacturing and dishonest in the conduct of their business. The jury found, among other things, that the article meant that the plaintiffs were knowingly selling useless machines.[1]

In an earlier case it appeared that a manure dealer published a circular stating in effect that a certain named competitor sold as genuine Peruvian guano a mixture of sand, sawdust, and other worthless materials. The circular was widely distributed on market days in several counties. The injured dealer brought an action for libel and was awarded £287 damages.[2]

Other cases in which the plaintiffs claimed to be injured in their reputation through attacks on their property are Hubbuck *v.* Wilkinson,[3] publishers of the Observer *v.* Advertisers' Protection Society,[4] and Griffiths *v.* Benn.[5] Because of their bearing upon the law relating to disparagement of goods, these cases have been considered in connection with a discussion of that subject.

Disparagement of competitors' goods.—Another method of competition sometimes resorted to is the publication of statements which are simply in disparagement of a rival's property or the quality of the goods which he manufactures or sells. One of the earliest English cases of this character is Heriot *v.* Stuart,[6] which appears to have been brought as an action for libel. The printer of the Oracle published of another newspaper called the True Briton that it was "the most vulgar, ignorant, and scurrilous journal ever published in Great Britain," and that it was "the lowest now in circulation; and we submit the fact to the consideration of advertisers." Erskine, for the plaintiff, admitted that the first words charging defendant with scurrility, etc., were not actionable, but that the latter were, inasmuch as they affected the sale and the profits to be made by advertising, to which Lord Kenyon assented.

In 1841, in a suit between the publishers of rival editions of Scott's Bible, the lord chancellor (Cottenham) remarked that although the advertisement complained of alleged that any additional matter contained in any subsequent edition was spurious and of no value, "that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the plaintiff's edition.[7]

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[1] British Empire Type-Setting Machine Co. and Empire Type-Setting Machine Co. of New York *v.* Linotype Co., 14 Times Law Reps., 253 (Q. B. D., 1898); 14 Times Law Reps., 511 (Court of Appeal, 1898); 15 Times Law Reps., 524 (House of Lords, 1899), and see p. 124.

[2] Salmon *v.* Isaac, 20 Law Times Rep., 885 (Q. B., 1869).

[3] P. 123.

[4] P. 128.

[5] P. 129.

[6] 1–2 'Espinasse, 437 (1796). Plaintiff nonsuited because of variance in the proof of an unnecessary allegation.

[7] Seeley *v.* Fisher, 11 Simon, 581, 583.

This case was followed shortly afterwards by Evans *v.* Harlow,[1] where the defendant, a business rival, published an advertisement in a newspaper cautioning parties using steam power that the plaintiff's self-acting tallow syphons or lubricators were wasteful. Attention was also invited to the defendant's improved lubricator, which, it was claimed, would effect a great saving. There was no allegation of special damage. Judgment was given for the defendant. According to the report of this case by Adolphus and Ellis,[2] Lord Denman, C. J., said:

> A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be "false, scandalous, malicious and defamatory" that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action. There is in this case a caution given by the defendant against the plaintiff; but it is not against fraud in him; it is simply on account of his selling defective goods. Anyone selling the same articles would have as much right to complain as he has. The imputation is only on the goods, and is not ground for an action.

This opinion of Lord Denman has been frequently cited and it apparently caused some doubt as to whether an action would lie for merely disparaging a rival's goods.

Thus, Lord Herschell, in White *v.* Mellin,[3] said:

> It is to be observed that Evans *v.* Harlow does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson, J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman,[4] J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to litigation, and that the courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Again, in the same opinion, he said:

> Advertisements and announcements of that description have been common enough; but the case of Evans *v.* Harlow was decided in the year 1844, somewhat over half a century ago, and the fact that no such action—unless it be Western Counties Manure Co. *v.* Lawes Chemical Manure Co.—has ever been maintained in the courts of justice is very strong indeed to show that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

Lord Herschell was referring to the report of Evans *v.* Harlow, contained in 5 Queen's Bench, 624.

Likewise, in Nonpareil Cork Manufacturing Co. *v.* Keasbey & Mattison Co.,[5] a circuit court of the United States quoted a part of

[1] 5 Q. B., 624 (1844).
[2] 5 Q. B., 624, 631.
[3] L. R. (1895) A. C., 154, 164, 165.
[4] Cf. opinion of these judges as reported in the Jurist.
[5] 108 Fed., 721, 723 (1901).

the above extract from Lord Denman's opinion, and concluded as follows:

> From the whole declaration it plainly appears that what the defendants are charged with is really but the expression of an unfavorable opinion of the goods of its competitor. But such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts.

It may be noted, however, that in both of these cases the action was based on the theory that the words were libelous of the plaintiffs personally.

In view of the doubts which appear to have been raised by this opinion, it will be of interest to note another report of the same case, contained in the Jurist.[1] According to this report Lord Denman said:

> The gist of the libel is that the plaintiff complains that the defendant told the world that the self-acting lubricators were not good; but this is an imputation to which every tradesman exposes himself. It is not because the words "falsely and maliciously" are used in the declaration that we can put a libelous construction upon words. The defendant cautions the public against the plaintiff because he sells bad goods. If that be a libel upon the plaintiff, everyone who publishes that his goods are better than those of another will be liable to an action for libel. *If the libel is concerning the goods, there is no special damage.*

Patteson, J., is also reported to have said:

> If this had been a caution against the plaintiff as a tradesman, then the libel would have been with respect to the plaintiff as a tradesman, but the defendant says it is the lubricators against which he would caution. Now, that is a caution against the goods and not against the person, and a publication in disparagement of the goods of a person, without an *allegation of special damage*, is not actionable. The plaintiff has not stated that in consequence of such publication any person has refused to buy his said goods.

Wightman, J., said in part:

> This case is distinguishable from Harman *v.* Delaney; there it was said of the plaintiff that he was no artist, but here it is not alleged that these articles were of the plaintiff's manufacture; *there is no allegation of special damage, and the publication is therefore not actionable.*

In 1862 a somewhat similar case was before the court of Queen's Bench.[2] It appeared that the parties were competitors, dealing in illuminating oil, and that the defendant published, in the shape of a circular, a report signed by Dr. Muspratt comparing the defendant's oil with that of the plaintiffs', and expressing the opinion that the plaintiffs' oil was inferior to the defendant's. This was alleged to be a false and malicious libel concerning the plaintiffs, in the way of their trade, which resulted in the loss of divers customers who were

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[1] 8 Jurist, part 1, 571, 572, 573 (1844).
[2] Young *v.* Macrae, 3 B. & S., 264, 269 (1862).

induced to buy from the defendant. On demurrer judgment was given for the defendant.

The doubts then existing with respect to a right of recovery for the mere disparagement of goods appear from the following extracts from the report:

Blackburn, J.:

Is there any case where an action has been maintained for a slander, written or verbal, of *goods*, unless where the slander is of the title to them and special damage has resulted?

James, for plaintiff:

It has always been thought so clear that such actions would lie that the point has never been disputed.

Cockburn, C. J.:

The answer to that is that not one of us recollects such an action in the course of his experience.

Although judgment in this case was given for the defendant, Chief Justice Cockburn said in part:

I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained. For although none of us are familiar with such actions, still we can see that a most grievous wrong might be done in that way, and it ought not be without remedy.

On the other hand, Blackburn, J., expressed the opinion that "where there is a written depreciation of an article, unless it is a slander, actionable in itself, no allegation of special damage will render it actionable except in the case of slander of title."

The opinion of the court with respect to such forms of advertising may be gathered from the following remark of Cockburn, C. J., addressed to counsel for the plaintiff:

You can bring another action and perhaps get another professor to make a report in favor of your oil.

It would appear that the first case in which there was a recovery for disparagement of goods was Western Counties Manure Co. *v.* Lawes Chemical Manure Co.,[1] decided in 1874. The parties were competitors, engaged in the manufacture and sale of artificial manure, and it was alleged that the defendant falsely and maliciously published a statement and comparative analysis of four samples of manure, disparaging the quality of the plaintiff's product and stating that it "appears to contain a considerable quantity of coprolites and is altogether an article of low quality and ought to be the

[1] L. R., 9 Ex., 218, 222 (1874).

cheapest of the four." Special damage was alleged. On demurrer it was held that an action would lie.

Bramwell, B., distinguished the case from Young *v.* Macrae, saying, in part:

> The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendant's own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him a special damage, is actionable, we give our judgment for the plaintiffs.

Pollock, B., concurring, observed that in Evans *v.* Harlow there was no allegation of special damage. The following extract from his opinion is in harmony with the dictum of Cockburn, C. J., above quoted:

> This case no doubt involves first principles. On the one hand the law is strongly against the invention or creation of any rights of action, but on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "ubi jus ibi remedium." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. * * * This action is, I think, in the nature of an action of slander of title and comes within the general rule laid down as to such actions in Comyns's Digest, where it is said that an action lies when special damage is shown.

Notwithstanding the doubts expressed by Blackburn, J., in 1862, and more recently by Lord Herschell, there are numerous English cases holding an action may be maintained when actual damage is shown to have resulted from false and malicious statements made in disparagement of another's goods.

Shortly after the decision in the Western Counties Manure Co. case an action was brought by a trader, who was assisted by his wife in the conduct of his business, charging the defendant with having published of the plaintiff's wife certain words imputing immoral conduct upon the premises, whereby the plaintiff was injured in his business and certain persons named and many others ceased to deal with him. A verdict was found for the plaintiff, but leave was reserved to the defendant to move to enter a verdict for him or a nonsuit. A rule was accordingly obtained, but was later discharged.[1] The plaintiff's wife was originally a party to the action, but by agreement she was dismissed. As stated by Chief Baron Kelly, the action—

> * * * then remained in substance not slander, but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff. * * * The two

[1] Riding *v.* Smith, L. R. (1876), 1 Ex. Div., 91, 93, 94; cf. Barrett *v.* Long, 3 H. L. Cas., 395.

questions are: First, whether such an action is maintainable at all; and, secondly, whether it can be maintained without proof of something of the same kind as the special damage that would have to be proved in an action for slander. It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff.

* * * I think it is sufficient to show that from the time of the injury being done the business has fallen off, and that it is unnecessary to prove that any particular persons have ceased to deal with the plaintiff. On both grounds, therefore, I think the plaintiff is entitled to succeed, and the rule must be discharged.

Pollock and Huddleston concurred.

While this action was not founded on disparagement of goods, the broad reasoning of the court was shortly afterwards adopted by Fry, J.,[1] in granting an injunction to restrain a tradesman from issuing circulars imputing that certain needles manufactured by a competitor were not an honest, independent make, and were intended to imitate those made by another firm of a similar name.[2]

An asphalt company laid some asphalt roofing for one Bird and guaranteed the work for 10 years. Subsequently the secretary of a rival company said to Bird: "You will regret ever using the rubbish put on by others as asphalt; it is only Trinidad rock, and not asphalt at all." In consequence of this Bird refused to pay for the work, although he was quite satisfied with it. Huddleston, B., left it to the jury to determine whether the words imputed that the plaintiffs carried on their business improperly or conveyed an imputation on the article sold, and, if the latter, whether the words were used maliciously and resulted in special damage. As the jury found that the words referred only to the article sold, that they were not used maliciously and that there was no special damage, judgment was given for the defendant.[3]

In 1886, on the motion of Liebig's Extract of Meat Co. (Ltd.),[4] the court granted an interim injunction, restraining one Anderson, a competitor, from using and issuing certain wrappers or advertisements containing the words, "This is the only genuine," with reference to the Liebig's extract of meat sold by the defendant. This order was granted, although it appeared that the complainants in their advertisements "may have overstepped the limits of truthful-

[1] Thomas v. Williams, L. R. (1880), 14 Ch. Div., 864.

[2] See also Thorley's Cattle Food Co. v. Massam, p. 112.

[3] Société Française Des Asphaltes v. Farrell, 1 Cababe & Ellis, 563 (1885).

[4] Liebig's Extract of Meat Co. (Ltd.) v. Anderson, 55 Law Times Reps., 206 (1886).

ness." The theory upon which the court proceeded is disclosed by the following extract from the opinion of Chitty, J.:

The case I have to deal with now is one of trade libel; that is to say, it is alleged on the part of the plaintiffs that the defendant Anderson is putting forward, in advertisements and general publications, on his wrapper, and otherwise, matter which is untrue and which is injurious to the trade and to the reputation of the trade of the plaintiffs.

In 1893 an article appeared in the Grocers' Journal entitled "Messrs. Champion's vinegar in court," stating that a charge had been made against a grocer for selling adulterated vinegar and that the dealer had purchased it from another, who had received it from Messrs. Champion. It further stated that a letter from this company was read denying the truth of the charge as to their vinegar, but that a fine was imposed on the retailer, the bench observing that it was most unfair that the disgrace should be visited on him. Champion & Co. brought an action against the Birmingham Vinegar Brewery Co., alleging, among other things, that they caused these paragraphs to be reprinted and circulated extensively, and that their travelers and agents were directed to leave copies with the plaintiff's customers and to state that plaintiff's vinegar was adulterated, and that persons retailing it would expose themselves to prosecution. An interim injunction was obtained restraining the further circulation of the publications complained of, and the defendants appealed. The divisional court dissolved the injunction, but at the trial the plaintiffs recovered £20 damages.[1]

Up to this time neither the House of Lords nor the Privy Council had rendered any opinion respecting the right to maintain an action for the disparagement of goods. The Privy Council had considered an Australian case,[2] in which the proprietor of the Sydney Evening News complained of a paragraph in the Australian Star referring to his newspaper, "The Market Street Ananias" and a "poor little silly noozy." The action, however, was brought on the theory that the offending paragraph was a reflection on the plaintiff's character or his conduct in relation to the newspaper. The right to base an action on statements merely in disparagement of the plaintiff's property was therefore not involved. Immediately afterwards, however, the House of Lords rendered an opinion in the case of White *v.* Mellin,[3] and although, as pointed out by Lord Herschell, it was unnecessary to decide the question in order to dispose of the appeal, previous disparagement cases were examined and commented on in such a manner as to create considerable doubt as to the state of the

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[1] Champion & Co. (Ltd.) *v.* The Birminghsm Vinegar Brewery Co. (Ltd.), 10 Times Law Reps., 164 (1893).

[2] Australian Newspaper Co. (Ltd.) *v.* Bennett, L. R. (1894), A. C. 284.

[3] L. R. (1895) A. C., 154, 159, 167, 168, 170.

law. Owing to the importance of this case, the opinions of the lords have been set out at some length.

The respondent was the proprietor of Mellin's Infants' Food, which he supplied in bottles to the appellant, who sold it to the public after affixing to the respondent's wrappers a label[1] reading in part as follows: " 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." The appellant was the proprietor of Vance's food. Discovering this practice, the respondent sought an injunction and damages. At the trial before Romer, J., the plaintiff proved the above facts, and called two analysts and a physician, who, in brief, testified that, in their opinion, Mellin's food was suitable for infants, especially up to the age of 6 months, and persons who could not digest starchy matters, and that Vance's food was unsuitable for such beings and pernicious and dangerous for young infants. It was alleged that the plaintiff's food was sold at wholesale and that it is a well-understood condition in the trade that it shall be sold by the retailer in identically the same form as to wrappers and labels as that in which it is supplied, without any additions or alterations, except that the retailer may affix a label with his own name and address thereon. There was no proof of this at the trial, and there was no evidence that the statement complained of had injured or was calculated to injure the plaintiff. At the close of the plaintiff's case the court, being of opinion that the label was merely a puff of a rival trader and that no cause of action was disclosed, dismissed the action, saying in part:

> So far I have only heard his [plaintiff's] evidence, and no doubt, so far as it goes, it does tend to show that his food is the best, at any rate, for infants under 6 months old. But, as I have said, no person on seeing what the defendant has done would read this statement put upon the plaintiff's food as being anything more than a rival puff. 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 put upon the goods of the man who complains. But, however annoying the form of the defendant's advertisement may be to the plaintiff, 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.[2]

The court of appeal (Lindley, Lopes, and Kay, L. JJ.) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial. The House of Lords reversed the decision of the court of appeal and restored that of Romer, J. The following extracts are from the opinions of the lords:

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[1] Cf. Collins v. American News Co. et al., p. 282.

[2] Mellin v. White, L. R. (1894), 3 Ch. 276, 279.

Lord Herschell:

* * * Looking fairly at the language used and the meaning to be attributed to it, I am not satisfied that it has been shown that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, my lords, assuming that he did so, the court of appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. * * * After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that anyone buying this bottle at the chemist's would be led to believe that Mellin's food which he had bought was not a good article or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? * * *

But, my lords, I can not help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better, either generally or in this or that particular respect, than his competitors' are. Of course, I put aside the question—it is not necessary to consider it—whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In Evans *v.* Harlow Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious, and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." My lords, those observations seem to me to be replete with good sense. * * *

* * * If an action will not lie because a man says that his goods are better than his neighbor's it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious, and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.[1]

Lord Watson said in part:

Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. In order to constitute disparage-

[1] And see p. 114.

ment which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established it must be held that the defendant has acted within his rights and that the palintiff has not suffered any legal injuria.

Lord Macnaghten said in part:

My lords, I entirely agree. Upon the legal aspect of the case I have nothing to add. I only wish to protest against it being supposed that there is any shadow of foundation in equity for the present claim. I mean no imputation upon the draftsman, because the claim as originally launched was founded on an implied contract arising out of the custom of trade. And if that could have been made out the respondent would have had something to say.

Lord Morris, concurring, noted the absence of proof of the implied condition in the trade above referred to, the absence of averments of malice and special damage, and said in part:

* * * The only reflection of the defendant upon the plaintiff's article was that his, the defendant's, was more healthful and nutritious. Such a statement simpliciter, in my opinion, conveys no right of action to the plaintiff. * * *

But it was said that although an action for damages could not be sustained an injunction in equity could be obtained. It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act.

Lord Shand, concurring, said in part:

I only desire to add that for my part I should be quite content with the ground of judgment which Romer, J., expressed in dismissing the case after the evidence of the plaintiff had been led.[1] * * *

If there had been in this case an imputation of intentional misrepresentation for the purpose of misleading purchasers or a statement that Mellin's food was positively injurious, or that it contained deleterious ingredients, and would be hurtful if it were used, I think there would have been a good ground of action; and if the authorities have not settled the law otherwise I should even say that an averment of special damage ought not to be necessary. * * *

Therefore, upon the simple ground that the advertisement complained of, though clearly it applied to the plaintiff's goods, really can not be characterized as a libel, I am of opinion that the action was rightly dismissed by the learned judge before whom it was tried.

Of the five judges who delivered opinions four agreed that the label complained of was a mere puffing advertisement, and the remaining judge, Lord Macnaghten, expressed no opinion on this point. This finding would be sufficient to dispose of the case, and it may fairly be said to be the main ground of the decision.

With respect to the difference of opinion as to the right to bring such an action under other circumstances Lords Watson and Shand believed that the action would lie; Lord Morris expressed no opinion, but considered only the facts of the case at bar, noticing, however, the absence of certain averments; Lord Herschell expressed grave

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[1] He then quoted the opinion of Romer, J., noted above.

doubts, but admitted that it was unnecessary to decide the point in order to dispose of the appeal, and Lord Macnaghten had "nothing to add" on the legal aspect of the case. Lord Ashburne, who was not present, concurred in the "judgment," but delivered no opinion.

With respect to the implied condition that the food should be sold as received, without additions to or alterations of the wrappers, Lord Morris was of opinion that without this averment no cause of action was disclosed, and Lord Macnaghten observed that the claim was originally founded on this implied contract, and that if it could have been made out the respondent would have had "something to say."

The failure to show special damage was noted by Lords Herschell, Watson, and Morris, although Lord Shand remarked that if the authorities have not settled the law otherwise he would say that such an averment ought not to be necessary.

In 1899 Hubbuck & Sons, oil merchants and paint manufacturers, brought an action [1] against a competitor grounded on the publication by the latter of a circular purporting to be a copy of a report of a test of the defendants' "Bell Brand Genuine White Zinc" and "Hubbuck's Patent White Zinc," which concluded as follows:

> Judging the finished work, it is quite evident that W., H. & C.'s [2] zinc has a slight advantage over Hubbuck's, but for all practical purposes they can be regarded as being in every respect equal.

The plaintiffs alleged that the defendants meant that their zinc was superior or at least equal to that of the plaintiffs', at a much cheaper price; that the plaintiffs' was adulterated and not genuine; that purchasers would do better by buying from the defendants; that the report and each statement thereof was untrue; that the alleged trials had not been made, or not fairly made, or made with the alleged results; that the plaintiffs' zinc was in fact superior; that by reason of the premises they had been injured in their trade and business, and the reputation of their zinc and of themselves as the manufacturers had been injured, etc. The plaintiffs asked for damages and an injunction. The defendants appealed from the refusal of the court to strike out the plaintiffs' statement of claim on the ground that it disclosed no cause of action. In the court of appeal the defendants, urging that special damage had not been alleged, relied on Evans *v.* Harlow, Young *v.* Macrae, and White *v.* Mellin, and claimed that Western Counties Manure Co. *v.* Lawes Chemical Manure Co. was overruled by White *v.* Mellin. In allowing the appeal the master of the rolls said in part:

> The fact that the defendants call their white zinc genuine, and contrast it with the plaintiffs' white zinc, which is not called genuine, is relied upon by the

[1] Hubbuck & Sons (Ltd.) *v.* Wilkinson, Heywood & Clark (Ltd.), L. R. (1899), 1 Q. B., 86, 92. Cf. Clarkson *v.* Book Supply Co. et al., p. 84.

[2] The defendants.

plaintiffs as showing that the circular is or may be fairly regarded as a defamatory libel on the plaintiffs, i. e., a libel on them in the way of their trade; but when the whole circular is looked at and it is found that the defendants state that for all practical purposes the two contrasted paints are in every respect equal, it is impossible to treat the circular as anything more than a disparagement of the white zinc paint made and sold by the plaintiffs. No ingenuity can convert the circular into a defamatory libel on the plaintiff company. * * *

We will now consider the circular in its other aspect, namely, as a disparagement of the plaintiffs' goods. From this point of view the case is undistinguishable from Evans *v.* Harlow and Young *v.* Macrae, where malice, falsehood, and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decision in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals is not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in White *v.* Mellin.

The court expressed the opinion that no cause of action had been disclosed and that a more definite allegation of special damage would not improve the plaintiffs' case. In conclusion it was said:

We regard this case as falling within the principle established by Evans *v.* Harlow, Young *v.* Macrae, and White *v.* Mellin. It is not necessary to consider how the case would have stood if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or at all events not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of claim as showing no reasonable cause of action. But the circular complained of is such as plainly to constitute no cause of action even if all the allegations in the statement of claim are true.

In 1898 the English courts again considered the law relating to disparagement of goods when an action was brought by the British Empire Typesetting Machine Co. and the Empire Typesetting Machine Co. of New York against the Linotype Co.,[1] to recover damages for an alleged libel. Although judgment was rendered on the theory that the words were defamatory of the plaintiffs in the way of their trade, the other view of the case was considered for the reason that the defendants urged that the objectionable article merely referred to the plaintiffs' machines. The libel complained of, which is quoted below, had been sent to the editors of the St. James Gazette and the Printers' Register, but had not been published in either of those papers:

THE EMPIRE TYPESETTER IN AMERICA.

The Union Printer and American Craftsman, the most wide-awake and spirited of American trade journals, has recently contained several references

[1] 14 Times Law Reps., 253 (Q. B. D. 1898).

to the Empire composing machines, which were installed in the office of the New York Evening Sun with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of February last and the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Co. is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow to this machine.

It appeared that in consequence of trade-union rules the presence of the machines made it necessary for the owners of the Sun to pay higher wages to their workmen, and for this reason the machines were removed. By innuendo it was alleged that the paragraph imputed that the plaintiffs were unskillful, incompetent, and negligent in manufacturing the machines, and were dishonest and unskillful in the conduct of their business, etc.

At the trial the lord chief justice (Lord Russell of Killowen) said in part:

Although I think that the mere vaunting of a man's goods, even if it implies disparagement of another man's, ought not to be actionable, yet I agree with Lord Herschell's opinion in White *v.* Mellin * * * that where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action ought to lie.

In answer to questions submitted by the chief justice, the jury found that (1) the publication was a libel; (2) it was directed against the business of the company as vendors of these machines generally; (3) the defendants published the alleged defamatory matter maliciously, intending to attack the plaintiffs in the conduct of their business; (4) that the libel meant to impute that the plaintiffs were knowingly selling useless machines; (5) £500 damages. No special damage was proved or alleged. Judgment was entered in accordance with the verdict. On an application by the defendants for judgment or for a new trial the judgment was affirmed.[1] The following extract is from the opinion of Lord Justice Smith, of the court of appeal:

If it were true that the libel in question was only a disparagement of the plaintiffs' goods, I agree that the case of Evans *v.* Harlow approved of in the House of Lords in White *v.* Mellin, is conclusive to show that the action would not be maintainable without proof of special damage. * * * If the meaning of the publication was, as the defendants now assert, merely an imputation upon the machines, what is the meaning of inserting the plaintiffs' name as being the persons who had installed these disparaged machines? * * * A libel may well contain a disparagement of goods, and at the same time a disparagement of the trader who in his business sells or sets them up. * * *

[1] 14 Times Law Reps., 511 (1898); 79 L. T. Reps., 8, 9, 10.

As to damages, if a trader falsely and with actual malice publishes a libel intending to attack and injure a rival in trade, as has been proved to have been done by the defendants in this case, I can not say, nor do I think, that £500 damages are in such circumstances excessive.

The judgment of the court of appeal was affirmed by the House of Lords,[1] but the language of the lord chancellor (Halsbury) was such as to throw further doubt on the law relating to mere disparagement of goods. In considering the following extracts from his opinion it should be remembered that the only question he had to consider was whether the words complained of were susceptible of a meaning which could make them actionable:

There is no doubt that if the only meaning which a reasonable man could attach to these words amounted to a mere criticism of the machine as a mechanical appliance, it is not an actionable wrong to publish such a criticism. I think that principle is well established, and I do not think that it requires any authority to establish it.

After considering the case of Harman *v.* Delany,[2] the lord chancellor continued:

It will be observed that the whole point of the decision is that it is a reflection upon the plaintiff in the way of his trade, aud it is upon that principle that the court decides. On the other hand, in Evans *v.* Harlow, the Court of Queen's Bench decided that a statement that what a tradesman had described as "self-acting tallow syphons or lubricators" were not good for the purpose of which they were advertised, but that anyone who adopted such lubricators "will find that the tallow is wasted instead of being effectually employed as professed," was not a libel upon the plaintiff. The principle which distinguishes the two cases (and, as I have said, it is the principle only with which I am dealing, and not the particular words of either of the libels proceeded against) is that while mere criticism upon a manufacture or goods is lawful, an imputation upon a man in the way of his trade is, even without special damage, properly the subject of an action.

Lord Macnaghten and Lord Morris concurred, but did not write separate opinions.

In 1904 the court of appeal endeavored to dispose of any doubts as to the right to recover for the disparagement of goods.[3] A contractor who was an importer of American red gumwood blocks for street paving brought an action against a company which imported Australian karri and jarrah wood for similar purposes. The basis of the complaint was the following letter to the members of a borough council:

We understand that your council propose laying the roadway of Oxford Street with American red-gum blocks. We would very strongly recommend that,

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[1] Linotype Co. *v.* British Empire Type-Setting Machine and The Empire Type-Setting Machine Co. of New York, 15 Times Law Reps., 524; 81 Law Times Reps., 331 (1899).

[2] 2 Strange, 898.

[3] Alcott *v.* Miliar's Karri and Jarrah Forests (Ltd.) et al., 91 Law Times Reps., 722; 21 Times Law Reps., 30 (1904).

before deciding upon this, you should pay a visit of inspection to Piccadilly, Waterloo Place, Haymarket, and Whitehall, the roadways of which have been paved with American red gum only from 6 to 18 months, and are now in a rotten condition. We venture to say that the result of such a visit would certainly remove from your mind any idea of using such material for roadways in your district.

The plaintiff alleged that the letter was written in order to prevent him from securing a certain public contract and that by reason of the letter he had been obliged to reduce his price and allow 25 per cent of the contract price to be retained as a guaranty of the sound merchantable quality of his wood. The jury found for the plaintiff and awarded £250 damages. The defendants appealed, relying mainly on Evans *v.* Harlow and Hubbuck *v.* Wilkinson, stating that doubt was thrown upon the correctness of the decision of Western Counties Manure Co. *v.* Lawes in White *v.* Mellin. The court of appeal did not call upon counsel for the plaintiff, but dismissed the appeal. The Master of the Rolls (Collins) said, in part:

The learned judge, in his summing up pointed out clearly to the jury what are the conditions under which an action of this kind can be maintained. The learned judge told the jury that "you may crack up your own goods as long as you like; you may say that your goods are better than anybody else's, and that your goods have qualities that others have not. It may be true or untrue, but you are entitled to do that. You have no right to say of your neighbor's goods that they are bad, or rotten, or whatever it may be, if it is untrue, and if damage results to your rival."

Referring to Hubbuck *v.* Wilkinson, the court said:

That case turns simply upon this, that the mere puffing of his own goods by a trader is not libelous any more than mere abuse is libelous. If it is clear that what is complained of is a mere puffing of his own goods by the defendant, then there is no question for a jury. That was the ground of the decision in that case, and the particular inference that there was mere puffing by the defendant was there drawn. How can we say in the present case that an imputation that the goods of a trader were rotten, and a statement that the result of a visit of inspection "would certainly remove from your mind any idea of using such material for roadways in your district" is not capable of being defamatory of the plaintiff's goods? If that statement is incapable of being disparaging of the goods of the plaintiff, I must say that I do not know what can be said to be disparaging. * * * Mr. Rufus Isaacs referred to the observations of Lord Herschell in White *v.* Mellin * * * which he made with reference to the case of Evans *v.* Harlow * * * but when those observations are fairly considered, it is clear that they do not touch the solid foundations of the law upon this matter. In that case Lord Watson said: "In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within his rights, and that the plaintiff has not suffered any legal injuria." That was the old law upon the subject, and it still remains the law; and I do not think that the observations which Lord Herschell made in any way alter that.

Stirling and Mathew, L. JJ., concurred, the latter saying, in part:

The notion that no action will ever lie for disparagement of the goods of a trader has really been condemned in the House of Lords, and it cannot be said now that in no case of disparagement of goods will an action lie. The law, therefore, was correctly stated by the learned judge to the jury, and, the jury having found a verdict for the plaintiff, the action is clearly maintainable.

In 1906 the law relating to disparagement of property was considered in the chancery division.[1] The proprietor of a newspaper, the Guardian, sought an injunction against the proprietor of the Star, who, it was alleged, disparaged his paper by statements untrue in fact and by which he had been damaged. The publications complained of were as follows:

(*a*) The most remunerative advertising medium for the district. The Star is the only weekly newspaper read extensively throughout the whole of Mid Cornwall. The circulation of the Star is 20 to 1 to any other weekly paper in the clay district.

(*b*) The Star is the only paper which can give a really comprehensive view of what the tradespeople of the town are doing. The Star has a circulation to which no other weekly paper of Mid Cornwall can compare. Where others count by the dozen we count by the hundred.

(*c*) Largest guaranteed circulation in the mining and china clay district in Mid Cornwall.

The plaintiff's evidence showed that instead of 20 to 1, or, indeed, any excess in the circulation of the Star over the Guardian, the facts were all the other way. The court quoted with approval the opinion of Mr. Justice Mathew in Alcott *v.* Millar's Karri, etc., Forests, and the judgment of Lord Watson in White *v.* Mellin above noted; but dismissed the action because of the failure on the part of the plaintiffs to prove any actual damage. With respect to the nature of the publications complained of, the court observed:

It has been argued that the defendant's statements were mere puffs, but I can not accept that; they were definite statements of fact and were wholly untrue.

In 1910 the publishers of the Observer brought an action for damages against the Advertisers' Protection Society.[2] The objects of the latter were, among other things, the protection of its members against fraud in advertising matters, the discovery of the circulation of various publications, and the supply of reliable information on advertising matters. In furtherance of these objects they published a monthly circular addressed to members, marked "Private and confidential." The alleged libels were contained in two issues of this

[1] Lyne *v.* Nicholls, 23 Times Law Reps., 86 (1906).

[2] Publishers of the Observer (Ltd.) *v.* Advertisers' Protection Society (Ltd.) et al., London Times, Feb. 3 and 4, 1910 (K. B.). Cf. Heriot *v.* Stuart, p. 113.

circular: The first reading "Observer.—We are informed that this is now selling about 5,000." The second was to the same effect. The plaintiffs claimed that the circulation of the Observer was then some 30,000, and was now over 60,000, and that the circulars had caused serious damage. It was contended that the statement practically imputed a fraud to the plaintiffs in holding themselves out as an advertising medium. According to the report, Darling, J., observed that—

The action was based on two grounds; first, on that of libel; secondly, it was what might be called an action on the case. It was clear law that a company might be libeled as well as an individual, but a libel could only be constituted by something calculated to bring the company into ridicule or contempt. This might be done by statements relating to the conduct of the business by the directors, but he did not think that a mere statement that the circulation of a newspaper was 5,000 could amount to a libel, and therefore he held that as far as the action was based on libel there was no case. It became, therefore, unnecessary for him to determine whether the occasion was privileged, though he would say that it would require a good deal more than he had heard to persuade him that it was so. There remained the ground of action "on the case"—for disparagement of the plaintiffs' property—and, as to that, they would be entitled to succeed if the jury found actual damage caused by an untrue statement maliciously made.

The jury found (1) that the defendants had published a disparaging statement of the plaintiffs' business; (2) that it was false; (3) that it was not malicious in the sense of being designed to injure the plaintiffs in their business; (4) that it was malicious in the sense of being without just cause or excuse; (5) that it did not cause injury to the plaintiffs, either necessarily or in fact; (6) no damages. On these findings judgment was entered for the defendants.

The broad language of the lord chancellor in the so-called Linotype case noted above was brought to the attention of the court of appeal in Griffiths *v.* Benn.[1] Griffiths was a director of William Griffiths & Co. (Ltd.), road contractors, and Bedell, the other plaintiff, was an electrical engineer and inventor of the "G. B." system of electric traction. The plaintiff Griffiths under the name of the G. B. Surface Contact Co., with Bedell as manager, carried on the work of installing this system, of which the plaintiffs owned the patents. The action was brought for damages for alleged slanders uttered by the defendant, Sir John Williams Benn, former member of Parliament and the leader of the Progressive Party in the London County Council, and for alleged libels contained in letters written by him to certain daily papers and for alleged disparagement of goods. The jury found that the statements were defamatory; that they referred

[1] Griffiths et al. *v.* Benn, 27 Times Law Reps., 346 (1911).

to the plaintiffs; that they were statements of fact and not of opinion and in many points were untrue; that they imputed that the "G. B." system was a failure, both generally and in the particular installation; and that the defendant was actuated by malice; and although they could not agree on the question of special damage, they assessed the general damage at £12,000.

The defendant appealed, urging, among other things, that "it was clear from the Linotype Co. (Ltd.) *v.* British Empire Type-Setting Machine Co. (Ltd.) * * * that if the only meaning which could reasonably be attached to a writing was that it was a criticism upon the goods or manufacture of a trader it could not be the subject of an action for libel."

An appeal was allowed on the ground that the words were not capable of a defamatory meaning. With respect to the law relating to disparagement of goods the master of the rolls (Cozens-Hardy) said:

> There are some general principles by which we must be guided. To disparage a trader's goods, which is often (though inaccurately) spoken of as a trade libel, does not give ground for an action of libel, although, if special damage is proved, the plaintiff may recover in an action on the case. On the other hand, the words used, though directly disparaging goods, may also impute such carelessness, misconduct, or want of skill in the conduct of his business by the trader as to justify an action of libel. Evans *v.* Harlow[1] is one side of the line and the Linotype case[2] is on the other side of the line. They only illustrate the well-established principles, and I do not refer to them except for that purpose. * * *
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> * * * There is a violent and, as the jury have found, an unjustified attack upon the "G. B." system—an attack which has not been proved to have caused any special damage. It seems to me extravagant to argue that an attack upon the system must be regarded as an imputation upon the owner of the patents who supplies the parts and licenses the use of the system.

Although not a suit between competitors, the case of Bruce *v.* Smith[3] is of interest for the reason that it illustrates the law of Scotland. The builder and owner of certain houses brought an action against the proprietors of the Glasgow Evening News, claiming damages on account of the publication of the following paragraph:

> People in the northwestern district of the city have discovered a new distraction in watching the rents which are appearing in the frontage of a new property still unoccupied. A year or so ago the building collapsed owing to an insecure foundation, but it has been run up again. Signs of fresh weakness are already evident, and there is much speculation as to the future on the part of small crowds which gather in the evening and gaze blankly at the building. The master of works may hear that his services are required when the tenement comes down with a run for the second time.

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[1] P. 114.
[2] P. 124.
[3] Bruce *v.* J. M. Smith (Ltd.), 36 Scottish Law Reporter, 243 (1898).

Plaintiff averred that the paragraph was false, calumnious, and malicious; that he was a large property holder and engaged in building houses and shops for sale and lease; and that the reputation of the building referred to had suffered by reason of the publication, which had prevented the letting of the buildings and greatly depreciated their selling value; but he made no special averments of damage. It was held that the action would lie.

The lord ordinary, whose judgment was affirmed by the court of sessions, said in part:

The plea that the action was irrelevant was supported on the general ground that no action for slander to property is recognized in the law of Scotland, that is to say, that although false statements were made about a party's property which had the effect of seriously reducing its value in the market the owner of the property could have no redress. I am not prepared to sustain that contention. * * * It is easy to imagine cases in which false assertions about goods or property may cause as much pecuniary damage and do as great a wrong as an attack on character, although of a different kind, and it is not easy to come to the conclusion that a wrong of that kind is without a remedy. * * *

This kind of action is, I believe, familiar in England, and various cases were referred to in the argument—in particular, Western Counties Manure Co. *v.* Chemical Manure Co., Ratcliffe *v.* Evans, and White *v.* Mellin. In Western Counties Manure Co. the law was thus stated by Lord Bramwell. When a plaintiff says, "You have, without lawful cause, made a false statement about my goods, and to their comparative disparagement, which false statement has caused me to lose customers," an action will lie; and in Ratcliffe *v.* Evans, Lord Bowen uses similar language. I do not know of any established rule in the law of Scotland inconsistent with these apparently equitable opinions.

The opinion of the lord justice-clerk was as follows:

Undoubtedly this case is a peculiar one. It is not often that one sees an action raised on such grounds as we have here. It is difficult to see how these statements denouncing the buildings in such terms can be held not to be injurious to the pursuer if they are not true. If these statements are not true, in my opinion it is impossible to treat them as not entitling the pursuer to an issue.

On the whole matter, I think that the judgment of the lord ordinary is right, and that an issue ought to be allowed.

Lords Young, Trayner, and Moncreiff concurred.

In an early Canadian report it appears that the owner of the steamer United Kingdom brought an action against the agent of the Great Britain, alleging that the latter, in the presence of prospective passengers, had spoken disparagingly of the plaintiff's vessel, stating that she was dangerous and that her boilers were unsafe, which resulted in the loss of profits that otherwise would have been derived from the carrying of passengers and freight. The jury returned a verdict for the plaintiff, which was, however, set aside on the ground that the evidence did not sufficiently support the declaration.[1]

The Acme Silver Co. brought an action against the Stacey Hardware & Manufacturing Co.[2] complaining of the publication of the following newspaper advertisement:

Note some of the following facts: That we carry the largest and best selected stock of silverware in western Ontario; none but quadruple plate direct from the following manufacturers.[3] Guaranty.—We warrant each and every piece of silver plate to be exactly as represented. We do not keep *Acme or common plate.*

It was alleged that the defendants meant that the plaintiff's goods were of a common and inferior class, and not of the same grade as the goods of other manufacturers kept in stock by the defendants, and not of such kind and quality as the defendants would keep in stock and recommend to their customers and the public. Special damage was also alleged. The defendants' demurrer was overruled by Robertson, J., who said in part:

* * * The charge is that the defendants "falsely and maliciously" published of and concerning the plaintiffs, etc. Now, in the case relied upon by defendants, Young *v.* Macrae,[4] Cockburn, C. J., says: "I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained."

Here special damage is alleged in direct terms, and if the plaintiffs are able to prove that allegation on the authority of the Western Counties Manure Co. *v.* The Lawes Chemical Manure Co., I think the plaintiffs are entitled to judgment.

In 1899 the case of George *v.* Blow was decided by the Supreme Court of New South Wales.[5] It appeared that the plaintiff and defendant were photographers, each using the so-called rococo process, and that the defendant printed and published the following words: "We are the only photographers supplying the rococo, as it is our own production." At the hearing of a demurrer to the declaration the court intimated that they did not wish to hear counsel for the plaintiff, and gave judgment against the defendant. Darley, chief justice, delivered the opinion of the court, saying in part:

It will be observed that this is not the case of one trader stating that his goods are better than the goods of another trader or stating that his goods are

[1] Hamilton *v.* Walters, 4 Upper Canada, Q. B. 24 (1834). Cf. W. Va. Trans. Co. *v.* Standard Oil. Co. et al., 50 W. Va., 611, 622 (1902).

[2] Acme Silver Co. *v.* Stacey Hardware Manufacturing Co., 21 Ontario Reps., 261, 263 (1891).

[3] Naming three companies.

[4] P. 115, 116.

[5] 20 N. S. W. Law Reps., 395, 399.

the best in the market or otherwise lauding his goods at the expense of the goods of others. All this may be done without affording any cause of action. See Hubbuck *v.* Wilkinson. This is the case of a trader who informs the public, I, and I only, can supply you with this article, and no one else can; and if any person else purports to do so, then the article so supplied is spurious, and not that which it purports to be. The case, then, closely resembles the case of Liebig's Extract of Meat Co. *v.* Anderson.[1] * * * Two elements necessary to found an action for a trade libel are established—first, that the plaintiff's goods are disparaged; secondly, that the disparagement is untrue.

The third element, namely, special damage, was considered sufficiently alleged, and there was judgment for the plaintiff accordingly.[1]

Section 8. Misrepresentation by means other than words.

AMERICAN DECISIONS.

In Hughes *v.* McDonough[3] the plaintiff, a blacksmith, alleged in substance that he shod a mare for one Van Riper in a good and workmanlike manner, and that the defendant, maliciously intending to injure him in his trade, mutilated and destroyed the work performed by the plaintiff on the mare, without the knowledge of its owner, by loosening a shoe which was recently put on by the plaintiff, so that if the mare was driven the shoe would come off easily, and that the defendant also drove a nail in the mare's foot, thus making it appear that the plaintiff was an unskillful and careless workman, and thus deprived the plaintiff of the patronage of Van Riper. The special damage alleged was the loss of Van Riper as a customer. The defendant urged that the wrong was done to Van Riper; that it was his horse whose shoe was loosened and whose foot was pricked; that the immediate injury and damage were to him; and that consequently the damages of the plaintiff were too remote to be the basis of a legal claim. The supreme court of New Jersey denied this contention, Chief Justice Beasley saying, in part:

* * * What, in point of substance, was done by the defendant, was this: He defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by words spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for the slander, and, plainly, no reason exists why the

[1] P. 118, see also Thorley's Cattle Food Co. *v.* Massam, p. 112.

[2] See also Du Toit *v.* Robinsky & Gotz, 2 South Africa Reps., Cape Provincial Div., 307, 311 (1911), in which the court said: "I take it, for the purposes of this case, that where a person, with the malicious intention of injuring another and to prevent his selling his goods, falsely depreciates the goods and by so doing actually causes damage to such other person, he would be liable in damages for such wrongful act, but in my opinion none of the necessary elements of such action exist in this case.

[3] 43 N. J. Law, 459, 463, 464 (1881). It does not appear whether the defendant was a competitor or not.

law should not afford a similar redress when the same injury has been inflicted by disreputable craft.[1]

In Davis *v.* New England Railway Publishing Co. et al.[2] the complainant, who was the owner of an express business between Boston and surrounding cities and towns, brought a bill in equity against the New England Railway Publishing Co., a corporation publishing the A. B. C. Pathfinder and Dial Express List, and two individuals, competitors of the complainant. In substance the bill alleged that the express list was the only one of its kind published in Boston, and was in form intended and calculated to create in the minds of the public the belief that it contained the names of all the reputable local express companies; that it was usually consulted by persons having occasion to employ an express; that the publishing company refused to make such reference to complainant's business as was made to other express businesses in said list, though he conducted his business in a lawful manner and offered to pay such sum as was charged other companies; that the exclusion of such reference to the complainant would enure greatly to the advantage of the defendants Kelly and Sampson. It was further alleged that the latter conspired to induce the defendant corporation to exclude the complainant from its publications, and that they accomplished this partly by falsely stating that complainant's business was not conducted in a proper and reliable manner, and partly by threatening, in case of a refusal, that they would no longer furnish data for such publication;

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[1] This case was cited and approved by Pitney, J., in Brennan *v.* United Hatters of North America, 73 N. J. Law, 729, 743 (1906).

Cf. Schultz *v.* Frankfort Marine Accident & Plate Glass Insurance Co. et al., 139 N. W., 386 (Sup. Ct. Wis., 1913), where "rough" or open shadowing of a citizen by detectives, so as to publicly proclaim him as a suspect and to publicly charge that he deserves watching, was held actionable.

In United States *v.* Patterson et al. there was evidence tending to show that one of the agents of the National Cash Register Co. "distributed small wires to other agents in his territory for the purpose of their surreptitious introduction into competitor's cash registers if the customer gave opportunity to the National's agents for close examination of the competitor's cash register in the customer's possession." (Hollister, J., 205 Fed. 293, 300 [1913].)

See also petition and decree in United States *v.* Burroughs Adding Machine Co. et al.

In State *v.* Standard Oil Co. of Indiana et al., 218 Mo., 1, 123, 258 (1909), there was testimony tending to show that a salesman of the Standard Oil Co. was furnished gauges to measure oil sold by competitors in order to show the purchaser that he had been given short measure. The evidence on this point, however, was conflicting.

In United States *v.* Standard Oil Co. of New Jersey et al. the Government contended that "the plan of pretending to the trade that competitors were overgauging barrels was one that was adopted and put into force by the Standard Oil Co. itself. It has cropped out here and there in this testimony that Standard Oil agents would go to the dealers and, after gauging their cans or their barrels, invariably found them incorrect and invariably found that the dealer was cheating his patrons, and sought in that way to get the business away from the independents." (C. C., E. D. Mo., Brief of Facts and Argument for Petitioner, vol. 2, pp. 529, 536–537.)

[2] 203 Mass., 470, 478, 479 (1909).

that they would diminish the advertising obtainable by it, and would otherwise injure its business.

The complainant prayed (1) that Kelly and Sampson be enjoined from inducing the publishing company not to refer to the business of the plaintiff, by any fraud, misrepresentation, threat, intimidation or in any other unlawful manner; (2) that the corporation be enjoined from issuing the publication without (*a*) containing such reference to the complainant's business as is made to the businesses of others, or (*b*) so altering the form of the publication that it will no longer be calculated to create the impression that it contains a complete list of reputable express companies. The complainant also sought damages. A demurrer to this bill was overruled by Knowlton, C. J., who said in part:

The defendant corporation professes to give the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. * * * The direct effect of the false statement is to point those who want the services of an express company to other companies, and to divert them from the plaintiff. They are told, in substance, that there is no such person as the plaintiff, and no such company as the Northern Express Co. [plaintiff's company] engaged in this kind of business. * * *

But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong. * * * The injury is to property, and it is not technically a libel upon the plaintiff. * * * Upon proof of the facts set out in the bill the plaintiff will be entitled to an injunction to protect him from the wrongful publication.

The defendants, Kelley and Sampson, are alleged, not only to have participated in the wrong, but to have instigated it. It is said that, for their own interests, and to obtain a monopoly in certain departments of the express business, they made false statements about the plaintiff to the other defendant, and threatened injury to the other defendant's business, in order to induce the wrongful publication. Upon proof of these facts and the other averments of the bill, the plaintiff is entitled to an injunction against these defendants, to prevent them from attempting to procure this wrongful kind of publication in the future. * * *

Their desire to advance their own interests, in competition, is not a justification for attempting to interfere with the plaintiff's business by misstatements, and the making of a false and misleading publication.[1]

Section 9. Misuse of testimonials.

AMERICAN DECISIONS.

The Singer Manufacturing Co. and the Domestic Sewing Machine Co. were exhibitors at the annual fair held by the Georgia State Agricultural Society. Although the Singer Co. had been awarded a diploma for exhibiting the best family machine and the best manufacturing machine, the Domestic Sewing Machine Co. published in

[1] Cf. Jarrahdale Timber Co. and McLean Bros. (Ltd.) *v.* Temperley & Co. and Elliott & Sons, p. 105.

the Atlanta Herald and the Constitution that the exhibition committee had reported that "The Domestic machine, as a family mechine, is the best." The Singer Co., for the purpose of denying such statement, published the report of the committee when it was rendered, whereupon the Domestic Co. published that the report of the committee as so set forth was untrue, and reiterated its claim to the distinction. A bill was filed by the Singer Co. alleging these facts and praying for an injunction.[1] The injunction was denied and this judgment was affirmed on appeal. The court said in part:

There is no complaint that the defendant is doing or publishing anything to induce the public to believe that the machine he sells is the same as the plaintiff's. * * * Again, this bill does not claim that the defendant is interfering with the complainant's right to the exclusive use of whatever credit the report of this committee gives him. His right to publish is unlimited. Indeed, the complaint is that the defendant does *not* publish the report. The true complaint of the bill, at least, is that the defendant has denied that the society gave to complainant the premium, and has asserted that in truth the society gave it to himself. It is not said that he is passing off his wares by putting complainant's mark on them, nor that he is publishing without authority a report which the claimant is alone entitled to publish, but that he is unblushingly denying the truth of complainant having gotten the prize and claiming that he got it himself. He is not *taking* complainant's property—he is not *infringing* the plaintiff's right of property. He is denying—it may be falsely and injuriously denying—plaintiff's right to whatever credit the premium of the society gives. Will an injunction lie to prohibit such a wrong?

* * * * * * *

The case made by the bill is one of words, which are untrue in fact and which are calculated to injure the credit of complainant's business and advance the business of defendant. If a wrong capable of redress before the courts at all, it comes more nearly within the definition of a libel or of slander concerning one's trade or business than anything else. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs—wrongs recognizable and capable of redress at law—that yet are not such wrongs as a court of equity will enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. * * * The principle is that to authorize the writ that there must be an irreparable, expected injury to a property right. It is a perversion of language to say that the complainant has a property right in the *truth* of the report. He has, perhaps, a right to the report, but a perversion of the truth, a claim that it is different from what it in fact is, can in no fair sense be called an infringement of his right of property in the report.

ENGLISH DECISIONS.

In the case of Batty *v.* Hill[2] the plaintiff, who manufactured pickles, was awarded a prize medal at the international exposition of 1862. Although he and one other exhibitor (Partridge) were the

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[1] Singer Manufacturing Co. *v.* Domestic Sewing Machine Co. et al., 49 Ga., 70, 72 (1872).

[2] 1 H. & M. Ch. Cas., 264, 268 (1863).

only persons who obtained prizes, the defendant Hill caused labels to be prepared before any prizes were awarded bearing the words "prize medal 1862," and the moment the awards were made issued his bottles bearing such labels, and also placed those words upon the cases in which he exported his pickles. The vice chancellor, Sir W. Page Wood, refused an injunction, saying in part:

On the question of balance of convenience I should be decidedly in favor of the plaintiff; the inconvenience to the defendant would be merely the necessity of telling the truth. It is, however, no part of the duty of this court to enforce the observance of the dictates of morality; and though the old maxim, "Rem facias, rem, si possis, recte; si non quocunque modo, rem," seems to apply in full force to modern times, I can only interfere when some private right is thereby infringed.

* * * * * * *

* * * As I have come to the conclusion that there is no substance whatever in the charge of a previous attempt to pass off the defendant's goods as the plaintiff's, I must deal with the present case without the only element which would enable me to make the order which is now applied for.

* * * * * * *

If it had been shown that an order for "prize medal pickles" would in the trade be answered by supplying the plaintiff's pickles, there might be some foundation for the interference of the court; but this case falls very far short of it, because that depends upon the presumption that the purchaser does not know the name of the merchant and rests entirely on the reputation acquired by the particular goods, whereas I have here merely the fact that two persons have put the same mark on their goods, the one rightly, the other falsely.[1]

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[1] Since this judgment was delivered, and partly in consequence thereof, Parliament passed "the exhibition medals act, 1863" (26, 27 Vict., ch. 119 [July 28, 1863]), providing for the summary prosecution of any trader who (1) falsely represents that he has obtained a medal or certificate from the exhibition commissioners in respect of any article or process for which a medal or certificate has been awarded by the commissioners; (2) falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the exhibition commissioners; or (3) falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the exhibition commissioners.

The act is apparently limited in scope by the definition of the words "exhibition commissioners" as the commissioners for the exhibition of 1851 and 1862. It applies to England, Scotland, and Ireland. A first offense is punishable by fine only, but subsequent offenses are punishable by fine or imprisonment. In proceedings under this act it is not necessary to prove that any person sustained damage by reason of the false representations, and a conviction does not affect any civil remedy in law or in equity.

During the debate on this measure it was stated by the lord mayor that "a monstrous system of fraud prevailed in regard to these medals, which ought to be checked without delay." (Great Britain, Parliamentary Debates, July 27, 1863, pp. 1483–1486.)

See also Green *v.* Archer, 7 Times Law Reps., 542 (Q. B. D., 1891), where it appeared that the parties, who were architects, had, while conducting their business as partners, jointly designed and supervised the construction of many important buildings in London. Immediately after a dissolution of the partnership Archer circulated photographs of these buildings, bearing in large letters at the foot of each copy the words "Designed by Thomas Archer, F. R. I. B. A., 14 Sackville Street, Piccadilly," omitting all reference to the former partner. Green brought an action for libel and sought an injunction. Mr. Justice Denman gave judgment for the defendant, holding that the words conveyed no imputation upon the character of the plaintiff and did not allude to him as an architect, and, further, that there was no slander of title.

In Franks *v.* Weaver[1] it appeared that the plaintiff discovered a medical preparation to which he gave the name of "Franks' Specific Solution of Copaiba," and that he had received certain written testimonials from some of the highest medical authorities. The wrappers in which this medicine was sold contained general directions for its use and copies of several of these testimonials. The defendant, Weaver, who had been appointed one of the plaintiff's agents, sold another preparation of his own, and on his labels it was stated that the nauseous and offensive properties of copaiba had been removed by Mr. Franks, to whom was due the merit of originally introducing, under the application "Specific Solution of Copaiba," a preparation of the balsam which was perfectly miscible with water, etc. It then went on to state the merits of defendant's solution and proceeded as follows:

Mr. Franks's specific solution of copaiba was extensively adopted by the late Sir Astley Cooper, Bart., F. R. S., and was also successfully employed in the public and private practices of the following (as well as many other) distinguished members of the profession, whose testimonials are subjoined.

Then followed the names of several medical authorities and directions for the use of the preparation which were similar to those used by the plaintiff, and, in addition, in totidem verbis, four of the testimonials given to the plaintiff and included in his wrapper.

The defendant stated that his sole reason for using the plaintiff's name and testimonials was to show that his chemical solution was of a nature similar to the medicine sold by the plaintiff and to show the efficacy of a medicine similar to that prepared by the plaintiff, and that a solution of copaiba was used by those whose names were appended to each label.

The master of the rolls (Lord Langdale) granted an injunction, saying in part:

* * * It is very true that if anyone compares the plaintiff's wrappers with the labels used by the defendant he will find a very considerable difference; the difference is even striking; but it is not by the similarity of form or the mode of printing that we can get at any result in this case. Again, if anybody critically reads the advertisement of the defendant, he will find that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say that the preparation he is selling is made by the plaintiff, and yet, for all that, nobody can look at all these things without observing that the name and the testimonials of the plaintiff are so craftily employed as to be well calculated to produce in the minds of ordinary readers the impression that the mixture or solution prepared and sold by the defendant is the same as that to which these testimonials are applicable; that is to say, the mixture or solution of the plaintiff.

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The plaintiff has no exclusive right to make the mixture or sell it; the defendant may sell his own mixture, which, for anything I know, may be quite

[1] 10 Beav., 297, 303, 304 (1847).

as good as the plaintiff's, but he must do it in an open, fair way; he has no right to use the plaintiff's name. Care must be taken that the injunction be so framed as not to go further than to prevent the defendant using the name or testimonials of the plaintiff for the purpose of securing to himself an unjust advantage to which he has no title.[1]

The plaintiff in Tallerman *v.* Dowsing Radiant Heat Co.[2] was the inventor of a system of treating disease by superheated air and patentee of an apparatus used in this treatment. This system had received favorable comment in the Lancet. The defendant company, which was subsequently formed for the purpose of introducing a rival mode of treatment, circulated pamphlets containing extracts from the article which had appeared in the Lancet, from which extracts were omitted any mention of the plaintiff Tallerman or his system. The extracts were so made that the reader would naturally be led to believe that certain statements of fact which appeared in the article related to the defendant's system, whereas in fact they related to the plaintiff's. The evidence showed that these pamphlets had been sent to the plaintiffs' patients, and that some of them had been misled thereby, and, further, that their circulation among such persons was attributable to one Pritchard, a former secretary of the plaintiff company, who had since entered the service of the defendant company. The plaintiff sought an interlocutory injunction, urging that this was an attempt to appropriate for the Dowsing system the reputation acquired by the Tallerman system, and was a species of unfair competition. This was refused by Sterling, J., who held that in the absence of any attempt by the defendant to pass off his system as the plaintiff's the court ought not to interfere.[3] The court said in part:

Whatever may be the legal merits of the case, the plaintiffs have, I think, reason to complain of what the defendants have done. The statements complained of are, to say the least, inaccurate, and the use made of the extracts from Dr. Sibley's article and speech was calculated to cause annoyance to the plaintiffs, and the employment of Pritchard was also calculated to arouse their suspicions. The case, however, is admitted not to be one in which the

[1] After granting an injunction in the ordinary form the master of the rolls restrained the defendant from publishing or circulating any cover, wrapper, etc., containing any testimonial in favor of the plaintiff's preparation, or in which any use was made of the character and reputation of the plaintiff as applicable to any preparation or compound of the defendant or his firm. In a later case Stirling, J., referring to Franks *v.* Weaver, observed: "The basis of that judgment was that the defendant was selling his own goods as those of the plaintiff. * * * It seems to me the justification for thus modifying the ordinary form of injunction must be found in this, that the master of the rolls came to the conclusion that the use of the character and reputation of the plaintiff there complained of was a means of passing off the goods of the defendant as those of the plaintiff." (Tallerman *v.* Dowsing Radiant Heat Co., L. R. (1900), 1 Ch. Div., pp. 7–9.) The form of the injunction granted in Franks *v.* Weaver is reported in 8 L. T. (O. S.) 512.

[2] L. R. (1900), 1 Ch. Div., 1, 5.

[3] Batty *v.* Hill followed; see p. 136.

defendants are seeking to pass off their treatment or apparatus as and for the plaintiff's. Neither can it be said that their pamphlets contain false statements as to the plaintiffs' business; the false statements relate to the defendant's business.

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* * * In the present case there is no evidence of any actual damage having been suffered by the plaintiffs, and having regard to the nature of the statements complained of I entertain great doubt whether any actual damage will ever accrue to them.[1]

Warren *v.* The D. W. Karn Co.[2] was a suit brought by a former superintendent of the defendant company to restrain the publication by the defendant in an altered form of certain testimonials given in recommendation of organs, manufactured by the defendants under the plaintiff's superintendence, in which he as well as the company was commended. The plaintiff had left the defendant's employ and started a rival business, and by the alterations he was deprived of any commendation. One letter contained the words "the builders and Mr. Charles S. Warren have every reason to congratulate themselves," and another was addressed to the plaintiff. The words "and Mr. Charles S. Warren" were stricken from the first letter, and the salutation "My Dear Mr. Warren" omitted from the second, "The D. W. Karn Co., Gentlemen," being substituted.

Boyd, C., dismissed the action, saying, in part:

The writer of the testimonials (in whatever shape they are) by sending them to the plaintiff or the company intended that they should be published. And as between the superintendent and the company whose agent or employee he was, the testimonials were the property in the possession of the company who had the right to control their publication, and this right continued after the plaintiff separated from the defendants' company in the absence of any restriction imposed by the writers of the testimonials. * * *

* * * There is no proof that the plaintiff has been or is likely to be injuriously affected in reputation or in business by this allegation or that the public had been led astray thereby.

Granted that the testimonials have been garbled by withholding the part relating to the plaintiff, does that give jurisdiction to interfere by way of injunction to restrain such use of the papers? It is not every breach or violation of good faith or departure from honorable dealing which can call forth the powers of equity to make redress; there must be disclosed some case of civil

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[1] The plaintiffs appealed. The appeal was not heard, but on the defendants giving a perpetual undertaking not to print, publish, issue, or circulate any pamphlet, notice, circular, or advertisement containing any press notice, testimonial, or other documents, or any extract therefrom, originally written in favor of the plaintiffs' hot-air treatment, it was ordered that the defendants should pay to the plaintiffs £25 for their costs of the action, and that all further proceedings in the action should be stayed. The plaintiffs were to be at liberty for one month from the date of the order to advertise in any manner they might think proper a statement of the names of the parties to the action, that the action was for an injunction, and the contents of this order, but without making any comment thereon, and, save as aforesaid, the plaintiffs agreed not to advertise or publish the order.

[2] 15 Ontario Law Reps., 115 (1907).

property which the court is bound to protect before the court can enjoin the publication of private papers.

Many doubtful and it may be unwarrantable acts must be left to the verdict of conscience or to the judgment of public opinion, and the present grievance appears to be one falling outside of legal limits and to be resolved in the court of conscience.

Tested by the business maxim "Every man for himself," the pamphlet may be regarded as a shrewd stroke of advertising; tested by the golden rule of fair dealing, it would not in my opinion fair so well. The testimonials were given for the joint work of the company and its guiding spirit, the then superintendent; to use them so as to exclude the latter appears to be an unfair use. * * *

The case is one of first impression. I find no ground of legal liability, and the action should therefore be dismissed, but I do not give costs.

Section 10. Intimidation of competitor's customers by threats of infringement suits.

It has been a somewhat common practice for manufacturers of patented articles to prevent the sale of a competing article by circulating broadcast threats to sue for infringement all dealers handling these articles. Such a campaign against a competitor is usually begun by circularizing the trade generally, and in particular the customers of the competitor whose business it is sought to injure or destroy, stating that the competitor's article is an infringement of the writer's patent and that suits will be instituted against all dealers handling the infringing article; and letters of this description are frequently supplemented by oral statements of traveling salesmen. The destructive effects of this method of competition, when persisted in, are thus vividly described by Quarles, J., in Dittgen *v.* Racine Paper Goods Co.:[1]

If such a campaign be skillfully conducted for a series of years, as seems to have been the case here, the competitor is helpless. His orders are countermanded, old customers desert him, through fear of litigation, or demand bond of indemnity as a condition for placing orders. His business is melting away. Everywhere the trade is apprehensive of "peremptory measures" if they buy goods of an infringer. He appeals to the patentee to bring suit and offers to enter an appearance in any court having jurisdiction, but all to no purpose. Customers will not listen to his explanations or denials, and unless he can get relief in a court of equity his business, which represents 20 years of effort, may be entirely ruined by a competition which is malicious and unfair.

Both Federal and State courts have referred to this practice as "unfair competition,"[2] as being "unfair in the business world,"[3]

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[1] 164 Fed., 85, 89 (C. C., 1908).

[2] Dittgen *v.* Racine Paper Goods Co., 164 Fed., 85 (C. C., 1908); s. c., 171 Fed., 631 (C. C. A., 1909); Atty Gen. *v.* Natl. Cash Register Co., 148 N. W., 420 (Mich., 1914).

[3] Electric Renovator Manufacturing Co. *v.* Vacuum Cleaner Co. et al., 189 Fed., 754 (C. C., 1911).

754 (C. C., 1911).

or as constituting "unfair business methods."[1] The circuit court, in Dittgen *v.* Racine Paper Goods Co.,[2] said, in part:

> Without reciting the evidence more in detail, I am driven to the conclusion that defendant has been guilty of unfair competition and has thereby maliciously diverted and injured the trade of complainant; that against such unfair methods complainant could obtain no adequate remedy in the courts of law; that he has sustained substantial loss in his business and is therefore entitled to an injunction and accounting, as prayed.

And the circuit court of appeals in the same case said, per Kohlsatt, J.:

> Undoubtedly one claiming that his patent is being infringed should take steps to advise the public of his rights as provided by statute; provided, however, that if it is made to appear that under pretense of so doing he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of obtaining in cases of unfair competition in trade, and subject to injunction.[3]

In Electric Renovator Co. *v.* Vacuum Cleaner Co. et al.[4] the court said:

> A threat of punishment is intimidation and is unfair in the business world.

It appears to be settled that the Federal courts will restrain the issuance of letters or circulars threatening to sue a competitor's customers for infringement where such letters are written not bona fide to warn the trade of the writer's claims of infringement and in good faith intending to bring such actions as are threatened, but for the express purpose of frightening away a competitor's customers and thus injuring his business.

AMERICAN DECISIONS.

In what is probably the first case of this nature in which an injunction was granted by a Federal court the complainant was the owner of two patents for manufacturing "muffled" slates. The defendants, who also manufactured muffled slates under a patent alleged to have been issued to one Goodrich, sent out circulars to jobbers and retailers threatening suits against all who should deal in the complainant's slates, claiming that they were an infringement of the defendants' patent. It was also stated that a suit against the complainant for an infringement would be fruitless and that resort must therefore be had to proceedings against the complainant's customers. The complainant instituted suit to restrain the further dis-

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[1] Electric Renevator Manufacturing Co. *v.* Vacuum Cleaner Co., 189 Fed., 754 (C. C., 1911).

[2] 164 Fed., 85, 91 (1908).

[3] 171 Fed., 631 (1909).

[4] 189 Fed., 754 (C. C., 1911).

tribution of these circulars, and the court granted an injunction, holding that where the circulars were clearly sent out for the purpose of intimidating the competitor's customers and injuring his business an injunction would lie. In the course of the opinion the court said:

The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and after the proofs were taken and the suits ripe for hearing the defendants voluntarily dismissed them, the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that such suits were brought in a mere spirit of bravado or intimidation and not with the bona fide intent to submit the question of infringement to a judicial decison. * * *

Here the complainant seeks to restrain the defendants from making threats intended to intimidate the complainant's customers under the pretext that complainant's goods infringe a patent owned or controlled by defendants, and threats that if such customers deal in complainant's goods they will subject themselves to suit for such infringement; the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business. * * * It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the gravamen of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in Kidd *v.* Horry. I can not believe that a man is remediless against persistent and continued attacks upon his business and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity can not restrain systematic and methodical outrages like these, by one man upon another's property rights. * * *

The effect of the circular sent out by the defendant Kane certainly must have been to intimidate dealers from buying of complainant or dealing in slates of his manufacture because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation and to forego even certain profits, if threatened with a lawsuit, which would be embarrassing and vexatious and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation.[1]

Adriance, Platt & Co. were engaged in the manufacture of farm implements, including a spring-tooth harrow built under a patent which they owned. Before their harrows were placed on the market the National Harrow Co., which owned a large number of patents on spring-tooth harrows, advised Adriance, Platt & Co. that their

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[1] Emack *v.* Kane, 34 Fed., 46, 49, 50 (C. C., 1888).

harrows were infringements of its patents and tried to induce the company to take out a license. This they declined to do, and requested the National Co. to institute suit to determine the question of infringement. The latter company refused to do so, but stated that it proposed to prevent the sale of the former's harrows in its own way. The National Harrow Co. thereupon began to send out circulars and letters to the customers of Adriance, Platt & Co., claiming that the latters' harrows were made in infringement of the former's patent and threatening to sue dealers who handled them for infringement. The Adriance-Platt concern brought suit to restrain the distribution of these circulars and letters. The circuit court dismissed the bill. An appeal was taken and the judgment reversed, the appellate court holding that the complainant was entitled to an injunction and an accounting. The following is an excerpt from the opinion of the court:

Undoubtedly the owner of a patent is acting within his rights in notifying infringers of his claims and threatening them with litigation if they continue to disregard them; nor does he transcend his rights when, the infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid and in an honest effort to protect them from invasion. The question whether the patent owner is acting in good faith in advertising his claims to the manufacturer's customers by circulars or letters can seldom be determined from the contents of the communication alone, and, like all questions of intent, must generally be determined by the extrinsic facts. It is always easy to frame such circulars in guarded terms which will not commit the sender to any definite libelous charges, omitting specific statements of fact and substituting statements of opinion; and when they are sent for an illegitimate purpose they are likely to be so framed. When the manufacturer is financially responsible, is accessible, and his infringements readily provable, and when the patent owner is financially able, and is one who makes it his sole business to grant licenses, and is under a duty to his licensees to prosecute extensive infringers, the sending of such circulars to customers would seem to be merely a preliminary or cumulative measure, and the bringing of an infringement action the paramount and imperative proceeding. As ordinarily the patent owner would be prompt and zealous to assert his claims, if he halts and purposely procrastinates, and attempts to effect by threats and manifestos that which he can compel by the strong hand of the law, a strong inference arises that he has not any real confidence in his pretensions. This inference becomes irresistible if he refuses to bring suit during a considerable period of time when the alleged infringement is open, notorious, and defiant, and so extensive as to threaten destruction to his alleged exclusive rights. The indicia of bad faith are persuasive in the present case. It is impossible to read the communications warning the complainant's customers against selling its harrows, with which the defendant seems to have flooded the country, without being led to believe that they were inspired by a purpose to intimidate the complainant's customers and coerce the complainant, by injuring its business, into becoming a licensee of the defendant. In view of its failure to bring an infringement action, under circumstances which made an action practically compulsory, the defendant can not shelter itself behind the theory that its circulars and letters were merely legitimate notices of its rights. We are satisfied that they were sent, not for the purposes of self-protection, but in execution of the defendant's threat to stop the complainant from building harrows by other means than legal remedies.

Until the present action was brought the defendant contented itself with warnings and threats to the complainant's customers and made no attempt to prosecute an infringement suit. The publicity of the complainant's suit neutralized these tracts, and the defendant brought several actions against customers of the complainant. Out of its numerous patents it selected one, presumably the least infirm, as the basis of its attack upon the complainant's alleged infringing harrow. Those suits, after the proofs were taken, came to an end by the voluntary dismissal of the bill. The inglorious conclusion of these suits may afford an explanation of the defendant's reasons for preferring to attack the complainant by the circulars and letters rather than in a court of justice.[1]

In Dittgen *v.* Racine Paper Goods Co.[2] the complainant had for 15 years manufactured individual cigar pouches in sheets and for five years had manufactured pouches under letters patent. The defendant was also engaged in the manufacture and sale of paper cigar pouches and asserted certain rights to such manufacture under letters patent of limited scope issued prior to the complainant's patent. Complainant alleged that the defendant had circulated among the complainant's customers and the trade generally letters representing that the complainant's pouches infringed the defendant's patent and that for five years defendant had made oral representations to the trade to the same effect, and had further represented that an injunction had been secured restraining the complainant from manufacturing paper cigar pouches. Defendant had likewise threatened to sue any of the trade that continued to use complainant's pouches. The complainant requested defendant to commence suit in order that the rights of the parties might be judicially determined, and offered to accept service in any court of competent jurisdiction, but the defendant refused to bring suit and persisted in sending out the aforesaid statements. The complainant further alleged that his trade had been seriously injured as the result of defendant's methods; that large orders had been canceled and that customers had refrained from giving orders that would otherwise have been given because of fear inspired by the defendant's representations. The circuit court found that the defendant's statements were false and malicious and that the complainant was entitled to an injunction and accounting. On appeal the decision was sustained,[3] the circuit court of appeals, through Kohlsaat, J., saying in part:

It is unconscionable that appellant should be permitted to use a grant from the Government to work a wrong upon appellee without bringing suit to secure

[1] Adriance, Platt & Co. *v.* National Harrow Co. et al., 121 Fed., 827, 829 (C. C. A., 1903); see also Farquhar *v.* National Harrow Co., 102 Fed., 714 (C. C. A., 1900), and Lewin *v.* Welsbach Light Co., 81 Fed., 904 (1897).

[2] 164 Fed., 85 (C. C., 1908).

[3] 171 Fed., 631 (C. C. A., 1909).

a judicial determination. An injunction granted in a proceeding for that purpose would have afforded clearly defined limits to appellant's claims. The course pursued by it herein, by reason of its very indefiniteness, is more onerous and oppressive than would be the order of a court. It was practically prohibitive. It is one of the well-established powers and duties of a court of equity to remedy wrongs such as are here disclosed.

In a very recent suit the complainant, a manufacturer under letters patent of apparatus known as "invincible" machines, designed to renovate house furnishings, had been notified by the defendant, the owner of patents under which a vacuum cleaning apparatus was manufactured, that its patents were being infringed by the complainant, and defendant threatened suit. Complainant had replied that it did not believe its apparatus to be an infringement of defendant's patents, and suggested that defendant institute suit to determine the question, stating at the same time that it would hold defendant accountable for any damages resulting from any threats sent to users of the complainant's machines. Defendant did not bring suit, and, notwithstanding complainant's warning, sent out letters threatening suit against users of complainant's machines, demanding an accounting of the profits realized from such machines and damages suffered therefrom. Complainant wrote defendant, directing attention to the fact that it had previously invited a suit to determine the question of infringement, and stating that unless defendant ceased sending out threatening communications, suit would be instituted for an injunction to prevent their circulation, and for damages. Defendant continuing to send out the communications, suit was brought by complainant. A preliminary injunction was granted, which was later made permanent, the court holding that the defendant was chargeable with bad faith and unfair business methods in threatening complainant's customers with suits and not bringing any suit to determine the question of infringement.[1]

On the other hand, where it appeared that such letters were sent out in good faith for the purpose of protecting the sender from an infringement an injunction was refused. The United Electric Co. commenced suit against the Creamery Package Co. for infringement of its patents. The latter company in turn sought an injunction against the United Electric Co. to restrain it from sending out threatening letters or circulars attempting to influence its customers not to use or purchase its product. The Creamery Package Co. alleged that the United Electric Co. had written one Long, notifying him that the Creamery Package Co.'s machines infringed its patents; that it had instituted proceedings against the company, and suit would be brought against him for infringement, and that the com-

[1] Electric Renovator Manufacturing Co. *v.* Vacuum Cleaner Co. et al., 189 Fed., 754 and 1023 (C. C., 1911).

pany had in fact begun such suit; and further alleged that the letters sent out and the suits begun were not intended to protect the United Electric Co.'s legitimate rights, but to harass and annoy the Creamery Package Co. The answer positively denied that the suits were instituted or the letters sent out for any purpose except for the protection of the United Electric Co.'s rights under its patent. Upon hearing, no proofs were introduced to meet the denials and explanations of the United Co.'s answer, and the court refused to grant an injunction.[1]

The Clip Bar Manufacturing Co. manufactured a metallic curb guard constructed in accordance with the disclosures in a patent belouging to the Steel Protected Concrete Co., but declared invalid by the circuit court of appeals for the fifth circuit. The concrete company had been notifying customers of the Clip Bar Co. and other parties manufacturing the guard for it that it constituted an infringement of its patent and that it intended to bring suit in the eastern district of Pennsylvania against infringers, and in accordance with this statement filed a bill in the district court of said circuit charging an infringement and praying an injunction, accounting, and damages. The Clip Bar Co. filed a bill for an injunction to restrain the concrete company from sending out letters threatening suit, contending that the patent having been declared invalid by the circuit court of appeals for the fifth circuit it must be deemed invalid and the subject-matter thereof public property; and that this being the case the concrete company's letters threatening a suit constituted unfair competition in trade. An injunction was denied, however, the court holding (1) that the adjudication in one circuit of the invalidity of the patent did not render the question res adjudicata except as between the parties to the suit in that jurisdiction, nor terminate other suits for infringement against different defendants in other jurisdictions; and (2) that the notices of proposed suits were sent out in good faith and were within the rights of the concrete company. Referring to the good faith of the defendant, the court said:

> It nowhere appears on the record that the notices given to the plaintiff's customers were not in good faith or that they were false or malicious or for the purpose of destroying the business of the plaintiff. To the contrary, the defendant, so far as appears, believing its claims to be valid, has proceeded to bring suit in this district to establish infringement. Under these circumstances, it must be held for the purpose of the present motion that the defendant is acting within its rights.[2]

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[1] United Electric Co. *v.* Creamery Package Co. et al., 203 Fed., 53 (D. C., 1913).

[2] Clip Bar Manufacturing Co. *v.* Steel Protected Concrete Co., 209 Fed., 874, 875 (D. C., 1913) ; see also New York Filter Co. *v.* Schwarzwalder et al., 58 Fed., 577 (1893) ; Kelley *v.* Ypsilanti Dress Stay Manufacturing Co., 44 Fed., 19 (1890).

The decisions of the State courts on this subject are not in accord. An injunction has been granted restraining the issuance of threatening communications where the language was too "excessive and ill chosen to convey simple information" that the sender's patent was being infringed,[1] the publication of an advertisement falsely stating that another's article was an infringement has been restrained,[2] and an injunction has also been granted restraining a defendant from issuing or publishing any demand for royalty or license fees for the use of an invention covered by another's patent and from threatening litigation against those who might buy the patented article.[3] The Illinois appellate court in Everett Piano Co. *v.* Bent.,[4] declined to grant an injunction where the threats were made in good faith but before any suit was begun to settle the question of infringement. The Massachusetts courts regard the circulation of communications of this sort as constituting either libel or slander of title or merely misrepresentations as to the character or quality of the patentee's property or the title thereto and hold that a court of equity has no jurisdiction to grant injunctions in cases of this character.[5]

ENGLISH DECISIONS.

There are a number of English cases prior to 1883 in which the plaintiffs sought to restrain the issuance of circulars or letters threatening to sue customers for infringement or to recover damages for such acts. The cases are not entirely in accord, but it appears to be settled that to recover damages at common law it was necessary for the plaintiff to prove not only that the statements of infringement were untrue, but also that they were not made bona fide or, as it is sometimes expressed, that they were made without reasonable or probable cause. An injunction will also issue in such cases to restrain the further circulation of such threats. Where the statements of infringement were proved to be untrue and there was evidence that the defendant continued to distribute the notices, an injunction to restrain such distribution would lie, mala fides being necessarily shown by the continued publication after the falsity of

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[1] Croft *v.* Richardson, 59 Howard's Practice Repts., 356 (N. Y., 1880).

[2] Snow & Brush *v.* Judson, 38 Barb., 210 (1862).

[3] Shoemaker *v.* South Bend Spark Arrester Co., 22 L. R. A., 332 (Sup. Ct. Ind., 1893); see also New Iberia Extract of Tobasco Pepper Co. *v.* E. McIlhenny's Sons et al., 61 So. Rep., 131 (Sup. Ct. of La., 1912).

[4] 60 Ill. App., 372 (1895).

[5] Boston Diatite Co. *v.* Florence Manufacturing Co. et al., 114 Mass., 69 (1873); Whitehead *v.* Kitson, 119 Mass., 484 (1876); Aberthaw Construction Co. *v.* Ransome, 192 Mass., 434 (1906).

the statements had been determined.[1] In Wren *v.* Weild[2] the court said:

* * * We think the action could not lie unless the plaintiffs affirmatively proved that the defendant's claim was not a bona fide claim in support of a right which, with or without cause, he fancied he had; but a mala fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

In Lycett Saddle, etc., Co. *v.* Brooks & Co.[3] the court said:

* * * It is necessary for them [plaintiffs] suing under the common law to prove not only that the statements are untrue, but that they are made maliciously, or, as it has been sometimes expressed, without reasonable and probable cause.[4]

As this practice has been covered by statute in England since 1883, the common-law decisions have not been discussed at length.

Section 11. Combinations to cut off a competitor's supplies or to destroy his market.

A number of cases have arisen involving the legality at the common law of concerted action by manufacturers or traders to embarrass or drive out of business an objectionable competitor. The principal methods employed for this purpose have been in the case of retail dealers to cut off their supplies of materials or commodities by boycotting, or threatening to boycott, the wholesalers or manufacturers from whom they purchase; and in the case of manufacturers or wholesale dealers, to destroy the market for their goods by a concerted withdrawal of patronage. In practically all of the reported cases involving the legality of these methods of competition, the defendants have been members of trade associations. In one case, however, the plaintiff claimed to have been injured by the members of a steamship conference.[5]

By the weight of American authority these methods appear to be illegal. The English courts, however, in most cases have adopted the contrary view. It may be noted that even in England, where the efforts of a print sellers' association to cut off the supplies of a competitor by inducing dealers not to patronize publishers who sold to him, were held lawful, the defendant's counsel, one of whom was Rufus Isaacs (now lord chief justice), urged that "the statement of

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[1] Wren *v.* Weild, L. R. (1869), 4 Q. B., 730; Rollins *v.* Hinks, L. R. (1872), 13 Eq., 355; Axman *v.* Lund, L. R. (1874), 18 Eq., 330; Halsey *v.* Brotherhood, L. R. (1880), 15 Ch. Div., 514; L. R. (1882), 19 Ch. Div., 386.

[2] L. R., 4 Q. B., 730, 737 (1869).

[3] 22 R. P. C., 656 (1904).

[4] As to common-law liability see also Dredge *v.* Parnell, 13 R. P. C., 392 (1896); Alfred Appleby's Twin Roller Chain (Ltd.) *v.* Albert Eadie Chain (Ltd.), 16 R. P. C., 318 (1899); Craig *v.* Dowding, 25 R. P. C., 259 (1908).

[5] Mogul Steamship Co. *v.* McGregor, Gow & Co. L. R. (1892), A. C., 25.

claim disclosed no cause of action, *as it only alleged an unfair competition*[1] on the part of the defendants."[2] In some cases American courts have not only condemned such practices but have contrasted them with "honest"[3] and "lawful"[4] competition, "fair, open competition"[5] or "fair and free competition."[6] The Supreme Court of Massachusetts in considering the concerted withdrawal of patronage by the members of a granite manufacturers' association, declared that competition "is a right * * * which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla."[7] On the other hand, Carland, district judge, expressed the opinion that the action of an association of retail dealers in notifying wholesalers and jobbers that they were opposed to sales by such wholesalers and jobbers to mail-order houses and requesting the former not to sell to the latter, was not "unfair trade competition," and that "persuasion" was not "unfair competition."[8]

AMERICAN DECISIONS.

CUTTING OFF COMPETITOR'S SUPPLIES.—The plaintiff in Bohn Manufacturing Co. *v.* Hollis et al.[9] was a manufacturer and vendor of lumber and other building material. The defendant Hollis was the secretary of the Northwestern Lumbermen's Association, a voluntary association of retail dealers, comprising from 25 to 50 per cent of the retail lumber dealers in Iowa, Minnesota, Nebraska, and the Dakotas. According to the by-laws, members were not to deal with any manufacturer or wholesale dealer who sold lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such sales, the secretary threatened to send notice of the fact to members of the association, whereupon this action was brought. The bill alleged a combination and conspiracy to monopolize and restrain trade in lumber, to fix and control prices and compel dealers to pay the prices so fixed, to limit the retail trade in lumber to its own members, to extort money from any wholesale dealer who should deal directly

[1] Bureau's italics.
[2] Boots *v.* Grundy, 16 Times Law Reps., 457 (1900).
[3] Doremus *v.* Hennessy, 62 Ill. App., 391 (1895), aff. 176 Ill., 608 (1898).
[4] Doremus *v.* Hennessy, supra, and Klingel's Pharmacy *v.* Sharp & Dohme, 104 Md., 218 (1906).
[5] Jackson et al. *v.* Stanfield et al., 137 Ind., 592 (1893).
[6] Bailey *v.* Master Plumbers, 103 Tenn., 99 (1899).
[7] Martell *v.* White, 185 Mass., 255 (1904).
[8] Montgomery Ward & Co. *v.* South Dakota Retail Merchants' & Hardware Dealers' Association et al., 150 Fed., 413 (1907).
[9] 54 Minn., 223, 231, 234 (1893).

with the consumer, and to compel all wholesale dealers to join the association and act and deal only with its members. It was further alleged that the defendants secretly bound themselves under penalties to compel plaintiff and others similarly situated to sell lumber only to them and to wreck and destroy their business if they sold to others. An injunction was prayed for restraining defendants from issuing such notice, from stating or mailing any matter that might tend to injure plaintiff's trade or business, and from combining with others to hinder or limit its sales. A temporary injunction was granted as prayed, which the court later refused to dissolve. The order was reversed and the injunction dissolved by the supreme court of Minnesota.

As to associations in general, the court said in part:

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions in all departments of labor and business for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful but laudable. Carried beyond those limits they are liable to become dangerous agencies for wrong and oppression.

The court stated the following proposition to be entirely decisive of this case:

* * * It is perfectly lawful for any man (unless under contract obligation or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly many, after consultation, may agree to exercise jointly and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up and stripped of all extraneous matter, this is all that defendants have done or threatened to do, and we fail to see anything unlawful or actionable in it.[1]

Delz *v.* Winfree, Norman & Pearson et al. was a suit to recover damages from two firms dealing in live stock. The plaintiff, a butcher, averred in substance that the defendants were the only persons engaged in the business of selling stock suitable for slaughter; that the defendants Winfree, Norman & Pearson, without justifiable cause, and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent him from carrying on said business, did combine and conspire with the other defendant firm and one Barbour, a butcher, not to sell the plaintiff for cash any live animals

[1] Cf. Jackson et al. *v.* Stanfield et al., p. 156; Ertz *v.* Produce Exchange of Minneapolis et al.; and Gray *v.* Building Trades Council, p. 161. Criticized in Retail Lumber Dealers *v.* State, 95 Miss., 337, 343 (1909).

or slaughtered meat; that others were induced not to sell him slaughtered meat for business purposes; and that in pursuance of said agreement they refused to sell him live animals or meat, by which he has been damaged, in that he was compelled to discontinue one of his shops and was forced to buy meat at higher prices than he otherwise would have had to pay. The court sustained a general demurrer to the petition. This judgment was reversed by the State supreme court and the cause remanded.[1] The court said, in part:

"Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Plaintiff's petition goes further than to charge that each of the defendants refused to sell to him. It charges that they not only did that, but that they induced a third person to refuse to sell to him. It does not appear from the petition that their interference with the business of plaintiff was done to serve some legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him.

At the trial it appeared that there was an agreement between the defendant firms that neither of them would sell animals for slaughter to any butcher who was indebted to the other; that this agreement was not made with special reference to the plaintiff, but was made by the defendants for their mutual protection against dishonest and insolvent customers, and for the purpose of compelling such customers to pay their debts, and not with the intention to injure the plaintiff or any other butcher in his business. It appeared also that the plaintiff was largely indebted to defendant firms when they refused to sell to him; that he had been so indebted for some time previous to such refusal; that said indebtedness had not been discharged at the time of the trial; and that neither of the defendant firms had ever induced or attempted to induce Barbour or any other person not to sell meat to the plaintiff. A verdict and judgment were rendered for the defendants, and on appeal to the court of civil appeals this judgment was affirmed.[2] The court, referring to the opinion of the supreme court above noted, said, in part:

* * * It would seem, therefore, that since each of the defendants had the unquestionable right to refuse to trade with the plaintiff, or any other butcher who might desire to buy from them live animals, that the defendants without malice to any one, and for the lawful purpose of protecting each other from

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[1] Delz *v.* Winfree, Norman & Pearson et al., 80 Tex., 400, 405 (1891).
[2] 6 Tex. Civil Appeals, 11, 15 (1894).

dishonest or insolvent customers, and otherwise mutually assisting each other in the conduct of their business, might agree that each, upon the request of the other, would refuse to deal with any butcher. * * *

In Cote *v.* Murphy[1] it appeared that during a strike in the building trades two organizations, the Planing Mill Association and the Builders' Exchange, had resisted the demands of the workmen, but that certain contractors who did not belong to these organizations conceded their demands. These contractors purchased materials from the plaintiff and six other individuals, whereupon the Planing Mill Association and the Builders' Exchange attempted to induce lumber dealers and others to refrain from selling to these dealers, and in several instances their efforts were successful. The defendants were active members of one or both of the associations. The plaintiff brought suit, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public, and, further, that the conspiracy was carried out by a refusal to sell material to him, and, by threats and intimidation, preventing others from doing so. The Supreme Court was of opinion that the refusal of the trial court to instruct that "under all the evidence the verdict must be for defendants" was error, and a judgment for the plaintiff was reversed. The court conceded that the strike was conducted in an orderly, lawful manner, and was not unlawful, and held that the combination of employers to resist the demands of the men was not unlawful, and that the methods adopted to further the objects of the combination were not unlawful. With respect to the latter the court said in part:

* * * The threats referred to, although what are usually termed threats, were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or villify them in the newspapers, or bring on them social ostracism, or similar declarations, these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which concurs with his own notions; but to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice; it may have prompted him to a somewhat sordid calculation; he may have considered which custom was most profitable, and have acted accordingly; but this was not such coercion and threats as constituted the acts of the combination unlawful.

The National Association of Master Plumbers of America resolved to withdraw their patronage from any firm dealing in plumbing material, selling to others than master plumbers, and those only were regarded as master plumbers who were members of the national association or one of the several local affiliated associations. Notices were sent to certain wholesale dealers requesting them to sell to none but members of the association, and as a result a firm of master

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[1] 159 Pa. St., 420, 431 (1894).

plumbers in Providence, R. I., was unable to purchase supplies. They filed a bill against the Providence Master Plumbers' Association and the national association, charging in substance a conspiracy to prevent complainants from buying supplies anywhere in the United States and to ruin their business unless they would become members of the Providence association. An injunction was denied and the bill dismissed, the court being of opinion that the object of the members of the association was to free themselves from the competition of nonmembers, and that this was lawful; that the agreement not to deal with wholesale dealers who sold to nonmembers and the sending of the notices to that end was not unlawful; and that as neither the object of the combination nor the means adopted were unlawful there was no ground for the charge of conspiracy, and the fact of combination was immaterial. Referring to the threats to withdraw patronage, the court said in part:

> * * * We do not think * * * that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the association of their own rights, and not the exercise of a force violative of the rights of others. * * * It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage upon whomsoever they chose and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the association more than that of the nonmembers, they would doubtless comply; otherwise they would not.[1]

There were two voluntary unincorporated trading associations in Kansas City—the Traders' Live-Stock Exchange and the Farmers' Live-Stock Association. The by-laws of the former provided (1) that the exchange will not recognize any yard trader unless he is a member of the exchange, and (2) that members violating the rules shall be subject to fine and suspension or expulsion. The effect of these by-laws was detrimental to the members of the farmers' association because, as construed and enforced, they operated to deter members of the traders' association from doing business on the market with the members of the farmers' association or doing business on such market with others who did business with the members of the latter association. The members of the farmers' association sought an injunction, in their individual names, against members of the traders' association, in their individual names, to restrain them from the enforcement of the above-mentioned by-laws, or any other like coercive rules, the effect of which might be to deter themselves or others from doing business on the market with members of the

[1] Macauley Bros. v. Tierney et al., 19 R. I., 255, 261 (1895).

farmers' association. It was alleged that the purpose and effect of the rules were to close the cattle market to the members of the farmers' association and to monopolize it in the hands of the traders' association, and that the enforcement of the rules had produced, as to the members of the farmers' association in their business on the market, what is called a "boycott." A judgment of the trial court in favor of the plaintiffs was reversed, with directions to enter judgment in favor of defendants. The Supreme Court held that because such by-laws operated directly on the members of the association alone, and only indirectly and remotely on those outside of it, the latter did not have sufficient interest to maintain an action of injunction to restrain the association from the enforcement of the penal provisions in question.[1]

In Montgomery Ward & Co. *v.* South Dakota Retail Merchants' & Hardware Dealers' Association[2] it appeared that the members of the association agreed that they would not purchase merchandise from wholesalers and jobbers who sold to catalogue or mail-order houses, and that the secretary of the organization corresponded with jobbers and wholesalers, stating that the retail dealers were opposed to such sales and requesting that the trade of the wholesalers and jobbers be confined to "legitimate" retail dealers. It further appeared that he subsequently wrote to the members of the association letters containing a list of jobbers who did not reply to the communication first mentioned and that the editor of the Commercial News published the letters above referred to, accompanied by editorial comment, strongly supporting the position taken by the association. It was alleged that the acts of the association, together with the publications in the Commercial News, were committed in pursuance of a conspiracy between the members and the publisher of the paper to injure and boycott the business of the complainant. A temporary injunction was denied by Carland, district judge. With respect to the agreement among the members, and the letters of the secretary, the court said, in part:

> Are these acts of the retail dealers unlawful? Do they show unfair trade competition? Is persuasion unlawful when considered with reference to the facts of this case, or, in other words, is persuasion unfair competition? Upon the answer to these questions depends complainant's right to a temporary injunction.
>
> That the retail dealers have a lawful right to agree among themselves that they will not purchase merchandise from wholesalers and jobbers who sell to catalogue or mail-order houses can not be denied, and it necessarily follows that they have the right to inform each other as to what wholesalers and jobbers do sell to catalogue or mail-order houses. The question in this case is: What may they do, in addition, to influence the wholesalers and jobbers not to sell to catalogue houses?

[1] Downes et al. *v.* Bennett et al., 63 Kans., 653 (1901).
[2] 150 Fed., 413, 417, 418 (C. C., 1907).

It must be conceded that complainant has the right to transact and carry on its business free from intimidation or coercion, that this is a property right, and that a combination to interfere with this right otherwise than in fair competition must show justification. The American cases, however, when carefully considered, show that the great weight of authority in the United States is in favor of the proposition that it is not unfair competition, intimidation, or coercion for a combination to interfere with this right by persuasion or any peaceable means. * * *

It thus appears that the retail dealers have done nothing, nor threatened to do anything, which is actionable. * * *

With respect to the conduct of the publisher of the Commercial News, the court declared:

* * * There are two reasons why an injunction should not issue to restrain the publications of articles by the defendant Mannix, which, though not libelous, have a tendency to injure the business of complainant, and they are: First, this court can not determine in advance, by any rule which it might promulgate for the guidance of the defendant Mannix, as to what would be a mere libel, and what would come within the prohibition of the injunction; second, without reflecting in any way upon the character or influence of the Commercial News, it may be said that the court can not find that any article published by it on its own behalf alone would unlawfully intimidate anyone or compel any jobber or wholesaler to refuse to sell to catalogue or mail-order houses against their will.

The Retail Lumber Dealers' Association of Indiana was formed for "the protection of its members against sales by wholesale dealers and manufacturers to consumers and the giving of such other protection as may be within the limits of cooperative associations." Any person "regularly in the retail lumber trade, owning or operating a lumber yard in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale," was eligible for membership. A "regular" dealer, when his territory was encroached upon by a wholesale dealer or manufacturer, was authorized to notify the person offending that he had a claim against him for such sale or shipment and to make a demand therefor. A failure to adjust the matter was referred to the executive committee, which heard the grievance and determined the claim. The name of any wholesaler or manufacturer who ignored the decision of the committee was reported to the members of the association, whose duty it was to no longer patronize such person under pain of expulsion. An action was brought by Newton Jackson and wife against Howard Stanfield et al.[1] for damages and for relief by injunction on the ground that the defendants had entered into an unlawful combination for the purpose of injuring the plaintiffs in their business, and that, in consequence thereof, the plaintiffs had suffered actual damage and were threatened with great loss. The defendants were partners, selling lumber at retail at South Bend,

[1] Jackson et al. *v.* Stanfield et al., 137 Ind., 592 (1893).

were members of the retail lumber dealers' association, and the defendant Stanfield was a director of that organization. It appeared that the plaintiff Jackson bought and sold lumber, dealing with his wife's money, and also on commission, by negotiating sales as agent of a wholesale dealer or manufacturer without owning the lumber himself. It further appeared that the Birdsell Manufacturing Co. desired to purchase a large bill of lumber; that the plaintiff and the defendants were competitors in the sale of said lumber; that Jackson was successful in making said sale, and, acting as a broker, bought the lumber from the West Michigan Lumber Co., an honorary member of the association; that the lumber was shipped directly by that company to the Birdsell Manufacturing Co., and that a commission on such sale was paid to the plaintiff. In accordance with the regular procedure, the defendants wrote to the West Michigan Lumber Co., demanding $100 on account of the Birdsell transaction. The matter was finally referred to the executive committee of the association, which decided that the defendants' claim was valid, and steps were taken to compel a settlement. Subsequently, the West Michigan Lumber Co. sent its draft for $100 to the association and said sum was passed over to the defendants in payment of their claim. Thereafter this company refused to sell lumber to the plaintiff, being afraid of incurring the penalty for violating the rules of the association. It appeared that later the plaintiff made an offer to Studebaker Bros. Manufacturing Co. to sell 2,000,000 feet of lumber, which offer was based on the price list of the West Michigan Lumber Co.; that this offer was accepted, but that the West Michigan Lumber Co. refused to sell to or through the plaintiff, by reason of the rules of the association. The plaintiff, therefore, turned over such sale to the lumber company without requiring the payment of any commission. Jackson thereafter caused lumber to be purchased for his customers in the name of Smith & Jackson, a firm of regular retailers, as defined by the association, and paid them a share of his commission. A judgment in favor of the defendants was reversed by the Supreme Court of Indiana, which said in part:

The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards, with an adequate stock on hand, by driving them out of business. By this plan they reached the wholesale dealer and compelled him to pay an arbitrary penalty under a threat of financial injury, and they forced him to assist in ruining the dealer who does not own a yard.

There is such an element of coercion and intimidation in the by-law under consideration toward the wholesale dealers, manufacturers, and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether he would pay the demand or not or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of anyone by wrongfully preventing those who would be customers from buying anything from the representatives of such business by threats or intimidation is in restraint of trade and unlawful. * * *

The great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let-alone policy; a withdrawal of all business relations, intercourse, and fellowship that creates the liability, but the threats and intimidation shown in the complaint. * * *

It is idle to say that the victim of such a combination is only "incidentally" affected thereby. The object of the association and the result attained is a monopoly of the trade by owners of yards, and the broker is simply ignored by the wholesale dealers.

It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may, and do, sometimes become honorary members, so as to keep within touch of the retail dealers and secure trade. Is is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade.

* * * Such rules contravene the rights of nonmembers to earn their living by fair competition. * * *

* * * * * * *

The judgment is reversed, with instruction to restate conclusions of law and render judgment upon the special findings in favor of the appellants for $583, and with the further instruction to render a judgment perpetually enjoining the defendants from in any way, other than by fair, open competition, interfering with the plaintiffs in their business and from demanding a penalty or making a claim against anyone under the by-laws of said association who may sell to the plaintiffs or through them to a consumer.[1]

A petition for a rehearing was denied.

In Doremus et al. *v.* Hennessy[2] it appeared that the appellee brought an action on the case, alleging in substance that she kept a laundry office in Chicago; that she received clothing and contracted with laundries to do the work for her; that the appellants conspired to destroy her business because she would not increase her prices to agree with the prices fixed by the Chicago Laundrymen's Association, of which defendants were members; that they induced parties with whom she had contracts by false representations that she was financially irresponsible, and by threats and intimidations that the appellants would injure the business of said parties, to break their

[1] The court, referring to Bohn Manufacturing Co. *v.* Hollis et al., 54 Minn., 223, supra, said (p. 615): "The opinion proceeds upon the theory that there was no element of coercion or intimidation in the acts complained of, but we think the decision in this respect is in conflict with approved authority and is bad as a precedent."

[2] 62 Ill. App., 391, 403 (1896); aff. 176 Ill., 608, 614 (1898).

contracts to do laundry work for her; and that in consequence thereof her business was ruined. There was evidence to support the allegations. One witness testified that "they [the officers of the association] told me that they would give me $300, a horse and wagon, and enough work to keep me going provided I would keep back her work and retain it as long as I possibly could, to the detriment of her patronage," and that they threatened to ruin his business if he did not comply with their demands.

Defendants contended, among other things, that their acts in inducing parties to break their contracts with appellee were not mere malicious acts, done solely with the intent to injure her, but were legitimate trade competition, for which they could not be held liable.

A judgment for the plaintiff was affirmed by the appellate court and by the Supreme Court of Illinois, which held (1) that appellants had no right directly or indirectly to interfere with or disturb appellee in her lawful business, or to threaten to do so, for the sake of compelling her to raise her prices in accordance with their own; (2) that maliciously to induce a person to break a contract with another for the purpose of injuring another is actionable.

The appellate court observed that—

> Honest competition in business is always permissible, and it is not easy to draw the line between acts which are but lawful competition and those which are unlawful, because designed to and actually resulting in an injury to the person or property of a rival. The line of demarkation is, in this matter, no more difficult of ascertainment than as to the lawfulness or unlawfulness of many other things of which the law takes note.

The supreme court, in discussing the plaintiff's rights, said, in part:

> * * * It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. * * *
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> Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with malicious motives, is without excuse and actionable. Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be

actionable unless there was actual malice. Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition.

The Supreme Court of Tennessee in considering certain by-laws of a master plumbers' association held that they constituted an unreasonable restraint upon trade, that they were contrary to public policy, and void under the common law. As demonstrating the harmful and unlawful tendency of the association the court referred to certain by-laws which provided that "no member * * * shall purchase any supplies from any supply house, manufacturer, or dealer in plumbing materials who does not comply with the rules and requirements of this association," and "no member shall buy material of any kind from a jobber who buys material from a manufacturer who sells plumbing or gas-fitting material to anyone in our city who is not a member of our association." With respect to these rules the court said:

These by-laws virtually divided the trade in plumbing materials and supplies for Memphis into two main parts, in the nature of combinations, one of them being represented by members of the association and dealers who sell to them alone, and the other being represented by nonmembers and dealers who sell to them alone; and thereby the two classes are intended to be arrayed against each other, not in fair and free competition but with a view to the utter demolition of the latter class and the entire control of the trade by the former class.

The underlying thought is the destruction of all competition with nonmembers by driving them out of the business, and the acquisition of the whole trade for members, whose competition among themselves and whose prices to customers are subject to the illegal rule already considered. * * * The mere fact that every plumber in the city of Memphis had the legal right originally to purchase supplies and materials from any dealer or dealers he might choose did not justify the association in the passage of by-laws requiring its members to buy from that class of dealers it saw fit to name. The two things are not the same, but antagonistic. The former is freedom, the latter restraint. * * * The proof in the record discloses the fact that several dealers out of the State ratified the by-laws so far as relating to themselves, and repeatedly refused to sell material and supplies to nonmembers for no other reason than that doing so would be a violation of the by-laws, and subject them, as dealers, to a "boycott" by the association. * * *

By-laws with such capabilities, import, and design are clearly obnoxious to the common law, as well as violative of our statutes. (Shannon's Code, 3185 and 6622) * * *.[1]

A commission merchant alleged, in substance, that the members of a local produce exchange, comprising practically all firms dealing in produce in that city, conspired not to sell to or buy from the plaintiff,

[1] Bailey v. Master Plumbers, 103 Tenn., 99, 116 (1899).

that the defendant exchange procured from the codefendants and many others an agreement not to deal with plaintiff, in pursuance of such conspiracy the defendants reported daily to his patrons that he was unable to buy produce, with the intent of inducing such patrons to discontinue doing business with him, and that by reason of the premises he had been ruined.

The court, in affirming an order overruling the defendants' demurrer, approved the decision in Bohn Manufacturing Co. *v.* Hollis,[1] but observed that it was inapplicable to the facts in the case at bar. The court said, in part:

It is to be noted that the defendants in the Bohu case had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the Bohn case, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly, many may lawfully agree to do jointly by voluntary association, provided they do not interfere with the legal rights of others. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him.[2]

In Hawarden *v.* Youghiogheny & Lehigh Coal Co.[3] there were 23 defendants, who were divided into two classes, the first class being composed of certain foreign corporations and their agents at Superior, Wis., who were termed "wholesalers," and the second being composed of certain retail dealers of the same place. In one count

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[1] P. 150.

[2] Ertz *v.* Produce Exchange of Minneapolis et al., 79 Minn., 140, 144 (1900). The Supreme Court of Minnesota in a later case expressed the opinion that the action of the retail dealers in Bohn Manufacturing Co. *v.* Hollis (supra), was in effect a strike and not restrainable in equity; that they intended only to inform members of their association of the action of the plaintiff in selling direct to the contractors and that there was no claim made of any boycott, which in the case at bar was held illegal. Ertz *v.* Produce Exchange was regarded as in line with the authorities generally and placed the court "with the weight of authority in holding that boycotts are illegal." Gray *v.* Building Trades Council, 91 Minn., 171, 181 (1903).

[3] 111 Wis., 545, 549, 551 (1901).

the plaintiff, in substance, alleged that he was a retail coal dealer at Superior; that the defendant wholesalers owned practically all of the coal docks at Superior and Duluth, and that a retailer could not carry on his business at Superior unless he could buy of the wholesalers freely and without discrimination; that the wholesalers entered into a combination with the defendant retailers by which it was agreed that the wholesalers should sell to the defendant retailers, and to none other, for the purpose, among others, of forcing out of the retail trade all retailers not in the combination, and, among others, the plaintiff; that such agreement or conspiracy had been successful, and as a result thereof the plaintiff's business had been destroyed, to his damage.

In another count the plaintiff attempted on behalf of a class of persons, namely, retailers who were excluded from the combination, to obtain equitable relief by way of perpetual injunction restraining the continuance of the operations of the conspiracy. The defendant demurred. With respect to the first count the court said in part:

> Do these facts constitute a cause of action at common law? We think they do. * * * The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose and constitutes malice in contemplation of law. Therefore under the allegations of the complaint it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated.
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> The conclusion reached renders it unnecessary to consider the effect of section 1747e, Statutes of 1898, with regard to combinations in restraint of trade or commerce.

With respect to the second count the court said:

> * * * That courts of equity have jurisdiction to restrain such conspiracy when irreparable damage will result and legal remedies will prove inadequate or a multiplicity of suits be necessary seems to be well settled.

It was held, however, that a general demurrer to the whole complaint on the ground of improper joinder should have been sustained, and the action was remanded for further proceedings according to law.

In an action brought by the Jacobs' Pharmacy Co., of Atlanta, Ga.,[1] the facts as stated by the court were as follows:

> The record in this case discloses that prior to the institution of the present action and since then there existed in the United States three organizations, known, respectively, as the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists. These associations, occupying each toward the others close and intimate relations, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by

[1] Brown & Allen et al. *v.* Jacobs' Pharmacy Co., 115 Ga., 429, 452 (1902).

those engaged in the drug trade. A local association was formed in Atlanta, known as the Atlanta Retail Druggists' Association. When it was first organized, Joseph Jacobs, secretary and treasurer of the Jacobs' Pharmacy Co., the plaintiff in the present case, was a member of it, but at that time it was distinctly understood and agreed among its members that it was to undertake no action with reference to the cutting of prices by dealers in drugs or to control prices of the same. Afterwards the plaintiff, either by its methods of advertising or certain things that it did in the conduct of its business, gave offense to the members of this association, and charges were preferred against Jacobs. He then withdrew from the local association. Some of the members of that association were members of one or more of the large associations above referred to. After the retirement of Jacobs, the local concern put in operation a scheme to prevent the Pharmacy Co. from being able to buy goods with which to conduct its business. The main features of that scheme were that the local concern, by circulars, letters, or otherwise, undertook to notify wholesalers and manufacturers throughout the country that the Pharmacy Co. was an aggressive cutter and to request persons and concerns addressed not to sell it any more goods;[1] further, to require all salesmen representing the manufacturers or wholesale houses to procure from the local association a card, in order to procure which such salesmen had to sign an agreement not to sell the Pharmacy Co. any goods;[2] and another part of the scheme was to give the manufacturers and wholesalers to understand that, unless they refused to sell the plaintiff any goods, the members of the local association would not buy any more goods from them. In this condition of affairs the plaintiff brought its equitable petition against the defendants, alleging, in substance, the facts set forth above, and praying for damages for alleged injuries to its business already done and for an injunction to prevent the defendants from carrying into effect the scheme above outlined.

An injunction was granted substantially as prayed for. This judgment was affirmed, the court saying in part:

The learned judge did not err in holding that the defendants who are members of the Atlanta Druggists' Association, in the name of such association or otherwise, should be enjoined from sending out to wholesale druggists or proprietors of proprietary medicines, through the mails, or delivering them to them otherwise, the letter and agreement set out in Exhibits A and B to plaintiff's petition, or seeking to cause the latter to be signed by means of the letter set out in Exhibit A, or other like means, or sending out any letter, circular, or agreement of similar character or purpose, directly or indirectly, to wholesalers, jobbers, or proprietors; and from issuing to salesmen and causing to be signed the card agreement attached to the petition as Exhibit C, or any card or agreement of similar import or purpose; and from in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter; and from conspiring and from seeking to prevent wholesale or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods, or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff; and from taking part in or carrying out any conspiracy or combination for that purpose; and from designating or pointing out the plaintiff to other druggists' associations, or their representatives, as an aggressive cutter, and from writing

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[1] These letters subsequently referred to by the court as Exhibit A.

[2] Agreements hereinafter referred to as Exhibit B and salesmen's cards as Exhibit C.

or sending through the mails any card, circular, letter, or other written or printed communication conveying, or intended to convey, to proprietors or wholesalers throughout the United States that plaintiff is an aggressive cutter and under the ban of the local organization, or of similar import.

Shortly after the decision in this case the Court of Appeals of Maryland was required to consider a similar statement of facts in an action brought by Klingel's Pharmacy, of Baltimore, against the Calvert Drug Co. and Sharp & Dohme (dealing in drugs and druggists' supplies) and the Baltimore Retail Drug Association.[1] The plaintiff averred in substance, that there was an unlawful conspiracy to maintain a maximum schedule of prices for drugs and druggists' supplies; that because the plaintiff had refused to enter the combination, no drugs or supplies would be supplied to it by the defendants, and that no other dealer would be allowed to sell to plaintiff without being blacklisted and boycotted by the defendants, whereby the plaintiff was wholly unable to purchase supplies and was prevented from pursuing its business. A judgment sustaining the defendants' demurrer was reversed, the court saying in part:

The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment. Whilst an owner of property has the legal right to refuse to sell it to another, and whilst as in the case of Bohn Manufacuring Co. *v.* Northwestern Lumbermen's Association, * * * several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages and in fact may refuse to work unless such better wages are obtained "still the law does not permit either an employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion to secure these ends," nor does it permit vendors to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their own method of conducting a lawful business in a lawful way. * * * The threatened boycott was successful. It deterred persons from selling to the plaintiff, and as a direct result ruined the plaintiff's business. These are the allegations of the narr., and if proved to be true they show an injury to the plaintiff as the direct consequence of lawless acts of an unlawful federation, and entitle the plaintiff to recover.

In Leonard *v.* Abner-Drury Brewing Co.[2] a bill was filed charging, among other things, that four brewing companies confederated and conspired together in an association in order to prevent competition in the manufacture, sale, and price of brewed or malt liquors. It was agreed that no one should sell below a price fixed by the association and that no brewer should sell beer to the customers allotted to another. It was alleged that the officers of the International Brotherhood of Stationary Firemen agreed to induce the firemen employed by the Chr. Heurich Brewing Co. to break their contract

[1] Klingel's Pharmacy *v.* Sharp & Dohme, 104 Md., 218, 235 (1906).
[2] 25 App. D. C., 161, 175, 176 (1905).

of employment unless that company would enter the association and submit to its regulations respecting the price of beer and the allotment of customers. It was further averred that one Healy, the president of the International Brotherhood, informed the Heurich company that in the event of a refusal to submit to the demand other workmen in its employ would be required to quit work, and that the product of the brewery would, through the influence of said Healy, be boycotted. The suit was filed by customers of the Heurich company, who alleged that they supplied a large demand for Heurich beer, and that the proposed increase would involve great and irreparable injury to the complainants. The bill was dismissed and the complainants appealed. The decree was reversed by the Court of Appeals. The court, by Mr. Chief Justice Shepard, said, in part:

Their ground of complaint does not rest upon a contract with the Heurich company, which the latter is about to break in obedience to the unlawful demands of the members of the trust and the compulsion exerted by them and their confederates. If such were the case and that contract should be broken through the malicious interference of the defendants, the complainants might maintain an action against them for damages occasioned thereby. They could certainly maintain an action against the Heurich company for such breach, and they might possibly maintain one against all of the defendants, including that company, for threefold damages under the provisions of section 7 of the antitrust act. Possibly, also, they might, under certain conditions, obtain an injunction against the Heurich company to prevent such a breach.

Having no enforceable contract with the Heurich company, however, their right to any remedy depends entirely upon the condition that they have shown a case of legal injury which would directly result from the forceable and wrongful termination of their established trade relations with the Heurich company.

The court then stated the substance of the allegations, and continued as follows:

In the event of the execution of the conspiracy, these conditions would entitle them to an action for such damages as they would be permitted to prove at law, with threefold recovery under the statute. * * * But damages for acts which might work commercial wrong are not always recoverable at law, the rules of which relating to the measure of damages do not ordinarily warrant the assessment of consequential damages of an uncertain or speculative character, such as loss of trade and profits and the failure of credit and business. For such injuries the remedy at law, even under the statute giving a threefold recovery, is inadequate and incomplete. In such cases, then, the jurisdiction of equity attaches, and to accomplish the ends of justice the writ of injunction will issue to prevent the doing or the continuance of the wrongful acts.

The Doctor Blosser Co., which was engaged in the general printing business in Atlanta, brought an action against a number of printing concerns using the trade name of the "Employing Printers' Club of Atlanta,"[1] praying for an injunction and damages. It appeared

[1] Employing Printers' Club et al. v. Doctor Blosser Co., 122 Ga., 509, 515, 516 (1905).

from the record that the organization embraced nearly the entire printing and publishing fraternity except newspapers, and that practically all the skilled labor in this business belonged to various labor unions which had an agreement with the defendants that the latter would employ only union labor, and that the unions would not permit their members to work for any employer who was not a party to the agreement. The defendants induced the plaintiff to become a member of the club by advising its officers that it could not otherwise continue to employ union labor in its shop. The club, which employed a system of maintaining prices, regulating bids, and distributing printing contracts among its members, adjudged that the plaintiff was to pay to Foote & Davies Co., a firm in the combination, the sum of $300 to partly reimburse it for the loss of profit on a contract which had been made by the plaintiff for the printing of the Wesleyan Christian Advocate, and further that the naming of the prices for the publishing of this periodical should "revert irrevocably" to the Foote & Davies Co. at the expiration of the present contract. The plaintiff failed to comply with this edict and the club caused the pressmen, feeders, printers, and binders employed by plaintiff to quit work, thereby rendering it impossible to conduct business. It further appeared that some of the employees reported to work, and that their respective unions refused to call a strike in the plaintiff's shop, whereupon the defendants threatened that unless the unions would call out their labor they, the defendants, would no longer observe union regulations, and in pursuance of this threat some of the defendants posted their respective businesses as "open shop." The plaintiff thereupon filed this petition. An injunction was granted and an exception was taken. The defendants also demurred to the complaint. Held, that the defendants were properly enjoined "from interfering with the plaintiff's business as a printer engaged in competitive trade, and from unlawfully influencing the labor organization from [sic] obstructing its business." The opinion of the court, in which all the justices concurred, was delivered by Evans, J., who said in part:

There can be no doubt that the facts alleged in the petition, if true (and the demurrer admits their truth), establish not only a conspiracy to fix and control the price of printing in the city of Atlanta, but also a malicious interference with the business of the plaintiff. The scope and purpose of the Employing Printers' Club was to create a monopoly and stifle competition in the printing business. A mere agreement to do wrong is not actionable; but when the parties do an overt act in furtherance of the illegal combination, resulting in injury to a third person, the conspiracy becomes actionable, and the conspirators are liable to the injured party for damages proximately flowing from their illegal act. * * *

Independently of the conspiracy, the petition states a case of malicious interference with the plaintiff's contract of employment with its employees. * * * The several defendants had the undoubted right to employ any character of labor that they might prefer. If they desired to supplant the union labor and substitute therefor nonunion labor, such action would be strictly within their legal right. But the record shows that practically all the skilled labor in this branch of business in the city of Atlanta belonged to the various labor unions, which had an agreement with the defendants that the defendants would hire only union employees, and that the unions would not permit their members to work for any employer who was not a party to the agreement. This agreement was incidental to the main purpose of the organization. * * * A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the hurt and injury of one engaged in a competitive business.

In a subsequent case it appeared that two corporations controlling the manufacture and sale of plumbers' supplies in Indianapolis refused to sell material to a licensed plumber, though he offered cash, solely because he was not a member of the Merchant Plumbers' Association. The plumber brought an action based on certain sections of the Indiana statutes,[1] charging the supply companies and the association with having combined and confederated to prevent competition in the plumbing business. It was alleged that this was accomplished by fixing prices arbitrarily, by selling to members of the association at from 30 to 75 per cent less than list prices, or by refusing to sell to nonmembers and driving them out of business unless they joined the association. The defendants were perpetually enjoined from refusing to sell, or inducing others not to sell, supplies to the plaintiff for cash at the usual and customary prices. This judgment was affirmed by the Supreme Court of Indiana, which held, among other things, that the statute created no new offense, but was declaratory of the common law.[2]

The Farmers' Elevator Co. of Gowrie was a corporation engaged in buying and selling, among other things, farming implements, vehicles, lumber, coal, and farm produce. The general plan of its promoters was that its stock should be owned and controlled by resident farmers, to whom it looked for its patrons and customers. In a suit against this company[3] it appeared that the plaintiff was a young man "without a habitation and without an occupation"; that he was not a farmer; that prior to the purchase of stock in the elevator company he never had any acquaintance about the town of Gowrie; that he employed another to purchase four shares of stock for him, and that immediately upon the purchase of the stock he demanded an investigation of the books and brought two actions against the company, one, by mandamus, to compel the transfer of the stock upon the books of the company, and another to compel the defendant to permit an examination of the books. By agreement the actions were consolidated and tried on the equity side of the court. The trial court found that the

[1] Acts, 1899, p. 257; ss. 3884, 3887, Burns (1908).
[2] Knight & Jillson Co. *v.* Miller, 172 Ind., 27 (1909).
[3] Funck *v.* Farmers' Elevator Co. of Gowrie, et al., 142 Ia., 621, 623, 625 (1909).

plaintiff was "a malicious meddler," and that he purchased his stock and sought membership in the defendant corporation for the purpose of betraying it to its competitors. The court therefore refused an order permitting him to examine the books, but held that he was entitled to a transfer of his stock. From this judgment the defendant appealed. Reversed, and the case dismissed. The supreme court of Iowa summarized the facts as follows:

> * * * It appears from the testimony with reasonable certainty that an organized system of "boycott" has been applied to the defendant for several years by so-called "regular" dealers. These "regular" dealers are organized into associations. It is a part of the course of conduct of some of these associations, through their officers, to ascertain what wholesale and jobbing and commission houses do business with the defendant and other like corporations. For that purpose a system of espionage on their business has been adopted. When the name of a jobbing or wholesale house is discovered which does business with the defendant some form of coercion is resorted to to cause them to desist. The result is that in order to do business at all the defendant is compelled to keep secret the names of the persons with whom it deals at jobbing and wholesale centers. Much of the time it is unable to buy the supplies needed for its trade, solely because of such "boycott." At the time of the trial there were only two sources available to it from which it could obtain lumber, and it was able to maintain these sources only by keeping the names of its sources secret. In order to prevent the ascertainment of the names of persons from whom it buys shipments and to whom it sells shipments it has had to adopt a system of initials and reconsignments. Every time that it loads a car of grain for shipment its competitors take the number of the car and the initials thereof. Several letters are contained in the record which have been written by officers and members of these associations which strongly confirm the claim of the defendant as to the alleged boycott. We think it may fairly be said from this evidence that the parties engaged in such boycott are guilty of an unlawful conspiracy to destroy the business of the defendant or else to coerce it into maintaining an approved scale of prices.

The court further found that the plaintiff was acting in behalf of the persons guilty of the boycott and in furtherance of the conspiracy in which they were engaged against the defendant. While admitting that the mere motive of the purchaser of stock will not ordinarily be inquired into in a proceeding to order a transfer on the books of the company, the court said:

> To our minds this case presents something more than the mere motive of the plaintiff. The evidence discloses an active conspiracy, which it would be the duty of the court to enjoin if proper jurisdiction could be acquired. Can a court consistently enjoin and punish a conspiracy with one hand and aid and abet it with the other? It is true that the plaintiff asks nothing in this case that is of itself illegal. If this transaction stood alone, the plaintiff would have the absolute right to the relief demanded, as held by the trial court. But must the court aid a conspiracy to its final goal simply because it travels this part of the way over a legal highway? We think not. In the light of the evidence the plaintiff does not stand before the court as a mere purchaser of stock in the defendant company, but as a conspirator, or a puppet of conspirators, working in conjunction with many others by unlawful means toward an unlawful

end. A conspiracy usually, often necessarily, involves in its details many lawful acts; that is to say, acts which in themselves would be lawful. They are none the less unlawful as parts of the plan of conspiracy. It is our conclusion, therefore, that the plaintiff is entitled to no aid from a court of equity, and that the relief prayed for should be refused.[1]

In the same year a decree was signed by the district court of Webster County, Iowa, in a suit brought by the Farmers' Elevator Co. against the Iowa Implement Dealers' Association, and the officers and members of that organization. In this proceeding it was found by the court that the defendants, by fraud, coercion, persuasion, and intimidation prevented and threatened to prevent jobbers and manufacturers of farm machinery, implements, wagons, vehicles, and other implements of husbandry from dealing with the Farmers' Elevator Co.; that the defendants published a monthly journal called the Retailers' Sentinel; that they also published a black list and notice of boycott of manufacturers and jobbers who sold wagons, buggies, vehicles, etc., to persons or corporations in a manner that was not satisfactory to the defendants and to the association; that in each issue of the Retailers' Sentinel there was published "a list of firms against whom complaints have been filed and by the date of going to press satisfactory assurance for adjustments of same have not been received by the officers of this association"; that the purpose of this notice was to prevent the members of the association from trading with the said manufacturers and jobbers, and for the purpose of instituting a boycott against them and to prevent the latter from dealing with the plaintiff and others; that the defendants combined and conspired to prevent manufacturers and jobbers from selling farm machinery, buggies, etc., to the plaintiff; that the defendants did prevent such sales, and that the conspiracy continued until the time of trial. It was further found by the court that it was practically impossible after the formation of the combine for the plaintiff to purchase standard articles from the manufacturers and jobbers in the State of Iowa; that for many years it had been a custom of the defendants and the association to solicit knowledge respecting the sales of implements to the plaintiff and to all other retailers who were not "regular dealers," and, after said information had been obtained, to file charges with the secretary of the association against said manufacturers and jobbers, who were thereupon requested to defend said charges, and that as a result thereof, trade and commerce were hindered, restricted, and restrained in the State of Iowa.

The Iowa Implement Dealers' Association and all officers and members were, among other things, "strictly enjoined from in any manner whatever interfering with the business of the plaintiff, from

[1] Cf. Heminway *v.* Heminway, p. 64, and Forrest *v.* Manchester, etc., Ry., p. 288.

preventing or attempting to prevent any jobber, wholesaler, or vender of farm implements, buggies, vehicles, or any other articles, goods, wares, or merchandise of any kind, from selling the same to the plaintiff," and further enjoined from "using or attempting to use force, fraud, coercion, or intimidation in preventing or attempting to prevent any wholesaler, jobber, or manufacturer" of any goods from entering into any contract of sale or barter with the plaintiff, or from preventing any jobber or manufacturer from entering into and carrying out any contract made by the plaintiff with such jobber, wholesaler, or manufacturer. The defendants were further enjoined from "communicating with, writing to, threatening, annoying, or harassing any jobber, wholesaler, or manufacturer, or any servant, agent, or employee of any such wholesaler, jobber, or manufacturer, who has heretofore or who may hereafter make or enter into any contract of any kind for the sale and delivery to the plaintiff of any goods," etc., for the purpose of preventing or attempting to prevent the making or performance of any contract with the plaintiff. The defendants were further enjoined from interfering with the free, unrestrained, and unlimited trade and commerce between all jobbers, wholesalers, and manufacturers or venders of farm implements, vehicles, etc., with the plaintiff.[1]

Destroying competitor's market.—A builder and contractor in Denver brought an action against the Master Builders' Association and others[2] for damages and for an injunction, averring, among other things, that the defendants had combined for the purpose of regulating bids of contractors and to prevent all contractors and builders who were not members of the defendant association from bidding on, or entering into, any contract to build, and to induce the patrons and customers of such contractors to cease patronizing or doing business with any contractor or builder not a member of such organization. One of the specific acts complained of was the sending of the following letter signed by each of the individual defendants to Marean & Norton, architects, who were about to construct a building:

Gentlemen: We, the undersigned members of the Master Builders' Association, decline to bid on the McCartney building if Mr. Domascio's bid is received in competition. Respectfully, yours.

The court found for the plaintiff, awarding him damages and a permanent injunction directed to each of the defendants and the officers and members of the association restraining them, among other things, from interfering with or molesting the business of the plaintiff by sending messages to any of the architects objecting to

[1] Farmers' Elevator Co. *v.* Iowa Implement Dealers' Association et al., unreported decision of Wright, J., in the District Court of Webster County, Iowa, September term, 1909, and see Report of Commissioner of Corporations on Farm-Machinery Trade Associations, p. 157.

[2] Master Builders' Association et al. *v.* Domascio, 63 Pac., 782, 784 (Ct. Apps., Colo., 1901).

the bidding by the plaintiff upon any contemplated work, from inducing others to refuse to employ him, and from in any manner interfering with the business of the plaintiff. In reversing this judgment the court of appeals, by Wilson, J., said in part:

* * * In the written notice of Marean & Norton there was no threat, expressed or implied, either against the plaintiff or against the architects; nor was there any language even suggestive of coercion or intimidation. The latter were at perfect liberty to have received the bid of the plaintiff, and in so doing not have become liable to any threatened loss, injury, or penalty. It cannot even be said in this case that they would have been embarrassed by reason of the number of contractors who had signed this notice, because it is undisputed that there were at least 50 other contractors in the city from whom they could have solicited and received bids. We think, therefore, there was nothing in this specific act which could have sustained a judgment against the defendants for damages or the issuance of the injunctive writ. * * *

* * * Defendants did not notify or threaten the architects that, in case they received the bid of the plaintiff, they (the defendants) would thereafter refuse to deal with them. All that the defendants did say to the architects was (giving the notice and the allegations the broadest construction): "If you receive the bid of the plaintiff for any contract, we will not give you our bids in competition therewith." * * *

We do not go to the extent of holding that the complaint wholly failed to state a cause of action. It is possible that some parts of it did. We do hold, however, that the allegations of the complaint with reference to the notice to Marean & Norton, signed by defendants, did not, of themselves, state a cause of action. * * *

There was not a scintilla of evidence, either by admission or otherwise, against the defendant corporation, the Master Builders' Association of Denver, and hence the court had no authority whatever to render a judgment or issue a writ of injunction against it. The judgment will be reversed.

The Lumber Dealers' Association of Texas distributed to nearly every lumber dealer in the State, including the customers of Olive & Sternenberg, a circular naming that firm, among others, as one which sold to others than "legitimate" dealers, and urging a withdrawal of patronage until such time as they notify the association that they will desist from selling to other than "regular" dealers. The injured firm, which owned a large sawmill, brought an action against the president of the association and others charging a conspiracy against the plaintiffs and praying for damages and an injunction. The trial court sustained a demurrer to the petition, but this judgment was reversed. The court of civil appeals quoted and followed Delz *v.* Winfree,[1] and concluded as follows:

It can not be held that defendants had the right to prevent plaintiffs from selling to consumers, or that such interference by them (defendants) was serving a legitimate purpose connected with their own business. To break plaintiffs down as competitors for the consumers' trade might, it is true, result in benefit to defendants, but such a benefit obtained in such a manner could not be deemed a legitimate purpose within the meaning of the opinion quoted. * * *

[1] P. 151.

Plaintiffs had the right to sell at wholesale or retail, or both, to the retail dealer and to the actual consumer, and defendants had the same right, as well as the right to solicit and secure trade from plaintiffs' customers by underselling them. This would be legitimate. They could do this and would not be responsible for the injurious consequences to plaintiffs' business; but they could not without some legal purpose directly serving their own business maliciously induce third persons not to trade with plaintiffs and so to injure them.

Plaintiffs can not recover for any injury except such as results from the wanton and unlawful interference with plaintiffs' business in influencing third persons not to trade with them, and only for the injury that has occurred.[1]

The Continental Insurance Co. complained that certain representatives of the Board of Fire Underwriters of the Pacific had threatened to boycott the firms and individuals who held policies issued by the complainant and other "nonboard" companies unless such policyholders forthwith canceled the policies. An order restraining such threats was continued by McKenna, circuit judge, who referred to this conduct as "unlawful," "inimical and unjustifiable."[2]

In Boutwell *v.* Marr[3] the plaintiff was the owner of a mill for polishing granite and had been conducting a profitable business. The defendants were granite manufacturers and members of the Granite Manufacturers' Association, comprising 95 per cent of all the granite manufacturers of the place. The association was affiliated with a larger organization known as the Granite Manufacturers' Association of New England. The local association adopted a resolution forbidding members doing business with anyone not a member of the association. Prior to this the association had adopted a by-law prohibiting dealing with members not in good standing and imposing fines for the violation of its rules. Prior to the adoption of the resolution above referred to the plaintiff had enjoyed a large business with the members of the association, but as a result of its passage he lost the entire patronage and was forced out of business. There was evidence clearly tending to show that the assocation sought by the resolution to compel plaintiff to become a member, but he steadfastly refused to do so. It was held that the withdrawal of the patronage of the members of the association by the coercion of a by-law which imposed fines on any member who violated the rules of the association was unlawful, and that the fact that the members of the association voluntarily assumed the obligation on joining the association did not make the by-law legal. The court said in part:

Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an

[1] Olive & Sternenberg *v.* Van Patten et al., 7 Texas Civ. App., 630 (1894).

[2] Continental Insurance Co. *v.* Board of Fire Underwriters of the Pacific, 67 Fed., 310, 323 (1895).

[3] 43 L. R. A., 803, 805 (Vt., 1899).

organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case it could easily be found that a fine of $50 for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in an aggressive movement of unlawful character, the defendants can not complain if the law so treats it. * * *

The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body can not change the result. The law sees in membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure.

An action was brought by John H. Rourke and another, druggists, against the Elk Drug Co. and others, including the Binghamton Retail Druggists' Association and a number of its members.[1] The methods alleged to have been adopted by the defendants are indicated by the following extract from the opinion of the Appellate Division of the Supreme Court of New York, which overruled a demurrer to the complaint.

The plaintiffs' grievances seem to be in the injury to their business as druggists, caused by these defendants doing various acts in pursuit of a single purpose, to wit, the ruin of the business of the plaintiffs. * * *

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The complaint alleges a clear cause of action against each of the defendants. It alleges a conspiracy into which all entered to accomplish an unlawful purpose by unlawful means. The defendants as coconspirators are charged with making threats; with intimidation, with libels upon plaintiffs' business reputation calculated to destroy their business, with the use of slanderous language affecting their business character and directly affecting their business; with interfering with their advertising and preventing them from reaching customers in the ordinary way, and many other things are charged which clearly show a cause of action in plaintiffs at common law. Then, again, the complaint charges the defendants with forming a combination among themselves and with others for the unlawful purpose of preventing the free pursuit of a lawful business, of increasing the price of commodities in common use, and of preventing competition in trade in certain articles, all of which things are expressly prohibited by statute and made a misdemeanor. Laws 1899, chapter 690.

In Martell *v.* White[2] it appeared that the defendants were members of the Granite Manufacturers' Association of Quincy, Mass.; that one of the by-laws of the association provided that members dealing with nonmembers shall for each transaction "contribute" from $1 to $500, the amount to be determined by the association. It was

[1] Rourke et al. *v.* Elk Drug Co. et al., 75 N. Y., App. Div., 145 (1902).
[2] 185 Mass., 255, 257 (1904).

voted that several members should "contribute" sums ranging from $10 to $100, it having been proved that they had purchased granite from a dealer "not a member," who was the plaintiff in this action. Most of the plaintiff's customers were members of the association, and after these proceedings they declined to deal with him. This was due to the action of the association in compelling them to contribute, as above stated, and to their fear that a similar vote would be passed should they continue to trade with the plaintiff. In an action based on an alleged conspiracy to injure the plaintiff in his business of quarrying and selling granite the trial court at the conclusion of the evidence ordered a verdict for the defendants. The plaintiff reserved exceptions, which were sustained on appeal, the court being of opinion that the case should have been submitted to the jury. The opinion was delivered by Hammond, J., who said, in part:

It is elemental that the unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used. * * *

The defendants contend that both as to the object and means they are justified by the law applicable to business competition. * * *

It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then so far as respects the end sought the conspiracy does not seem to have been illegal.

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Speaking generally, * * * competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the Mogul Steamship case[1] above cited, and in Bowen *v.* Matheson.[2] The fact, therefore, that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla. * * *

* * * No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and

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[1] P. 178. [2] 14 Allen, 499.

artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal.

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In view of the considerations upon which the right of competition is based we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

In Purington *v.* Hinchliff[1] it appeared that agreements were made whereby the Chicago Masons' & Builders' Association would not purchase brick except from members of the Brick Manufacturers' Association, and members of the Bricklayers' Union would not handle brick except for the Masons' & Builders' Association. It was alleged that the masons' association comprised substantially all the responsible firms engaged in that business in Cook County, that the Brick Manufacturers' Association comprised 95 per cent of the manufacturers of brick in said county, and that 98 per cent of the competent bricklayers were members of the Bricklayers' Union. Hinchliff was a brick manufacturer at Hobart, Ind., and the principal competitor of the members of the Brick Manufacturers' Association, and it appeared that he had made unsuccessful efforts to secure admission to the association. There was evidence tending to show that after these agreements his business was interfered with by agents of the associations and of the union; that contractors were compelled to cease using his brick; that large orders were canceled; that one owner was compelled to pay a fine to the builders' association before being permitted to complete a building with the plaintiff's brick; that workmen were directed not to lay such brick because he was not in the combination; and that even the hod carriers would not handle them. A judgment for the plaintiff was affirmed by both the appellate court and the supreme court. In the latter court it was said:

* * * No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained. All parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done pursuant to such conspiracy and for the subsequent loss whether they were active participants or not. * * *

Under the authorities * * * and in view of the evidence as it appears in the record there is evidence fairly tending to show that appellants were

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[1] Purington *v.* Hinchliff, 120 Ill. App., 523; aff., 219 Ill., 159, 167 (1905).

guilty of an unlawful combination and conspiracy to maliciously injure the appellee's business.

Some of the members of the Inland Empire Implement & Hardware Dealers' Association were engaged in selling buggies and wagons. In order to meet the competition of a firm manufacturing vehicles in Iowa and peddling them in Washington, methods were adopted which are sufficiently disclosed by the following extract from the opinion of the circuit court of appeals, which affirmed an order for an injunction pendente lite issued against certain officers of the association.[1]

The affidavits sufficiently sustained the allegations of the bill and the conclusion of the court below, and showed that the appellants were pursuing a systematic course of interference with the business of the appellees in peddling buggies and wagons in the State of Washington; that as an agent of the appellees would go through the country taking in his train a number of buggies or wagons, the agents of the appellants would follow, generally in pairs, in order the better to watch, harass, and dog the steps of the peddler. Wherever the peddler would stop, the followers stopped; wherever he lodged, they lodged. As he started out in the morning, they were close in pursuit. Whenever he engaged in conversation with a customer, they would interrupt the conversation and advise the customer not to buy, and "to prevent trouble" the customer would often refuse to buy. The followers in nearly every instance had no vehicles of their own to offer. Their declared purpose was to prevent the appellees' agents from making sales. The result was frequent personal altercations and in one instance a fist fight. The appellees' agents were often intimidated. Some of the followers carried rifles, some of them had been made deputy sheriffs, and in one instance one of the appellees' agents was arrested by such a sheriff under the provision of a law which had been declared void by the superior courts of the State of Washington.[2] The proof showed a practical destruction of the business of the appellees in the State of Washington, and that the purpose of the appellants, and it is not by them anywhere denied, was to continue in the course of action complained of.

The defendants contended that if any damage was sustained by the complainants, it was the natural and unavoidable result of competition incident to the carrying on of the defendants' business in a lawful manner.

The circuit court, in discussing this case, observed that—

under our competitive system one dealer may, if he can, put his competitor out of business, but he must do it through well-recognized methods of competition, namely, by offering better goods or better facilities or selling at lower prices.[3]

On appeal the court said in part:

Their purpose was not to sell goods of their own and thereby interfere with sales by the appellees, but it was by pursuing a policy of molestation to drive

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[1] Evenson et al. *v.* Spaulding et al., 150 Fed., 517, 521, 522 (C. C. A., 1907).
[2] Cf. Standard Oil Co. et al. *v.* Doyle, p. 272.
[3] Spaulding et al. *v.* Evenson et al., 149 Fed., 913, 919 (1906).

the appellees out of business and out of the country. The right of competition furnishes no justification for such acts. This is in accordance with the weight of authority.

ENGLISH DECISIONS.

In Punch *v.* Boyd et al.[1] an action was brought to recover damages for libel, and for a conspiracy to injure wrongfully the plaintiff in his trade and business, and also for an injunction to restrain the defendants from publishing and distributing certain handbills and advertisements and from otherwise continuing to assail and injure the plaintiff's business. Nine of the defendants were butter merchants of Limerick, three were alleged to fill offices in societies and guilds of manufacturers engaged in the trade of coopers in Cork and Limerick, and another was a printer in Limerick. The plaintiff moved for an interlocutory injunction, stating that he had been for several years engaged in manufacturing machine-made butter casks and firkins; that the guild of coopers in Limerick, and especially one of the defendants, had threatened the persons in his employment and had been prosecuted and convicted; that he (the plaintiff) sent his firkins to Cork, that the Cork coopers sent a deputation to Limerick, and they, aided by the local coopers, induced nearly every butter buyer in Limerick to sign his name to the document of which the plaintiff complains; that placards containing this document were extensively posted in and about Limerick signed by persons and firms styling themselves butter merchants of the city of Limerick; that these were handed to farmers at the butter market in Limerick and published in newspapers circulating in Limerick, Clare, and Cork. It was further stated that the publication and distribution of these placards had almost entirely ruined the plaintiff's business and if suffered to continue would completely destroy it; that it was the intention of the plaintiff to speed his action; and that his application was made bona fide for the protection of his business. The objectionable publication was as follows:

Notice to farmers.—We, the undersigned butter merchants of the city of Limerick will not, from Saturday, 19th September, purchase any butter packed in machine-made casks or firkins, as we find them to be most injurious to the keeping qualities of butter; and we strongly urge on the farmers in Limerick and Clare and surrounding counties the great necessity of packing their butter in hand-made casks or firkins. (Here followed the signatures of 17 persons and 3 firms.)

It was urged that an ad interim injunction should not be granted before the hearing. The court, by May, C. J., said, in part:

In the present case, assuming the statements of the plaintiff to be proved, I think that a serious case would be established against the defendants, combining

[1] 16 L. R. (Ireland), 476, 482 (Q. B. Div., 1885).

libelous publications, injurious to the trade and manufacture which he carries on, with a conspiracy between the several defendants to injure his property. Supposing that case established, I think the verdict of a jury would not afford a sufficient compensation, but that an injunction would be awarded to restrain further proceedings of the like character. It appears to me a case in which the court, in its discretion, before the hearing, should grant an interlocutory injunction. The threatened injury is of a serious and continuing character and one in which it is just that the court should interfere at once. The court is not asked to restrain or determine any business or trade or other proceedings beneficial to the defendants and the termination of which might be injurious to them. Its interposition is called for to terminate and prevent proceedings injurious to the plaintiff and that only in the meantime and until the defendants can establish that the acts complained of are innocent and lawful. The court does not prejudge the case of the defendants, but interferes to prevent injury to the plaintiff by the publications complained of until the defendants shall have established their defense.

In Mogul Steamship Co. *v.* McGregor, Gow & Co. it appeared that certain steamship lines engaged in carrying between the Orient and England, desiring to enjoy exclusively the carrying of tea from China, entered into an agreement regulating this traffic as between themselves and providing for a division of cargoes and the determination of the rates of freight. The agreement also provided for (1) the semiannual payment of a rebate of 5 per cent to such persons as shipped exclusively by their vessels; (2) sending their steamers to Hankow (an interior shipping point) whenever an "outside" vessel started there, to secure the freight without regard to whether the rate would be remunerative or not; and further provided that agents of the parties to the agreement should be prohibited from being interested in competitive steamers or from loading vessels belonging to outsiders. The agreement could be terminated at any time on notice; and it was also provided that if at any time any one of the "conference" lines steamers should not be in port or named for despatch within a week with available cargo space, parties shipping by an outside vessel should not forfeit the 5 per cent rebate. The plaintiffs in this case desired to become parties to the agreement, and being excluded sent their vessels to Hankow, where they were obliged to secure cargoes at unremunerative rates. The plaintiffs brought an action claiming damages and an injunction, alleging a conspiracy on the part of the defendants to prevent them from obtaining cargoes for their steamers, such conspiracy consisting in a combination and agreement among the defendants, having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which combination and agreement shippers were bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the plaintiffs' steamers. In the alternative, the conspiracy was alleged to consist of a combination and agreement among defendants, pursuant to which the defendants, with intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers, agreed to refuse, and refused to accept cargoes from shippers except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers, and, by threats of stopping the shipment of homeward cargoes altogether, which they had the power and intended to carry into effect, prevented shippers from shipping cargoes by the plaintiffs' steamers.

Lord Coleridge gave judgment for the defendants,[1] which was affirmed by the court of appeal[2] and again affirmed by the House of Lords.[3] In considering the legality of the object of the combination Lord Halsbury directed attention to the fact that the first paragraph of the statement of claim alleged a conspiracy "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs," and was of opinion that "the whole matter comes round to the * * * proposition, whether a combination to trade, and to offer in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers [sic] to pursue the same trade is unlawful," and he was "clearly of opinion that it is not."

Lord Watson observed that there was—

> * * * nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying trade during the tea season against the encroachments of the appellants and other competitors and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants, great and small, in every branch of commerce, and it is, in the eye of the law, perfectly legitimate.

Lord Bramwell referred to the argument of the plaintiffs "that the defendants have entered into an agreement in restraint of trade, an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring and bring this action." Assuming (but not deciding) that the agreement was in restraint of trade and not enforceable, he declared that to maintain their action on this ground the plaintiffs "must make out that it was an offense, a crime, a misdemeanor," and he was clearly of opinion that it was not.

Lord Morris stated that the defendants had no other or further object than to appropriate the trade of the plaintiffs, and that this object was a lawful one.

Lord Hannen declared that the object of the defendants was "to secure to themselves the benefit of the carrying trade from certain

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[1] L. R. (1888), 21 Q. B. D., 544.
[2] L. R. (1889), 23 Q. B. D., 598.
[3] L. R. (1892) A. C., 25, 37, 42, 43, 48, 50, 57, 58.

ports," and was of opinion that it could not be reasonably suggested that this was unlawful in any sense of the word.

In brief, the means employed to effect the objects of the combination included the giving of deferred rebates for exclusive dealing, the use of so-called "fighting ships," and a demand for the exclusive services of agents who were theretofore employed by members of the combination and their competitors.

Lord Halsbury observed that if an offer by the members of an associated body of traders of reduced freights to persons who would deal exclusively with them is unlawful, "it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful."

* * * * * * *

The sending up of ships to Hankow, which in itself and to the knowledge of the associated traders would be unprofitable, which was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My lords, after all what can be meant by "out of the ordinary course of trade?" I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

Lord Watson said, in part:

I can not for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment.

Lord Bramwell, in considering the question of rate cutting, said:

* * * If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefor, but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I can not think that the defendants did more than they had a legal right to do.

Lord Field was of opinion that—

* * * all the acts complained of were in themselves lawful, and if they caused loss to the appellants that was one of the necessary results of competition.

Lord Hannen said, in part:

* * * If * * * the object of the defendants was legitimate, were the means adopted by them open to objection? I can not see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering

to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.

With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered by these ships to the ships of nonconference owners, and by their presence at Hankow shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others.

Considering the withdrawal of the defendants' agency from persons who also represented nonconference steamers, Lord Watson stated that it first appeared to be a matter of difficulty, but on consideration he was satisfied that it could not be regarded as an illegal act.

In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or the other of them in circumstances which place the appellants at no disadvantage.

Lord Morris observed that—

* * * the dismissal of agents might be questionable according to the circumstances; but in the present case, the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

In the opinion of Lord Hannen the removal of the agents appeared to be "a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade."

The Glasgow Fleshers' Trade Defense Association, in order to prevent certain competing cooperative societies from purchasing American and Canadian meat, which was obtainable at only one place in Scotland (the Yorkhill Wharf in Glasgow), where it was sold at auction, notified the cattle salesmen that they would not buy at their auction sales unless they declined to sell to the cooperative stores. The salesmen yielded to the pressure and published at their sales conditions to the effect that the bids of cooperative societies would not be received. This arrangement relieved the butchers from the competition of the cooperative societies in both buying and selling. The butchers also threatened to withdraw their patronage from hide merchants unless they agreed to decline to do business with cooperative societies. The Scottish Cooperative Wholesale Society (Ltd.) brought an action against the butchers' association and the salesmen,[1] alleging an illegal and malicious conspiracy, and seeking to enjoin the cattle salesmen from inserting the objectionable conditions in their articles of sale, and to recover damages from the butchers for the loss alleged to have been sustained through their action. It was held that the salesmen were entitled to insert the conditions of sale complained of, and that the butchers were not liable for inducing the salesmen to do an act in itself lawful by means which they were entitled to adopt.

The court, by Lord Kincairney, said, in part:

While the pursuers aver that the object of the first defenders, the fleshers' association, was to ruin the trade of the cooperative societies as fleshers, and that their object and the means they adopted were alike illegal and malicious, they do not aver that the ruin of the pursuers' trade was their only object, and it would be absurd to shut one's eyes to the obvious fact that the ultimate aim of these defenders was, at least in part and probably wholly, the furtherance of their own interests by disabling or putting an end to the competition of the cooperative society fleshers, firstly as bidders and secondly as retailers.

* * * * * * *

On the whole, I have come, after anxious consideration, to the conclusion that, assuming all the pursuers' averments, except perhaps their averment, too vague for relevancy, about threats said to be employed by the first defenders (butchers), it does not appear either that what the salesmen were induced to do was illegal or in breach of the pursuers' rights, or that the acts of the first defenders in so inducing them, or in inducing the hide merchants to cease their purchases from the pursuers, were wrongful acts involving liability for damages, and that the defenders must therefore be assoilzied.[2]

I have experienced considerable difficulty in deciding the questions in this case, but I can not think that any good could possibly result from allowing a proof. There is truly nothing to inquire about, and a proof would leave the facts substantially as they appear on record. I am by no means indifferent to the importance of the case, and it may be that the result at which I have arrived is not altogether desirable. It is a very serious matter that one of the gates of the country, so to speak, should be closed against a considerable class of the people and that the trade in foreign cattle should be somewhat artificially diverted and confined. I do not know whether harm is caused or not; but if there be, I am unable to see that it can be remedied as matters stand except by legislation or (a point on which I express no opinion) by regulations of the local authority,[3] unless, indeed, the fleshers' combination can be met by some counter plan or can be checked by the force of public opinion.

In Boots *v.* Grundy[4] it appears that the plaintiffs, who were dealers in etchings and engravings, had, by reason of engaging in the practice of underselling, incurred the enmity of members of the Printsellers' Association, who, by means of circulars, induced dealers not to purchase from publishers who supplied the plaintiffs. The plaintiffs sought an injunction and damages, but the statement of

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[1] Scottish Cooperative Wholesale Society (Ltd.) *v.* Glasgow Fleshers' Trade Association et al., 35 Scottish Law Rep., 645, 648, 652 (1898).

[2] Assoilzie is to free a party from the conclusions of an action or to find a criminal not guilty.—Bell's Dictionary of the Law of Scotland.

[3] A by-law subsequently passed by local authority was held valid in Scott et al. *v.* Magistrates of Glasgow, 36 Scottish Law Rep., 458 (1899).

[4] 16 Times Law Reps., 457 (1900).

claim was stricken out on the ground that it did not state a cause of action. The defendants' counsel, one of whom was Rufus Isaacs, Q. C. (now lord chief justice), contended, among other things, "that the statement of claim disclosed no cause of action, as it only alleged an unfair competition on the part of the defendants."

The members of an Australian grocers' association adopted the usual method of cutting off the supplies of a competitor who had incurred their displeasure by cutting the price of certain liquors. They accomplished this by means of an agreement with a brewers' club which embraced the majority of brewers doing business in Melbourne, the agreement providing that the brewers should not supply beer to grocers who sold it below a specified price, and that the association should furnish lists of grocers who complied with that condition and of those who did not. One Taffs refused to join the association, but expressed his willingness to adopt the association's prices. He subsequently discovered that many grocers were selling beer at less than the rates agreed upon, and he thereupon reduced his price in order to keep his custom. In January, 1892, the association caused the brewers' club to place him on the list of those who were not to be supplied, and the boycott was continued until the following October, when he informed the brewers that he was prepared to adopt the association's price list as to ales and stout, and the brewers resumed their supplies in spite of a protest from the association, which desired that Taffs should first become one of its members. The boycott was subsequently resumed, and Taffs brought an action for conspiracy, alleging, in substance, that the defendants, with the object of injuring him in his business, maliciously conspired to prevent, and did prevent, certain persons with whom he was desirous of contracting for supplies and who would otherwise have contracted with him, from entering into such contracts. The plaintiff claimed damages and an injunction. Madden, C. J., in the course of his summing up, said to the jury:

Every man in the community may pursue his own advantage by lawful means. He may do the very utmost he can, he may exercise every faculty, and every advantage and means that he possesses to drive himself on in the world, and he need not care one jot how much his superiority of means or conduct or enterprise destroys the chances of another. He may leave others as far behind in the race as he can, using his own faculties for his own advantage. But he must not play foul with the other man, he must leave him his equal chance too. He must leave him his own advantages, and he must not interfere with that man in using his advantages and his opportunities to drive himself along in the race. * * *

* * * Instead of leaving it to the brewers to work the thing out by lawful means they take upon themselves to use the only possible means they could use, that is, compulsion on the man who does not want to come in, and that is unlawful. * * * In this case the object as avowed, was to compel this man Taffs to give up dealing in his own way, and go on dealing in their way.

To give up his own way was to give up his advantages by the pursuit of which he would get these prices. As a rule a man does not give much for nothing, and if a man reduces his prices it is because it suits him and gains him advantages in another direction. If he is forced to give that up he is injured because he is not allowed to pursue his business in his own way and the necessary result is injury to himself.

There was a verdict for the plaintiff.[1]

In a more recent Australian case[2] it appeared that the Coastal Retail Butchers' Association entered into a combination with the Wholesale Butchers' Association for the purpose of raising the price of meat, the latter agreeing not to supply retailers who sold meat below the association price. The plaintiff, a butcher carrying on business in Perth, belonged to the Coastal Retail Butchers' Association, but afterwards withdrew, and refused to be bound by the association prices. Thereupon the wholesale butchers refused to supply him with meat, and there was evidence to indicate that such refusal was due to the instigation of the defendants. The plaintiff, who was thereby compelled to close up his business, brought an action to recover damages from the defendants for having conspired together to injure him in his business, and for having in fact injured him. The jury, in response to questions submitted by the court, found that the defendants intentionally injured the trade of the plaintiff, and further (in response to what is hereinafter referred to as the third question) that they did this without just cause or excuse. Damages were assessed at £200. The defendants moved to set aside the judgment, challenging the answer to the third question on the ground that what was done by them was in protection of their own interests and was not done without just cause or excuse. This contention was sustained by the court, which held that the defendants had not infringed any legal right of the plaintiff, and that the judgment must be set aside. McMillan, J., said in part:

* * * In this case it is clear from the evidence, and it has even been admitted by counsel for the plaintiff, that the original object of this combination was not to injure the plaintiff or any other person, but was to benefit the wholesale butchers and the retail butchers by raising the price of meat. It was in no way directed against the plaintiff, for there was no reason to assume that he would not come in with the others and share the benefits which all thought would be derived from an arrangement of this kind. * * * The mistake which has, in my opinion, been made by the plaintiff and his advisors is that they have regarded too exclusively the rights of the plaintiff. They have forgotten that those rights must be made compatible with the exercise of the rights of others. It is not enough to show that the defendants intended to injure the plaintiff. Every man intends all the natural consequences of his acts, but what the plaintiff must establish is that the real intention of the defendants was to injure him, and he is not entitled to succeed if he merely

[1] Taffs v. Beesley, 16 Australian Law Times, 59, 62 (Victoria, 1894).

[2] Rea et al. (defendants), appellants, v. Buckland (plaintiff), respondent, 11 Western Australian Law Reps., 2, 5 (1908).

shows that he has been incidentally damaged, if the real and ultimate object of the defendants was the advancement of their own interests and if they used no unlawful means to attain that object. In the words of Lord Watson in the Mogul case, at page 42: "If neither the end contemplated by the agreement nor the means used for its attainment were contrary to law, the loss suffered by the appellants was damnum sine injuria * * * ." It seems to me, therefore, if the whole of the evidence is looked at, it is obvious that the defendants were acting for the protection of their own interests, and that although the plaintiff was incidentally injured, that was not because the defendants were actuated by any desire to injure him, but simply because his interests were apparently conflicting with the interests of the defendants. Undoubtedly the plaintiff suffered injury, but it is an injury which, in the words of the learned judge I have quoted, is sine injuria. * * * I am content to say that if the evidence is looked at as a whole there is no evidence fit to be left to the jury which could support their answer to the third question, because the evidence was all one way, and shows that the object of the defendants was to benefit themselves and not to injure the plaintiff. In these circumstances I think that the only answer which could, on the facts, have been returned to the third question was that the defendants were acting as they were with just cause and excuse.

Although not a judicial decision, the following summary of an opinion rendered by the Australian Inter State Commission, condemning certain activities of a master printers' association is of interest.

The by-laws of the Melbourne Master Printers' Association provided, among other things, for the adoption of a price list and scale of costs upon which every member was bound to make his estimates. In quoting prices at least 30 per cent was to be added to the cost of labor and material. Quotations were required to be registered with the secretary, and all subsequent bidders were bound to quote not less than the registered price, subject to a right of challenge. Challenges were heard and decided by a committee of the association unless previously settled in conference. Having eliminated competition in prices between the members of the association, a further effort was made to strengthen their position by means of a contract entered into between the printers' association and the Association of Wholesale Paper Merchants of Victoria (hereinafter called the merchants' association), providing, among other things, that the price charged by members of the merchants' association to printers who do not observe the printers' association price list and cost scale should be loaded 25 per cent. Lists of members were exchanged. Other dealers in printers' supplies cooperated with the printers' association by enforcing the principal features of the contract. The other trades thus associated were printers' furnishers, makers of printers' inks, typemakers, stationers, process engravers, stereotypers and electrotypers, bookbinders and paper rulers, linotypers, and the Victorian Provincial Press Association. The manager of one printing establishment was refused supplies, although cash was offered, and in another instance an order for paper, given in March, 1913, had not been filled in February, 1914, and the paper was obtained from Europe through another source. Applications were made for increased duties in connection with the printing trade, but objections were filed by a body known as noncombine master printers on the ground that the applicants and some others in the printing trade were concerned in a combination which was already injurious to the objectors and to the public of Victoria, and might become still more injurious if it acquired a greater command of the trading position through an increased tariff. The Interstate Commission, whose duty it was to investigate these complaints, reported that it was of opinion that as the operations of the combination had been confined to intrastate commerce, the provisions of the Australian Industries Preservation Act could not be successfully invoked, but that—

in its later composition and range of action Typothetæ developed a power for mischief in the printing trade of Victoria not easily to be overstated. There was, as the evidence showed, no reason in the state of the printing trade or of the paper trade for the combination between them, and the prosecution of its main purpose, beside breeding a greater degree of rancor than that which is normally engendered between any kind of union and those outside it, has coerced numbers of printers to join an association out of fear which they would not join out of free choice or interest; has subjected the public of Victoria to prices not warranted by the conditions of trade, and has compelled the few men of independent spirit who have been fighting for common liberty of purchase and of serving the public to carry unjust burdens and to suffer the inconveniences, delays, and obstructions of traders who are proscribed men in the markets of their own city. And, in particular, the action of this body has already tended, and will, unless checked, increasingly tend, to frustrate the intention of Parliament as evidenced in the present tariff acts by compelling non-Typothetæ traders to seek their supplies from abroad rather than to purchase from local manufacturers. In conclusion, the power to do this with impunity is largely derived from the position of advantage in which the combining traders have been put by tariff—assistance designed with quite different aims. It was, as has been said, in this way that the operations of the combine became germane to our investigation, and it is in this regard that those operations appear to us to be an undoubted abuse of the legislation of the Parliament.

In referring to the methods of competition above noted, the commission said, in part:

To such shifts have reputable traders been driven by betaking themselves to a system of coercion they feel to be unnatural and unfair and shrink from carrying out in cold blood. Mr. Pratt probably spoke for a very large number of his fellow members when he said to Mr. Bracken, "I do not approve of the coercion, but I must fall into line." It is not surprising that Mr. Pratt, when questioned before the commission as to what he thought of clause 5 [providing for price discrimination] from the point of view of fair business methods, preferred not to answer the question.

The attorney general of Victoria was of the opinion that there had been no breach of the existing law, but came to the conclusion that the complaining printers had made out a case for parliamentary interference. After consultation with the cabinet, he was directed to draft a bill under which agreements such as the above would be illegal. This bill, entitled "A bill relating to unfair discriminations in trade, and for other purposes," was read for the first time December 2, 1913, and on February 11, 1914, it was agreed that it should be read for the second time six months from that date.[1]

Section 12. Intimidation, obstruction, and molestation of a competitor or his customers.

In delivering his opinion in Mogul Steamship Co. *v.* McGregor, Gow & Co.[2] Bowen, L. J., declared that no man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation, and that intimidation, obstruction, and molestation are also forbidden. Lord Halsbury also observed that "intimidation, violence, molestation, or the procuring of people to break their contracts are all of them unlawful acts."[3] In Martell *v.* White[4] the Supreme Court of Massachusetts declared that "no man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation"; and the courts of other States have used similar expressions.[5]

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[1] The principal provisions of the bill are as follows:

"Any person who with any other person (such other person not being his partner, principal, or agent in respect to the sale of the goods) combines, conspires, confederates, or agrees to refuse to sell goods for cash to any other person, (*i*) either absolutely, or (*ii*) except at a price unfairly or unreasonably high, or (*iii*) except upon disadvantageous and oppressive terms or conditions, shall be guilty of a misdemeanor and liable to a penalty not exceeding £500.

"For the purposes of this act the price of goods shall be deemed to be unfairly and unreasonably high if it is so much in excess of the current open and published market price of such goods as to justify a reasonable belief that the person selling or offering or attempting to sell such goods desires or intends to discriminate against an actual or intending buyer to the detriment of such buyer as compared with other buyers.

"The terms and conditions upon which goods are sold or offered for sale or attempted to be sold shall be deemed to be disadvantageous and oppressive when either expressly or by implication they provide that the buyer of any goods referred to or specified in the schedule to this act shall not buy such goods from any other person or class of persons than the seller of such goods or from persons or classes of persons indicated by the said seller.

"In any proceeding under this act any price list issued or published or circulated by any person selling or offering or attempting to sell goods which refers to goods referred to or specified in the schedule to this act shall be prima facie evidence of an offer to sell such goods at the prices stated in such price list." (Report by the Interstate Commission upon a combination (known as Typothetæ) between Master Printers, Paper Merchants, and Suppliers of Printers' Materials in the State of Victoria, May 6, 1914; Victoria Parliamentary Debates, vol. 135, pp. 3345–3350, 3879.)

[2] L. R. (1889), 23 Q. B., 598, 614.

[3] S. c., L. R. (1892), A. C., 25, 37.)

[4] 185 Mass., 255, 261 (1904).

[5] Crump *v.* Commonwealth, 84 Va., 927, 940, 941 (1888); Jackson *v.* Stanfield, 137 Ind., 592, 613 (1893); Vegelahn *v.* Guntner, 167 Mass., 92, 99 (1896); Doremus *v.* Hennessy, 176 Ill., 608, 614 (1898); My Maryland Lodge *v.* Adt, 100 Md., 238, 250 (1905); Victor Talking Machine Co. *v.* Lucker, 150 N. W., 790 (Minn., 1915).

The New Orleans Seed Co. filed a bill in equity alleging in substance that it was engaged in the business of buying and crushing cotton seed, and that it owned several hundred thousand sacks, legibly branded, which it distributed along railroads and river banks for the producers to fill with seed and return to the complainant. It was further alleged that the Warren Mills, a competitor, knowingly, willfully, and continuously used the complainant's sacks against its remonstrances; that complainant had repeatedly brought actions of replevin, but that the defendant gave the necessary bonds and proceeded with its business; that this remedy was wholly inadequate, and that the complainant had failed to obtain as much seed as it would had the defendant not so used its sacks. The complainant prayed for an injunction, an accounting, and damages. An order overruling a demurrer to the bill was affirmed on appeal.[1]

The indictment in People *v.* Everest et al.[2] charged Hiram B. Everest, Charles M. Everest, and three others with conspiring to destroy the business and property of the Buffalo Lubricating Oil Co.; to prevent it from carrying on its business of producing, manufacturing, refining, and selling petroleum and its products; to destroy the machinery, buildings, property, and products of said corporation; to destroy the credit of the company; to wrongfully and unlawfully entice from the employment of the said corporation its skilled workmen, and particularly one Miller, who was then in the employ of the said corporation; to bribe and hire Miller to construct the works of the said corporation so that they would not answer the purpose for which they were intended, and would be defective, and could not be successfully operated, but would blow up and explode, and destroy the stills and other apparatus while in operation; to hire the said Miller so to operate its works that the crude petroleum which it should undertake to refine and convert into lubricating oil should be converted into coke and tar, and other articles of little value; to hire Miller and other workmen of the said company to build unnecessarily hot fires in its furnaces and thereby convert the oil in its stills into worthless, inflammable, and explosive gases which would explode and seriously impair the machinery and works of said company; to institute and maintain suits which the defendants knew to be unfounded in merit; to hire witnesses to falsely testify in such suits; and to falsely represent to all purchasers of and dealers in refined oils that the said company had no right to manufacture and market the same. The indictment

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[1] Warren Mills *v.* New Orleans Seed Co., 65 Miss., 391 (1888). See decree, United States *v.* Central-West Publishing Co. et al.

[2] 51 Hun, 19 (N. Y. Sup. Ct., 1889).

set forth several overt acts done by the defendants in pursuance of said agreement, which were of the same nature as those above mentioned, as the means by which the object of the conspiracy was to be accomplished. The proof tended to show that a conspiracy was formed of the character charged in the indictment, and also that the defendants induced Miller, while in the employ of the company, purposely to mismanage the stills used in the process of distillation, so as to injure the same, and lessen their value, and to make the process of refining crude petroleum a failure, resulting in a pecuniary loss to said company; and also induced Miller to leave the service of said company. There was a failure of proof to show that the defendants conspired to do all and every one of the other things charged, or to prove that they did all the other overt acts alleged in the indictment. The defendants were found guilty of the crime of conspiracy and fined $250, which judgment was affirmed on appeal.[1]

The testimony in Standard Oil Co. *v.* Doyle[2] tended to prove that Doyle's drivers had been interfered with and intimidated, that his customers had been threatened, and that he had been arrested and prosecuted on false charges in connection with the sale of oil. The court in that case, while conceding that "one man may by fair methods compete with a rival until by sheer force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival," declared that a different case is presented where one seeks to destroy the rival's business by unlawful means, and that it was most assuredly unlawful to obstruct, harass, and annoy the plaintiff's employees, to threaten his customers, and to procure his arrest on false charges for the purpose of alienating his patrons.

In Spaulding *v.* Evenson[3] the court enjoined the defendants *pendente lite*—

> from preceding or following in close range any employee, agent, or servant of the complainants or the terms used by them or any of them in such manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employees in the free use of the highway, and from in any other manner occupying said highway in such a manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employees in the free use thereof; also from approaching or speaking to any actual or supposed customer or customers of the complainants so long as complainants' agents or servants are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale by the complainants; also from resorting to any species of intimidation, force, or fraud, or any conduct that would imply intimidation, force, coercion, or fraud, for the purpose of preventing complainants from selling buggies or wagons and carrying on said business of selling buggies or wagons.

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[1] See Record of this case, House Rep. 3112, 50th Cong., 1st sess., pp. 801–948.
[2] 118 Ky., 662 (1904).
[3] 149 Fed., 913 (1906); 150 Fed., 517 (1907), supra, p. 176.

The circuit court of appeals was of opinion that "the right of competition furnishes no justification for such acts."

In 1898 the Economist Furnace Co. filed a bill[1] stating that the complainant was engaged with teams and salesmen in selling cooking ranges from house to house in Steuben County, Ind., and that while so employed the Wrought-Iron Range Co. came to the same place with a large number of teams and 25 men, and entered upon a system of interference with the complainant's business, having for its object the obstruction of the same by threats of violence, by pursuing complainant's teams and salesmen by day and night, and by preventing it in various ways from carrying on its business. The case was removed from the State to the Federal court, which granted a temporary injunction. Each of the defendants was thereby restrained "from in any manner molesting, interrupting, hindering, disturbing, or otherwise interfering with, or threatening or intimidating plaintiff or any of its agents or employees in the prosecution or transaction of its business described in the bill of complaint." For a violation of this order the company, its manager, and four employees were adjudged guilty of contempt. In considering the conduct of the defendants the court said, in part:

* * * They knowingly and persistently continued to practice the prohibited acts which interfered with and disturbed the complainant in the transaction of its business, and which, if tolerated, would have resulted in substantially destroying its business. The court feels persuaded that the purpose sought to be accomplished by the defendants was to destroy the business of the complainant, as it clearly appears that during nearly two months, with the number of teams and men employed by it, the defendant company had made no sales of stoves or ranges, and apparently had made no bona fide effort to make any such sales, but had been constantly engaged in pursuing the complainant wherever its teams and employees went, with the purpose and effect of interferiug with its business. Nor does the court think the defendants engaged in the course of practice pursued by them for the purpose of protecting the trade name and rights of the defendant company from infringement. If the complainant was engaged in wrongfully representing its ranges to intending purchasers as the manufacture of the defendant company, the proper method of redress was by an application to the court for injunctive relief and not by taking the vindication of real or fancied wrongs into its own hands.

Similar practices were condemned by a New York State court in a suit brought by the Drake Hardware Co.[2] In that case the Wrought-Iron Range Co. and its agents were enjoined from—

"preceding or following in close range any employee's team or teams of plaintiff with employee's [sic] team or teams, in such manner as to hinder, obstruct, harass, or intimidate plaintiff and its employees in the free use of the highway, and from in any other way occupying said highway in such manner as to

[1] Economist Furnace Co. *v.* Wrought-Iron Range Co., 86 Fed., 1010, 1012 (C. C., 1898).

[2] Drake Hardware Co. *v.* Wrought-Iron Range Co., 78 N. Y. Supp., 1114 (Sup. Ct. App. Div., 1902).

hinder, obstruct, harass, or intimidate plaintiff and its employees in the free use thereof, except as hereinafter provided, from approaching and speaking to any actual or proposed customer or customers of the plaintiff, so long as said plaintiff's agents or servants are personally present and engaged in selling or negotiating the sale of a range or stove and for the purpose of defeating a sale by the plaintiff (this prohibition, however, not to interfere with any attempt by defendant or its agents in any lawful, peaceful, and ordinary method to persuade any person or proposed customer to buy its ranges instead of plaintiff's); from resorting to any species of threats, intimidation, force, or fraud, or any conduct which would imply threats, intimidation, coercion, or force for the purpose of preventing plaintiff from selling its stoves and ranges and carrying on its business of selling stoves and ranges from wagons; from in any manner touching or interfering with the horses, wagons, harnesses, and property of plaintiff; and especially from procuring persons and proposed customers of plaintiff to reject its offers of sale of ranges by making counter offers of sale of defendant's ranges at lower prices and upon other more advantageous terms, and which orders, when received, defendant will not fill," and that, as so modified, said order be affirmed, without costs to either party as against the other.

In December, 1914, the Supreme Court of North Carolina decided a case involving similar competitive methods.[1] Six persons who claimed to be employed by the Wrought-Iron Range Co. were indicted and charged with a conspiracy to break up the St. Louis Steel Range Co., a competitor, and to drive it from the business field and leave it clear for the agents and employees of the first-named company. As stated by the court, the conspiracy was to be carried out by the following means:

To break up the sales made by the agents of the rival company; to abuse that company; to villify it; to follow up its agents from town to town, from road to road, from house to house, and villify and abuse them; to slander, villify, and run down that company; to charge falsely that such rival company was composed of a set of thieves and liars; and to say falsely that the agents of that company were a set of thieves and liars who were trying to cheat and defraud the people.

A judgment quashing the indictment was reversed on appeal. Clark, C. J., said in part:

A combination to use such means, reeking with fraud and falsehood, was a conspiracy at common law and indictable as such. * * * A combination to injure the business of another by a resort to systematic falsehood and misrepresentations, as here charged, has not been made lawful by any statute nor recognized as permissible by the decision of any court.[2]

ENGLISH DECISIONS.

In Garret *v.* Taylor[3] it appeared that the plaintiff was a mason and possessed of a stone pit, and that the defendant, to discredit and

[1] State *v.* Dalton et al., 83 S. E., 693, 695.
[2] See also Sisson, Crocker & Co. *v.* Johnson et al., 34 Pac., 617 (Sup. Ct. Cal., 1893); Sparks *v.* McCreary, 156 Ala., 382 (1908); and Jones *v.* Barmm, 119 Ill. App., 475.
[3] Cro. Jac., 567 (1620).

deprive him of the profit of the quarry, "imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working," etc. There was a judgment for the plaintiff.

In Iveson *v.* Moore[1] the plaintiff declared that he was possessed of a term of years of a certain colliery in Yorkshire near the highway through which his customers used to come and go to take and carry away the coal, and that the defendant, intending to deprive him of the benefit of his colliery and to alienate and appropriate his customers and cause them to come to the defendant's adjoining colliery, laid several cartloads of sticks and a tree across the highway and kept them there for two months, whereby the plaintiff was damaged. A verdict was given for the plaintiff. Afterwards this case was argued before all the justices of the common pleas and barons of the exchequer, and they all were of opinion that the action well lay.[2]

The following is the full report of Rex *v.* Cope et al., tried by Chief Justice Pratt in 1719:[3]

> The husband and wife and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card maker. The evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards. But there was no account given, that ever more than one at a time were present, though it was proved they had all given money in their turns. It was objected, that this could not be a conspiracy, for two men might do the same thing without having any previous communication with one another. But the Chief Justice ruled, that the defendants being all of a family, and concerned in making of cards; it would amount to evidence of a conspiracy, and directed the jury accordingly.

In Tarleton *v.* McGawley[4] it appeared that the plaintiffs were the owners of a vessel trading on the coast of Africa and that the defendant, for the purpose of preventing the natives from trading with the plaintiffs' ship, fired a cannon from the vessel of which he was commander, killing one of the natives, whereby the plaintiffs lost their trade. There was a verdict for the plaintiffs.

In Green *v.* The London General Omnibus Co.[5] it was alleged in substance that the plaintiff was an omnibus proprietor, and that the defendants, intending to ruin him and prevent him from carrying on his business, wrongfully, vexatiously, and maliciously caused their omnibuses to precede and follow his vehicles in such a manner as to hinder, prevent, and frighten persons from entering them, and to obstruct the thoroughfares and become a nuisance to the inhabitants

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[1] 1 Ld. Raymond, 486 (1699); 1 Comyns, 58; 12 Mod., 262.
[2] See also Rose et al. *v.* Miles, 4 M. & Selw., 101 (1815).
[3] 1 Strange, 144.
[4] Peake, N. P., 270 (1793).
[5] 7 C. B. (N. S.), 290 (1859).

near the points where passengers were accustomed to enter, which obliged the police to order the plaintiff's omnibuses to move off. It was also alleged that the defendants drove other vehicles against the omnibuses and horses of the plaintiff in such a manner as to injure them and to prevent the doors of said vehicles from being opened, and, further, that the defendants' servants pushed themselves between plaintiff's vehicles and persons about to enter, and that they insulted and assaulted plaintiff's servants while they were employed in conducting his business. Erle, C. J., was of opinion that the action would lie, and held the plaintiff entitled to judgment on the defendants' demurrer.

In Bell *v.* Midland Railway Co.[1] it appeared that the plaintiff owned a wharf which was occupied partly by himself and partly by his tenants, and which was connected by a branch line with the defendant railway under the authority of an act of Parliament. It further appeared that the railway company constructed another wharf, and, with a view to the diversion of the trade from the plaintiff's wharf to their own, notified him that they would cease to provide power for carrying to and from the wharf, and subsequently obstructed the siding by placing posts, railway carriages, trucks, etc., across the rails. Circulars were sent to the tenants informing them that the company had ceased to deliver at the plaintiff's wharf and intimating that they would find ample accommodation at the company's wharf. In consequence of the defendants' conduct the plaintiff's property became useless and the tenants quit. The jury found that the defendants had intentionally obstructed the access to the plaintiff's wharf, and returned a verdict for him with £1,000 damages. Counsel obtained a rule to enter a verdict for the defendants or a nonsuit. This rule, however, was discharged. Chief Justice Erle, on the question of damages, said in part:

> * * * Looking at the conduct of the company, who set up a wharf of their own, and, careless whether they were doing right or wrong, prevented all access to the plaintiff's wharf, for the purpose of extinguishing his trade and advancing their own profit, it is impossible to say that the plaintiff was not entitled to ample compensation. To say that under these circumstances £1,000 was not very temperate damages seems to me to be a very bold proposition on the part of the company.

Willes, J., observed:

> * * * If ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand, and in plain violation of an act of Parliament, and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves.

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[1] 10 C. B., 287, 304, 307 (1861).

The London & North Western Railway Co. filed a bill against a competitor, the Lancashire & Yorkshire Railway Co., alleging that the latter had erected a strong barrier partly on a public lane and partly on complainant's land, so as to completely obstruct one of the entrances to complainant's station. The purpose of the defendants was to divert the traffic to their line by closing a convenient approach to their rival's station. The complainants alleged irreparable damage, prayed an injunction, and sought damages for the trespass, obstruction, and nuisance referred to. A demurrer was overruled without hearing counsel in support of the bill. Vice Chancellor Wood observed that "it is just one of those cases of trespass and irremediable damage which the court does interfere to prevent."[1]

In Kinkead, Reid & Co. *v.* The Johannesburg Chamber of Mines,[2] it appeared that the plaintiff was in the business of supplying the mining companies on the Rand with native laborers. For this purpose it appointed an agent at Eurekastad to recruit Kafirs to come and work in the mines at a fixed wage. The natives agreeing to come to the mines were accompanied on the trip by a white agent of the plaintiff, by whom they were provided with passes. Food was also supplied them at the expense of the plaintiff. On their arrival at the mines the men were received by the plaintiff and placed with different companies as needed. For their services in thus supplying the laborers the plaintiff was paid 30 shillings per laborer. On November 30, 1893, there arrived at Johannesburg a body of 181 of these natives. While there, two police officers, at the instance of one Grant, an agent of the chamber of mines, took them from the charge of the plaintiff's agent and lodged them under the charge of the police. Subsequently Grant admitted that the chamber had acted wrongly, and the laborers were handed over to the plaintiff, but in the meantime about 60 of them had run away. Subsequently the action of the defendants was repeated in connection with a body of laborers, and the plaintiff was informed that it would be continued as long as the plaintiff continued to import natives.

It appeared from a statement by the court that Grant as agent for the chamber of mines was desirous of securing for himself the exclusive business of supplying the mines with laborers. In this condition of affairs the plaintiff sought an injunction. On final hearing the court found that the business of the plaintiff was a lawful one, and a rule nisi restraining the defendant from further interference therewith was confirmed. The court, per Kotze, C. J., after consider-

[1] London & North Western Railway Co. *v.* Lancashire & Yorkshire Railway Co., L. R., (1867), 4 Eq., 174.

[2] 1 Official Reports, High Court, South African Republic, 139, 146 (1894).

ing whether the action of the defendant amounted to inducing a breach of contract, said:

* * * I prefer to base my decision on the general principle of our law that where an encroachment is made upon the rights of another person the law always affords a proper means of protecting him—ubi jus ibi remedium. The respondent has interfered in an arbitrary, malicious, and unlawful manner with the lawful trade of the applicants, and has prevented them, to their great loss, from carrying on that trade.

Section 13. Exclusive dealing.

Contracts for exclusive dealing, though regarded by many as being in restraint of trade, were uniformly upheld at common law unless unreasonably restrictive in character, the same test being applicable as is applied to other contracts in restraint of trade. Accordingly contracts of this nature which afford only a fair measure of protection to the interests of the party for whose benefit they are made, without being so extensive in their operation as to interfere with the interests of the public are valid and enforceable. The prevailing view at common law is that the chief effect of such contracts is to increase the trade of the parties thereto, and that any resulting restriction of competition is merely incidental.

AMERICAN DECISIONS.

CONTRACTS TO BUY OF ONE PERSON EXCLUSIVELY (EXCLUSIVE PATRONAGE).—One of the earliest American cases on this subject is Palmer *v.* Stebbins,[1] decided by the Supreme Judicial Court of Massachusetts in 1825. That was an action on a breach of a condition in a bond whereby the defendant in connection with a sale of his business to the plaintiffs had agreed to give the plaintiffs all his freighting up and down the Connecticut River and to aid the latter's business in boating and not to promote any other boatman to compete with them in consideration of an agreement on the part of the plaintiffs to handle his freighting at the usual rates. The court held that the agreement, even if considered as being in restraint of trade, was sufficiently limited in its scope to be sustained as valid. In the course of the opinion it was said:

* * * An agreement with a tradesman to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another. As to the public, therefore, such a contract stat indifferenter. It would be extravagant to suppose that anyone, by multiplying contracts of this kind, could obtain a monopoly of any particular trade. But admitting that such a contract is a restraint of trade, yet it is

[1] 3 Pick., 188, 192.

clearly a limited restraint and is not binding by the terms of it beyond the sphere of the obligee's actual business. Such a particular restraint made by voluntary contract on good consideration is valid in law. * * *

In the case of Trentman et al. *v.* Wahrenburg et al.[1] liquidated damages were recovered for the violation of a contract by the terms of which the defendant agreed to buy from the plaintiff and no one else certain building materials for construction purposes in Allen County, Ind., for a period of five years. In holding the contract valid, the court said:

The most certain test to determine whether or not a restraint upon the exercise of a business, trade, or profession is reasonable is to consider whether the restraint is such as is necessary to afford protection to the interests of the party in whose favor it is given and not so largely [sic] as to interfere with the interests of the public generally. In the case under consideration the limitation as to time and the restriction as to place were both reasonable. The law is equally well settled that an agreement to buy from one person only is not in restraint of trade when made for a limited time and confined to one locality.

In J. W. Ripy & Son *v.* Art Wall Paper Mills[2] the plaintiff brought an action to recover the purchase price of certain goods sold the defendants, under a contract by which the latter agreed to buy their wall paper exclusively from the plaintiff company for a certain period of time. The plaintiff had judgment in the lower court, which was affirmed on appeal. The contract was held not to be in restraint of trade nor contrary to public policy for the reason that it was reasonable as to time and no attempt was made to regulate or fix the price of goods wherein the public was interested. The court said, in part:

It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. * * * A contract between individuals the main purpose and effect of which are to promote, advance, and increase the business of those making it will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce.

A similar arrangement was held to be legal in the case of National Distilling Co. *v.* Cream City Importing Co.,[3] where the plaintiff was allowed to recover the purchase price of certain goods sold the defendant. The defendant contended that the plaintiff was a mem-

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[1] 65 N. E., 1057 (App. Ct. of Ind., 1903).
[2] 136 Pac., 1080 (Okla. Sup. Ct., 1913).
[3] 86 Wis., 352 (1893).

ber of an unlawful trust formed for the purpose of securing a monopoly, but the court held that this was no defense to an action against the vendee for the purchase price, the illegality, if any, being entirely collateral to the action. The defendant also alleged that it was impossible for it "to buy such goods through agents or members of said trust at their real market price, by reason of such combination, but it was compelled to pay a greater price therefor, and for the purpose of recovering back such overpayments on its purchases it was obliged to enter into an agreement to purchase all such goods used in its said business for the period of six months succeeding the date of purchases from said trust or the members thereof, and by so doing it would then receive the amount of such overcharges," and that it was injured by such business methods. The court held, however, that the sales were valid and that the provision for a rebate was merely an inducement to them to continue their business relations with the plaintiff.

In Corn Products Refining Co. *v.* The Oriental Candy Co.[1] the plaintiff company had at the close of 1908 offered the candy company a rebate on its purchases for that year if its entire requirements for 1909 were purchased from the Corn Products Co., the rebate to be payable at the close of 1909. The candy company, instead of waiting until the close of 1909, deducted the amount of the rebate from its payment in December, 1908, and the Corn Products Co. sued for the amount. Recovery was had, the court holding that the rebate was not illegal, and that the right to it did not arise until all of the conditions had been complied with, and then only at the time specified in the offer. Regarding the legality of the offer of a rebate, the court said, in part:

> The proposition of the defendant in error of December 9, 1908, was not illegal. It was made to plaintiff in error after its contract for purchases for the year 1908, which is also legal and binding, and appears to have been a mere voluntary proposition on the part of the defendant in error, without imposing any obligation whatever upon plaintiff in error. It was a mere statement or proposition to give plaintiff in error certain profits on its purchases of 1908, on condition that it do certain things therein named, which plaintiff in error never did do, and which it never was obligated to do, and was never in any way compelled or urged to do. It was simply a proposition that might have become an obligation on the part of the defendant in error had plaintiff in error seen fit to have accepted its terms and to have performed the conditions upon which it was informed it could have the profits therein named. It is not an illegal contract or contract in restraint of trade, and would not have been if it had been accepted and performed on the part of plaintiff in error. It was not in any sense a part of the contract for the purchase by plaintiff in error for the year 1908, and in no way affected the validity of that contract. This same proposition, in substance, or so-called contract, was in every way upheld by the Ap-

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[1] 168 Ill., App., 585, 590, 591 (1912).

pellate Court of Indiana in the case of Bessire & Co. *v.* Corn Products Manufacturing Co.[1]

A by-law of the Associated Press which required its members not to purchase news from any association declared by the board of directors to be antagonistic to the Associated Press was held void by the Supreme Court of Illinois in Inter Ocean Co. *v.* Associated Press.[2] While it was held in this case that the business of the press association was impressed with a public interest and it must serve all alike who complied with reasonable regulations, the basis for declaring the by-law to be an unreasonable regulation and void was that it tended to create a monopoly and to restrict competition. Regarding this the court said:

> The by-law of the appellee corporation above referred to is not required for corporate purposes nor included within the purposes of the creation of that corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish and could prejudice the interests of the public. Such a power was never contemplated in its creation and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from publication by any of its members news procured from any other corporation or source than itself which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor and to prevent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void. * * *
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> The provisions of the contract that the appellants should purchase news from no other source and the restrictive clause of the by-law are both null and void, and the contract is the same as if these provisions had not been incorporated therein.[3]

A contrary result as to the validity of a similar by-law was reached in Matthews *v.* Associated Press[4] and Bleistein *v.* Associated Press.[5]

For other cases in which contracts to buy from one person exclusively have been enforced see Heimbuecher *v.* Goff, Horner & Co.;[6] Southern Fire Brick & Clay Co. *v.* Garden City Sand Co.;[7] Fuller *v.* Hope[8]; George & Chapman *v.* East Tennessee Coal Co.[9]

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[1] 94 N. E., 353.

[2] 184 Ill., 438, 453, 454 (1900).

[3] In a letter from the Attorney General of the United States, dated Mar. 12, 1915, to James M. Beck, counsel for the Sun Printing & Publishing Association of New York, the view is taken that a similar by-law of the Associated Press, in so far as it prevents or seriously hinders the members of that association from purchasing or otherwise obtaining news from a rival agency, is in violation of the Sherman law and should be abrogated.

[4] 136 N. Y., 333 (1893).

[5] 136 N. Y., 662 (1893).

[6] 119 Ill., App., 373 (1905).

[7] 223 Ill., 616 (1906).

[8] 163 Pa. St., 62 (1894).

[9] 15 Lea, 455 (Tenn., 1885).

The decisions involving the validity of contracts by which a patron of a public-service company binds himself to exclusive dealing are less uniform. In Central New York Telephone and Telegraph Co. *v.* Averill et al.[1] the Court of Appeals of New York held invalid the contract of a telephone company for exclusive patronage. In this case the plaintiff contracted with the defendants, who were proprietors of a hotel, to install a telephone exchange, the latter agreeing, among other things, to give the telephone company the exclusive right to place instruments in the hotel. The defendants afterwards threatened to install the system of a rival company, whereupon a temporary injunction was obtained. A motion to vacate the injunction was granted, the court holding the contract void, as being in restraint of trade, since the rights of the public were affected. The supreme court of the State said:

And, while it may very well be that a semipublic corporation may be unable to make contracts that would be perfectly valid if made by an individual or by a private corporation, the reason is, not that certain powers are conferred upon the former, but because by the very nature of its operations public interests are more likely to be affected. * * * Just so long as the public is not injured, however, any fair and reasonable contract of such a character is perfectly valid.[2]

This holding was reversed by the appellate division of the supreme court, but on appeal upheld by the court of appeals. The ground of the court's conclusion is stated by Judge Bartlett as follows:[1]

While it may, of course, adopt every proper expedient to enlarge its own business, this does not include the right to pursue a policy of exclusion which is distinctly injurious to the public by restricting their circle of communication by telephone. It matters not that the customer may be willing to agree to exclude others or that the contract to do so is supported by a sufficient consideration as between the parties. The evil in such an agreement is its antagonism to the interests of the public. If a telephone company may make a contract of exclusion with one of its customers it may make such a contract with all and thus preclude all from any telephonic communication with persons who happen to be served by a rival company. * * * It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy and, therefore, void. It tends to nullify the consideration moving to the public for the grant of the franchise, by lessening the sphere of telephonic service; and it is impossible to regard a contract as consistent with public policy which would defeat the very policy that induced the State to bring one of the parties to the contract into existence as a public-service corporation.[3]

A similar contract between a telephone company and a private subscriber was held invalid in Gwynn *v.* Telephone Co.[4] A different view, however, was taken in Bald Eagle Valley Railroad Co. *v.* Nit-

[1] 199 N. Y., 128, 138 (1910).
[2] 105 N. Y. Supp., 378, 382 (1907).
[3] Cf. Lough *v.* Outerbridge, 143 N. Y., 271 (1894).
[4] 69 S. C., 434 (1906).

tany Railroad Co. et al.[1] That was an action to restrain the defendants from violating a covenant whereby they had agreed to ship all their freight over the complainant's lines. A demurrer to the bill was overruled and an injunction granted as prayed, the court holding that the contract was not unreasonably in restraint of trade.[2]

A similar result was reached in Beck *v.* Indianapolis Light & Power Co.[3] In that case the defendant had contracted to take electric current from the plaintiff and not to use any electricity except the plaintiff's for a period of five years. Upon a breach by the defendant, the plaintiff filed a bill praying for an injunction restraining the defendant from using any electricity save that supplied by it, and the court held that the bill was not demurrable.

Contracts to sell to one person exclusively (where no agency exists).—In Over *v.* Byram Foundry Co.[4] the plaintiff brought an action on a contract whereby the defendant had agreed to purchase from the plaintiff company all the sash weights manufactured by it during a specified period, in consideration of an agreement on the part of the plaintiff to sell such sash weights to the defendant only. It appeared that the parties were both manufacturers of sash weights, and on this ground particularly it was urged that the contract was invalid. The court, however, held otherwise, saying:

> * * * A contract binding the party manufacturing to sell exclusively to one person during a limited period is valid.

In Van Marter *v.* Babcock[5] an action was brought for breach of a contract whereby the defendant had agreed to buy a certain quantity of peppermint oil from the plaintiff. The only defense was that the contract was void as being in restraint of trade, because it bound the plaintiff not to sell any peppermint oil save to the defendant, and not to distill any such oil for anyone else save those who had contracted their oil to the defendant. The court held that the contract constituted only a partial restraint and overruled a motion on the part of the defendant for a new trial.

One of the few common-law cases involving the rights of a stranger to an exclusive contract is Rosenau *v.* Empire Circuit Co.[6] That was an action to recover damages for an alleged unlawful conspiracy formed by the defendants to ruin the business of the Court Street Theater, of which the plaintiff was receiver. This theater

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[1] 171 Pa. St., 284 (1895).

[2] Cf. United States Tel. Co. *v.* Central Union Tel. Co., 202 Fed., 66 (C. C. A., 1913); Union Trust, etc., *v.* Kinloch Tel. Co., 258 Ill., 202 (1913).

[3] 36 Ind. App., 600 (1905); and see Metropolitan Elec. Supply Co. *v.* Ginder, L. R. (1901), 2 Ch., 799.

[4] 37 Ind. App., 452, 458 (1906).

[5] 23 Barb., 633 (1857).

[6] 131 N. Y. App. Div., 429, 435 (1909).

had for some years done a prosperous business in conducting burlesque performances in the city of Buffalo, and was controlled by a concern which had also established burlesque theaters in Washington and Baltimore in competition with those of the defendants. The individual defendants, who were the owners of several such theaters in various cities, including Buffalo, for the purpose of promoting their business interests and to eliminate the competition thus encountered, organized the defendant company, and conveyed to it, in consideration for shares of its corporate stock, title to these theaters. The company then notified the owners of 41 burlesque shows, which included all that were suitable to be played at its theaters or the theater of the plaintiff, that it would not book any show to play in its theaters save on condition that the owners thereof would agree not to play in any theater not owned or controlled by the company. Thereupon the owners of practically all the 41 shows, including 19 which were already under contract with the Court Street Theater, agreed to play exclusively in the defendant company's theaters, with the result that the Court Street Theater Co. could not obtain any suitable attractions to play in its theater and subsequently went into the hands of a receiver. The court held that in insisting upon these exclusive contracts the defendants were strictly within their legal rights, notwithstanding the fact that breaches of existing contracts with the Court Street Theater Co. were thereby induced. McLennan, J., in delivering the opinion, said in part:

> * * * What the defendants did was open and above board. They simply said to the owners of burlesque shows, "if you play or show in the Court Street Theater, you can not play in the theaters owned, leased, or controlled by us," and, as before said, we conclude that in adopting that plan and rule and in enforcing it the defendants were acting within their legal rights. The purpose and object of the adoption and enforcement of such rule was to secure financial advantage and profit to the defendants; it was for the purpose of enabling it to make provision by which its theaters should at all times during the theatrical season be occupied with suitable burlesque shows, and, as before suggested, there is no basis for the conclusion or finding that this important corporation was actuated by malice as against the owner of the plaintiff's company in organizing the defendant company and in adopting the rule which it did. Its chief purpose and object was to conduct its business in such fashion so that it would be successful and yield a profit to its stockholders and a reasonable return for the money and property which they had invested therein.[1]

A different view prevails as to the validity of contracts whereby persons agree to sell certain rights or privileges to one public-service

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[1] Other cases in which contracts of this general character have been held valid are: Blauner *v.* Williams Co., 36 Misc., 173 (N. Y. Supreme Ct., 1901); State ex rel., Berryhill *v.* St. Paul Gas Light Co., 92 Minn., 467 (1904); Long *v.* Towl, 42 Mo., 545 (1868); Central Shade Roller Co. *v.* Cushman, 143 Mass., 353 (1887); Clark *v.* Crosby, 37 Vt., 188 (1864); Schwalm *v.* Holmes, 49 Cal., 665 (1875); Saddlery Hardware Co. *v.* Hillsborough Mills, 68 N. H., 216 (1894). But see Reeves *v.* Decorah Farmers' Co-Operative Soc., 140 N. W., 844 (Iowa, 1913); Ludewese *v.* Farmers' Mutual Co-Operative Co., 145 N. W., 475 (Iowa, 1914).

company exclusively.[1] Thus, in Calor Oil & Gas Co. *v.* Franzell,[2] eminent-domain proceedings were brought by the plaintiff company to condemn a strip of land across the defendant's farm for the purpose of laying gas pipes therein. It was pleaded in defense that the defendant, for a valuable consideration, had previously agreed to give, and in pursuance of such agreement had given, another gas company the exclusive right of laying pipe lines across his land. The court held that the contract was void because it restricted competition and tended to the creation of a monopoly.[3]

A contract between individuals or private corporations to buy from and to sell to one another exclusively has been upheld. Thus, in Live Stock Association *v.* Levy[4] it appeared that the plaintiff corporation, with the consent and approval of its stockholders, of which the defendant was one, entered into a contract with the New York & New Jersey Sheep Brokers' Association whereby it was agreed that the stockholders of the plaintiff corporation should for a period of three years thereafter buy their sheep and lambs of the said association only, and that the members of the latter should during the same period sell sheep and lambs for the New York market to the stockholders of the plaintiff corporation only. Subsequent to the making of this contract, the stockholders of the plaintiff corporation agreed among themselves and with the corporation that each of them should forfeit to the latter a penalty for each carload of sheep and lambs purchased by any one of them from any member of the sheep brokers' association, as distinguished from the association itself, after having been notified by the plaintiff not to so purchase. The defendant, having purchased from a member of the association in violation of his agreement, was sued by the plaintiff corporation for the penalty provided for in the stockholders' agreement. The court held for the plaintiff, and, after pointing out that the operation of the contract was limited both as to time and place, said:

> There is no violation of law or of public policy in an agreement between two traders that one should sell to the other all its commodities and the other buy from the former corporation alone.

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[1] Contracts binding public-service companies to serve one person exclusively, being opposed to the fundamental obligation of such companies to serve all impartially, are clearly invalid. Sammons *v.* Kearney Power & Irrigation Co., 77 Nebr., 580 (1906). The validity of grants of certain classes of exclusive privileges by these companies, however, in connection with the conduct of their business has been frequently upheld. For the leading cases in the Federal courts, see Express Cases, 117 U. S., 1 (1886); Chicago, St. Louis & Northern R. R. Co. *v.* Pullman Car Co., 139 U. S., 79 (1891); Donovan *v.* Pennsylvania Co., 199 U. S., 279 (1905). But see United States Telephone Co. *v.* Central Union Telephone Co., 202 Fed., 66 (C. C. A., 1913).

[2] 128 Ky., 715 (1908).

[3] To the same effect are West Virginia Transportation Co. *v.* Ohio River Pipe Line Co., 22 W. Va., 600 (1883), and Kettle River R. R. Co. *v.* Eastern R. R. Co., 41 Minn., 461 (1889).

[4] 22 J. & S., 32, 38 (N. Y. Superior Court, 1886).

But in Judd *v.* Harrington[1] an arrangement of a similar character, coupled with an agreement by the contracting parties to pool their commissions as a means of protecting their business interests from loss "by unreasonable competition," was condemned by the Court of Appeals of New York. After setting out the articles of agreement in full, the court observed that—

> they manifestly were intended for the purpose of creating a combination between the butchers engaged in buying and the brokers engaged in selling sheep and lambs in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers, and the butchers to buy only from the brokers. The owners of sheep or the drovers or consignees who had them for sale and the public, who were interested in the price of meat as an article of food, might have been prejudiced by the agreement. Whether they were in fact is not material.

CONTRACTS TO SELL ONE PERSON'S GOODS EXCLUSIVELY (TYING CONTRACTS).—In an early case decided by the Supreme Court of Illinois a contract of this character was held valid.[2] According to the terms of the contract involved, the defendant agreed to deal exclusively in Aetna sewing machines and accessories sold by the plaintiff, the plaintiff agreeing to furnish the same at a discount from Chicago retail prices of 30 per cent on six months' time. For the purpose of securing to the plaintiff the performance of the contract a penal bond was executed. The defendant having failed to account for certain machines sold to him, an action was brought on the bond. The supreme court affirmed a judgment for the plaintiff, holding that the contract was not void as being in restraint of trade. In the course of the opinion it was said:

> * * * We see nothing in such a contract so in restraint of trade as to make it in that respect against public policy, and require that it should be adjudged void. We know of no warrant of authority therefor.

In Standard Fashion Co. *v.* Siegel-Cooper Co. et al.,[3] the Court of Appeals of New York granted an injunction restraining the breach of a tying contract. There the plaintiff, a manufacturer of paper patterns, had agreed to furnish patterns for a period of two years to the defendant upon the condition that the latter would not sell or allow to be sold in its store any other make of paper patterns. Subsequently the defendant refused to handle the plaintiff's goods, and, furthermore, became the selling agent for a competing pattern manufacturer. The court held that though it could not grant specific performance, it should extend its remedy as far as possible to prevent the defendant not only from making money by breaking its agreement but from inflicting a double wrong on the plaintiff by depriv-

[1] 139 N. Y., 105 (1893).
[2] Brown *v.* Rounsavell, 78 Ill., 589, 591.
[3] 157 N. Y., 60 (1898).

ing it of the right to sell its goods in the defendant's store and conferring that right on a business competitor.[1]

Similarly covenants or conditions in leases to the effect that the lessee shall sell only beer of the lessor's manufacture on the leased premises are generally upheld. In Ferris *v.* American Brewing Co.[2] the plaintiff brewing company, as the lessor of certain premises to the defendant, brought an action to enjoin the breach of a covenant in the lease whereby the defendant had agreed that he would sell no beer upon the premises except that manufactured by the plaintiff. In defense it was urged that the covenant was void as against public policy. The court, however, held otherwise and granted an injunction as prayed in the bill.[3]

The facts are not stated in the opinion of the court in The Lloyd Sabaudo *v.* Cubicciotti,[4] but a preliminary injunction was issued restraining the defendant as an individual from announcing, either privately or publicly, to any or all of the complainant's booking agents in Philadelphia, that if they continued to sell the tickets of the complainant they would be deprived of their positions as booking agents of any or all of the trans-Atlantic steamship lines mentioned in the bill of complaint, or of any other steamship company, and restraining the defendant as an individual from thereafter employing any authority, argument, or persuasion based upon a predicated loss of their business as booking agents of any of the above-mentioned lines, or dissuading the complainant's booking agents from continuing in the future to offer for sale and to sell the tickets of the complainant.[5]

Contracts for exclusive agency or territory.—Contracts by which a manufacturer agrees to do business in a certain territory solely through one dealer have been upheld in numerous decisions. A typical case is Keith *v.* Herchberg Optical Co.[6] That was an action to recover the purchase price of goods sold to the defendant by the plaintiff's traveling agent. In defense it was shown that the defendant had bought the goods in question on condition that he should have the exclusive right to sell such goods in the town of Booneville, and that the plaintiff's agent had breached this condition by selling the same class of goods to two other merchants in the same town. The court held that the exclusive feature of the

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[1] See also Butterick Pub. Co. *v.* Rose, 141 Wis., 533 (1910); Butterick Pub. Co. *v.* Fisher, 203 Mass., 122 (1909).

[2] 155 Ind., 539 (1900).

[3] To the same effect are Joseph Schlitz Brewing Co. *v.* Nielson, 77 Nebr., 868 (1906); Schlitz Brewing Co. *v.* Travi & Corstorta, 179 Ill. App., 268 (1913); Christian Feigenspan *v.* Nizolek, 65 Atl., 703 (N. J. Ch., 1907). But see Muller *v.* Bohringer, 3 Pa. Co. Ct., 144 (1887).

[4] 159 Fed., 191 (C. C., 1908).

[5] But see U. S. *v.* Hamburg American Steamship Line et al., 216 Fed., 971, 974 (D. C., 1914).

[6] 48 Ark., 138 (1886).

contract was valid, and that the plaintiff having violated it could not maintain the action.

In Superior Coal Co. *v.* Darlington Lumber Co.[1] the plaintiff, a coal-mining company, brought suit to recover the purchase price of certain coal sold and delivered by it to the defendant, a retail coal dealer in the town of Benld, Ill. The contract under which the coal had been sold also provided that the plaintiff should not sell coal to any other dealer in this town, and it was claimed by the defendant that this provision had the effect of rendering the contract invalid. The court affirmed a judgment for the plaintiff, and in the course of its opinion said:

* * * The contract was clearly entered into by the parties for their mutual benefit and with a view to facilitate trade and increase their business, and not with a view to restrain trade or to create a monopoly in the sale of coal at the town of Benld, and the fact that the effect of the contract may have been to incidentally restrain competition in the sale of coal at said town did not make the contract illegal and void.[2]

Contracts for exclusive agency which contain a corresponding obligation on the part of the agent to sell only the goods of his principal have likewise been upheld by the courts. Thus in Newell et al. *v.* Meyendorff,[3] the contract price of cigars sold the defendant was recovered although there was set up in defense a contract by which he was given the exclusive right to handle a certain brand of cigars in the territory upon the condition that he would cease advertising and selling various other brands of cigars. The contract was interpreted as one limited to place and person and not void as in restraint of trade. In applying the common-law rule the supreme court of Montana said:

* * * The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiff's industry, by the selection and service of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reason therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract for a consideration for the enlistment of the services of an agent for the plaintiffs in their business.

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[1] 236 Ill., 83, 84 (1908).

[2] Similar contracts have been sustained in the following cases: Singer Manufacturing Co. *v.* Union, etc., Co., Holmes (Fed.), 253 (1873); Roller *v.* Ott, 14 Kans., 609 (1875); Cent. Shade Roller Co. *v.* Cushman, 143 Mass., 353 (1887); Pacific Factor Co. *v.* Adler 90 Cal., 110 (1891); Woods *v.* Hart, 50 Nebr., 497 (1897); N. Y. Trap Rock Co. *v.* Brown et al., 61 N. J. L., 536 (Sup. Court, 1898); Whitson *v.* Col. Phonograph Co., 18 D. C. App., 565 (1901).

[3] 9 Mont., 254 (1890).

The same result was reached in Walter A. Wood Mowing & Reaping Machine Co. *v.* Greenwood Hardware Co.[1] That was an action for the purchase price of goods sold by the plaintiff to the defendant under a contract whereby the plaintiff in consideration of an undertaking of defendant to handle its goods exclusively, agreed to designate the defendant its sole agent in a limited territory, and to use reasonable efforts to prevent other agents from making sales therein. The principal defense was that the contract was void by reason of these exclusive provisions, but the court held otherwise, regarding the restraint imposed as limited and reasonable.[2]

ENGLISH DECISIONS.

At early common law all contractural restrictions upon one's right to do business were held against public policy and unenforceable.[3] The rule, however, has been relaxed, and according to the present English law whether an agreement in restraint of trade is invalid or not depends on the reasonableness of the restraint imposed. Contracts whereby a person agrees to deal exclusively with another have been uniformly declared reasonable and therefore valid.

CONTRACTS TO BUY OF ONE PERSON EXCLUSIVELY (EXCLUSIVE PATRONAGE).—The practice of giving a rebate to shippers to patronize exclusively ships of certain lines has been declared a legitimate form of competition by the House of Lords.[4] In that case a so-called conference of shipowners offered a rebate of 5 per cent to all shippers who confined their shipments of tea and general cargo from China to Europe to members of the conference. The plaintiffs were excluded from the conference and thereafter claimed damages and an injunction to restrain the defendants from continuing said practices. The plaintiff alleged a conspiracy and contended that the agreements were in restraint of trade and therefore illegal, but the House of Lords affirmed the decision of the court of appeal, holding that since the action of the defendants was done with the lawful object of protecting and extending their trade and increasing their profits, and, since they had not employed any unlawful means, the plaintiffs had no cause of action. The lord chancellor said:

> * * * I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful, it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

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[1] 75 S. C., 378 (1906).

[2] See also Welboldt *v.* Standard Fashion Co., 80 Ill. App., 67 (1898); Peck-Williamson Ventilating Co. *v.* Muller & Harris, 118 S. W., 376 (Ky. Court of Apps., 1909).

[3] Standard Oil Co. *v.* U. S., 221 U. S., 1, 51 (1911).

[4] Mogul Steamship Co. (Ltd.) *v.* McGregor et al. L. R. (1892), A. C., 25.

Lord Watson said in part:

There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying trade during the tea season against the encroachments of the appellants and other competitors and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce, and it is, in the eye of the law, perfectly legitimate.

Lord Hannen said the arrangement in effect was—

nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.

And further:

* * * The objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself.

In Metropolitan Electric Supply Co. (Ltd.) *v.* Ginder[1] an action was brought to enjoin the breach of a contract whereby the defendant had agreed to take all the electrical energy required on his premises from the plaintiff company for a period of not less than five years. While this agreement was in force the defendant gave notice to the plaintiff to disconnect his premises from its system and made arrangements to obtain a supply from a rival company. The court regarded the contract as valid and issued an injunction restraining the defendant "from taking the electrical energy required for his premises from any person other than the plaintiff."[2]

Contracts or leases binding a purchaser or lessee to use only articles of his vendor's or lessor's manufacture in connection with the article sold or leased have also been upheld. A striking example is afforded by the case of United Shoe Machinery Co. of Canada *v.* Brunet, decided by the Privy Council in 1909.[3] The plaintiff company, which was a subsidiary of the United Shoe Machinery Co., of New Jersey, in accordance with the lease system of the parent company, had leased to the defendants, a firm of shoe manufacturers, certain shoe-manufacturing machines, for a term of 20 years, each lease containing a prohibitive or tying clause to the effect that the lessee should not use, in connection with the plaintiff's machines, any machines leased from other manufacturers. The defendants having installed in their factory certain machinery secured from a competitor of the plaintiff, the latter sought an injunction to restrain them from using its machines in conjunction with those of its com-

[1] L. R. (1901) 2 Ch., 799.

[2] See also Winnipeg Saturday Post *v.* Couzens, 19 W. L. R., 25 (1911); Gervais *v.* Paquette & Turgeon, 37 Que. S. C., 501 (1909).

[3] L. R. (1909) A. C., 330, 342, 343.

petitor, and prayed for damages. The principal defense was that the tying clause which had been violated was illegal as constituting a restraint of trade and tending to create a monopoly. The case was tried before a special jury of traders, which found, among other things, that the plaintiff company was a monopoly, but to what extent it was a burden to the public no finding was made. A majority of the lower court held the leases void and dismissed the case. On appeal to the Privy Council, this decision was reversed, the view being taken that the plaintiff had the right to refuse to lease machines altogether[1] or to lease them on whatever terms best promoted its own interests. In this connection, Lord Atkinson, in delivering the opinion, said:

> * * * By virtue of the privilege which the law secures to all traders, namely, that they shall be left free to conduct their own trade in the manner which they deem best for their interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants' machines, as they chose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they deem best in their own interest, irrespective of the like consequences. This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape the obligation of their contracts. * * *

Respecting the contention that the tying clauses would prohibit the defendants and other shoe manufacturers from obtaining machinery superior to that leased by the plaintiff, if such machinery should be put on the market, it was said:

> This, however, is a very remote contingency, since the appellants, having, as is alleged, captured the entire trade, are unlikely not to keep abreast of invention or to allow the field they have won to be reoccupied by others.[2]

CONTRACTS TO SELL TO ONE PERSON EXCLUSIVELY.—In Donnell *v.* Bennett[3] an injunction was sought to restrain the breach of a contract by which the defendant, Cormack, had agreed to sell to the plaintiff for a period of two years all the fish not required by him in his business, and in addition not to sell fish to any other manufacturer than the plaintiff. The breach assigned was that the defendant, Cormack, had not only failed to sell any fish to the plaintiff but had also entered into a contract with the defendant, Bennett, to sell fish to him exclusively. The court granted an injunction restraining Cormack from selling any fish to Bennett or any other manufacturer save

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[1] The jury having found that the plaintiffs' machines were not patented in Canada, the decision of the court was arrived at without considering the effect of the Canadian patent act.

[2] But see English patents and designs act, 1907.

[3] L. R. (1883), 22 Ch. Div., 835.

the plaintiff and restraining Bennett from buying any fish from Cormack.[1]

A similar result was reached in Altman *v.* Royal Aquarium Society.[2] There it appeared that the plaintiff had rented a stall in the defendant's building on condition that he (the plaintiff) should have the exclusive right to exhibit and sell certain specified classes of goods therein. The defendant having allowed, or failed to prevent, others from exhibiting or selling goods of the character specified, the court, on the application of the plaintiff, granted an injunction restraining the defendant from so doing.

CONTRACTS TO SELL ONE PERSON'S GOODS EXCLUSIVELY (TYING CONTRACTS).—A system of tying contracts with a rebate as an inducement was held by a Canadian court to amount to only ordinary competition in Queen *v.* American Tobacco Co. of Canada (Ltd.),[3] which was a criminal prosecution based upon article 520 of the Canadian Criminal Code. By the system adopted by the defendant in that case a rebate of 6 per cent was offered to all dealers who handled its cigarettes exclusively. Other tobacco manufacturers complained that since the defendant had contracts with nearly all of the jobbers, competition was almost an impossibility. The court of sessions for the district of Montreal decided that these contracts amounted to no more than ordinary competition and discharged the defendant. The court said in part:

> It is true that it may be considered a very shrewd contract, a very shrewd combination, and an attempt to give as much as possible, the greatest circulation to the cigarettes manufactured by them, but yet I can not see that it would have been unlawful to agree with as many parties as they could find that they would consent to sell only their cigarettes exclusive to those of others. * * * I can not see there a combine against the law, as, for instance, in cases of trusts, but only a way of dealing with their own property in a way which may, perhaps, be detrimental to some other people in the same line of business, but at the same time I do not believe that this amounts to more than ordinary competition.[4]

Conditions in leases to the effect that the tenant shall not sell any liquor on the leased premises save that manufactured by his landlord have been before the English courts in several cases, the earliest of which is Cooper *v.* Twibill.[5] That was an action of replevin for taking the plaintiff's goods from a public house of which he was lessee. The defendant justified on the ground that the plaintiff was in arrears of rent due under a condition in the lease because he had not purchased the beer sold in his house of a certain firm. In answer

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[1] See also North Western Salt Co. (Ltd.) *v.* Electrolytic Alkali Co. (Ltd.), L. R. (1914), 2 A. C., 461.

[2] L. R. (1876), 3 Ch. Div., 228.

[3] 3 La Revue de Jurisprudence, 453 (1897).

[4] See also Graham *v.* J. I. Case Threshing Machine Co., 19 Man., 27 (1909).

[5] 3 Camp., 285n (1888).

it was shown by the plaintiff that the beer delivered to him by the firm in question was unwholesome, by reason whereof he had lost divers customers, and that upon refusal by the firm to furnish good beer, but not till then, he sold beer purchased from other persons. Although Lord Ellenborough, who tried the case, did not hold the condition invalid as a matter of law, he had the following to say as to its propriety in charging the jury:

> The whole of these leases, by which people of the description of the plaintiff are prevented from having the article they deal in from those who will serve them best, are extremely injurious to the public interest and welfare.

Similarly, in Thornton *v.* Sherett,[1] which was an action on a note given to secure the performance of a similar covenant of 12 years' duration, the court said:

> * * * I very much disapprove of these covenants by which the brewer gets the publican in his power; and more especially, in a case like the present, where the plaintiffs have drawn in the defendant to take all his beer from them for so long a period as 12 years.

In Catt *v.* Tourle,[2] however, the legality of conditions of this character was squarely upheld. In that case the plaintiff sold a piece of land to trustees of a freehold society who covenanted with him that he, his heirs, and assigns should have the exclusive right of supplying beer to any public house erected on the land, but the plaintiff did not enter into any covenant to supply it. The defendant, who was also a brewer and a member of the society, acquired a portion of the land, on which he erected a public house, supplying it with his own beer. The court held that the covenant was not void either for uncertainty or want of mutuality or as being an unreasonable restraint of trade or because it purported to be perpetual, and that though it was in terms positive it was in substance negative, and that the court could interfere by injunction. Lord Justice Giffard, in affirming the order overruling the demurrer, said:

> * * * With respect to this covenant being invalid by reason of its being in restraint of trade, it does not go beyond the ordinary brewer's covenant except in this particular, viz, that the ordinary brewer's covenant is generally between lessor and lessee or mortgagor and mortgagee, whereas the present covenant is between the vendor and purchaser of the fee. This difference does not make the covenant void.[3]

Patented articles.—In Jones *v.* Lees,[4] *decided* by the court of exchequer in 1856, the declaration alleged that the plaintiff, having obtained a patent for improvements in slubbing machines, granted

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[1] 8 Taunt. 529, 530 (1818).
[2] L. R. (1869), 4 Ch. Apps., 654.
[3] Such covenants have been held to run with the land. White *v.* Southend Hotel Co. L. R. (1897), 1 Ch., 767.
[4] 1 H. & N., 189.

to the defendant license to use the invention during the life of the patent, the defendant agreeing not to make or sell any machines without the invention of the plaintiff applied to them. The defendant acknowledged the breach of the covenant, but pleaded that the invention had become worthless. The court said "it would be a very mischievous decision if we were to hold that a contract, which it may be presumed was reasonable at the time it was entered into, might be construed as a contract in restraint of trade because something more useful than the subject matter of it has been invented or the habits of society have changed," and gave judgment for the plaintiff.[1]

Section 14. Bribery of employees.

A common method of competition is the giving of secret commissions to another's employees for the purpose of securing preferential treatment in the distribution of the employer's patronage. It is fair to assume, however, that in many cases the commission is demanded by the employee himself, who thus obliges the dealer to become a party to an illegal transaction or to abandon the business to a less scrupulous competitor.[2] The practice of giving and demanding bribes has been described as "unfair, unjust, and improper,"[3] and "a particularly hateful and demoralizing phase of unfair competition,"[4] and it has been denounced alike by the courts, legislative bodies and commercial organizations. Notwithstanding the fact that the courts have permitted the principal to recover the amount of the commissions so received,[5] and to repudiate contracts made under such circumstances,[6] it has been considered necessary in several States in this country and in other English-speaking countries to further discourage the practice by making it a criminal offense.

AMERICAN DECISIONS.

In United States *v.* Carter[7] a bill was filed to compel the defendant, late a captain in the United States Army, to account for illicit gains, gratuities, and profits received by him through collusion with

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[1] See also Printing & Numerical Register Co. *v.* Sampson, L. R. (1875), 19 Eq., 462.

[2] It has been stated that "British firms who trade abroad in countries where bribery is not criminal have (*a*) to pay commissions which, if their customers were English, would be unlawful, and so commit an act abroad which would be criminal at home, a course which is repugnant to those who object to bribery on principle; or (*b*) to lose business because their competitors are less scrupulous. As an illustration, it may be mentioned that an important Russian contract was recently lost to a firm of British manufacturers on this ground."—Report of Secret Commissions and Bribery Prevention League, 1914.

[3] Australian (Commonwealth) Debates, 1905, Vol. XXV, p. 495).

[4] Ib.

[5] United States *v.* Carter, 217 U. S., 286 (1910).

[6] City of Findlay *v.* Pertz, 66 Fed., 427 (1895); Alger *v.* Keith, 105 Fed., 105 (1900); Panama & South Pacific Telegraph Co. *v.* India Rubber G. P. & T. Works Co., 32 Law Times (N. S.), 517.

[7] 217 U. S., 286 (1910).

contractors for river and harbor improvements in the Savannah, Ga., improvement district, and to follow such illicit profits into securities and other property held for him by other defendants to the suit. Securities aggregating in value some $400,000, into which the larger part of the share of the defendant Carter was said to have gone, were attached and placed in the hands of a receiver to abide the result of the decree in this case. There was a decree in favor of the United States in the circuit court substantially as prayed for. Upon an appeal and cross appeal the decree was affirmed as far as it went and was enlarged in certain matters upon the appeal of the United States. The Supreme Court affirmed the decree in all particulars, Mr. Justice Lurton saying in part:

If it be once assumed that the defendant Carter did secretly receive from Greene and Gaynor a proportion of the profits gained by them in the execution of the contracts in question, the right of the United States in equity to a decree against him for the share so received is made out. It is immaterial if that appears, whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

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The facts stated by the bill and supported by the evidence show that Carter received from Greene and Gaynor, directly or indirectly, something in excess of $500,000 as his share in the Greene and Gaynor contracts. Under the legal principle, which we have heretofore announced, the United States may require Capt. Carter to account for all he has received by way of gain, gifts, or profits out of the Greene and Gaynor contracts, irrespective of the actual damage it has sustained or its ability to follow such gains into specific property. Undoubtedly it may, as by its bill it sought to do, follow the fund so corruptly received and assert title to any property into which such illegal gains have gone. But there was a prayer for "other, further, and general relief," and under that it was entitled to a judgment, as for money had and received for its use, for any difference between the cost of the specific property recovered and the gains so received which it is unable to trace.

In City of Findlay *v.* Pertz [1] it appeared that one Brooks, who was an agent of Pertz & Stewart, manufacturers of automatic separators

[1] 66 Fed., 427, 434, 435 (C. C. A., 1895).

for use on natural-gas wells, entered the employ of the board of gas trustees of the city of Findlay as superintendent of the gas works, and that while so employed ordered from Pertz & Stewart 32 separators, upon the sale of each of which that firm agreed to allow him a commission of $10. Learning of this agreement the board discharged Brooks, repudiated the contract, offered to return the separators, and demanded the return of such money as had been paid under the contract. In a suit by Pertz & Stewart to recover the balance alleged to be due, it was held that the city was entitled to rescind the contract. Lurton, circuit judge, said in part:

> Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principles of reason and morality, and has been sanctioned by the courts in innumerable cases. * * *
>
> We know no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public duty unite in condemning such contracts, and no court will tolerate any suit for their enforcement.

ENGLISH DECISIONS.

In the case of the Mayor, etc., of Salford *v.* Lever[1] it appeared that the plaintiffs were the proprietors of the gas works in their borough, and that it was the duty of their manager, Hunter, to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, Lever, was a coal merchant, who submitted tenders for coal. Before doing so, with a view of obtaining Hunter's recommendation, the defendant corruptly agreed to pay him a secret commission of 1s. per ton, and, in order to recoup himself, inserted in the tenders prices 1s. per ton in excess of those at which he would otherwise have tendered. Thereupon Hunter advised the plaintiffs to accept the defendant's tenders, which they did. The prices paid exceeded by a sum of £2,329 the prices which, but for the payment of the commission, the defendant would have received. Of the commission promised, the defendant paid Hunter about £1,500. During his tenure of office Hunter received bribes from many other coal merchants, who also obtained prices in excess, by the amount of the bribes, of the prices which they would otherwise have received; but there was no evidence that the total amounts paid to Hunter, or the excess prices obtained by the various contractors, including

[1] L. R. (1891), 1 Q. B. D., 168, 175, 180, 181.

the defendant, exceeded £10,000. Upon discovering the fraud the plaintiffs entered into an agreement with Hunter, under which he promised to assist them by giving the necessary information and evidence to enable them to bring actions against the contractors (including the defendant Lever) to recover the bribes paid to him, or promised to him, and guaranteed that the sums recovered should amount to £10,000. By way of security for the performance of the guaranty he deposited securities to the value of £10,000. On the recovery of this amount, together with costs, the corporation was to give Hunter a full discharge. The plaintiffs subsequently brought an action against Lever to recover the sum of £2,329 as damages for fraud in relation to the contracts mentioned, and in the alternative, as money had and received by him to the plaintiffs' use. The substance of Lever's defense was that the money which came into his hands passed into the hands of Hunter, the plaintiffs' agent, and that as they had recovered it, or part of it, they could not recover from the defendant; that the action was for a tort in respect of which the defendant and Hunter were joint tort feasors; and that the agreement amounted to a release of Hunter, which operated to discharge the defendant also. It was held that the matters relied on afforded no defense, as the rights of the plaintiffs against the defendant were entirely separate and distinct from their rights against their agent.

Lord Esher, M. R., said in part:

They call this a commission, a term very well known, at all events in the north of England, and commissions sometimes cover a multitude of sins. In the present case it was meant to cover a fraud. * * * He [Lever] got the advanced price into his hands, and as he got it by fraud he is bound to pay it back, unless something has happened to oust the right of the corporation. The damage to the corporation is clearly the 1s. per ton out of which they have been cheated, neither more nor less. The form of the action, on which some stress has been laid in the argument, is immaterial. Unless something has happened to oust the right of the corporation, they are entitled to sue the defendant for the 1s. a ton in one form of action or another, although he has parted with the money and has handed it over to his confederate, Hunter, because it was once in his hands and he is liable for the fraud to which he was thus a party.

* * * It signifies not what it may be called—whether damages or money had and received—the foundation of the claim of the principal is that there is a separate and distinct fraud by his agent upon him, and therefore he is entitled to recover from the agent the sum which he has received. But does this prevent the principal from suing the third person also, if he has been fraudulent, because of his fraud? It has been settled that if the principal brings an action against the third person first, he can not set up the defense that the action can not be maintained against him because the thing was done through the agent and the principal was entitled to sue the agent. What difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds—the one in his

character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received.

Lindley, L. J., who was of the same opinion, said in part:

The corporation had a separate cause of action against each of them and not one cause of action against both or either of them. No doubt, according to well-settled principles of law, if the plaintiffs had released Hunter from the demand, to which he had become jointly and severally liable with Lever, that release would have inured to the benefit of Lever. But there is nothing of that kind in the agreement.

Lopes, L. J., was also of opinion that the rights of action against Lever and Hunter were entirely independent of each other:

The right against Hunter is to recover the secret bribe which he has received, and it is founded on his fraud in regard to that bribe. The right against Lever is to recover the excess of price which he obtained through his fraud—a fraud, no doubt, in conjunction with Hunter, but an entirely separate and distinct fraud from that in respect of which the action against Hunter would be brought.

Lister & Co., spinners, dyers, and manufacturers at Bradford, permitted one Stubbs, who was their foreman dyer, to purchase dyestuffs for them at market prices. Stubbs placed orders for large quantities of goods with Varley & Co., drysalters, from whom he received, in consideration of these orders and without the knowledge of his employers, large sums by way of commission. It was alleged that the money so paid to Stubbs amounted in the course of about nine years to £5,541 5s. 4d., of which a large amount had been invested in realty. Lister & Co., on discovering that secret commissions had been received, sought to follow them into the investments thereof, and brought an action against Stubbs, claiming among other things (1) the £5,541 5s. 4d., (2) damages, and (3) the necessary accounts and inquiries as to the profits making up the sum mentioned and all other secret commissions, with interest. The plaintiffs then moved for an interlocutory injunction to restrain the defendant from dealing with the real estate in which a portion of the money had been invested and for an order directing him to bring the other investments and cash into court. It was held that the relation between the defendant and plaintiffs was that of debtor and creditor and not that of trustee and cestui que trust, and that the plaintiffs were not entitled to the order.

With respect to the recovery of the money, Stirling, J., observed:

I need not say that a more gross breach of duty it is impossible to conceive, if that be the true state of the facts; and there can not be a question that, if that be established, the defendant is liable to account to the plaintiffs for every penny which he has so wrongfully received from Messrs. Varley.

In the court of appeal Lindley, L. J., said, in part:

Then comes the question, as between Lister & Co. and Stubbs, whether Stubbs can keep the money he has received without accounting for it. Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to Messrs. Lister & Co., with or without interest, as the case may be.[1]

In 1896 Oetzmann & Co. sought to recover overcharges made on cutlery supplied to them by Long & Co. and to recover commissions which had been improperly paid by the latter firm to the plaintiffs' buyer. According to the report, the Lord Chief Justice[2] expressed the opinion that "these corrupt bargains were malignant cankers"; that "it was a system dishonest to the fair trader, dishonest to the fair employer"; that "if the evil continued to exist as it had existed in the past, the legislature must take measures to cut out the canker"; and that "it was unnecessary to point out how the evils worked; they operated to the detriment of the honest trader, who was above such nefarious practices."[3] It was proved that the wholesale buyer was regularly paid by the manufacturer, and in this way only were orders secured.[4] Judgment was entered, but the case stood over with a view to the parties arriving at a settlement in regard to the figures, in order to obviate a further inquiry.[5]

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[1] Lister & Co. *v.* Stubbs, L. R. (1890), 45 Ch. Div. 1, 15. Cf. U. S. *v.* Carter, p. 211. The prevalence of this practice in the sale of dyes is indicated by the following excerpts from a report of a special committee of the London Chamber of Commerce:

"It would not be too much to say that there are firms of very prosperous drysalters whose every account depends on bribery. It so permeates the trade that we can not stop it. Dyes which are worse than useless are palmed upon the manufacturer to make up a respectable bribe to the men."

"I saw at once that unless I bribed the dyers I could do little or nothing. Dyers simply take the one they are paid secretly the most to use. Dyers, I hear, have 3d. per bag (1 hundredweight) off logwood. Anyone who omits this can not sell logwood. I know two honest men driven out of the trade. * * * I had several vats I was trying for manufacturers deliberately spoilt because I would not bribe the men."—Report from the Special Committee on Secret Commissions to the Council of London Chamber of Commerce (July, 1898), p. 8.

[2] Lord Russell of Killowen.

[3] Oetzmann & Co. *v.* Long & Co., London Times, July 7, 1896, pp. 2–3.

[4] Statement of Lord Russell of Killowen, Parliamentary Debates, Apr. 20, 1899, p. 20.

[5] The benefits derived from the enforcement of this civil remedy are indicated by the following excerpt from a statement made by Mr. Oetzmann, plaintiff in the above case:

"My firm have had some experience in recovering sums of money from manufacturers and others. The most notorious case we had was Oetzmann *v.* Long. We had, however, found out others before that case. We compromised one case, in which we recovered about £15, sums paid to our then late buyer. In Long's case we recovered about £120 and a considerable sum more as damages and costs. After Long's case we took up one or two others, in one of which we got £120 before the issue of the writ, and in the other case we received £300 after the issue of the writ, with full costs, but that does not represent anything like the benefit we have received. We have benefited immensely by being able to buy cheaper. Immediately after Long's case we had many manufacturers calling upon us, some of whom we knew before, others of whom were more or less unknown, but who all said, now there is a chance of their doing business with us."—Report form the Special Committee on Secret Commissions to the Council of the London Chamber of Commerce (July, 1898), p. 5.

In Hovenden & Sons *v.* Millhoff,[1] it appeared that during a period of 12 years the plaintiffs had purchased from the defendant tobacco amounting in value to some £28,000. In 1899 they discovered that the defendant had been in the habit of paying to their agents 2½ per cent of the invoice price of the goods sold to them. These bribes had, in fact, been paid by the defendant to the plaintiffs' agents without the knowledge of the plaintiffs, who had no idea that they were including this 2½ per cent in the price of the goods. As soon as they discovered the facts the plaintiffs sought to recover the amount of secret commissions wrongfully paid by the defendant to the plaintiffs' servants or agents, the return of moneys overcharged in respect of goods sold and delivered, an accounting, and damages for conspiracy. A statement of claim was delivered alleging conspiracy to defraud, and alternatively claiming the amount of the bribes as money had and received. The conspiracy was negatived by the jury, which found that the prices paid were not in fact excessive, that the payments had an effect on the minds of the buyers in favor of the defendant in inducing them to give orders for the goods and to pay the stipulated prices, and that the damages amounted to 1 farthing. The trial judge, considering that the case presented by the plaintiffs was substantially one of conspiracy, that upon that charge they had failed, and that they had secured only a technical victory on the minor part of the case, gave judgment for the defendant. The plaintiffs moved for judgment or a new trial. As stated by the court of appeal, the question was whether the amount of the bribes paid by the defendant to the plaintiffs' agents without the knowledge of the plaintiffs could or could not be recovered by the plaintiffs from the defendant. The court, by Smith, L. J., said, in part:

> * * * It seems to me clear from the judgments in Corporation of Salford *v.* Lever[2] and in Grant *v.* Gold Exploration and Development Syndicate[3] that inasmuch as the amount of the bribes has been quantified it can be recovered as money had and received. At the trial the jury found that bribes were given by the defendant to the plaintiffs' agents, and that the damages, notwithstanding this, amount to 1 farthing. That is an absurd verdict. If a vendor bribes a purchaser's agent, of course, the purchase money is loaded by the amount of the bribe. It can not be denied. In this case the purchase money was £28,000, in which was included the £700 given to the purchasers' agents. Of course the vendor would have sold the goods for £28,000 less £700. Therefore he has in his pocket £700, money of the purchasers. That £700 he must disgorge. That is the cause of action here. When a purchaser finds out this state of things he may call upon his agent or the vendor to disgorge. In Corporation of Salford *v.* Lever (ubi sup.) the master of the rolls said: "The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received." When it was

[1] 83 Law Times Reps., 41, 42, 43 (1900).
[2] P. 213.
[3] L. R. (1900), 1 Q. B. 233.

proved at the trial that the bribes had been paid, the direction to the jury ought to have been that the amount which could be recovered as money had and received was the amount of the bribes. But instead of so directing the jury the learned judge left to them the amount to be recovered. They found 1 farthing. That verdict can not stand. The learned judge, instead of entering judgment for the defendant, ought to have directed the jury that the plaintiffs were entitled to judgment for £700.

By Romer, L. J.:

The courts of law in this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on the subject. But some persons undoubtedly hold laxer views. Not that these persons like the ugly word "bribe" or would excuse the giving of a bribe if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favor of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favor of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality, the assumption should be held an irrebuttable one; but we need not finally decide this, because in the present case there is nothing to rebut the presumption."

Judgment was given for the plaintiffs.

The same method of doing business was disclosed in the record of Cohen *v.* Kuschke & Co. and Koenig,[1] decided about the same time in the Queen's bench division. In this case the plaintiff sought to recover £38, a sum paid as a secret commission by Kuschke & Co. to the defendant Koenig, who was the plaintiff's buyer. It was not disputed at the trial that the sum of £38 was paid, but the question was whether it was a sum paid in pursuance of a bargain made by Koenig for the purchase from Kuschke & Co. of 32 bales of tobacco or was a mere

[1] 16 Times Law Reps., 489 (1900).

gratuity paid to Koenig as a "Christmas box" or present. The court left to the jury the question whether a term of the bargain was a promise to pay Koenig 3d. in the pound by way of secret commission, and whether the payment was made in pursuance of such promise. They answered in the affirmative, and judgment was thereupon entered for the plaintiff against Koenig. The question then arose whether the plaintiff was entitled to judgment against the defendants Kuschke & Co. They contended that as there was no evidence that the price of the 32 bales had been enhanced by the amount of the commission they were not liable. With respect to this the court, by Mr. Justice Bruce, said in part:

* * * I can not agree with that contention. It is clear that Kuschke & Co. knew perfectly well that Koenig was the plaintiff's agent and was buying the 32 bales for him; and it is quite clear from the evidence of the defendants that the money paid to Koenig was paid to him with the intention that he should have the benefit of it. * * * By the finding of the jury Kuschke & Co. did pay this money to Koenig as a secret commission, and in those circumstances I think it matters not whether a different price would have obtained had there been no bargain for a commission. In this sale it was a term—it entered into the bargain—that a sum of money which was part of the apparent or pretended price of the goods was to be paid over to Koenig for his own use. That money was in law not Koenig's money, but it was the money of the plaintiff. And if the defendants Kuschke & Co. paid over to Koenig, with knowledge of the circumstances, money which was the plaintiff's money, intending that Koenig should keep it for his own use and that the plaintiff should be kept in ignorance of the payment, I think they are liable to the plaintiff for the amount. The plaintiff can not, of course, recover the money twice over, but he is entitled to recover it against either or both of the defendants, and he is entitled to judgment against Kuschke & Co. for £38 and costs.[1]

Section 15. Competing with purchaser after the sale of business and good will.

Not infrequently purchases have been made of an established business or of the practice of a professional man without any express covenant by the vendor not to compete in a like business or profession with the vendee. In such cases the vendor has sometimes set up a competing business, and the courts have been called upon to determine how far, if at all, the vendee is entitled to be protected from the competition thus thrust upon him. The American courts are not agreed as to what is necessary to protect the good will, but in the

[1] See also Rex *v.* Whitaker, L. R. (1914), 3 K. B., 1283, 1294, where the commanding officer of a regiment was found guilty of bribery and of conspiracy to bribe. It appeared that representatives of Lipton (Ltd.), a firm of caterers, had paid the appellant to induce him to show them favor in relation to certain contracts. Lawrence, J., observed: "It was in evidence that canteen contractors were minded, when they got the opportunity, to pay money in the shape of bribes to persons who had influence in selecting contractors. This has been called a practice. The evidence, however, does not warrant that term, although there is sufficient to show that the commercial morality of canteen contractors is on a low plane. In order to secure the position they are not above paying sums of money to those who have the disposal of it."

absence of an express covenant the courts, as a rule, appear reluctant to imply a covenant that the vendor will not go back into the same business in competition with the vendee.

Definitions of good-will.—Good will was early defined by Lord Eldon as follows:

> The good will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.[1]

The English courts have recognized in late years that this definition is entirely too narrow to cover good will under changed commercial conditions. Lord Herschell said of this definition:

> If the language of Lord Eldon is to be taken as a definition of good will of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition.[2]

And Lord Macnaghton said:

> Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in Cruttwell *v.* Lye. * * * Often it happens that the good will is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.[3]

Wood, Vice Chancellor, in Churton *v.* Douglas,[4] said:

> Good will, I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

The Supreme Court of Wisconsin, in Rowell *v.* Rowell,[5] observed:

> Just what "good will" includes is not easy of definition. Nay, it varies with the customs of the general trade and the character or methods of the particular business. An early definition by Lord Eldon is "the probability that the old customers will resort to the old place." This involved the ancient idea that good will inhered in the premises where the business was conducted, which has some justification when considering an inn, tavern, or theater, as in most of the early cases. This, however, is too limited for modern kinds or methods of business. The habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many things besides place. Confidence in the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a designating name for the product, and probably many other cir-

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[1] Cruttwell *v.* Lye, 17 Vesey, 335, 346 (1810).
[2] Trego *v.* Hunt, L. R. (1896), A. C., 7, 17.
[3] Trego *v.* Hunt (1896), A. C., 7, 23, 24.
[4] Johnson, 174, 188 (1859).
[5] 122 Wis. 1, 17 (1904).

cumstances, might be mentioned as illustrative. The good will is a sort of beaten pathway from the seller to the buyer, usually established and made easy of passage by years of effort and expense in advertising, solicitation, and recommendation by traveling agents, exhibition tests or displays of goods, often by acquaintance with local dealers who enjoy confidence of their own neighbors, and the like.

AMERICAN DECISIONS.

THE GENERAL RULE WITH RESPECT TO REENTERING BUSINESS.—The general rule is that the vendor of a business, including the good will thereof, may, in the absence of express contract to the contrary, reenter the same line of business in the same locality and actively compete with the purchaser of his old business.

Cottrell and Babcock were partners engaged in the manufacture and sale of printing presses at Stonington, Conn. The copartnership was dissolved by mutual consent, Babcock selling all his right, title, and interest in the assets, including the good will, to Cottrell. Cottrell and his son subsequently conducted the business under the name of C. B. Cottrell & Co. Shortly afterwards Babcock, together with others, organized a corporation known as the Babcock Printing Press Manufacturing Co., to engage in the same line of business at New London, Conn., several of the former employees of Cottrell & Babcock being connected with the corporation; and by advertisement and personal letters and the personal solicitation of Babcock himself, sought to secure the business of patrons of the old firm of Cottrell & Babcock. The Cottrell company filed a bill seeking to prevent the Babcock Printing Press Manufacturing Co. from making, selling, or advertising a certain kind of printing press and from using a certain trade name or trade-mark. The case turned principally upon the question whether the cards and advertisements of the new corporation were such as to lead customers into thinking that it was the same as the old firm of Cottrell & Babcock or the successor to that firm. In discussing the right of Babcock to set up a competing business after the sale of the good will of the old business to his former partner, the court said in part:

By purchasing the good will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more he should have secured it by positive agreement. * * * At any rate, the express contract is the measure of his right; and since that conveys a good will in terms but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him.[1] * * *

One Trowbridge had been one of the members of a partnership engaged in the manufacture and sale of chocolate chips designated by a trade-mark as "Trowbridge's Original Chocolate Chips." He sold all his interest in the firm, including good will, to the other partners, and shortly afterwards began the manufacture of a similar kind of confectionery, using labels, advertisements, etc., which, it was alleged, so closely resembled those of the old firm that the latter's customers might be misled. The firm therefore filed its bill, seeking to restrain Trowbridge from using these trade-marks. The report of the case does not set out all of the particulars of the bill, but the opinion states that counsel contended that by the transfer of his interest in the good will of the business Trowbridge had precluded himself from entering into a similar business in the same town in competition with the old firm. Concerning this the appellate court said in part:

The position is wholly untenable. * * * In the present case the contract for the sale of defendant's interest in the business was in writing, and we do not find in it anything which can be construed into an agreement by the defendant to refrain from engaging in a similar business under his own name.

An agreement to retire from business and not to resume it again is in restraint of trade, and can not rest upon mere inference.[2] So long as the defendant does not attempt to sell his goods as those of the old firm, or represent that his business is a continuation of the old firm, he is at liberty to engage under his own name, honestly and in good faith, in the same line of business and in the same locality.[3]

One Knoedler had been the manager of the New York branch of the Paris firm of Goupil & Co., and later bought the New York business, including the good will. The relations between the two firms were friendly, and Knoedler designated his business "Former House, Goupil & Co., M. Knoedler," and frequently with the knowledge of the Paris firm, used the name "Goupil & Co." only. Later Mr. Goupil retired, and his partners opened a branch house in New York, using the name "Goupil & Co., of Paris; Boussod, Valadon & Co., Successors." On Knoedler's seeking an injunction the court held that the Paris firm could open a branch in New York and advertise under the name and style set forth above. The following is from the opinion of the court:

It is elementary law that the sale of a business and its good will does not imply a promise on the part of the vendor not to engage thereafter in a similar business; and the authorities agree that, in the absence of express or implied conditions in the contract of sale to the contrary, the vendor is at liberty to set up a similar business in the same locality and use his own name in carrying

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[1] Cottrell *v.* Babcock Printing Press Co., 54 Conn., 122, 138 (1886).

[2] Hall's Appeal, 60 Pa. St., 458.

[3] White *v.* Trowbridge, 216 Pa. St., 11, 19, 20 (1906).

it on. The good will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor. Any conduct on the part of a vendor of a good will calculated to impair the value of these advantages is a breach of the promise, implied in sales of every description, that the vendor will not disturb the vendee in the enjoyment of his purchase.[1]

Regarding the right of a vendor merely to establish a competing business, the decisions of a number of courts, State and Federal, are in accord with those set forth above.[2]

THE MASSACHUSETTS RULE.—The Massachusetts courts, however, have held in a number of cases that the vendor may not set up a competing business. The rule in that State in such cases is that a covenant is implied that the vendor will not establish a similar business if by so doing he derogates from the grant made by the sale of the good will. Under this rule it is a question to be determined, on the facts of each particular case, whether the new business does derogate from the good will sold to the plaintiff. The rule is thus stated in a recent decision of the Massachusetts Supreme Court:

In each case where the good will of a business is sold and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale.[3]

And again the same court says:

* * * In Massachusetts no competing business can be set up if it derogates from the grant of the good will of the old business.[4]

While the courts have held under this rule that, having regard to the facts in a given case, the vendor may set up in the same line of business, they require clear proof that the vendor is not depriving his vendee of the good will which he purchased. In a very large percentage of the more recent cases the decision has been in favor of the complainant seeking to be protected from the competition of the person or corporation from whom a business has been purchased.

Henry Upham had been connected with a bookstore in Boston, either in the capacity of clerk or as a member of the firm, for more than 30 years. The store had a department devoted to books used by or in connection with the Episcopal Church. Upham was himself

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1 Knoedler et al. *v.* Boussod et al., 47 Fed., 465, 466 (C. C., 1891); affirmed, 55 Fed., 895 (C. C. A., 1893).

2 Ranft *v.* Reimers, 200 Ill., 386 (1902); Williams *v.* Farrand, 88 Mich., 473 (1891); Von Bremen *v.* MacMonnies, 200 N. Y., 41 (1910); Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq., 185 (Ct. of Errors and Appeals, 1912); Faust *v.* Rohr, 81 S. E., 1096 (N. C. Sup. Ct., 1914); Wessell et al. *v.* Havens et al., 91 Nebr., 426 (1912); Hoxie *v.* Cheney, 143 Mass., 592 (1887).

3 Old Corner Bookstore *v.* Upham et al., 194 Mass., 101, 105 (1907).

4 Marshall Engine Co. *v.* New Marshall Engine Co. and another, 203 Mass., 410, 422 (1909).

an Episcopalian, actively and prominently identified with the church and organizations of its members, such as societies and clubs. In October, 1902, he sold all of his interest in the store, including the good will, to his partner, and the following month the latter organized a corporation which took over and conducted the business under the name of the "Old Corner Bookstore." In 1905 Upham, together with a number of other Episcopalians, some of them customers of the complainant, organized a corporation to carry on a book business in competition with the Old Corner Bookstore. Thereupon the latter instituted suit to restrain Upham from conducting a competing business. The bill was dismissed by the lower court, but on appeal this ruling was reversed, the court holding that the plaintiff was entitled to an injunction restraining Upham from working for, holding stock in, or otherwise being connected, directly or indirectly, with the competing business. The appellate court thus summarized some of the facts upon which it based the opinion that to permit Upham to continue the business would be in derogation of his grant:

> The good will sold included the good will of a department carried on for at least 36 years, and for the last 30 years under the immediate personal direction and control of the defendant Upham; and that department was a department for the sale of books used in. and in connection with, the Episcopal Church, and was the most prominent department or store for the sale of such books in Boston during that period. The business, it should be remarked, had a limited class of customers, for the customers are of necessity limited to those belonging to or interested in the Episcopal Church. The defendant under whose direction this department in the old business was conducted was and is prominent in and among Episcopalians. It was under these circumstances that this defendant sold the good will of the business which included that department. * * *
>
> The new business is primarily to sell church books to Episcopal Church people. It was started at the solicitation of the defendant Upham, who is prominent in Episcopal Church circles. Its stockholders are all of them men of the Episcopal Church, and its store is within five minutes' walk of the plaintiff's store.[1]

In a subsequent case it appeared that the complainant conducted a rubber-goods business in London, England, acting as exclusive sales agent for the defendant, the Boston Rubber Shoe Co. The defendant terminated the agreement and purchased the business as carried on by the complainant, including the leasehold, good will, etc., taking an assignment therefor. The defendant accounted to the complainant for everything contained in the assignment except the good will, which the defendant refused to consider. The complainant, therefore, filed a bill for an accounting of the value of the good will. A decree was entered for the complainant, which was affirmed on

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[1] Old Corner Bookstore *v.* Upham et al., 194 Mass., 101, 105 (1907).

appeal, the court sustaining the lower court in the conclusion that the personal knowledge of a sales agent located at a commercial center, his experience in a particular business, his acquaintance with probable purchasers, etc., amounted to a good will which might have been used effectually in competition with the defendant; that, having sold it to the defendant, the complainant could not so use it, and therefore should be compensated for it.[1]

The Marshall Engine Co. took an assignment from one Marshall of a certain patent and the good will of the business of manufacturing and selling engines used to reduce pulp to paper, together with the trade names connected with the business. Subsequently Marshall caused to be incorporated the New Marshall Engine Co., in which he held all but one share of the common stock, and proceeded to manufacture and sell engines similar to those of the old company, and to repair old engines made by it. The receivers of the Marshall Engine Co. brought suit to protect the rights which the company had acquired as assignee of the good will. An injunction was granted restraining the defendant Marshall from manufacturing, selling, or repairing engines similar to those of the complainant. The following is taken from the opinion of the appellate court:

> If the decree below is to stand, it must stand on the ground that the business set up by Marshall under the name of the New Marshall Engine Co. does in fact derogate from the grant made by him in the sale to the plaintiff of the good will of the business sold by him to it. * * *
>
> The good will of the business of selling engines to reduce pulp to paper is manifestly one not dependent on the place where it is carried on. A paper manufacturer is not concerned where he buys his machinery. What he wants is the best-made machine at the cheapest price. * * * We can not doubt that the business set up by the defendant is a competing business which injures the rights bought by the plaintiff when it bought the good will of Marshall's business.[2]

In this case the Massachusetts court granted an injunction restraining the defendant from engaging in a competing business without any limit as to either time or space, and this where there was no express covenant not to engage in a competing business.

But where the defendant had sold out an insurance business, including the good will, to the plaintiff, the same court held that what had been sold was sufficiently protected by enjoining the defendant from soliciting insurance from the former customers of the vendor and that the defendant would not be enjoined from again engaging in the insurance business.[3]

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[1] Gordon *v.* Knott, 199 Mass., 173 (1908); see also Foss et al. *v.* Roby, 195 Mass., 292 (1907).

[2] Marshall Engine Co. *v.* New Marshall Engine Co. and another, 203 Mass., 410, 420, 423, 424 (1909).

[3] Fairfield *v.* Lowry et al., 207 Mass., 352 (1911).

Exceptions to the rule that the vendor may reenter the business.—While, as stated above, the general rule in other States than Massachusetts is that a vendor may reenter the business in competition with the vendee, the professions and certain lines of business appear to be in the nature of an exception to this rule. The courts regard the good will of an established profession as based almost entirely on the ability, character, and personality of the practitioner, and, where a practice has been disposed of, have restrained the vendor from again entering the field in competition with the purchaser. In certain lines of business, such as milk routes and newspaper routes, only a small percentage of the business is done at any established office or store; the business is built up in the first instance by personal solicitation, and thereafter it comes to the customer as opposed to his seeking his requirements at an established place of business. In such cases the good will obviously can not consist of the probability that the customer will return to the usual place for his requirements, and the courts have held that the vendor of a business of this character may not solicit business from the old customers.

Foss & Roby, dentists, practiced as partners in Boston, Mass. The latter sold his interest in the practice, including the good will, to Foss, who subsequently sold a half interest to one Marston. Later Foss was declared a bankrupt and his interest sold to one Briggs, who immediately sold it back to Foss. Roby afterwards opened up a dental office in Boston and sent out circulars announcing the fact to his old patients. Foss and his partner thereupon instituted suit, praying an injunction restraining Roby from practicing dentistry in Boston, and damages. Judgment in the lower court was for defendant, but upon appeal the Supreme Judicial Court of Massachusetts reversed the judgment, holding that the complainants were entitled (1) to an injunction to restrain the defendant from practicing dentistry in the city of Boston, and (2) to damages if it were shown that the larger part of the defendant's present practice had been derived from former patients of the old firm. The following is an excerpt from the opinion of the appellate court:

> In a mercantile partnership the sale of the good will conveys an interest in a commercial business, the trade of which may be largely, if not wholly, dependent upon locality, and the right which the vendee acquires under such a purchase is the chance of being able to retain the trade connected with the business where it has been conducted. * * * But in a partnership for the practice of dentistry the personal qualities of integrity, professional skill, and ability attach to and follow the person, not the place.[1]

Teresa E. Brown, surgeon chiropodist, sold her business in the city of Baltimore, together with the good will thereof, to Mary C. Benzinger. There was no express covenant that the vendor would not re-

[1] Foss *v.* Roby, 195 Mass., 292, 297 (1907).

enter the business or profession in Baltimore, but the evidence was to the effect that she had stated that she was going to leave the city and give up the business. Shortly after the sale was consummated the vendor returned to Baltimore and engaged in competition with the purchaser, soliciting the patronage of her former patients. Suit was instituted by the vendee, and the Maryland court of appeals was of the opinion that the complainant was entitled to an injunction restraining the defendant from practicing in the locality over which the complainant's practice extended and from soliciting her former patients. The appellate court said in part:

> In some jurisdictions, however, a distinction is made, in the application of the law, between the sale of the good will of a trade or business of a commercial character where the location is an important feature of the business, and the sale of an established practice and good will of a person engaged in a profession or calling where the income therefrom is the immediate or direct result of his labor and skill and where integrity, skill, ability, and other desirable personal qualities follow the person and not the place. In the first of these sales the principle laid down [1] applies, while in the latter it does not.[2]

A number of other decisions sustain the principle set out in the above cases.[3]

As instances of injunctions restraining the vendor from reentering certain lines of business, such as newspaper routes and milk routes, may be cited Wentzel *v.* Barbin [4] and Snyder Pasteurized Milk Co. *v.* Burton.[5]

In the first of these cases the plaintiff had purchased from defendant all his right, title, and good will in a newspaper route. Within a month after the sale the vendor began to call upon the subscribers on the route with a view to inducing them not to take papers from the plaintiff but to take them again from him. In a suit by the purchaser of the route for breach of contract of sale the Supreme Court of Pennsylvania held that the defendant could not seek to secure again the business which he had sold for a valuable consideration. The opinion is very brief, and is as follows:

> When the defendant agreed to sell to the plaintiff "all his right, title, and good will to the Oakland paper route, until now controlled by the said R. M. Barbin," he became bound in honor and in law to carry out his contract in good faith. He was certainly not at liberty, especially after receiving a large part of the purchase money, to filch away from the plaintiff the veritable sub-

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[1] That in the absence of an express covenant the vendor of a business can enter a similar business in competition with the vendee.

[2] Brown *v.* Benzinger, 118 Md., 29, 36 (1912).

[3] Yeakley *v.* Gaston, 111 S. W., 768 (Texas Ct. of Civil Appeals, 1908); Dwight *v.* Hamilton, 113 Mass., 175 (1873); Townsend *v.* Hurst, 37 Miss., 679 (1859); Warfield *v.* Booth, 33 Md., 63 (1870).

[4] 189 Pa. St., 502 (1899).

[5] 80 N. J. Eq., 185 (Ct. of Errors and Appeals, 1912).

stance of that which he had sold. It was not like a setting up of another business of the same kind, but it was the taking away of the very thing he had sold that was complained of by the plaintiff.

In Snyder Pasteurized Milk Co. *v.* Burton,[1] the plaintiff had purchased from the defendant the personal property used by him in carrying on a milk business, together with the good will of the business. Later he engaged in a competing business owned either by himself or his wife and solicited and secured the patronage of his old customers. An injunction was granted restraining the defendant from soliciting the customers of the complainant and from serving any such customers whose business had been secured by solicitation.

Right of the vendor to solicit his former customers.—While with the exceptions already noted, the vendor may set up a similar business in the same vicinity, in most jurisdictions the courts will not permit him to solicit the patronage of his former customers, and thus actively to depreciate the good will he has sold.

One of the partners in a firm which conducted an importing and commission business in fancy groceries purchased the interest of the other partners in the assets, good will, trade-marks, etc. Shortly thereafter the vendors formed a new partnership for the transaction of a similar business in competition with the old concern. In an action to restrain certain acts of the vendors which it was alleged tended to destroy the good will which the plaintiff had purchased, the New York court of appeals held that the plaintiff was entitled to an injunction restraining the defendants from soliciting the trade of any customers of the old firm.[2]

A person engaged in manufacturing and selling soft drinks, and bottling and selling beer, sold the entire business, including the trade and good will, and shortly afterwards embarked upon a similar business within 600 feet of the old establishment. In a suit by the purchaser of the old business the court enjoined the vendor from, among other things, soliciting the custom of those who were patrons of the business at the time of the sale.[3]

The Acker, Merrall & Condit Co. purchased from one McGaw a grocery and cigar business in Baltimore, McGaw agreeing to serve the company for three years and to use his influence to induce the old employees to remain with the new company. Before the expiration of the three years he, with two other employees, formed a competing company and solicited trade from the customers of the Acker company. The Federal circuit court granted an injunction restraining not only McGaw but the newly formed company as well from

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[1] 80 N. J. Eq., 185 (Ct. of Errors and Appeals, 1912).
[2] Von Bremen *v.* Macmonnies et al., 200 N. Y., 41 (1910).
[3] Ranft *v.* Reimers, 200 Ill., 386 (1902).

soliciting trade from the customers of the Acker company, the court saying, in part:

It would be a reproach to the law if no adequate remedy could be afforded for the protection of a property so valuable as such a good will against the attacks of the vendor who had sold it and who afterwards attempts to regain it to the damage of his vendee.

As the continued patronage of the customers of such a business is what makes the good will of value, and as it is utterly repugnant to the contract by which it was assigned that the vendor should be allowed to seek to regain it by soliciting the customers to come back to him, and as the damage thus inflicted is irreparable and is difficult, if not impossible, in such a business as this to compute, I think a court of equity should not hesitate to grant a remedy by injunction.[1]

A similar ruling as to solicitation was made in Myers *v.* Tuttle.[2]

One George Althen purchased the business and good will of Melford & Vreeland, cracker and biscuit bakers in Newark, N. J., the vendors agreeing not to engage in a similar business within 1,000 miles of Newark without the written consent of Althen. Later they engaged in a like business; and in a suit by Althen to restrain the violation of the covenant the court refused to enforce it on the ground that it was not shown that such a wide area was necessary, but held that an injunction should issue restraining the defendants from soliciting the trade of the old customers of the complainant.[3] Decisions in Maryland,[4] Massachusetts,[5] New Jersey,[6] and Rhode Island[7] are also to the effect that soliciting trade from those who were customers prior to the sale of the business will be enjoined. In at least one instance an injunction has been issued restraining the defendant not only from soliciting business from the former customers of the old firm but also from serving, or dealing with, such customers whose business had been secured by solicitation since the sale.[6]

Well-considered opinions in Connecticut,[8] Michigan,[9] and Wisconsin[10] hold, however, that the vendor of good will may not only set up a competing business but may personally and directly solicit the

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[1] Acker, Merrall & Condit Co. *v.* McGraw et al., 144 Fed., 864, 865 (C. C., 1906).

[2] 183 Fed., 235 (C. C., 1910).

[3] Althen *v.* Vreeland, 36 Atl., 479 (N. J. Ch., 1897).

[4] Brown *v.* Benzinger, 118 Md., 29 (1912).

[5] Foss *v.* Roby, 195 Mass., 292 (1907); Fairfield *v.* Lowry et al., 207 Mass., 352 (1911).

[6] Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq., 185 (Ct. of Errors and Apps., 1912).

[7] Zanturjian *v.* Boornazian, 25 R. I., 151 (1903).

[8] Cottrell *v.* Babcock Printing Press Co., 54 Conn., 122 (1886).

[9] Williams *v.* Farrand, 88 Mich., 473 (1891).

[10] Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis., 546 (1892).

trade of those who were customers of the business at the time of sale. Regarding the right of the vendor to solicit his former patrons the Supreme Court of Michigan said in part:

It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality—next door, if you please—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right.[1]

In Cottrell *v.* Babcock Printing Press Co.,[2] the facts of which are set forth above,[3] the court refused to limit the right of the retiring partner in any way to solicit the patronage of his former customers.

In those jurisdictions where the solicitation by the vendor of the patrons of the business which he has sold is enjoined, the courts have also restrained certain other acts by which the vendor sought to secure the trade of his former customers. Thus in an Illinois case the vendor of a business was restrained, on reentering the business in competition with the vendee, from procuring a telephone company to give her the telephone number previously used by the old establishment, the patrons of the business having been accustomed to send in a large part of their orders through this telephone number.[4] A similar ruling was made in Brown v. Benzinger[5] regarding the efforts of the vendor to secure the old telephone number; and the use of the cable address of the old firm was prohibited in Von Bremen *v.* MacMonnies.[6] In the latter case the use of a list of dealers compiled by the old firm was also enjoined. In Myers Co. *v.* Tuttle[7] the defendant was enjoined from using the subscription lists of the bankrupt corporation whose good will had been sold to the complainant and from simulating the letterheads, billheads, and papers of the bankrupt corporation.

ENGLISH DECISIONS.

The doctrine is well settled in England that the vendor of the good will of a business is at liberty, in the absence of express con-

[1] Williams v. Farrand, 88 Mich. 473 (1891).
[2] 54 Conn., 122 (1886).
[3] See p. 221.
[4] Ranft *v.* Reimers, 200 Ill., 386 (1902).
[5] 118 Md. 29 (1912).
[6] 200 N. Y., 41 (1910).
[7] 183 Fed., 235 (C. C., 1910).

tract, to set up a competing business.[1] There appears to be no decided case to the contrary; and the decisions of the Massachusetts courts prohibiting the vendor from setting up a competing business if, having regard to the facts in the particular case, it will derogate from the grant, have no parallel in the English decisions.

The general rule that the vendor may reenter the business and compete with the vendee is qualified by the further rule that, while he may do this, he will not be allowed privately, by letter, personally, or by traveler to solicit any person who was, prior to the disposition of the good will, a customer of the old firm. This limitation was clearly established for the first time in Labouchere *v.* Dawson.[2] In this case the defendant, Dawson, had been one of the partners in a brewery business conducted under the name of "Benjamin Dawson & Co." The complainant purchased the business, including the good will and the exclusive right to use the name "Benjamin Dawson & Co." in connection with the brewery business. Shortly after the sale Dawson entered the brewery business, giving out that the new business was a continuation of the old and soliciting by travelers and agents the old customers of Benjamin Dawson & Co. The bill contained several prayers for relief, but at the bar the relief sought was confined to restraining the defendant from soliciting the business of the complainant's customers. An injunction was granted, Lord Romilly, master of the rolls, saying in part:

> The sale of the business did not prevent him from carrying on the same business in the same place or at Burton, which is a considerable distance off. But the question is this, Was he entitled to solicit personally the customers of the old firm to come and deal with him? * * * I am of opinion that the principle of equity must prevail; that persons are not at liberty to depreciate the thing which they have sold. * * * I will specify what appears to me to be the rule in the present case, so far as it can be laid down. In the first place the new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the good will. Customers, it is true, may be affected by public advertisements and public circulars, but that does not in the slightest degree militate against the principle I have laid down.

This case was approved and upheld by the English courts until 1884,[3] when it was overruled by the court of appeal in Pearson *v.*

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[1] Labouchere *v.* Dawson, L. R. (1871), 13 Eq., 322; Trego *v.* Hunt, L. R. (1896), A. C. 7; Jennings *v.* Jennings, L. R. (1898), 1 Ch., 378; Gillingham *v.* Beddow, 69 L. J. Ch., 527 (1900).

[2] L. R. (1871), 13 Eq., 322, 324, 325.

[3] Ginesi *v.* Cooper, L. R. (1880), 14 Ch. Div., 596; Leggott *v.* Barrett, L. R. (1880), 15 Ch. 306; Mogford v. Courtenay, 45 L. T. (N. S.), 303 (1881).

Pearson[1] on the ground that it was wrongly decided, and furthermore, that it went much beyond any previously decided case. No case involving the question decided in Labouchere *v.* Dawson and Pearson *v.* Pearson appears to have reached the House of Lords until 1896, when, in Trego *v.* Hunt,[2] the principle established in the former case was approved and Pearson *v.* Pearson overruled. The plaintiff and defendant in Trego *v.* Hunt were members of a partnership manufacturing varnish and japan under the name of Tabor, Trego & Co. By the terms of the articles of partnership the good will was to remain the sole property of Anna Trego, one of the plaintiffs, when the partnership should be dissolved at the expiration of the seven-year period for which it was to continue. Just prior to the expiration of this period it was discovered that the defendant Hunt was having copied the firm's list of customers, with their addresses, businesses, etc., which he stated that he intended to use when the partnership expired in obtaining the patronage of these customers for himself. The complainant therefore instituted suit and moved for an injunction restraining the defendant from making copies of any part of the partnership books for purposes other than those of the partnership business. The injunction was refused by the court of appeal[3] and an appeal was taken. The House of Lords, preliminary to an examination of the law involved in the case, stated that an injunction would be issued only if the canvassing by the respondent of the customers of the partnership would be a wrongful act. After a consideration of the adjudged cases the House of Lords decided that the respondent should not be permitted to solicit the customers of the partnership after its dissolution, and held that an injunction should issue restraining the respondent, his partners, servants, or agents from applying privately, by letter, personally, or by a traveler to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego & Co., asking such customer to continue after the dissolution to deal with him or not to deal with the appellants. Lord Herschell, in dealing with the argument that if, as was admitted, the vendor of the good will can set up a competing business, the line should not be drawn as to what the vendor could or could not do to attract the customers of the vendee, said:

I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers

[1] L. R. (1884), 27 Ch. Div., 145. [2] L. R. (1896), A. C., 7. [3] L. R. (1895), 1 Ch., 462.

of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the good will and an endeavor to destroy it. If the person who had previously been a partner in the firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the good will away from the persons to whom it has been sold and restore it to himself.[1]

There are expressions in the opinions of Lord Herschell, Lord Macnaghten, and Lord Davey in this case which indicate that they consider the protection given by merely restraining the solicitation of customers as inadequate to protect the good will, but they expressed the opinion that the right to reenter the business in direct competition with the vendee was so well established that it was too late to question it. A like opinion was expressed by Justice Farwell in the court of appeal in Curl Bros. *v.* Webster.[2] The decision in Trego *v.* Hunt has been closely adhered to by the English courts.[3] In Curl Bros. *v.* Webster, in the court of appeal, the injunction went slightly further than that in Trego *v.* Hunt, in that the defendant was restrained from soliciting anyone who was a customer of the plaintiff prior to the sale, though he had since traded with the defendant of his own initiative and not at defendant's solicitation.

The rule above stated denying the right to solicit does not apply after sales under bankruptcy proceedings or even in cases of voluntarily assignments for the benefit of creditors.[4]

The legal principle on which the injunctions have been issued by the English courts in this class of cases is variously expressed. Lord Macnaghten said that—

The principle on which Labouchere *v.* Dawson rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an

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[1] Trego *v.* Hunt, L. R. (1896), A. C., 7, 20.

[2] L. R. (1904), 1 Ch., 685.

[3] Jennings *v.* Jennings, L. R. (1898), 1 Ch., 378; Gillingham *v.* Beddow, 69 L. J. Ch., 527 (1900); Curl Bros. *v.* Webster, L. R. (1904), 1 Ch., 685.

[4] Walker *v.* Mottram, L. R. (1881), 19 Ch., 355; Green *v.* Morris, 110 L. T., 508 (1914).

implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different terms and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.[1]

In another place in the same decision Lord Herschell lays much stress on the fact that in such cases the vendor makes use of the knowledge of the vendee's business which he acquired while owning it, or while a partner therein, and it would be inequitable to permit him to use this knowledge in competition with the vendee.

He may, said Lord Macnaghten,

set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbor as a stranger and an outsider might do; but he may not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former business, moving under cover of a custom which is no longer his.

Lord Davey also grounded the decision in Trego *v.* Hunt, in part at least, on the use of information obtained through the respondent's connection as a partner with the appellant's business. He said in part:

I think that the principle on which the injunction asked for may be supported is that the defendant is availing himself of the knowledge of the connection formed by his old firm, which knowledge he acquired only as a member of that firm, to take away or depreciate the value of the good will or connection which he has contracted shall belong to the plaintiff.[1]

Section 16. Passing off the goods of one manufacturer or dealer as those of another.

AMERICAN DECISIONS.

This practice, commonly called in this country "unfair competition," has been so thoroughly treated in textbooks and reference works that only a brief résumé of the leading cases and established principles will be undertaken here.

While the term "unfair competition" is being gradually extended so as to include other unfair methods used to secure the trade of a rival, as generally used by the courts, it applies to cases where one attempts to palm off his merchandise or business as that of another. In England the equivalent term applied to this practice is "passing off." Many of the digests classify cases of this character under the general head of trade-marks, although the law governing trade-marks is really a branch of the broader doctrine of un-

[1] Trego *v.* Hunt, L. R. (1896), A. C., 7, 25.

fair competition. The principal and really the only well-defined distinction is that in the technical unfair competition cases no exclusive proprietary interest in the names or marks used is necessary to relief, while in trade-mark cases an exclusive right is necessary. Trade-marks are not defined in the act of February 20, 1905,[1] authorizing the registration of trade-marks, but section 2 of this act provides that a verified declaration stating that the applicant has an exclusive right to the particular mark sought to be registered, must accompany each application. That to entitle a name to equitable protection as a trade-mark the right to its use must be exclusive, is clearly shown in the decision of the Supreme Court of the United States in the case of Canal Co. *v.* Clark,[2] where the plaintiff canal company sought to have the name "Lackawanna," as applied to coal, protected as a trade-mark and was refused relief. That an exclusive right is not absolutely necessary in a suit based on unfair competition is shown in many decisions, both in the Federal and State courts. The Circuit Court for the Southern District of New York in 1895, in restraining a defendant from using the name Clark in connection with the manufacture of thread, said:

> * * * Where a party has for long years advertised his goods by a certain name so that they are distinguished in the market by that name the court will not permit a newcomer, by assuming that name, to destroy or impair an established business, even though others may have acquired the right to use the name legitimately.[3]

Similarly the circuit court of appeals, in holding that a manufacturing company could not fraudulently make use of the word "Minnesota" in connection with the manufacture of flour, said:

> It is hardly necessary to cite authority for the doctrine that in cases where the question is simply one of unfair competition in trade it is not essential there should be any exclusive or proprietary right in the words or labels used, in order to maintain the action.[4]

Another distinction is that in order to establish one's right to a trade-mark actual use with the intent to adopt the same is the test rather than the length of time used. In the class of cases under discussion it is necessary to prove that the mark or name has acquired a secondary meaning, which generally requires a showing of long-continued use. In a decision by the Supreme Court of Iowa, rendered October 23, 1914,[5] the court held that the complainant in order to be entitled to relief in a court of equity—

> * * * must show that, by continued use, the secondary meaning has become established in the public mind, and that his goods have become known and recog-

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[1] 33 U. S. Stat L., 724.
[2] 13 Wall., 311 (1871).
[3] Clark Thread Co. *v.* Armitage, 67 Fed., 896, 904 (1895).
[4] Pillsbury-Washburn Flour Mills *v.* Eagle, 86 Fed., 608 (1898).
[5] Motor Accessories Manufacturing Co. *v.* Marshalltown Motor Material Manufacturing Co., 149 N. W., 184, 187 (Iowa, 1914).

nized by the public under the name, device, or symbol, with its secondary meaning. The secondary meaning only comes from use. Before the courts will afford protection in its use it must be shown that, as to the party complaining, it has a secondary meaning in the public mind; that it designates and is understood to represent the goods of the party complaining, so that one appropriating it and using it, after such meaning had attached, would be in a position to practice a fraud upon the complainant and upon the public.

Another distinction frequently drawn by the courts is that while fraudulent intent need not be proved in trade-mark cases, it must be proved directly or by inference in all cases of unfair competition which do not involve a technical trade-mark. However, the courts are not uniform in holding that it is necessary that fraudulent intent be proved in order to obtain an injunction against unfair competition. The Supreme Court of the United States adheres to the rule that fraudulent intent is necessary. In 1890, through Chief Justice Fuller, it said:

* * * Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief.[1]

Again in 1900 this court, in the Elgin Watch case, said:

If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact or justify that inference from the inevitable consequences of the act complained of.[2]

This rule has been adopted and applied by the lower Federal courts with substantial unanimity.[3] A contrary view, however, prevails in a number of the State courts.

* * * The vital question—

The New Jersey court of chancery has said—

is not what did the defendant mean, but what has he done? * * * It is no less a dictate of justice than of sound reason that every person must be understood to have intended to do just what is the natural cousequence of his act

[1] Lawrence Manufacturing Co. *v.* Tennessee Manufacturing Co., 138 U. S., 537, 549 (1891).

[2] Elgin National Watch Co. *v.* Illinois Watch Case Co., 179 U. S., 665 (1900).

[3] Fairbank Co. *v.* Windsor, 124 Fed., 200 (1903); Samson Cordage Works *v.* Puritan Cordage Mills, 211 Fed., 603 (1914); Hires *v.* Villepigue, 196 Fed., 890 (1912); Lamont, Corliss & Co. *v.* Hershey, 140 Fed., 763; but see Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed., 357 (1902).

deliberately done. The aggrieved person, in cases of this class, is not required to show intentional fraud, but he makes a sufficient case to give him a right to protection when he shows that the defendant is using his label, or one so nearly like it as to render deception of public and injury to himself probable.[1]

In accordance with this reasoning the Supreme Court of Massachusetts in a recent case enjoined a defendant from selling his goods in imitation of the plaintiff's, although it appeared that he had acted innocently.[2] In the course of the opinion it was said:

* * * The wrong of unfair competition is present where goods are so dressed in form or marked by decorative symbols that the ultimate consumer, when the goods are distributed for use in the ordinary course of trade, either is or possibly may be deceived. The liability to deception being the test, it also is not necessary to show that specific buyers have been actually deceived or that the infringer did intend to deceive the public. He is bound to know the probable consequences where the means of such deception have been supplied by him.

To the same effect are Holmes, Booth & Haydens *v.* Holmes, Booth & Atwood Manufacturing Co., 37 Conn., 278 (1870); Hartzler *v.* Goshen Churn & Ladder Co., 104 N. E., 34 (Ind. App., 1914); Motor Accessories Manufacturing Co. *v.* Marshalltown Motor Material Manufacturing Co., 149 N. W., 184 (Iowa, 1914); Kansas Milling Co. *v.* Kansas Flour Mills Co., 133 Pac., 542 (Kans., 1913); Pratt's Appeal, 117 Pa. St., 401 (1888).

The basis of relief in all these cases is fraud. In some cases equity prevents such fraud on the ground that the confusion of goods results in injury to the plaintiff's business, and in others on the ground that the public should be protected from such deception. A case based on the ground first mentioned is McLean *v.* Fleming, decided in 1877.[3] There in affirming the decree of the lower court granting an injunction restraining the defendant from using a similar trade name the Supreme Court said:

Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good will of his trade and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same by using his labels and trade-mark without his consent and authority.

An example of relief granted partly on the ground that the public should be protected is the case of Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., decided in 1907.[4] In restraining the defendant

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[1] Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq., 164, 167 (1892).
[2] Foster Manufacturing Co. v. Cutler Tower Co., 97 N. E., 749 (Mass., 1912).
[3] 96 U. S., 245, 252.
[4] 151 Fed., 819, 833.

from using a similar tag on plug tobacco the Circuit Court for the Eastern District of Virginia said:

> The public as well as individuals is entitled to protection from those who by unfair means and methods seek to palm off an article which is not what it is represented to be.

While it is not necessary to show that the defendant's acts have resulted in actual deception, it must be shown that the natural and probable result is fraud. In a case decided in 1913 the District Court for the District of Massachusetts enjoined a manufacturer of door checks from using the word "Blount," although the evidence was conflicting as to whether the public was deceived. The labels, plates, and advertisements were introduced as evidence. The court said in part:

> Proof of actual deception is not necessary. The court may determine without it, from the exhibits themselves, whether deception will be the natural and probable result of their use.[1]

It is interesting to note in this connection that if the ultimate purchaser will probably be deceived as to the identity of an article, it is no defense that the retailer or immediate purchaser is not deceived by the manufacturer. Relief will be granted against the latter if it is shown that his purpose in selling to retailers was to defraud the public. In the case of Coca-Cola Co. *v.* Gay-Ola Co.,[2] decided by the circuit court of appeals for the sixth circuit in 1912, it appeared that the defendant manufacturer made no attempt to deceive the retailers of the product, but intended that the latter should substitute "Gay-Ola" for "Coca-Cola" in selling to consumers. Owing to the similarity of the products it was claimed that the consumers would not know the difference. The court in granting an injunction in this case said:

> * * * In a suit for unfair competition it is not necessary to show that the immediate purchasers were deceived as to the origin of the goods; but even if they thoroughly understand that they are buying the counterfeit, and not the genuine, the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer.[3]

On the other hand, a retailer or jobber may be enjoined from substituting the goods of one manufacturer for those of another, and it is immaterial whether the substitution is made at the instigation of

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[1] Yale & Towne Manufacturing Co. *v.* Worcester Manufacturing Co., 205 Fed., 952, 957.
[2] 200 Fed., 720, 722.
[3] See also Samson Cordage Works *v.* Puritan Cordage Mills, 211 Fed., 603; Wolf Bros. & Co. *v.* Hamilton-Brown Shoe Co., 206 Fed., 611.

the manufacturer or upon the initiative of the retailer. In the case of N. K. Fairbank Co. *v.* Dunn,[1] decided in 1903, the Circuit Court for the Northern District of New York issued an injunction pendente lite restraining the defendant, a retailer, from selling or delivering as Gold Dust that which was not Gold Dust. It appeared that the defendant advertised Gold Dust for sale at a price less than cost, and that on several occasions knowingly, willfully, and fraudulently handed out and delivered to his customers who called for Gold Dust another and inferior article known as Buffalo. District Judge Ray said in part:

> The acts complained of are unlawful. The defeudant has no right to deliver Buffalo when the customer calls for Gold Dust. The customer has the right to receive Gold Dust when he calls for it, and the seller purports to fill his order, without taking pains to examine the package delivered, and he is defrauded if an inferior article is substituted, even if the package bears a label showing it to be Buffalo and not Gold Dust.
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> The customer at a grocery is not compelled to inspect every package called for to see that he gets what he orders. * * * The merchant, by assuming to fill the order, represents that the goods put up and delivered are those ordered. The law is too well settled on this subject to require extended quotation. The manufacturer of an article placed upon the market for sale has the right to demand of the dealer who purports and advertises to sell it that he deliver his product when called for by the customer.

Another case in which the retailer was found to have deceived customers with respect to the identity of goods is that of Baker *v.* Slack,[2] decided by the circuit court of appeals for the seventh circuit in 1904. For a long time the defendant, a retail grocer, had handled and dealt extensively in the products of the older chocolate manufacturer, Walter Baker & Co. (Ltd.). Later he commenced to deal in the products of William Henry Baker, advertising such goods as Baker's chocolate and cocoa. There was evidence to show that customers asking for "Baker's cocoa" or "Baker's chocolate" were given William Henry Baker's goods, the profit on which to the retailer was a few cents a pound more. Also that the defendant's salesmen were instructed that when such goods were called for to say: "We have two Bakers. Which do you want, W. H. or Walter Baker?" Nine out of ten would ask for the best, and thereupon would be given W. H. Baker's goods. It was held that the complainant was entitled to an injunction restraining the defendant from advertising any product other than complainant's under the name of "Baker," or furnishing it in response to requests for "Baker's" goods, or in any manner using such name in con-

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[1] 126 Fed., 227, 228.
[2] 130 Fed., 514.

nection with other goods without clearly designating by whom such goods were made.[1]

Just what conduct amounts to unfair competition in the sense of passing off can best be shown by illustrative cases. Since the law of trade-marks is so well established and is in reality a branch of the law of unfair competition, trade-mark cases have not been used. The cases considered have been classified as follows:

Geographic or place names.
Company and trade names.
Personal names.
Descriptive and generic terms.
Dress of goods.
Dress of store.
Imitation of goods themselves.

Many of the cases on this subject fall into more than one of the above-mentioned classes. For example, the confusion of goods may have resulted from the similarity of the name used in conjunction with labels not unlike those used by the plaintiff. As was said by the Supreme Court in the case of McLean *v.* Fleming, previously referred to—

> Much must depend in every case upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection.[2]

GEOGRAPHIC OR PLACE NAMES.—Geographic names or names of places as a rule can be adopted by any one in connection with his business.

[1] For other cases in which retailers were enjoined from substituting other goods for those of a certain manufacturer, see Enoch Morgan's Sons Co. *v.* Wendover et al., 43 Fed., 420 (1890); Lever Bros. Boston Works *v.* Smith, 112 Fed., 998 (1902); American Fibre Chamois Co. *v.* Du Lee, 67 Fed., 329 (1895); Barnes *v.* Pierce, 164 Fed., 213 (1908); Gaines *v.* Whyte Wine Co., 81 S. W., 648 (Mo., 1904); and Millwood Distilling Co. *v.* Harper, 167 Fed., 389 (1909). But in Walter Baker & Co. *v.* Gray (192 Fed., 921), the circuit court of appeals for the eighth circuit in 1911 apparently makes the qualification that the substitution must be of goods so similar in dress, form, and pattern that the ordinary purchaser, by the exercise of reasonable care, will be unable to distinguish between them. In this case it was contended that the defendants, who kept the products of the plaintiff and of William H. Baker, of Syracuse, N. Y., for sale in their grocery store were guilty of unfair competition in handing out the latter company's product when "Baker's chocolate," without more, was called for by customers. The court held that inasmuch as the labels of the two products were so dissimilar in appearance that one could not be mistaken for the other by a purchaser of ordinary prudence, the defendant's acts in pushing the product upon which he made the most profit were not unlawful. The Supreme Court of the United States subsequently denied a petition for a writ of certiorari (223 U. S., 732 (1912).

[2] 96 U. S., 245.

This rule, however, is subject to the qualification that when such names have become so associated with the articles to which they are attached that their use by a competitor in connection with his articles would confuse the public the courts will protect the first user. So the Circuit Court for the Southern District of New York in 1899 protected a manufacturer in the use of the word "Waltham" in connection with the manufacture of watches.[1] The complainant in this case had manufactured watches at Waltham, Mass., for nearly 50 years. The defendant was the sole selling agent of the Columbia Watch Co., which, by the use of the name "Waltham" and a system of numbering, misled the public into buying its watches under the impression that they were buying the watches manufactured by the older firm. A decree was entered for an injunction and an accounting, the court holding "that such conduct is in violation of the law against unfair trade because intended to deceive and defraud the public and to deprive the complainant of the trade and good will to which it is entitled."[2]

Another illustrative case is that of Siegert *v.* Gandolfi et al., decided by the circuit court of appeals for the second circuit in 1906.[3] The action in this case was brought by the sons and successors of the original manufacturer of aromatic bitters which had become known as "Angostura Bitters," to restrain the defendants from selling a similar preparation, under the same name, which was manufactured at Baltimore, Md. The name "Angostura" was originally the name of the town in Venezuela where the product was first manufactured. The name of the town had since been changed and the plaintiffs no longer manufactured their product at that place. It was alleged that confusion in trade also resulted from the similarity of labels and bottles used. An injunction was granted restraining the defendants from using the word "Angostura" and from imitating the complainant's labels. The court said, in part:

> * * * When the name of a place or a locality has been so long applied as a descriptive designation of the product of some manufacturer there that it has acquired a secondary meaning and has come to be generally recognized in trade as signifying his particular product, it becomes so far his property that a business rival can not appropriate and use it to induce purchasers to buy a product made elsewhere, or even made at the same place. * * * If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected, and the circumstance that the manufacturer may have removed his place of business and is making his product in some other place is of no more consequence than it would be if he had adopted a fancy name.

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[1] American Waltham Watch Co. *v.* Sandman, 96 Fed., 330.
[2] See also C. A. Briggs Co. *v.* National Wafer Co., 102 N. E., 87 (1913).
[3] 149 Fed., 100, 103.

The same principles apply where two companies adopt the same or similar geographic names, if it appears that confusion will result to the disadvantage of the first user. Thus, the Supreme Court of New York, in a case decided in 1913, enjoined the use of the name "Lock City Canning Co." at the complaint of a company named the "Lockport Canning Co."[1] Both parties were engaged in the business of canning tomatoes at Lockport, N. Y. Lockport is commonly known as the Lock City. The court held that the similarity of name, together with the fact that they were business rivals, was calculated to deceive customers.[2]

COMPANY AND TRADE NAMES.—Where the name of a company has acquired a secondary meaning, courts will enjoin its use by another company if confusion would otherwise result. One of the earliest cases of this class is Howard *v.* Henriques et al., decided in 1851 by the superior court of the city of New York.[3] This was an action by the proprietor of a hotel to enjoin the proprietor of another hotel in the city from using the name "Irving Hotel." The plaintiff's hotel, although originally designated as the "Irving House," was very generally known as the "Irving Hotel." An injunction was granted, and the court in denying a motion to dissolve said:

> We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill rendered valuable, whether the same is upon articles of personal property which he may manufacture or apply to a hotel where he has built up a prosperous business. * * * Every man may and ought to be permitted to pursue a lawful calling in his own way, provided he does not encroach upon the rights of his neighbor or the public good. But he must not, by any deceitful or other practice, impose upon the public, and he must not be dressing himself in another man's garments, and by assuming another man's name endeavor to deprive that man of his own individuality, and thus despoil him of the gains to which by his industry and skill he is fairly entitled.

The same rule applies to corporate names. In Herrington Safe Co. *v.* Hall's Safe Co.,[4] the complainant corporation, which was the first user of the name "Hall" in connection with the manufacture of safes, was granted an injunction restraining the defendant, a corporation engaged in the same line of business, from using the name "Hall" either alone or in combination as a corporate name, unless accompanied by a statement clearly indicating that the defendant was a separate and independent concern from the complainant. To like effect is Bates Numbering Machine Co. *v.* Bates Manufacturing

[1] Lockport Canning Co. *v.* Pusateri, 139 N. Y. Supp., 640. Affirmed 145 N. Y. Supp., 1130.

[2] See also British-American Tobacco Co. (Ltd.) *v.* British American Cigar Stores Co., 211 Fed., 933; Dyment *v.* Lewis, 123 N. W., 244 (Iowa, 1909).

[3] 3 Sanford, 725.

[4] 208 U. S., 554 (1908).

Co.,[1] in which the use of the name adopted by the defendant as both corporate and trade names was enjoined on the ground of unfair competition. In that case the complainant since 1891 had manufactured and advertised a numbering machine as "the Bates numbering machine." In 1895 Bates, the patentee, severed his connection with the complainant and in 1902 organized the Bates Machine Co. In 1909 the defendant changed its name to the Bates Numbering Machine Co. and referred to its machines in its advertisements as Bates numbering machines. The Circuit Court for the District of New Jersey[2] granted an injunction restraining defendant from using the words "Bates Numbering Machine Co." as its corporate name or any other words resembling the trade name of the complainant which would mislead the public. The defendant was also enjoined from using the expression "Bates numbering machines" in connection with the sale of its product. The order was affirmed by the circuit court of appeals for the third circuit. The lower court said in part:

> * * * Not only confusion, but deception, was the necessary result of such conduct. A trade name is usually more striking than the name of its user. It is likely to give more information about the product and calculated to make a more lasting impression on the mind than a mere trade-mark. Where such trade name of the product is dissimilar to that of the manufacturer, it is likely to be remembered, even though the name of the person entitled thereto is overlooked or forgotten. * * *

Another case in which the use of a similar corporate name was enjoined is that of Hughes *v.* the Howe Grain & Mercantile Co.,[3] decided in 1914 by the court of civil appeals of Texas.[4] The plaintiff's corporate name was the "Howe Grain & Mercantile Co.," although it was commonly known as the "Howe Grain Co." The defendant, a former manager of the plaintiff company, upon engaging in a similar business at the same place adopted the latter name. The court held that the use of the name under the circumstances was a fraud and deception upon the complainant and the public. The adoption of names likely to be confused with existing corporations is regulated to some extent by statute, but the fact that the State issues a charter to a corporation by a certain name does not give such corporation a right to use it for the purpose of deceiving the public.[5] Of course the right to a particular name will only be protected within the locality where the name is known. As was said by the Supreme Court of Washington in 1910:

> There can not be unfair trade competition unless there is competition.[6]

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[1] 178 Fed., 681 (1910).

[2] Bates Manufacturing Co. *v.* Bates Numbering Machine Co. (1909), 172 Fed., 892, 897.

[3] 162 S. W., 1187.

[4] See also Crutcher & Starks et al. *v.* Starks et al., 171 S. W., 433 (Ky. Ct. Apps., 1914); Buzby *v.* Keystone Oil & Manufacturing Co., 206 Fed., 136.

[5] Bender *v.* The Bender Store & Office Fixture Co. (1913), 178 Ill. App., 203.

[6] Eastern Outfitting Co. *v.* Manheim et al., 59 Wash., 428; 110 Pac., 23; and see Borden Ice Cream Co. et al. *v.* Borden's Condensed Milk Co., 201 Fed., 510 (C. C. A., 1912) and post p. 261.

In this case the plaintiff, under the name of the "Eastern Outfitting Co., of Seattle, Wash.," was engaged in the business of selling cloaks, suits, and men's clothing in the city of Seattle and vicinity. It did no business in the eastern part of the State with the exception of one transaction with a customer who had moved from Seattle to Spokane. The defendant was engaged in the retail mercantile business in the city of Spokane under the name of "Eastern Outfitting Co." Subsequently the plaintiff undertook to engage in business in Spokane, claiming to have an exclusive right to the above name by reason of being the first user thereof. The court held, however, that the protection a party is entitled to in his trade name is only coextensive with his market, and instead of granting the relief prayed for by the plaintiff, enjoined the latter from using the name "Eastern Outfitting Co." in the city of Spokane. In like manner, it has been held that while there can be no confusion of identity between two tailoring establishments of the same name located in the cities of New York and Chicago,[1] the contrary is true where such establishments conduct a mail-order business.[2]

Personal names.—As a general rule, equity will not prevent a person from using his own name, but when the name of a person has become closely associated with his goods or business the courts often regulate its use by a competitor of the same name afterwards engaging in business. One of the "Baker" cases illustrates the relief granted in such instances.[3] The Circuit Court for the Western District of Virginia in this case enjoined the defendant from using the words "& Co." and from using the word "Baker" alone, requiring him to use it in some distinctive manner when applied to the manufacture of chocolate. The business of the complainants had been established about the year 1780 at Dorchester, Mass., while that of the defendant was of recent origin. The court, in deciding the question whether equity will enjoin a man from using his own name in connection with any business in which he wishes to engage, said:

> The result of the decisions is that a man has a right to use his own name in connection with any business he honestly desires to carry on. The doctrine is equally well settled that equity will direct how a man shall use his name in his purpose to denote his own individuality. He will not be allowed to so use his own name as to work an injury to another having the same name nor to perpetrate a fraud upon the public. * * *
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> * * * The respondent entering the chocolate market under a firm name so nearly resembling that of the complainant, an old-established and well-known concern, did not make the effort incumbent on him to distinguish his goods from those of the complainant so as to prevent confusion.

This is only one of the many cases in which Walter Baker & Co. (Ltd.) have been complainants. In Walter Baker & Co. (Ltd.) *v.*

[1] Arnheim *v.* Arnheim, 59 N. Y. Supp., 948 (1899).
[2] Ball *v.* Best, 134 Fed., 434 (1905).
[3] Walter Baker & Co. (Ltd.) *v.* Baker, 77 Fed., 181, 183 (1896).

Sanders,[1] decided in 1897, the Circuit Court for the Southern District of New York required that the defendant place upon his packages in prominent type the words "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Co." In a suit by the same firm against William P. Baker the court required that the defendant should use his name in full, "William P. Baker" or "William Phillips Baker." In 1904 the circuit court of appeals for the seventh circuit [2] restrained the defendant from advertising the goods of William H. Baker, of Winchester, Va., as "Baker's" goods.

A similar line of decisions illustrating the care with which a man must use his own name when entering a business in which some one of the same name has already an established trade is found in the Rogers cases. The original Rogers firm manufacturing silverware was the William Rogers Manufacturing Co., which was later transferred to the International Silver Co. In 1883 the court of common pleas of Philadelphia County enjoined the Rogers Manufacturing Co. from using the name "Rogers" on its ware.[3] In 1901 the Circuit Court for the District of Connecticut granted a preliminary injunction restraining two sons of the original Rogers Bros. from using the word "Rogers" or "Rogers Bros." and from stating that their goods were "the real Rogers goods."[4] And where a corporation used the name "William H. Rogers Corporation" fraudulently, merely allowing the W. H. Rogers, whose name was employed, a small profit for the use of his name, the use of the name "Rogers" in any form was enjoined by the court of errors and appeals of New Jersey in 1905.[5] But in 1907, the person just mentioned having started in business on his own account, the court refused to enjoin him from using his own name, but required him to use the words "not connected with the original Rogers" in connection with his name.[6]

In 1905 the Supreme Court of the United States, in the so-called Remington case,[7] stated that the courts would not interfere where the only confusion, if any, results from the similarity of the names and not from the manner of the use. The later cases, however, do not state the rule so broadly, as is shown by the decision of the Supreme Court in the Waterman case, decided November 30, 1914.[8] This was a suit to enjoin the defendant from using in connection with the manu-

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[1] 80 Fed., 889.

[2] Baker & Co. *v.* Slack, 130 Fed., 514.

[3] Wm. Rogers Mfg. Co. *v.* Rogers Mfg. Co., 16 Phila., 178.

[4] Int. Silver Co. *v.* Simeon L. & Geo. H. Rogers Co., et al., 110 Fed., 955.

[5] Int. Silver Co. *v.* Wm. H. Rogers Corp., 60 Atl., 187.

[6] International Silver Co. *v.* William H. Rogers, 67 Atl., 105. See also Chickering et al. *v.* Chickering & Sons et al., 215 Fed., 490 (1914); Guth Chocolate Co. *v.* Guth, 215 Fed., 750 (1914); Kurtzmann *v.* Kurtzmann, 147 N. Y. Supp., 673 (1914); Kaufman *v.* Kaufman, 123 N. Y. S., 699 (1910).

[7] Howe Scale Co. *v.* Wyckoff, Seamens & Benedict, 198 U. S., 118.

[8] L. E. Waterman Co. *v.* Modern Pen Co., 235 U. S., 88, 94, 98.

facture and sale of fountain pens the name "A. A. Waterman" or any name containing the word "Waterman" in any form. The circuit court of appeals restrained the defendant from using the name "A. A. Waterman & Co." instead of "Arthur A. Waterman & Co.," and required that the words "not connected with the L. E. Waterman Co." be placed side by side in equally large and conspicuous letters when the permitted name was used. Both parties appealed, the defendant on the ground that the only confusion shown to exist resulted from a similarity of names and not from the manner of the use, relying on the Remington case.[1] As to this contention, Mr. Justice Holmes, in delivering the opinion of the court, said:

> * * * But whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake.

The plaintiff's appeal was on the ground that the agreement of A. A. Waterman with the defendant was a mere sham to allow the latter to use the name "Waterman" on its pens, and that, therefore, the court below should have unqualifiedly enjoined the defendant from using the name "Waterman." A majority of the court refused to hold as a matter of law that the agreement was fraudulent, and affirmed the decree of the circuit court of appeals as being sufficient to protect the plaintiff's rights. Mr. Justice Pitney dissented, saying:

> * * * The case presents no question respecting the right of an individual to the bona fide use of his name, but rather the question whether a partnership or a corporation can, by purchase or otherwise, obtain the right to use the name of a third party for the very purpose of employing it in unfair competition with the established business of still another party. The case in its circumstances closely resembles International Silver Co. *v.* Rogers Corporation,[2] and for reasons sufficiently indicated by a reference to that case I think the Modern Pen Co. should be unqualifiedly enjoined from using the name "Waterman."

But where it clearly appears that a personal name is adopted by a firm or corporation for the express purpose of securing the good will of a rival, courts will not hesitate to give the full measure of relief. Thus in 1896 the circuit court of appeals for the sixth circuit held that a corporation could not assume the name of a stockholder with the evident purpose of appropriating the trade of a well-known concern of the same name.[3] The complainants were manufacturers of snuff, known to the trade as "Garrett's snuff." The defendant was

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[1] Supra.
[2] 67 N. J. Eq., 646.
[3] Garrett et al. *v.* T. H. Garrett & Co., 78 Fed., 472, 477 (1896).

a corporation capitalized at $35,000, divided into 350 shares. T. H. Garrett subscribed for 2½ shares and was engaged as an employee by the company. The packages, labels, and wrappers of the complainants were also imitated, and the use of these was restrained by a preliminary injunction entered in the circuit court. The injunction having been refused as to the name, an appeal was taken. The decision was reversed with instructions to make the injunction permanent and to grant an injunction against the use of the name "T. H. Garrett" or of the name "Garrett" in the defendant's name or business. The court said in part:

The district judge in effect decided that defendant was trespassing on complainant's good will, by directing that the injunction which he allowed should issue. That injunction, however, fell far short of affording substantial relief or protection to complainants. It related only to labels and devices which he found had been abandoued by the defendant. The only additional feature covered by the injunction was the ground color of defendant's labels. The defendant was enjoined from using either a white color or a murky-white color. But these were matters of detail, and of minor importance, as compared with the use of the name "Garrett." Without the use of that name the fraudulent scheme of the defendant would never have materialized.

Descriptive and generic terms.—The use of these terms is governed by the same general rules which apply to personal, corporate, or geographic names. Protection will be afforded even though the right to the term is not exclusive if it has taken on a secondary meaning through long-continued use. The important consideration is whether the similarity between two descriptive or generic terms is such that confusion is likely to result. A typical case is Rubber & Celluloid Harness Trimming Co. *v.* Rubber-Bound Brush Co. et al.[1] The complainant, a manufacturer of brushes, had adopted the word "Rubber-set," which by long usage and extensive advertisement had come to mean the brushes of complainant. The defendant was a manufacturer of similar brushes, and adopted the word "Rubber-vulc," which was held by the court to be so similar to the word used by the complainant that it would be restrained as unfair competition. The court also restrained the defendant from the use of the word "Rubber-Bound" in its corporate name on the ground that the name was displayed on the goods, which would tend to mislead the public as to whose goods it was purchasing.[2]

The court in so holding said:

* * * while the use of descriptive words can not be defended upon the ground that they constitute a trade-mark, yet * * where a descriptive word has been before the public so long and to such an extent as that it would be

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[1] 88 Atl. 210 (N. J. Court of Errors and Appeals, 1913).

[2] See also Hartzler et al. *v.* Goshen Churn & Ladder Co., 104 N. E., 34 (Ind. App., 1914); Florence Manufacturing Co. *v.* J. C. Dowd & Co., 178 Fed., 73 (1910), in which it was held that the use of the word "Sta-Kleen" should be enjoined at the suit of the proprietor of the word "Keepclean."

unjust for anyone to simulate it, and thus enable his goods to pass off as the goods of another, equity, which looks at the substance and not the mere form of things, will prevent the use of such words and give the complainant relief by way of injunction.

As to whether an intent to defraud was necessary in such cases the court said:

I understand the general rule to be that in that class of cases which is denominated passing-off cases it is not necessary that the complainant in order to succeed should prove misrepresentation or actual fraud by the defendant or give any evidence that any single person was deceived. It is enough if, in the opinion of the judge, the symbol or device or get-up used by the defendant is one which so closely resembles the symbol, device, or get-up used by the complainant as to be likely to deceive the public.

Although in many cases words descriptive of an article may not be appropriated as a technical trade-mark, the use of the words will be protected on the ground of unfair competition. A case decided by the Circuit Court for the District of Oregon in 1907 in which the words "Turpentine Shellac" were adopted, illustrates this rule.[1] The complainant in this case was engaged in the manufacture of a preparation used as a priming coat upon inside wood finish. The preparation consisted principally of turpentine and shellac, and the name adopted was merely descriptive of the article. The name was registered and recorded in the Patent Office and had been used for some time prior to its adoption by the defendants. In overruling a demurrer to the bill the court said:

* * * The preparation in question is very naturally called "Turpentine Shellac," as it consists principally of a mixing or combination of the two more simple ingredients, turpentine and shellac, and, of course, in its ordinary signification the name is merely descriptive of the compound. It can scarcely indicate origin or proprietorship, so that it is not a term or designation suitable for appropriation as a trade-mark in the technical sense. As a trade name it may be properly so employed, but within itself is inapt for exclusive appropriation as a trade-mark. Beyond this, however, words or symbols naturally descriptive of the product, while not adapted for exclusive use as a trade-mark, may yet acquire, by long and general usage in connection with the preparation and by association with the name of the manufacturer, a secondary meaning or signification, such as will express or betoken the goods of that manufacturer only, and in this sense he will be entitled to protection from an unfair use of the designation or trade name by others that may result in his injury and in fraud of the public.

In order to acquire an attractive name for their goods manufacturers often coin new words which sometimes from continued use become as well known as the article itself. Competitors do not as a rule adopt the same word or phrase used by their successful opponents, but adopt a word of the same sound as one already in use. It is interesting to note what degree of similarity the courts have con-

[1] Standard Varnish Works *v.* Fisher, Thorsen & Co., 153 Fed., 928, 930 (1907).

sidered as likely to result in confusion and hence as warranting their interference by injunction. A good illustration is the case of National Biscuit Co. *v.* Pacific Coast Biscuit Co. et al.,[1] decided by the Court of Chancery of New Jersey in 1914. The defendants' trade was limited to the Pacific coast, while that of the complainant was nation wide. Unfair competition was alleged because of the similarity of packages, trade-marks, etc., as well as the similarity between the names "Uneeda" and "Abetta." An injunction enjoining many of the alleged unfair methods was granted. As to the name "Abetta," the defendant was restrained from putting up and selling or offering for sale "any carton of bakery products having thereon an imitation of complainant's 'Uneeda Biscuit' trade name, calculated to mislead or deceive, like this on defendants' carton 'Abetta Biscuit.'"

As to whether an intent to defraud was necessary the court said:

> It is unnecessary in these passing-off cases to find intentional fraud or that it be shown that anyone has been actually deceived to entitle a complainant to protection.

The circuit court of appeals for the ninth circuit has said that a trade name, unlike a trade-mark, appeals to the ear more than to the eye.[2] In that case the Fairbank company had used the name "Gold Dust" in connection with the sale of its washing powder since 1887. In 1894 the defendant began the manufacture of washing powder, designating it as "Gold Drop." Care was taken to use a different style of labels and packages. An order of the circuit court dismissing the action was reversed, the appellate court holding that the names were so similar in sound as to mislead or deceive customers. The court said in that case:

> * * * It is not essential to the right of complainant to injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles it will be presumed that the respondent contemplated the natural consequences of its own acts.

On the other hand, the use of similar descriptive or generic terms is not of itself sufficient ground for injunctive relief where it appears that the articles to which the names are attached are so differently dressed and labeled that deception is not likely to result.[3] The word "Ruberoid" was adopted as a trade-mark in connection with the manufacture and sale of roofing material by the complainant. The defendant, also a manufacturer of roofing material, adopted the word "Rubbero" as a trade name. There was no imitation in the arrangement, color, design, or general appearance of the wrappings and markings on the package. The Circuit Court of the United States for the Eastern District of Missouri held that the use of

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[1] 91 Atl., 126, 130.
[2] N. K. Fairbank Co. *v.* Luckel, King & Cake Soap Co., 102 Fed., 327 (1900).
[3] Standard Paint Co. *v.* Trinidad Asphalt Manufacturing Co., 220 U. S., 446, 461 (1911).

names so similar was calculated to confuse the public and constituted unfair competition, but this was overruled by the circuit court of appeals for the eighth circuit, Judge Sanborn dissenting.[1] The validity of the complainant's trade-mark was also in question. On appeal the supreme court held that "Rubberoid" being a descriptive word, the word "Ruberoid" is also descriptive, and therefore could not be appropriated as a trade-mark. As to whether the use of the word Rubbero by the defendant constituted unfair competition, the court said, in affirming the decision of the circuit court of appeals:

> * * * To preclude its use because of such resemblance would be to give to the word "Ruberoid" the full effect of a trade-mark while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. * * * Such a wrong is not established against the asphalt company. It does not use the word "Rubbero" in such a way as to amount to a fraud on the public.

Similarly the use of the name "Baco-Curo" has been decided not to be unfair as compared with "No-To-Bac,"[2] nor "Coke" as compared with "Coca-Cola,"[3] nor "New Idea" as compared with "New Departure."[4] It should be borne in mind. however, that the similarity in name is usually only one of the controlling elements in such cases.

Dress of goods.—Imitation of the labels or packages of a rival is one of the commonest forms of unfair competition. Labels are to a large extent protected under the law of trade-marks, but many are of such a nature that they can not be exclusively appropriated. As previously stated,[5] in unfair competition cases it is not necessary that the plaintiff's right is exclusive in order to be protected. If the defendant's label, in the opinion of the court, is liable to result in confusion, relief will be granted. A case in which the similarity of labels was alone involved is that of Notaseme Hosiery Co. *v.* Straus et al.,[6] decided by the circuit court of appeals for the second circuit in 1912. Infringement was also alleged, but the case was decided solely on the ground of unfair competition. It was shown that the plaintiff had used the label six months prior to its adoption by the defendant. The engraving company which prepared the complainant's label also designed that of the defendant, each being a rectangular design having a diagonal black band with white script and triangular red panels. The defendant was notified of

[1] Trinidad Asphalt Mfg. Co. *v.* Standard Paint Co., 163 Fed., 977 (1903).
[2] Sterling Remedy Co. *v.* Eureka Chemical & Manufacturing Co., 70 Fed., 704 (1895).
[3] Coca-Cola Co. *v.* Branham et al., 216 Fed., 264.
[4] Hamilton Manufacturing Co. *v.* Tubbs Manufacturing Co., 216 Fed., 401.
[5] See p. 235.
[6] 201 Fed., 99, 100.

the similarity of the label, but continued its use. The District Court for the Southern District of New York entered a decree for the defendant. In reversing this decision the circuit court of appeals said:

> In our opinion the evidence is insufficient to show actual deception. Such proof, however, is not necessary. The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions—whether there is a degree of similarity calculated to deceive. And we think there is such similarity. It seems clear to us that the general impression made by the defendants' label upon the eye of the casual purchaser would be likely to result in his confounding the defendants' goods with those of the complainant.

The usual injunction and accounting was granted. The complainant was awarded the profits made on sales of hosiery by the defendants from the time they were notified of the similarity of the labels used.

Mere use of the same color apart from any other imitative feature probably would not be enjoined as unfair, although color may be one of the elements contributing to a general similarity which is deceptive, as it was in the case last cited. It is the effect of the dress as a whole that is controlling. Thus the Circuit Court for the Western District of Virginia, in enjoining the use of a tin tag on plug tobacco, said:

> It is the result of the combination, letterpress, background, color, size, and form of tag which give to the label of complainant features that are separate, new, and distinctive.

In this case the Reynolds Tobacco Co. had since 1894 been using on its plug tobacco tin tags of rhomboid shape, having a dark background with the word "Schnapps" thereon in red letters slanting backward. Later the defendant placed upon the market a plug tobacco of the same size and shape and with tags thereon of the same size, shape, style, and color as that of the complainant, the only difference being in the name, the defendant using the word "Traveller" instead of "Schnapps." It was contended that this similarity misled the retail purchaser and thus resulted in an injury to the complainant. It was shown that a large portion of this particular brand was sold in communities where there were ignorant people, who, being unable to read, relied solely on the general appearance of the brand and size of the plug.[1]

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[1] Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed., 819 (C. C., 1907). See also Modesto Creamery *v.* Stanislaus Creamery Co. et al., 142 Pac., 845; Tanqueray, Gordon & Co. *v.* Gordon D. & D. Co., 213 Fed., 510; H. E. Winerton Gum Co. *v.* Autosales Gum & Chocolate Co., 211 Fed., 612 (1914); Lawrence et al. *v.* P. E. Sharpless Co., 203 Fed., 762; affirmed, 208 Fed., 886 (1913); Schwahn et al. *v.* Miele et al., 203 Fed., 176; Wm. Wrigley, jr., Co. *v.* L. P. Larson, jr., Co. et al., 195 Fed., 568 American Pin Co. *v.* Berg Bros., 188 Fed., 683; Seeman et al. *v.* Zechnowitz, 121 N. Y. S., 125.

Similarly the imitation of the form of a package or container alone seldom constitutes unfair competition. One of the few exceptions is where the use of a peculiarly shaped bottle was enjoined by the Circuit Court for the Southern District of New York in 1896.[1] Both parties to the suit bottled whisky made by the Hannis Distilling Co. and known as "Mount Vernon Whiskey." The complainant, however, had the sole privilege of attaching to the bottles the distiller's guaranty of purity. The complainant had adopted a peculiar, flat-shaped bottle, and the defendant afterwards began using a bottle of the same shape and appearance, but which he claimed to have purchased in open market. The labels were different. A preliminary injunction was granted on the ground that the ultimate consumer was or might be deceived.

It is also unfair competition to dispose of one's goods in bottles or packages bearing another's marks, labels, or name. This method of passing off one's goods as those of another is not often employed. A case decided by the District Court for the Southern District of New York in 1914 is in point.[2] The bill charged sales by defendant of an article resembling in color, appearance, and flavor the plaintiffs' brandy, the giving therewith of empty genuine Hennessey bottles, and advising and assisting purchasers to place defendant's liquors in plaintiffs' bottles and to sell the same as genuine Hennessey brandy. The case was tried with seven others against the same defendant. Evidence was secured by detectives employed by the plaintiff. It was held that an injunction should issue.

Dress of store.—The deceptive dress of a store or the use of a sign which will cause confusion as to the identity of the store will also be enjoined. Misleading names are usually the controlling feature of such cases. A case in which the similar dress of a store is involved is that of Weinstock, Lubin & Co. *v.* H. Marks, decided by the California Supreme Court in 1895.[3] The plaintiff corporation was engaged in the clothing and dry goods business in Sacramento, its store being known as the "Mechanics' store." The defendant, upon engaging in a business of the same general character, erected a building very much like that of the plaintiff in the same block, designating his store as the "Mechanical store." Plaintiff alleged that due to the similarity of the two stores a large part of his trade was diverted to the defendant. The lower court restrained the defendant from the further use of the name "Mechanical store," and further decreed that the defendant maintain and place in a conspicuous part of his store and also in a conspicuous place on the outside or front thereof,

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[1] Cook & Bernheimer Co. *v.* Ross et al., 73 Fed., 203; see also Moxie Co. *v.* Daoust, 206 Fed., 434.

[2] Hennessey et al. *v.* Wine Growers' Association, 212 Fed., 308.

[3] 109 Cal., 529, 543; 42 Pac., 142.

a sign showing the proprietorship of said store in letters sufficiently large to be plainly discernable by customers. The latter part of the injunction granted by the trial court was modified on appeal. The court said:

The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had the right to do all these things, if of themselves they do not offend against equity, but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right a wrong. * * * We think the decree should be modified so as to require that the defendant, in the conduct of this business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff.

A case in which the facts were similar was decided by the Appellate Court of Illinois in 1897.[1] Both parties to this suit were engaged in the sale of milk in Springfield, Ill. The appellee used wagons with the running gears painted yellow, the body brown, and the tops white, bearing the name "Walnut Grove Dairy, Alexander Mueller." In front of the entrance to the wagons, on either side, and on the top, there was painted a picture of two cows, some trees, a running brook, some lilies, and a fence. The painting, inscriptions, and pictures on the appellant's wagons were practically identical with those of the appellee except that he used the name "Walnut Park Dairy," followed by his own. The court in affirming a decree of the lower court enjoining the use of said wagons decorated in that manner said:

* * * The wrong in this case does not consist in appellant painting the running gear of his wagons yellow, or the body brown, or the top white, etc. The wrong is in their accumulation, not in any one of them alone; but all combined are sufficient to entitle appellee to an injunction. * * * It can not be maintained that appellee so impoverished the vocabulary of the English language, and so exhausted the taste and skill of the artist who lettered and painted the pictures on his wagons, that appellant was compelled to imitate him so closely. We feel constrained to hold from the facts and circumstances in proof of this case that his purpose was to usurp appellee's business and draw some of his customers to him, and would thereby injure appellee's business he had been so many years in establishing.

Imitation of goods.—The general rule is that in the absence of patent protection the general get-up of an article may be copied. Obviously it is unfair for one to make an exact copy of an article and sell it under his own name. Copying the necessary features of an article will not be prohibited, but imitating the striking features of an article made by a rival will be enjoined. A case in

[1] Nokes v. Mueller, 72 Ill. App., 431, 435.

which all of the distinguishing features of the article were imitated excepting the name, is that of Enterprise Manufacturing Co. *v.* Landers, Frary & Clark, decided by the circuit court of appeals for the second circuit in 1904.[1] The complainant for 30 years had manufactured a line of mills of various sizes for grinding coffee, drugs, etc., adopting therefor a certain characteristic shape, design, color, and ornamentation, which had become well known to purchasers and associated in their minds with his goods. Defendants in 1898 began the manufacture of a similar line of mills under their own names. The Circuit Court for the District of Connecticut enjoined the defendants from selling the different styles of mills which had already been imitated and also from imitating in the future other styles made by plaintiff. In affirming the decree of the lower court the court said:

> * * * It is elementary law that when the simulation of well known and distinctive features is so close the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods. * * *
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> No doubt, with such identity and attractiveness, competition with complainant's mills would be much more effective; but defendants overlook the fact that a court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor.

And while many of the features of an article may separately be a subject of appropriation because they were not original with plaintiff, the appropriation of all of the prominent features in such a manner as would probably deceive the ordinary purchaser constitutes unfair competition. Such was the ruling of the circuit court of appeals of the second circuit in the case of the Yale & Towne Manufacturing Co. *v.* Alder, decided in 1907.[2] The padlock manufactured by the defendant represented the plaintiff's article in form, size, coloring, lettering, and details of finish. The chief differences were that the complainant's lock bore the name "Yale," and the defendant's the name "Yap"; the names of the manufacturers and the places of manufacture wholly unlike were each placed on the same part of the locks and in similarly small letters. While not commending the defendant for his conduct, the Circuit Court for the Eastern District of New York dismissed the complaint on the ground that ordinary purchasers would not be deceived. The order was reversed on appeal, the appellate court holding that ordinary purchasers would be deceived, even though dealers and the trade generally would no doubt notice the differences.

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[1] 131 Fed., 240.

[2] 154 Fed., 37.

Owners of a patented or copyrighted article have an exclusive right to make and sell the article during the life of the patent or copyright. At the expiration of the patent or copyright the public is entitled to copy the article and use its name. One who takes up the manufacture of such an article after the expiration of the patent, however, is not entitled to palm off his goods as the make of the original manufacturer, and must distinguish his goods in such a manner as not to cause confusion. Such an attempt was held to be unfair in Merriam Co. *v.* Ogilvie.[1] The Merriam Co.'s copyright on the name "Webster" used in connection with dictionaries having expired, the defendant adopted the name, accompanied with other words and phrases used by the plaintiff, conveying the impression that his dictionary was a later edition of the plaintiff's. The defendant used the words "Imperial," and "Universal," instead of the word "International." Both parties claimed injunctive relief. The Circuit Court for the District of Massachusetts enjoined the plaintiff from sending out circulars to the effect that it had the exclusive right to use the name "Webster." The defendant was enjoined from sending out circulars and advertisements trespassing on the reputation of the plaintiff or which would mislead purchasers into buying his dictionary for one of the series published by the plaintiff. The orders were affirmed, but the injunction relating to the defendant was broadened so as to preclude the use of misleading words on the title pages and the backs of the dictionaries. The court said, among other things:

> It seems to us that Ogilvie was not content with using the word "Webster," which was at large a word entitled to be used in connection with a dictionary, but purposely used words of description calculated to lead the ordinary purchaser to suppose that he was getting the publication which had beeu built up by the Merriams. This, we think, was an appropriation of something which he was not entitled to appropriate, and under the circumstances amounts to unfair competition.
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> The presence of an equitable purpose is necessarily an element of great weight in the determination of a question of fairness in trade. And where another avails himself of the principle of public dedication, he must in good faith fully identify his production and thoroughly disassociate his work from the work of the one who has given significance to the name and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, that it is something produced and put upon the market by himself.

ENGLISH DECISIONS.

The legal term applied by the English courts to the practice of palming off the goods or business of one person as that of another is

[1] 159 Fed., 638, 642. See also Prest-O-Lite Co. *v.* Davis, 215 Fed., 349; Jenkins Bros. *v.* Kelly & Jones Co., 212 Fed., 328 (1914); Yale & Towne Manufacturing Co. *v.* Worcester Manufacturing Co., 205 Fed., 952; Singer Manufacturing Co. *v.* June Manufacturing Co., 163 U. S., 169.

"passing off." In the American courts the equivalent term is "unfair competition," although that term is gradually being broadened so as to include other unfair methods of competition. The important distinctions in the United States decisions between trademark actions and actions for unfair competition, as shown in the discussion of the American cases under this section, are, 1, that no exclusive right is necessary to establish unfair competition; 2, that to obtain relief on the ground of unfair competition it is necessary to show that the name or mark sought to be protected has acquired a secondary meaning; and, 3, that many of the courts refuse relief on the ground of unfair competition unless fraudulent intent is shown or is clearly inferable from the circumstances. The first and second distinctions noted above are recognized by the English courts, but it is well settled that proof to the effect that the defendant intended to deceive is no more necessary in passing-off actions than in cases of infringement. In 1892 Lord Justice Lindley, speaking for the court of appeal, said:

> To obtain an injunction in a case like the present it is not necessary to prove an intention to mislead, nor to prove that anyone has in fact been misled; all that need be proved is that the defendants' goods are so marked, made up, or described by them as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendants' goods for the goods of the plaintiff.[1]

Although denying the plaintiff protection in the use of the word "cellular" as applied to cloth, Lord Chancellor Halsbury said:

> * * * It seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like 60 years ago by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things—I say things because it is to be observed that not only words, but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the interference of the court.[2]

In actions for passing off, it is apparently sufficient to prove that retailers may succeed in deceiving the public. In a case decided in the court of King's Bench in 1824, it appeared from the evidence that the retailers who bought the goods of the defendant knew by whom they were manufactured, but resold them as and for goods manufactured by the plaintiff.[3] The plaintiff was a shot-belt and powder-flask manufacturer, and marked his goods with the words "Sykes patent," although the patent had been declared invalid. The de-

[1] Reddaway *v.* Bentham Hemp Spinning Co., L. R. (1892), 2 Q. B., 639 (1892).

[2] Cellular Clothing Co. (Ltd.) *v.* Maxton & Murray, L. R. (1899), A. C., 326, 334; and see Carr & Sons *v.* Crisp & Co. Ltd., 19 R. P. C. 497 (1902).

[3] Sykes *v.* Sykes, 3 B. & C., 541, 543.

fendant marked his goods similarly and, it was alleged, sold them as and for the goods of the plaintiff. It was objected that this allegation was not supported by the evidence, but the objection was overruled by the trial court. The jury, upon being left to say whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were not manufactured by them, but by the plaintiff, found a verdict for the plaintiff. Abbott, C. J., in refusing to grant a new trial, said in part, as follows:

It was established most clearly that the defendants marked the goods manufactured by them with the words "Sykes patent" in order to denote that they were of the genuine manufacture of the plaintiff; and although they did not themselves sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers, for the express purpose of being resold, as goods of the plaintiff's manufacture. I think that is substantially the same thing.

A retailer, jobber, or other middleman may also be liable to a manufacturer for passing off if he substitutes another's goods for those of that particular manufacturer. In the case of Yeatman *v.* Homberger & Co.,[1] decided in 1912, the court of appeal held that the plaintiff had a cause of action against the defendants for offering to sell to the trade as "Taylor's wine" a product which was not of the plaintiff's manufacture. The defendants who were wine merchants issued circular price lists offering to sell Taylor's 1908 vintage port at 27s. per dozen bottles, the regular price of the same being 34s. per dozen bottles. The wine advertised by the defendants, however, was not the well-known Taylor's wine manufactured by the plaintiff, but was that of another manufacturer whose name was Alexander D. Taylor. The injunction granted by the trial court was dissolved by consent. Another case is that of Bovril (Ltd.) *v.* Metrakos et al.,[2] decided in the Superior Court for the District of Montreal in 1909. The plaintiff in this case was a manufacturer of fluid beefs which were sold under the name of "Bovril." The defendants were the proprietors of a confectionery store in Montreal, and it was alleged that they served customers who asked for "Bovril" with a preparation of fluid beef known as "Armour's Beef Cordial" and "Armour's Extract of Beef." The court, in addition to awarding the plaintiff nominal damages, perpetually enjoined the defendants, their agents, etc., from selling or offering for sale under the name "Bovril" any substance, preparation, or extract of beef as being the product of plaintiff's manufacture other than that manufactured and sold by the plaintiff.[3]

[1] 107 L. T., 742.

[2] 17 La Revue de Jurisprudence, 32. See also Grierson, Oldham & Co. Ltd. *v.* Birmingham Hotel etc. Co., 18 R. P. C. 158.

[3] See also Templeton *v.* Wallace, 4 Terr. Reps., 340; Parazone Co. (Ltd.) *v.* Gibson 21 R. P. C., 317 (1904); and Kinnell & Co., (Ltd) *v.* A. Ballantine & Sons, 47 Scottish L. Rep., 227 (1910).

Actions for infringement are frequently joined with actions for passing off. The passing-off feature, however, is of less importance since the passage of the trade-mark act of 1905,[1] which has had the effect of entitling many names and words to registration as valid trade-marks which before were merely trade-names or common-law trade-marks. The important section in this connection provides, in part:

A registrable trade-mark must contain or consist of at least one of the following essential particulars:

(1) The name of a company, individual, or firm represented in a special or particular manner.

(2) The signature of the applicant for registration or some predecessor in his business.

(3) An invented word or invented words.

(4) A word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or a surname.

(5) Any other distinctive mark but a name, signature, or word or words other than such as fall within the description in the above paragraphs (1), (2), (3), and (4) shall not, except by order of the board of trade or the court, be deemed a distinctive mark.

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For the purposes of this section "distinctive" shall mean adequate to distinguish the goods of the proprietor of the trade-mark from those of other persons.[2]

Under this section, for example, the word "Oswego" has been held entitled to registration as a trade-mark,[3] whereas, prior to the passage of the act of 1905, such word could only have been protected by an action for passing off. Hence, any infringement of their use can now be prevented by a statutory trade-mark action, without resort to the doctrine of passing off. Cases of this sort have been omitted from the present discussion, and only those which were decided on the sole ground of passing off have been considered. The same classification adopted in discussing the American cases has been followed.

Geographic or place names.—Under the trade-mark act of 1905 geographical or place names may be registered when they have become distinctive. The use of such names prior to its enactment was only protected when the words had acquired a secondary meaning and their use by another would result in confusion. A case in point is the well-known "Stone Ale" case, decided in 1891 by the House of Lords.[4] The plaintiffs were brewers at Stone, in Staffordshire, and the ales manufactured by them had become commonly known as

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[1] 5 Edw. 7, Chap., 15.

[2] Ibid., sec. 9.

[3] In re National Starch Co.'s Application, 25 R. P. C., 802 (1908).

[4] Thomas Montgomery v. Thomson et al., L. R. (1891), A. C., 217, 220, 227.

"Stones Ales" and one particular ale as "Stone Ale." The firm had been in business since 1780. The defendant had recently established a brewery at Stone and made use of the name of the place. The court of appeal granted a perpetual injunction restraining the defendant from carrying on the business of a brewer at Stone under the title "Stone Brewery" or "Montgomery Stone Brewery," or from selling any ale or beer not of the plaintiffs' manufacture under the term "Stone Ales" or "Stone Ale." The defendant objected to that part of the order of the court which related to the use of "Stones Ales" and "Stone Ale," on the ground that they were not registered trade-marks. The House of Lords affirmed the order of the lower court. Lord Herschell, speaking for the court, said:

I do not think the principle on which the court ought to act in such a case as the present is open to doubt. The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the person seeking the injunction had a right of property in a particular name.

Lord Hannen, in answering the defendant's contention that the word "Stone" was merely used in a geographical sense, said:

The principle contended for by the appellant may be admitted as correct, but in considering what may induce purchasers to believe that the appellant's goods are the goods of the respondents all the circumstances of the case must be taken into account. * * * The appellant is, undoubtedly, entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondent's ale.

Frequently the relief granted when the name has become the market name of the product is merely an injunction restraining the use of the word unless it is accompanied by a statement sufficient to distinguish the two products. An injunction granted in the case of Birmingham Vinegar Brewery Co. (Ltd.) *v.* Powell[1] as to the use of the word "Yorkshire Relish" was in this form. The respondent had for many years manufactured a sauce according to a secret recipe and sold the same under the above name. The appellants were engaged in manufacturing and selling a difference sauce, which they termed "Yorkshire Relish." It was shown that some of the purchasers did not in fact know the name of the respondent in connection with the product. An injunction was granted restraining the appellant from using the words, unless they clearly set forth that their product was not the same as respondent's. The House of Lords, in affirming the decision, held that the appellant was guilty of passing off, since the recipe for the respondent's sauce had not been discovered, and therefore the two sauces could not be the same.

[1] L. R. (1897), A. C., 710.

Where the same geographical name is given to two natural as distinguished from manufactured products of a particular locality, it appears that the English courts are less inclined to interfere. Such appears to be the effect of Grand Hotel Co. of Caledonia Springs (Ltd.) *v.* Wilson et al.,[1] decided by the privy council in 1903. The plaintiffs in this case were owners of certain mineral springs in the township of Caledonia, and marketed the water for medicinal and table purposes under the name "Caledonia Water." The defendants, who were respondents in the privy council, having discovered other springs in the same township, sold water therefrom as "from the New Springs of Caledonia," but under a different brand. The court held that the respondents were entitled to thus indicate the source of the waters sold by them, inasmuch as it appeared that their goods were sufficiently differentiated from those of the plaintiff to avoid confusion. In spite of the latter circumstance, however, Lord Davey, who delivered the opinion of the court, chose to distinguish the Stone Ale case[2] on the ground that it involved manufactured articles and seems to have considered natural products as being governed by a different rule of law. Thus he said:

> Lastly, it must be observed that in the present case the name of the locality necessarily enters into and forms part of any real description of the respondents' waters, and that the words "Caledonia Springs" have acquired a secondary or perhaps tertiary meaning as the name and the only name of the locality. * * * Indeed, it is impossible to see how the respondents could adequately describe a natural product of the soil, which derives its excellence from the inherent properties of the soil in that particular locality, without some reference to the place and using for that purpose, in some form, the only name by which it is known.

Company and trade names.—Firm and trade names are usually registered, either by virtue of the companies act[3] or as trade-marks under section 9 of the act of 1905.[4] The protection thus afforded is supplemental to the common law, which protects the owner in the use of a name, regardless of whether it is registered or constitutes a trade-mark, if the use of a similar name is calculated to mislead the public. Relief is sometimes granted, even though the injury may only be prospective, as is illustrated by the decision in the court of appeal in a case decided in 1912.[5] This was an action by Lloyd's, the well-known association of underwriters and their agents at Southampton (Dawson Bros.) against a small company which was incorporated in 1911. The defendant company under its memorandum of association had very extensive powers to carry on businesses of all

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[1] L. R. (1904), A. C., 103, 110, 111.
[2] Thomas Montgomery *v.* Thomson et al., supra.
[3] 25 and 26 Vict., chap. 89, sec. 20; Companies (Consolidation) Act 1908, sec. 8.
[4] 5 Edw., 7, chap. 15, supra.
[5] Lloyd's & Dawson Bros. *v.* Lloyd's, Southampton (Ltd.), 28 T. L. Reps., 338, 339.

kinds, but so far had been engaged only in purchasing and selling yachts and acting as ship brokers. No one interested in the company had the name of Lloyd and no reason was given for the use of the name except that it was a suitable one. The plaintiff sought to restrain the defendant from carrying on the business under its present name or any other name calculated to produce the belief that its business was the business of, or any branch of, Lloyd's. The lower court dismissed the motion for an interlocutory injunction on the ground that the evidence was not sufficient to show that the defendants intended to engage in a business similar to that of plaintiffs. An injunction was granted on appeal, which was afterwards made perpetual, the master of the rolls, Cozens-Hardy, being quoted as having said:

> When he found that a man was taking a particular name with the knavish intention of obtaining somebody else's business thereby, he assumed that the man was not a fool as well as a knave and that, if he was allowed to go on, he would succeed in his knavish purpose.

However, if there is no likelihood of confusion, the action will not lie, even though the trade names used are identical. The Ridgway Co., publishers of Everybody's Magazine, in 1911 sought to restrain the Amalgamated Press (Ltd.) from using the word "Everybody's" in connection with a weekly penny paper, called "Everybody's Weekly." The price of the plaintiff's magazine was 1 shilling. The action was dismissed by the chancery division of the high court of justice on the ground that the two things were perfectly distinct and in no way likely to compete with one another.[1]

The rule in regard to the use of misleading names is the same when corporate names are involved. A corporate charter grants no immunity in the use of a deceptive name. A case in which the use of a corporate name was enjoined is that of North Cheshire & Manchester Brewery Co. (Ltd.) *v.* Manchester Brewery Co. (Ltd.), decided in 1898 in the House of Lords.[2] The appellant company was organized in 1897 for the purpose of acquiring the business of the North Cheshire Brewery Co., which had its office and brewery at Macclesfield. The company was also the owner of some licensed houses in Manchester. It was incorporated and registered under the above name. The respondents (the Manchester Brewery Co.) were incorporated in 1888. An injunction was granted by the court

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[1] Ridgway Co. *v.* Amalgamated Press (Ltd.), 28 T. L. Reps., 149; 29 R. P. C. 130. See also Dunlop Pneumatic Tyre Co. Ltd. *v.* Dunlop Motor Co., L. R. (1907) A. C. 430; Turner's Motor Mfg. Co. Ltd. v. Miesse Petrol Car Syndicate, Ltd., 24 R. P. C. 531 (1907); Nugget Polish Co. Ltd. *v.* Harboro Rubber Co., 29 R. P. C. 133 (1912); and Scottish Union and National Ins. Co. *v.* Scottish National Ins. Co. Ltd., 26 R. P. C. 105 (1908). But see Eastman Photographic Materials Co. Ltd. et al. *v.* John Griffiths Cycle Corp'n. Ltd. et al., 15 R. P. C. 105 (1898); Dunlop Pneumatic Tyre Co. Ltd. *v.* Dunlop Lubricant Co., 16 R. P. C. 12 (1898); Dunlop Pneumatic Tyre Co. Ltd. *v.* Dunlop-Truffault Cycle & Tube Mfg. Co. Ltd., 12 T. L. R. 434 (1896); and Warwick Tyre Co. Ltd. *v.* New Motor and General Rubber Co. Ltd., 27 R. P. C. 161, 170 (1909).

[2] L. R. (1899), A. C., 83.

of appeal restraining the appellants "from using the name, style, or title of the 'North Cheshire & Manchester Brewery Co. (Ltd.)' or any other style or name which includes the plaintiffs' company's name, or so nearly resembles the same as to be calculated to induce the belief that the business carried on by the defendant company is the same as the business carried on by the plaintiff company, or in any way connected therewith," from which this appeal was taken. The judgment was affirmed on the ground that the public would be misled into thinking that the two companies had been consolidated. As to whether the appellants adopted this name with such an intent the Lord Chancellor said:

> In the result it is perfectly immaterial to my mind, for the purpose of the decision of this case, whether they were fraudulent or not. The question is whether this is an injury to the plaintiff's right. If it is an injury to the plaintiff's right, it is perfectly immaterial whether they intended it or not. The court must restrain them from that which is injuring another person, however indifferently or innocently they may have done it.

Personal names.—The view first taken by the English courts was that the honest use of a personal name in trade could not be enjoined even though it caused confusion. In Turton *v.* Turton[1] it appeared that the plaintiffs had for many years carried on the business of steel manufacturers under the name of "Thos. Turton & Sons," and that the defendant, John Turton, had for a slightly shorter period of time carried on a similar business in the same town, first as "John Turton," and later as "John Turton & Co." In 1888 he took his two sons into partnership and carried on the same business as "John Turton & Sons," whereupon the plaintiffs sought an injunction restraining the defendants from carrying on their business under the firm name of "John Turton & Sons" or any other name so closely resembling the plaintiffs' name as to be calculated to deceive. At the trial no evidence was introduced showing that the defendants had imitated the trade-marks or labels of the plaintiffs or otherwise attempted to deceive the public, although it was admitted that the use of the name complained of was of itself likely to cause confusion. It was held that since the confusion resulted from the mere use of the defendants' name without more, no relief should be granted, Lord Esher saying:

> Therefore, upon principle, I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names, he is doing no wrong.

In J. & J. Cash (Ltd.) *v.* Cash,[2] however, which was decided by the court of appeal in 1902, a different conclusion was reached upon substantially similar facts. There the plaintiffs and their predecessors had for some years been carrying on business under the name of

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[1] L. R. (1889), 42 Ch. Div., 128, 136.
[2] 86 L. T., 211, 212.

"Cash" at Coventry. They manufactured and sold frillings, woven names, and initials. Joseph Cash, the defendant, entered into business at Coventry under the name of "Joseph Cash & Co." He did not describe his goods as "Cash's Frillings," etc., but claimed the right to use his own name in connection with such a business. Justice Kekewich, in the lower court, granted an injunction restraining the defendant from manufacturing or selling the three articles mentioned under the name of "Joseph Cash & Co." or of "Cash." The order as modified by the court of appeal prevented the use of the names without taking reasonable precautions to clearly distinguish the business and articles from those of the plaintiff.

The result of the *Cash* case is apparently to put personal names on the same footing as other trade names, and to authorize an injunction restraining the use of such names in a manner likely to cause confusion, where a proper cause for equitable interference is made out. The English courts, however, steadfastly refuse to unqualifiedly enjoin the use of a personal name in trade, even where fraudulent intent is established. Thus in Massam *v.* Thorley's Cattle Food Co.,[1] where it appeared that the defendants adopted the name of their general manager, who held only one share of their stock, for the express purpose of securing the benefit of the plaintiff's business reputation, and in other ways attempted to imitate the latter's goods to their own advantage, the court, while restraining them from using the name "Thorley" in a manner likely to deceive customers, said:

> We can not prohibit their using the name if they use it in a way not calculated to mislead the public.

And again, in J. & J. Cash (Ltd.) *v.* Cash, supra, Lord Justice Vaughn Williams said:

> It may be that a trade is of such a nature that the products of that trade, when used in connection with a particular trade name, have become almost indissolubly connected with the business carried on by a certain manufacturer who has created that particular business. But still, even though that may be so, and even though the nature of the trade must be taken into consideration in an action for an injunction, there never has been a case yet where an order has been made restraining a man altogether from carrying on a particular trade in his own name.

Descriptive and generic terms.—Words merely descriptive of the article may not be exclusively appropriated by a manufacturer, but the use of such a word may become so closely identified with a particular manufacturer's goods that its use by a rival trader would be calculated to deceive. Whether the words have acquired a secondary meaning is a question of fact. A good illustration is afforded in the Camel's Hair Belting case, which was decided by the House of Lords in 1896.[2] The plaintiff for many years had manufactured belting,

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[1] L. R. (1880), 14 Ch. Div., 748, 763.

[2] Reddaway *v.* Banham, L. R. (1896), A. C., 199, 210, 213.

which he sold as "camel hair belting," and which in point of fact was made largely of camel's hair, although this was not generally known. The defendant who had formerly been employed by the plaintiff, subsequently formed a new company and began the manufacture of belting on his own account, stamping the same as "Camel Hair Belting." The jury found that words "Camel hair belting" had come to mean the plaintiff's goods as distinguished from those of any other manufacturer, and that the use of these words by the defendants was likely to cause confusion. Upon these findings the House of Lords, reversing the court of appeal, held that the plaintiff was entitled to an injunction restraining the defendant from using the words "camel hair," as descriptive of, or in connection with, belting manufactured by them without clearly distinguishing such belting from the plaintiff's belting. In the course of his opinion, Lord Herschell said:

> The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A when he was really getting the goods of B. * * * In the present case the jury have found, and in my opinion there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They have found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining goods manufactured by the plaintiffs, and thus both to deceive them and to injure the plaintiffs.

Similarly, invented words or terms used in connection with articles may be protected even though they may not be the subject for a valid trade-mark. Thus the word "Silverpan" was held not to be a valid trade-mark, but another manufacturer was not allowed to use the words "Silver Pan" in connection with a similar article of merchandise.[1] The plaintiffs were jam manufacturers, and in 1886 commenced to make their jams in silver pans instead of copper vessels, adopting the word "Silverpan" in connection with the sale of their product. It was registered as a trade-mark in 1887. The defendants, who were retail grocers several miles away, in advertising the jam of another manufacturer, used the words "Silver Pan." The plaintiffs sought to restrain the defendants from passing off such goods as the goods of the plaintiffs, the defendants in the meantime having succeeded in expunging the plaintiffs' trade-mark from the register. The court of appeal, in affirming the order of the lower court granting an injunction, held that the word "Silverpan" had

[1] Faulder & Co. (Ltd.) v. Rushton (Ltd.), 20 R. P. C., 477 (1903).

come to mean Faulder's jam. It was also decided that it was necessary for the plaintiff to show in such cases that the identification of the name with his article was recognized within the district in which the defendant carried on business.

DRESS OF GOODS.—The imitation of labels and packages is one of the most frequently used methods of passing off one's goods for those of another. When appealing to the eye of the customer it is only necessary to imitate the striking features of another's goods in order to cause confusion. The name, color, or size may be a prominent feature of the label, but the question usually to be decided by the court is whether the entire dress of the article will mislead the ordinary purchaser. The cases falling under this head are usually cases of deliberate fraud, because, as a rule, to result in passing off, the general get-up must be imitated, and this can hardly happen by accident. An early case in which the adoption of the name was considered in connection with other imitative features of the label is that of Croft *v.* Day, decided in 1843.[1] An establishment manufacturing blacking had long been carried on under the firm name of Day & Martin at 97 High Holburn. A nephew of the Day who was a partner in the original firm, having obtained the authority of a man named Martin to use his name, set up the same trade at 90½ Holburn Hill, and sold blacking in bottles with labels having a general resemblance to those of the original firm. The labels in question were the same color and size, and the letters were arranged in precisely the same manner. An injunction was granted restraining the defendant from using any label which would mislead the public into buying his goods for (thinking it was obtaining) those of the plaintiff. The master of the rolls, in granting the injunction, said:

> My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names of Day & Martin, but upon the fact that the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself to which he is not, in fair and honest dealing, entitled.

The adoption of a single feature would probably not result in confusion, and, as Lord Justice Cotten said in 1887, speaking for the court of appeal:

> There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common-law doctrine, in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendants from passing off their goods as those of the plaintiffs.[2]

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[1] 7 Beav., 84, 89.

[2] Lever *v.* Goodwin, L. R. (1887), 36 Ch. Div., 1, 5.

Both plaintiffs and defendants in this case were manufacturers of soap. It appears that the defendants sold their soap in packets of the same size and shape, wrapped in the same kind of paper, with spaced printing of the same color, as that of the plaintiffs, the chief difference being in the name adopted, the defendants' soap being described as "Goodwin's Self-Washing Soap" instead of "Sunlight Self-Washer." The term "Self-Washer" was registered by the plaintiffs as a trade-mark. The case failed with reference to the trade-mark, the court holding that the words were merely descriptive, but an injunction was issued as to the use of the wrappers. It was held also that while the retail dealers to whom the defendants sold soap might not be deceived, the defendants were nevertheless guilty of a wrongful act, because they had put into the hands of the middlemen a means of committing a fraud on the plaintiffs.

However, a manufacturer can not be held responsible for deception, caused by the deliberate fraud of the retailer, to which he is not a party. This was the ruling of the House of Lords in the case of Payton *v.* Snelling, Lampard & Co. (Ltd.),[1] decided in 1900. The plaintiffs were wholesale dealers in coffee, and in 1895 began selling their "Royal Coffee" in tins which were enameled in bright colors. Defendants, in 1897, adopted the same method of packing their "Flag Coffee." The tins were decorated in the same colors and in practically the same manner, and it was contended that even though the names were entirely different a retail dealer might conceal the name on the can and thus substitute the defendants' coffee for that of the plaintiff. An injunction was granted in the trial court, but was reversed in the court of appeal, which court dismissed the action, holding the evidence insufficient, and that even though a manufacturer introduced a new feature into the get-up of his goods, he did not thereby acquire an exclusive right to it. The decision was affirmed by the House of Lords.

Selling one's own goods in refilled packages or bottles bearing another's labels is fraud of such a gross nature that it is seldom attempted. The only difficulty lies in detecting the offense. A case in point is that of Hennessey & Co. *v.* Neary,[2] decided in 1901. The defendant sold an inferior brandy for that of plaintiffs' "Three Star Brandy," using the bottles of the plaintiffs with the labels still attached. In an action to restrain an infringement of trade-mark and for passing off, it was proved by experts that the brandy was not the plaintiffs', but an inferior article, and an injunction was granted.

Dress of store.—Similarity in dress of store alone apparently will not support an action for passing off. However, it may be part of a

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[1] L. R. (1901), A. C., 308. [2] 19 R. P. C., 36.

general scheme to pass one's business or goods off for those of another. An early case, in which the dress of two rival cab companies was involved, is that of Knott *v.* Morgan.[1] A bill was filed by the proprietors of the London Conveyance Co., charging the defendant with fraudulently securing the customers of the plaintiff by the use of the words "Conveyance Company" and "London Conveyance Company" on its omnibuses. The same insignia were used, and the dress of the cabmen and conductors was also imitated. An injunction was granted restraining the defendant from using the words above on his omnibuses or any other names, words, or devices painted, stamped, printed, or written thereon in such a manner as to form or be a colorable imitation of those in use by the plaintiff. The action of the court was based on its belief that the defendant intended to mislead the public into thinking his omnibuses belonged to the plaintiff.

A case in which the facts were very similar, and in which an injunction was also granted, is that of W. & G. Du Cros *v.* Gold.[2] This was an action to restrain the defendant from so getting up his taxicabs as to pass them off as the plaintiffs'. The plaintiffs' cabs were painted dark green and yellow, or primrose, and on the door there was a panel immediately below the window, on which the initials of the two brothers, William and George Du Cros, appeared in a very characteristic form. The initials "W. & G." were connected by the sign "&." Other people had painted their taxicabs green and yellow, including the defendant, whose full name was Morris Gold. To more clearly imitate the cabs of the plaintiffs he had painted on the panels of the doors of his cabs his initials "M. G." in the same form and script as the plaintiffs', with a twist or curl between the two letters that would be easily mistaken for the sign "&." Evidence was introduced of actual deception; and counsel for the plaintiffs agreed to an order for the obliteration of the letters "M. G." The court's order was based not upon the similarity of color, which on the evidence was shown to be common to the trade, but upon the association of these elements with the letters "M. G." painted in a deceptive manner.

Accordingly the use of signs which may mislead customers as to the identity of the store may be enjoined. In Hookham *v.* Pottage[3] the court of appeal (in chancery) granted an injunction restraining the defendant from using the name of the plaintiff, with whom he was formerly connected, on his shop sign in a manner deceptive to the public. Plaintiff and defendant were formerly partners in business, the partnership having been dissolved by a decree of the court. It

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[1] 2 Keen, 213 (1836).
[2] 29 T. L. Reps., 163 (1912); see also London General Omnibus Co. Ltd. *v.* Felton, 12 T. L. Reps., 213 (1896).
[3] 27 L. T., 595 (1872).

was agreed that the plaintiff should continue in the old business. Subsequently the defendant set up the same line of business only a few doors from the old place and on the same side of the street. The appearance of the two shops was similar, and the defendant painted over his door "S. Pottage, from Hookham & Pottage." The word "Hookham" was immediately over the door, and evidence was introduced to the effect that customers actually had been deceived. It was held that while the defendant was entitled to announce to the public by this method the fact that he was formerly a member of the old firm, he could not do so in a manner calculated to cause the belief that he was carrying on the old business.[1]

IMITATION OF GOODS.—As stated in the discussion of the American cases on this subject, the general rule is that there can be no monopoly in the form, color, or construction of an article in the absence of patent protection. There are cases, however, where the peculiar shape or style of the article has become associated with the article so as to mean the particular trader's article. To permit a rival to adopt the same characteristic shape or style would be to allow him to pass his goods off for those of the first user. Naturally the cases which fall into this class are not numerous. In Ripley *v.* Bandey[2], decided in 1897, Justice Kekewich, although refusing the plaintiff an injunction because of laches, held that the defendant in imitating the plaintiff's oval blocks of blue was guilty of passing off. The plaintiff's goods were sold under the name "Oval Blue," while the defendant adopted the name "Tiger Blue." It was shown that the plaintiff had manufactured laundry blue since 1871, and that other manufacturers had made blue in blocks of similar shape since 1880. Although the plaintiff knew of this, no complaint was made until this action was commenced against the defendant, in 1896. Although the injunction was refused for this reason, the court said:

> I am satisfied * * * that the defendant intended to appropriate the plaintiff's words as far as he could; to enter into rivalry with him in the trade, not by making better goods, advertising more, nor by honest industry only—although I hope he exercised that, too—but by imitating as closely as possible the plaintiff's goods; and that he desired to manufacture and sell "Oval Blue," because he knew—which he did know—that Ripley's "Oval Blue" had a large sale in the market, that Ripley's was "Oval Blue" and "Oval Blue" was Ripley's, and he found that he could not get that sale which he desired of his own goods unless he sold goods of that oval shape, and so passed them off—that was the actual and intended result—as Ripley's "Oval Blue." On that ground also I should hold the plaintiff entitled to relief.

An appeal was taken, but in process of trial the case was compromised.

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[1] See also Glenny *v.* Smith, 2 Drewry & Smale 476 (1865), and Boswell *v.* Mathie, 11 Sess. Cas. (4th Series) 1072 (1884).

[2] 14 R. P. C., 591, 594.

Another case in which the shape of the article was imitated by the defendant is that of Elliott & Co. (Ltd.) *v.* Hodgson, decided by the high court of justice, chancery division, in 1902.[1] The plaintiffs asked that the defendant be restrained from using cigar boxes similar to those used by plaintiffs, and that he be further restrained from selling or dealing in any cigars made in the distinctive shape adopted by the plaintiffs, namely, "bull nosed," or "flat ended," and "cylindrical shaped" throughout, without clearly distinguishing the same. Neither cigar had bands, the plaintiffs' being sold under the name of "Bulldog" and the defendant's under the name of "Turnbull." An injunction was refused as to the boxes, but an interlocutory injunction was granted as to the shape of the cigars, the court holding that the cigars might be sold apart from the boxes so as to mislead purchasers.

The manufacture and sale of articles on which the patent has expired may be mentioned in this connection. At the expiration of a patent anyone may manufacture the patented article and may sell it under the name by which it was sold by the patentee, provided only that proper precautions are taken not to deceive the public as to the manufacturer. The rule, which, it may be noted, is the same as that prevailing in the United States, is well illustrated by the case of Cheavin *v.* Walker.[2] That was an action to restrain the defendants from manufacturing and selling filters under the following label: "S. Cheavin's Patent Prize Medal Self-cleaning Rapid Water Filters, Improved and Manufactured by Walker, Brightman & Co., Boston, England." It appeared that these filters were made according to the plaintiff's patent, which had expired. During the life of the patent the plaintiff's filters had been labeled "G. Cheavin's Improved Patent Gold Medal Self-cleaning Rapid Water Filters, Boston, England," and were known to the trade and by the public as "Cheavin's filters." The court of appeal held that since the plaintiff's patent had expired the defendant had the right to manufacture filters according to the patent and to sell them by the name by which the patentee had caused his own filters to be generally known; and that since the defendant had clearly designated that he and not the plaintiff was the manufacturer of the filters which he offered for sale the plaintiff was not entitled to relief under the rule against passing off.

The same result was reached in Linoleum Manufacturing Co. *v.* Nairn,[3] in which a right to the exclusive use of the word "Linoleum" was asserted, the product to which the name was attached having been covered by patents which had expired.

Miscellaneous.—A recent case which involves a kind of passing off not properly belonging in any of the above classes is Spalding

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[1] 19 R. P. C., 518. [2] L. R. (1877), 5 Ch. Div., 850. [3] L. R. (1878), 7 Ch. Div., 846.

& Bros. *v.* A. W. Gammage (Ltd.) and Benetfink & Co. (Ltd.),[1] decided by the court of appeal in 1914. The plaintiffs, in the year 1910, put on the market a football known as the "Improved Orb," which proved a great commercial success. Some of these balls, however, proved to be defective, and accordingly, in 1912, the plaintiffs sold a large quantity of them to waste-rubber manufacturers at a very low price, and at about the same time brought out a new article called the "Improved Sewn Orb Football," manufactured under patent No. 15168, and offered it for sale at a price of 10s. 6d. The 1910 balls, which had been sold as junk in the manner related, were resold to the defendants, who proceeded to advertise them as "Improved Orb Footballs," made under patent No. 15168, and to sell them for 4s. 9d. apiece. The balls were, in fact, "Improved Orb Footballs" of the plaintiff's manufacture, but they were not made under patent No. 15168, as advertised. It appeared that these advertisements were carelessly framed by one of the defendants' employees and that they were promptly discontinued as soon as their misleading features were pointed out by the plaintiffs. In lieu thereof the defendants published a new series of advertisements in which the nature of the footballs offered for sale was accurately described. The trial judge, however, took the view that these advertisements, though harmless in themselves, ought to have expressly said that there had been a mistake in the earlier advertisements, and for their failure to do so he granted an injunction restraining the defendants from "selling, advertising, offering for sale, or supplying" footballs other than "Improved Sewn Orb Footballs" made under patent No. 15168. The injunction was dissolved on appeal, on the ground that the corrected advertisements cured the misleading features of the earlier ones, and there being no evidence of any damage to the plaintiffs during the time the latter were published, the action was dismissed. The language of the court, however, leaves no doubt as to its opinion of the illegality of the first series of advertisements. Thus Phillimore, L. J., said:

> But the defendant company proceeded to sell what I may call the 1910 footballs, having attracted customers by advertising them with a description which was substantially that used for the 1912 footballs. This is a "passing off" which is actionable. It is not the usual passing off when the man sells his own goods, representing them to be those of another trader. But it is a more subtle and possibly a more injurious passing off when a man sells the second-class goods of a trader, representing them as the first-class goods of that trader.[2]

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[1] 110 Law Times Reps., 530. See John Jameson & Son *v.* Isaac Clarke, 19 R. P. C. 255 (1902), where it appeared that the plaintiffs sold whiskey in casks to retailers and supplied customers with two kinds of labels, one for 3-year-old whiskey and one for use on bottles containing whiskey at least 7 years old, and that the defendant purchased 3-year-old whiskey, secured imitations of labels for 7-year-old whiskey, and sold it as such. An injunction was granted. See also Teacher *v.* Levy, 23 R. P. C. 117, 124 (1905), and Hunt, Roope, Teage & Co. *v.* Ehrmann Bros., 27 R. P. C. 512, 521 (1910).

[2] Cf. Everett Piano Co. *v.* Maus, p. 97.

Section 17. Conspiracies to injure competitors.

AMERICAN DECISIONS.

The members of a partnership operating the Kellogg elevator in Buffalo brought an action against certain railroads and others, including the president of the Western Elevating Association Co., a joint-stock association, composed of 20 members, charging a conspiracy to prevent the plaintiffs from operating their elevator. The plaintiff alleged that the Kellogg elevator was well located and equipped with a capacity of 20,000,000 bushels each season, and stated the prevailing rates for elevating and transshipping grain; that by an agreement between the defendants the elevating association was to elevate and load all grain to be forwarded by the railroad companies, utilizing for these purposes any of the elevators comprising what were known as the "facilities of the port" that had rail connection with the railroad, and first selecting, so far as the association might find feasible, the elevators designated by the railroad company. For these services the association was to receive one-half cent per bushel on all lake grain arriving at Buffalo in the lake season and carried from Buffalo by the railroad company, payment to be made on all grain actually elevated and handled by or under the direction of the association or otherwise. The plaintiff charged that such agreement and kindred agreements "were entered into as a part of an unlawful combination and conspiracy to injure these plaintiffs and preventing them from doing business as above set out"; that in pursuance of such combination the railroads refused to carry grain for shippers who sent it through the plaintiff's elevator except on the condition that an additional charge of one-half cent per bushel was paid by such shipper to said railroad companies; that such agreements and refusals were unlawful and made for the purpose of injuring the plaintiffs and preventing them from doing business at their said elevator, and for the purpose of advancing the interests of the association and the railroads, who either own or are interested in certain elevators in said association. It was further alleged that two named firms had arranged to use the plaintiff's elevator and were prevented from so doing by the said unlawful combination and conspiracy; and it was alleged generally that many shippers of grain were hindered and delayed from sending their grain through the Kellogg elevator by reason of said combination, and that the plaintiffs had been prevented and would be prevented from elevating many million bushels of grain and from receiving the elevator charges, etc., to their damage of $100,000. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and on appeal the judgment was sustained the appellate division of the supreme court holding that the inferences and charges contained in the complaint were sufficient to enable the plaintiffs to give proof in support of the charge that the agreement was entered into to accomplish an unlawful combination against the plaintiffs.[1] On appeal after trial the appellate division held the defendants liable on the ground that the discrimination practiced by the railroads against the plaintiffs was unlawful, and this being the natural result of the contract and contemplated by the members of the association, they became parties to it and liable also.[2] The court of appeals subsequently held that the acts complained of were in contravention of section 168, subdivision 6, of the New York Penal Code, making it criminal to conspire to commit any act injurious to trade or commerce, but that the gist of this action being the conspiracy no action would lie if the defendants, when entering into the contracts, acted under the belief that the plaintiffs themselves would become members of the association. Such a belief on the part of the defendants tended, the court said, to disprove any intention on the part of the defendants to injure the plaintiffs, whatever might be said of the agreement as affecting others.[3]

James E. Doyle brought an action against the Standard Oil Co. and others, charging a conspiracy to ruin him and drive him out of the oil business.[4] He alleged, and the evidence introduced by him tended to show, that he had been in the employ of the Standard Oil Co. for 15 to 20 years in the city of Lexington and vicinity, when, in 1901, he resigned to go into the oil business for himself and made an arrangement with the Wilburine Oil Works Co., of Cincinnati, to furnish him oil for sale. For several months he did a flourishing business. Among other sales was one of a carload of oil to defendant, Griffith, who was doing business under the name of the Brilliant Light Oil Co. Shortly after he commenced business, one Bonnycastle, representing the Standard, arrived to look after the business of that company, one of the objects, it was alleged, being to secure the return to the Standard Co. of the business it has lost as a result of Doyle's resignation. Bonnycastle approached the defendant, Gilman (who was oil inspector of Fayette County), for aid and advice.[5] They concluded that the best thing to do to secure the return of Griffith's patronage was to furnish wagons and oil to one Fisher, who was a deputy oil inspector under Gilman, to sell oil in opposition to

[1] Kellogg et al. *v.* The Lehigh Valley Railroad Co. et al., 70 N. Y. Supp., 237 (Sup. Ct. App. Div., 1901).

[2] Kellogg et al. *v.* Sowerby et al., 87 N. Y. Supp., 412 (Supt. Ct. App. Div., 1904).

[3] Kellogg et al. *v.* Sowerby et al., 190 N. Y., 370 (1907).

[4] Standard Oil Co. et al. *v.* Doyle, 118 Ky., 662, 669, 670, 671, 681 (1904).

[5] See United States *v.* Standard Oil Co. of New Jersey et al. (C. C. E. D. Mo.), brief of Facts and argument for petitioner, Vol. II, pp. 422–428. See also United States *v.* American Tobacco Co. et al. (C. C. So. D. N. Y.), record, Vol. II, pp. 326–327.

Griffith, who was operating the Brilliant Co. Immediately after this, however, Bonnycastle and another agent of the Standard visited Griffith and proposed that if he would ship back the oil he had purchased from Doyle they would consider giving him a rebate of 1 cent per gallon, and also that, if he did not return the oil, they would put wagons on the route in opposition to him and ruin his trade. As a result of this and subsequent conversations Griffith returned the oil and formed a partnership with the oil inspector, Gilman, who subsequently bought Griffith's half interest in the business. During the partnership and afterwards Fisher, the deputy, was secretary and treasurer of the concern, and the Standard Oil Co. supplied them with two wagons to be used in peddling the company's oils. There was evidence to show that they were furnished free of charge, but the testimony was conflicting. These wagons were run in opposition to Doyle, and there was proof to show that the drivers of the Brilliant Co. obstructed, annoyed, and harrassed his driver by following him, and sometimes getting in front of him, stopping at every place at which he stopped, sometimes going into a residence with Doyle's driver and there offering oil at a cheaper rate, offering to give free oil as an inducement not to buy oil of him, and in one or two instances cursing and abusing Doyle's employee.[1] Sometimes they would stand for hours at one place awaiting the movement of plaintiff's driver. The plaintiff proved that after he discovered that the Standard had made an arrangement with the oil inspector to sell oil in competition with him he became apprehensive that his oils would not receive a fair inspection and had the next car of oil inspected in another county, where is was reported to be above the legal standard. When this car reached Lexington Gilman and his deputy inspected it and reported that it was below test. Doyle thereupon had samples tested by Profs. Scovell and Peters, expert chemists at the Agricultural and Mechanical College, and it was again reported to be above the legal test. The next day defendant, Gilman, and one O'Mahoney, an ex-oil inspector, made tests and had the same chemists make other tests and the oil was found to be below the required standard. Gilman then condemned the carload as unsafe for illuminating purposes, and caused his deputy, Fisher, who was also a deputy clerk, to issue a summons against Doyle to show cause why he should not be punished for selling unsafe oils. This was subsequently dismissed for the reason that it was illegally issued, whereupon Gilman caused a warrant to be issued, charging Doyle with selling and offering to sell unsafe and condemned oils. At the trial tests were made by all parties who had previously tested the samples, and the charge was dismissed. After condemning this oil, Gilman

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[1] See Intimidation, obstruction, and molestation of a competitor or his customers, p. 187 et seq.

reported to Doyle's customers that the oil had been condemned and that they must not buy or sell it, and that if they did they would be prosecuted. After this notice these customers did not sell any more of this oil nor purchase any more from him. One witness, formerly in the employ of the Brilliant Co., stated that before this oil was condemned by Gilman and his assistant, Gilman said to witness and Bonnycastle, the agent of the Standard Oil Co., that appellee had not treated him right in having his oil inspected in Kenton County and trying to cut him out of his fees for inspection, and that defendant remarked, "I don't think it will stand the test anyhow, and I will condemn it." Bonnycastle then said, "Condemn it, and we will see you through." Judgment in the circuit court was for the plaintiff. In affirming this judgment, Judge Nunn, of the court of appeals, said, in part:

The charge of malicious conspiracy, confederation, etc., against appellants, even if true, did not give appellee a cause of action, unless the means used by them to carry out their purpose were unlawful, and that by such means they succeeded in injuring appellee's business. Malice and bad motive alone do not constitute a cause of action, but where one exists they only make it worse for the defendants. Undoubtedly one man may by fair methods compete with a rival until by sheer force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival. The damage in such case is in the eye of the law damnum absque injuria. But a different case is presented where one seeks not only to build up his own business at the expense of a rival's, but to impair, and if possible, destroy, that rival's business by the use of unlawful means by saying and doing that which he has no lawful right to say and do, in so far as it works loss and damage to his rival. It is also true whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful, so far as the purpose is concerned, yet, where unlawful means are used in effectuating that purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence may be recovered.

* * * The remaining matter to be determined is whether the alleged means used to injure or drive appellee out of business were lawful or unlawful. If lawful, the petition did not state facts sufficient to constitute a cause of action; if unlawful it did, and the lower court did not err in overruling appellants' demurrer. * * *

* * * It was most assuredly unlawful to obstruct, harass, and annoy appellee's employees when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils; to cause and procure false and injurious reports concerning appellee and his business to be circulated in Lexington and vicinity; and to procure appellee's arrest and prosecution on false charges in connection with his business in the sale of oils for the purpose of estranging and alienating the acquaintances, customers, and patrons of appellee. * * *

* * * If it be true, as the jury seems to have determined, that this conspiracy was formed, and in pursuance thereof the appellants fraudulently caused appellee's oils to be condemned, and willfully reported the oils to be below the

legal test, when they knew or had reason to believe they were not below the test, and had appellee arrested upon the false charge of selling condemned oil, and obstructed, harassed, and annoyed appellee's drivers when delivering his oil for the purpose of injuring and driving appellee out of the business of selling oils, we can not say that the verdict is excessive.

The Crystal Oil Co. had conducted a retail (tank wagon) oil business in Des Moines, Iowa, from 1893 to 1898, and during this time had purchased its oil from the Standard Oil Co. In the latter year it began to purchase a part of its supply elsewhere, whereupon the Standard company demanded all of its business. The Crystal Co. refusing to comply with the demand, the Standard immediately equipped itself with tank wagons, which were operated under the guise of independents, and began business in active competition with the Crystal Co. There was apparently evidence to show that the Standard's drivers devoted themselves largely to securing customers of the Crystal Co., and made little effort to build up a business generally. The Crystal Co. had been accustomed to supply its customers with green cards to be displayed in windows when oil was wanted. The Standard's drivers were instructed to give special attention to these cards, and in pursuance of these instructions they sold oil to parties displaying them, permitting them to suppose that they were dealing with a Crystal agent. The evidence also apparently showed that the Standard's agent urged the drivers to "go after the green cards," "to hustle the green cards," "go after the Crystal Co." After a few months the Crystal Co. was forced out, the Standard withdrew its tank wagons, and ceased to do a retail business. One Dunshee, assignee of the Crystal Co., brought an action for damages for the unlawful interference by the Standard with the business of the former company; and it was held, on appeal, that, while defendant had a right in good faith to establish a competing business, it had no right, under the guise of competition, to inflict a malicious injury on the Crystal Co. and to drive it out of business. Judgment was therefore given for the plaintiff. The appellate court, in the course of its opinion, said in part:

Coming to the case in hand, we may concede to the appellants the undoubted right to establish a retail-oil business in Des Moines, to employ agents and drivers, and send them out over the same routes and make sales to the same people with whom the Crystal Oil Co. was dealing; but in so doing it was bound to conduct such business with reasonable regard and consideration for the equal right of the Crystal Co. to continue its business and to continue supplying oil to such of its customers as desired to remain with it. If, however, there was no real purpose or desire to establish a competing business, but under the guise or pretense of competition to accomplish a malicious purpose to ruin the Crystal Co. or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business, seeking in good faith the patronage of the same people. And if, under such pretense of competition, defendants maliciously interfered with the business of the Crystal Oil Co. in the manner charged, and injury to the latter was thereby inflicted, a right of action exists for the recovery of damages.[1]

Section 18. Miscellaneous.

AMERICAN DECISIONS.

The Quebec Steamship Co. owned a fleet sailing regularly from New York to the Barbados. The British steamer El Callao, sailing between New York and South America, began to take freight for the Barbados, whereupon the steamship line offered a greatly reduced rate to all merchants in New York who would agree to ship in its vessels exclusively during the week that the El Callao was taking on cargo. At other times the regular rates were maintained. A firm of commission merchants at New York were shipping by the El Callao, and demanded that the steamship line accept their freight to the Barbados at the special rate. The steamship company refused, except upon condition that the merchants would ship by its line exclusively, whereupon the shippers sought equitable relief, to the effect, substantially, that the defendants be compelled to transport their freight at special rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the time specified by the defendant's line exclusively. There was a finding by the lower court that the regular rate was reasonable. The New York Court of Appeals held that the defendant was a common carrier and under the common law must carry for all at a reasonable rate; and that the regular rate being no more than was reasonable, the defendants could give reduced rates to customers who would give it all their business and refuse those rates to others who would not do so. The opinion is, in part, as follows:

"* * * When an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met and when it disappeared to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I can not perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines." The court quoted from the remarks of Lord Coleridge in Mogul Steamship Co. *v.* McGregor, and concluded as follows:

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[1] Dunshee *v.* Standard Oil Co. et al., 152 Iowa, 618, 626 (1911).

"The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only. But to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedents based upon the doctrine of the common law, and would, I think, be contrary to reason and justice."[1]

The Passaic Print Works alleged in an action for damages against the Ely & Walker Dry Goods Co. et al. that it manufactured prints and calicoes, selling the same through agents to jobbers or wholesale dealers throughout the United States, who in turn sold to the retail trade; that the city of St. Louis was one of its wholesale markets; that its selling agents had fixed the price for certain named brands of calicoes, and that it had received large orders for the said prints at said prices. It was further alleged that the Ely & Walker Dry Goods Co. and others combining and conspiring among themselves and with others unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular in the name of the defendant corporation to be issued to the retail trade tributary to St. Louis offering a limited quantity of various brands of cloth, among them certain brands manufactured by the plaintiff, at reduced prices. It was averred that the plaintiff had not sold to any of the defendants any of the said prints for about a year, and that it had never sold to said defendants any of two named brands; that if defendants had any of the last-mentioned prints it had purchased them at second hand. It was further averred that the effect of the circular was to advertise to the retail trade tributary to St. Louis that the said brands could be purchased at less from the defendant corporation than they could be from other jobbers to whom the plaintiff had sold large quantities thereof and to cause the jobbers to either cancel their orders or to compel the plaintiff to make a rebate in order that other jobbers might meet the prices so specified in defendants' circular, and to break up, injure, and destroy the sale and trade in such prints in the St. Louis and tributary markets, except at greatly reduced prices. It was also alleged on information and belief that said quotations were made for the purpose of injuring and destroying plaintiff's trade, and that in consequence it lost large profits on sales

[1] Lough et al. *v.* Outerbridge et al., 143 N. Y., 271, 282 (1894); reargued and decision affirmed, Andrews, Ch. J., and Peckham, J., dissenting (145 N. Y., 601). See also investigation of Shipping Combinations under House resolution No. 587, 62d Cong., 2d sess., Hearings, vol. 2, pp. 1391–1397.

which it might have made, and had been further damaged by having to change the name of its goods and by having their identity lost. The trial court sustained a demurrer to the plaintiff's petition. In affirming the judgment the circuit court of appeals said, in part:

Moreover, the owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers and incidentally to occasion loss to third parties who have the same kind or species of property for sale. The right to offer property for sale and to fix the price at which it may be bought is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is damnum absque injuria. We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act and rendered the same unlawful when, but for the motive of the actor, it would have been clearly lawful. * * *

The case at bar falls within neither of the exceptions to the general rule above stated—that if an act is done in the exercise of an undoubted right and is lawful the motive of the actor is immaterial. No one can dispute the right of the defendant company 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. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of the secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell, and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful. * * * In view of all the allegations which the complaint contains, it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in issuing it was to occasion loss or inconvenience to the plaintiff.[1]

The Duncan-Schell Furniture Company's agency for the sale of the White sewing machines was terminated and one Boggs was appointed its successor. The president of the furniture company, after having expressed the intention of running Boggs out of business with the same machine, advertised some old White machines as "just received" and of the latest pattern and equipped with the best attachments. These machines were advertised at $24.75 and $25, although the price of the new machines handled by Boggs was $45. Subsequently the president of the furniture company refused

[1] Passaic Print Works *v.* Ely & Walker Dry Goods Co. et al., 105 Fed., 163, 166 (C. C. A., 1900). Certiorari denied by United States Supreme Court, 181 U. S., 617 (1901). Cf. Ajello *v.* Worsley, p. 289.

to sell the machines to the manufacturer's State agent at any price, stating that he wanted to keep them as souvenirs, and, when informed that the advertisements were hurting Boggs and the White Sewing Machine Co., replied that he "didn't care for that"; he "advertised as he pleased." Boggs brought an action to recover damages for injury to his business.[1] From a verdict and judgment for the plaintiff the defendants appealed. Affirmed. Held, that the case presented was not one of lawful competition, but of simulated competition, designed and carried out with malice, for the purpose of injuring the plaintiff in his business, and that such conduct was actionable. The court said, in part:

Every man has the legal right to advance himself before his fellows and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor. The law will not permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong.

The Victor Talking Machine Co. brought an action for goods sold and delivered to one Lucker, with whom they had a jobbing contract terminable at the will of either party. The defendant set up as a counterclaim that, after the plaintiff had terminated this contract, and at a time when he had on hand a large stock of machines and records of the plaintiff's manufacture, the plaintiff notified the retailers and dealers with whom the defendant had been doing business that the defendant was no longer a jobber or distributor of its goods, and that they must thereafter buy Victor machines and records from jobbers and distributors other than the defendant. The trial court gave judgment for the Victor Company on the pleadings as to the counterclaim, holding that the allegations were not sufficient to warrant a recovery. On appeal this ruling was sustained, the Supreme Court of Minnesota saying, in part:

In this case defendant had for sale goods of plaintiff's manufacture. Plaintiff had the same class of goods for sale. In this sense they were competitors. Defendant had the right to sell to anyone he chose, among others to the licensed dealers of plaintiff. No contract or other obligation prevented his selling to them or prevented their buying from him. In this situation plaintiff notified these dealers that defendant was no longer a jobber or distributor of its goods. This was true, and no action can be predicated on such a statement. It also told them that they must thereafter buy Victor machines and records from jobbers or distributors other than defendant. This was a direction which the dealers had the right to follow or not, as they pleased. There is no allegation

[1] Boggs v. Duncan-Schell Furniture Co. et al., 143 N. W., 482, 486 (Sup. Ct. of Iowa, 1913).

that plaintiff used or attempted any sort of coercion. There is no charge of misrepresentation, as in Virtue *v.* Creamery Package Manufacturing Co.[1] This was a notice by one competitor, telling buyers not to do business with another. Such conduct, without more, is not actionable. One man may lawfully seek the business of a competitor and may tell the "trade" not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud, or other harassing methods.[2] * * *

Peter Graham was proprietor of a grocery store near the station of the St. Charles Street Railroad Co. in New Orleans. One Newman, a foreman of the company, whose tenant also conducted a grocery, urged the employees of the company not to deal with Graham, discharged some who persisted in so doing, raised the rent of premises he leased to one of the employees because he dealt with Graham, and gave another tenant notice to quit for the same reason and in his efforts to divert trade from Graham, he used abusive language regarding him. Graham instituted an action for damages against the railroad company and the foreman for the resulting injury to his business. Judgment was given in the lower court against both the railroad company and Newman. On appeal the judgment was reversed as to the railroad company but affirmed as to Newman, the appellate court saying in part:

No man is privileged to injure another in his business. If the defendant, Newman, by his conduct and language sought to create a prejudice or feeling against plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff. Nor is that reparation to be measured by proof of actual damage. Every act of man that causes damage to another obliges the wrongdoer to restitution, is the language of the code, requiring the obvious qualification that the act must be wrongful, and in the assessment of the damages the exercise of the discretion of the jury or court is admitted. * * * The fact that the defendant's tenant had a grocery in the neighborhood, apt to be benefited by diversion of plaintiff's customers, supplies the motive of interest, but does not, in our view, at all mitigate his conduct. With all reasonable allowance for the competitions of trade and the means by which the shopkeeper or merchant obtains business, words and actions to discredit it and injure a rival in business can not be tolerated.[3]

James Robinson conducted a mercantile and saloon business. The Texas Pine Land Co. was engaged in the logging business, in connection with which it also did a mercantile business and issued pay checks to its employees redeemable in goods at its store. It had become a custom for the employees to use these checks as a sort of currency in dealing with others in the community, including Robinson, who, with others, had been accustomed to use the checks so taken as money in their dealings with the Texas Pine Land Co., which for a time accepted them in payment of obligations. Later,

[1] 123 Minn., 17; 142 N. W., 930, 1136.

[2] Victor Talking Machine Co. *v.* Lucker, 150 N. W., 790 (Minn. Sup. Ct., 1915).

[3] Peter Graham *v.* St. Charles Street Railroad Co. et al., 47 La. Ann. 214, 1656, 1659 (Sup. Ct. of La., 1895).

however, it refused to accept any of these checks that had passed through Robinson's hands, and threatened to discharge any of its employees who traded in any way with Robinson. The latter thereupon brought an action against the company for injury to his business, alleging as the cause of action the refusal to honor pay checks that had passed through his hands and the threats to discharge any employees who dealt with him. Judgment was entered in the lower court for the defendant, and on appeal the judgment was sustained, the appellate court thus stating in part the reasons for its decision:

> According to plaintiff's allegations, competition in trade existed between plaintiff and defendant, and it was legitimate for defendant to appropriate to itself all the customers it could command, even to the extent of driving plaintiff out of business, provided the means used for that purpose did not contravene any law or violate a definite legal right of the plaintiff. The latter had no legal right to protection against competition. He had no superior right to the trade of defendant's employees or that of other persons. * * * If the defendant could so control its employees as to prevent their dealing with plaintiff or so control their wages as to divert them from the channels of plaintiff's business in favor of its own, we know of no rule making it actionable. Had the defendant no proper interest of its own to subserve in so doing, but had acted wantonly in causing loss to plaintiff, the rule would be different. * * * Defendant might at any time have stopped the issuing of checks and plaintiff could not have complained. * * * If they could stop the system altogether without giving a right of action in tort, it would follow that they could place restrictions on the use of checks without incurring such liability. * * * A system whereby such checks would be honored in the hands of anyone except plaintiff was calculated to insure trade at defendant's store and diminish that of its rival; and as plaintiff has no definite right to the public trade, he has no legal right to complain that defendant absorbed it by the manner of managing its business and its relations with its employees.[1]

One Lewis opened a general merchandise store near the place of business of the Huie-Hodge Lumber Co., which also operated a general store in connection with its lumber business. Lewis and the lumber company were therefore active competitors for the trade of the employees of the latter. Lewis later brought an action for damages against the lumber company, alleging that in order to ruin his business the company had prevented wholesalers and jobbers from selling him by threatening to refuse to patronize such wholesalers and jobbers, had threatened to discharge its employees if they dealt with him, had in fact discharged some of them for so dealing, and had intimidated and threatened its employees by posting a notice in its mills exhorting them to be loyal to the company and to deal at its store, and advising them if they could not do so to quit the company's employ and go elsewhere. Plaintiff further alleged that the defendant had employed a system of espionage on its employees

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[1] Robinson *v.* Texas Pine Land Association, 40 S. W., 843, 844 (Texas Ct. of Civil Appeals, 1897); see also Payne *v.* Railroad Co., 13 Lea, 507 (Tenn. Sup. Ct., 1884).

to ascertain whether they dealt with the plaintiff, and as a result the latter had been compelled to deliver goods to such employees after dark and before daylight. The lower court dismissed the petition, and on appeal to the Supreme Court of Louisiana the action of the lower court was affirmed on the ground that the defendant was not acting wantonly or maliciously to injure the plaintiff but was attempting to protect and safeguard its own business interest.[1]

In Collins *v.* American News Co. et al.[2] the complaint, which requested some form of equitable relief, the exact nature of which does not appear, alleged in substance that plaintiff was a dealer in newspapers, using them as a medium for distributing handbills and circulars,[3] that defendant news companies were wholesale selling agents for several New York City papers; that plaintiff had a contract with one of defendants to deliver to him daily such papers as he should order, which contract he had always performed on his part; that with intent to deprive plaintiff of his right to carry on his business, the publishers of the papers involved had confederated and agreed to prevent plaintiff from distributing his handbills in his accustomed way, and had directed their selling agents not to supply papers to plaintiff, unless he should cease such distribution and agree not to distribute; that these agents were now threatening to cease selling papers unless he complied with this demand; that plaintiff's business would be ruined if this was done; and that he was without adequate remedy at law. A demurrer was sustained, the court holding that the complaint failed to state the existence of a binding contract on the part of defendants to supply plaintiff with newspapers, and that, in the absence of such a contract, defendants were free to refuse to sell papers to one who used them as a medium for advertising in competition with their own advertising. Gildersleeve, J., said in part:

By reasonable intendment, the defendants seek not to injure the plaintiff, but to protect themselves by preventing him from making such use of their publications as shall make him a competitor with them in the business of advertising. In this they are deeply interested, for it is a matter of common knowledge that the business of newspaper publishing depends for its profit almost entirely upon the revenue derived from its advertising patronage.

* * * As plaintiff's counsel argues, the plaintiff's business of distributing handbills with his papers is entirely lawful, and one with which no one can rightly interfere. But interference and assistance are two different things. The defendants do not propose to interfere with plaintiff's business. They merely refuse to aid him in it by allowing him to use their papers as a means of circulating handbills to the injury of their advertising business. The plaintiff virtually takes the selfish, one-sided view that, since his business is

[1] Lewis *v.* Huie-Hodge Lumber Co., 46 So., 685 (La. Sup. Ct., 1908).

[2] 69 N. Y. Supp., 638, 641 (Sup. Ct. N. Y., special term, 1901); affirmed by appellate division, 74 N. Y. Supp. 1123.

[3] Cf. White *v.* Mellin, p. 120.

lawful, the defendants must aid him in it, so far, at least, as to sell him their papers, even if it be to their own hurt, so long as it is to his profit.[1]

In a suit for an injunction brought by the Rocky Mountain Bell Telephone Co. against the Utah Independent Telephone Co.[2] the substance of the complaint consisted in the designation by the defendant of No. 888 for its telephone connecting its "trouble clerk" with the telephones used by its subscribers and patrons, after the plaintiff had for years prior thereto adopted and used that number for the same purpose. It was alleged that the adoption of the number by the defendant was fraudulent, surreptitious, and done for the purpose of obtaining information with respect to defects in the plaintiff's system and using the same in efforts to induce the patrons of the plaintiff to subscribe for defendant's telephones instead of those of the plaintiff, to its great and irreparable damage. The court dismissed the suit and this judgment was affirmed by the Supreme Court of Utah, which said in part:

Nor would the fact that some of appellant's patrons subscribed for and used respondents' telephones in consequence of the use of the number 888, as alleged, give the appellant a right to an injunction unless perhaps the subscribers were obtained by a method of what in law is termed unfair competition or unfair trade. That the matters complained of in this case do not bring it within those terms is well illustrated in the cases of Deering Harvester Co. *v.* Whitman & Barnes Manufacturing Co.,[3] Dennison Manufacturing Co. *v.* Thomas Manufacturing Co.,[4] and by many of the cases hereinafter cited. Unfair competition, as we understand it, consists in one person's imitating by some device or designation the wares made and sold by another for the purpose of palming off or substituting his wares for those of the other, and in that way misleading the purchaser by inducing him to buy the wares made and sold by the first instead of those by the second. This in

[1] The placing of handbills, circulars, etc., in newspapers and magazines without the consent of the publisher or owner has recently been made a criminal offense in New Jersey and New York.

New Jersey, Laws 1913, chapter 322: "Any person who places upon or affixes to, or causes an advertisement, notice, circular, pamphlet, card, handbill, printed book, or notice of any kind to be placed upon or affixed to, or places in, or causes to be placed in, a newspaper, magazine, periodical, or book without the consent of the owner or owners of said newspaper, magazine, periodical, or book shall be guilty of a misdemeanor."

New York, Laws 1914, chapter 113: "Any person who, with intent to profit, directly or indirectly thereby, places or causes or produces an advertisement to be placed in or affixes or causes the same to be affixed to a newspaper without the consent of the publisher of said newspaper, or who directly or indirectly places or causes or procures an advertisement to be placed in, or affixes or causes the same to be affixed to a magazine or periodical without the consent of the publisher of such magazine or periodical, and in a way calculated to lead the readers thereof to believe that such advertisement was circulated by such publisher, is guilty of a misdemeanor.

"The placing of an advertisement, notice, circular, pamphlet, card, handbill, printed notice of any kind in, or the affixing thereof to, a newspaper, magazine, or periodical is presumptive evidence that the person or persons or corporation or corporations whose name or names appear therein as proprietor, advertiser, vender, or exhibitor, or whose goods, wares, and merchandise are advertised therein, caused or procured the same to be so placed or affixed with the intent to profit thereby."

[2] Rocky Mountain Bell Telephone Co. *v.* Utah Independent Telephone Co. et al., 31 Utah, 377, 383 (1906). Cf. Winchester Repeating Arms Co. *v.* Butler Bros., 128 Fed. 976 (D. C. (1904).

[3] 91 Fed., 376; 33 C. C. A., 558.

[4] 94 Fed., 651.

law constitutes misrepresentation and deception, and therefore becomes and is a fraud not only against the person whose wares are thus imitated but against the public as well. There is nothing of this sort in this case. Appellant is not dealing in any article which is being imitated, either in substance or form, by the use of the mystic number 888. It is true that its trouble department or the telephone number that connects that department with all other telephones is identified by that number. But this is not for the purpose of either increasing its use or augmenting the sale or to identify any article of trade or commerce made or sold, but for the sole purpose of making it possible and convenient for the patrons of appellant to communicate with that department. No one is injured, no one is deceived, except as alleged, because respondent is using the same number in having its patrons communicate with its department organized for the same purpose. * * *

* * * But suppose it is true that respondent does learn of trouble in respect to appellant's telephones by the means alleged. It could not profit from this unless it can convince the subscriber using appellant's telephone that respondent system is the better one and is better calculated to serve his purpose in that it is less liable to cause trouble. This, if competition is permissible in the telephone business, would seem to be legitimate competition. * * *[1]

In an action for damages Walsh and others, manufacturers of and dealers in saleratus and soda, alleged in substance that the defendants had built up a large trade in "Dwight's Cow Brand Saleratus and Soda," which was in great demand and of substantially the same quality as that sold by plaintiffs at lower prices. It was further alleged that the defendants, with intent to injure the plaintiffs and contrary to the statute,[2] agreed to pay dealers, quarterly, one-half cent per pound on all purchases of "Cow Brand Saleratus and Soda," in consideration of their undertaking not to sell the defendants' product at less than a stated price, which was exorbitant, caused by extensive and extravagant advertising, and further agreeing not to sell any other brand of saleratus or soda at a less price than "Dwight's Cow Brand." It was stated that as a result of these contracts the business of the plaintiffs was utterly destroyed, and they were wholly prevented from competing with the defendants or making any sales of their goods.

A judgment dismissing the complaint on the ground that it did not state a cause of action was affirmed by the appellate division of the New York Supreme Court.[3] Ingraham, J., said in part:

Assuming, for the purpose of this argument—a question, however, which we do not determine—that a contract made by a firm engaged in the manufacture and sale of an article of commerce with those dealing with the firm, which is illegal or prohibited by law, would give a cause of action to any third party engaged in the same business, having no contractual relation with either of the parties to the contract alleged to be illegal, the illegality of the contract alleged must be established before there could be any cause of action. There

[1] Cf. Street *v.* Union Bank of Spain and England, L. R. (1885) 30, Ch. Div., 156.
[2] Laws 1893, Ch. 716, sec. 1.
[3] Walsh et al. *v.* Dwight et al., 40 N. Y. App. Div., 513, 515 (1899).

is, however, nothing in the contract alleged in the complaint to have been made by the defendants which prevents the jobbers and dealers from purchasing or selling the goods of others than the defendants. The defendants simply offered to parties purchasing their goods to make a reduction in the price of the goods sold, in consideration of the purchasers agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price than that at which they agreed to sell the defendants' goods. It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them at such price as the defendants should designate, can not be disputed. Nor can it be that a manufacturer of merchandise can not agree to sell to others upon condition that the vendees in selling at retail should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business, such an agreement is not illegal as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business or the manufacturer of other articles from selling their product to anyone who was willing to buy. There is nothing to prevent an individual from selling any property that he has at any price which he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to an action for damages by those whose business such a contract has interfered with.

The H. W. Johns-Manville Co. sought to enjoin the Lovell-McConnell Manufacturing Co. from "interfering with the plaintiff's advertising contracts and from issuing advertisements threatening infringement suits against dealers, agents, or users," of plaintiff's autohorn. The plaintiff was the sole distributor in this country for an automobile signal known as the Long horn. Defendant was the manufacturer of a similar horn, known as the Klaxon, owning the patents under which it was manufactured. In a suit against another manufacturer these patents were sustained, infringement was found, and the claims of said patents were given a broad construction. Plaintiff had advertising contracts with several trade journals. The act complained of was the sending of the following letter to the leading automobile trade journals:

In accordance with instructions from our clients, the Lovell-McConnell Manufacturing Co., we hereby notify that under Clause VII of the Lovell-McConnell Manufacturing Co.'s advertising contract, in event that the publisher prints in any issue subsequent to the receipt of this notification any advertisement illustrating or concerning following infringing instruments: Newtone, Spartan, Long, the Lovell-McConnell Manufacturing Co.'s advertising contract is subject to immediate cancellation.

This notification is made as a result of Judge Chatfield's recent decision sustaining the validity of the Klaxon basic patents.

Clause VII of the various contracts which defendant had with the trade journals in which plaintiff had advertised, or was about to advertise, read as follows:

VII. Publication of advertisements of an unfair-competition nature, or which, in the judgment of this company [the defendant], are of products infringing its patents, renders this contract liable to immediate cancellation.

Complainant contended that the sending of these notices by defendant to the trade journals was a "very vicious and willful case of trade interference." An order from the district court denying a motion for a preliminary injunction was affirmed by the circuit court of appeals, Lacombe, circuit judge, saying in part:

We do not see any ground on which to base an injunction. Certainly there was nothing unfair or of which plaintiff could complain in Clause VII of defendant's contracts with the different periodicals in which its advertisements were inserted. If the publishers were willing to agree in advance that defendant might cancel its contract and cease its advertising, whenever products which it thought were infringements were advertised, surely no one else had any right to complain. So, too, by virtue of that clause, defendant might discontinue its advertising whenever some product advertised was in its judgment an infringement. Of course it would have to act in good faith; it could not avail of the seventh clause to get rid of its obligations under the contract, if the advertisement complained of related to a product which in defendant's judgment was not an infringement of any of its patents. But there is nothing here to indicate any such bad faith; on the contrary, the circumstance that they have brought suit to enjoin the manufacture and sale of plaintiff's horn indicates that, rightly or wrongly, defendant believes that it is an infringement.

We do not understand that it is contended that defendant, assuming that it entertains such belief, might not notify the journals that the contract was canceled and thereupon cease advertising. But if it took such a course, the first thing the journals would do would be to demand information as to what advertisement it was of which defendant complained, whose product it was that in defendant's judgment infringed its patent. Surely no one can contend that defendant should refuse to give such information. If, wheu such information had been given, a journal had offered defendant to discontinue further publication of plaintiff's product if defendant would renew its advertising contract, what possible cause of action would plaintiff have against anyone? Nor can we see how the situation is changed by the circumstance that the information is given to the journals before, instead of after, the discontinuance of defendant's advertising.[1]

The South Royalton Bank brought an action for damages against the Suffolk Bank,[2] alleging, in substance, that the latter maliciously, in order to destroy the plaintiffs or compel them to employ the defendant to redeem their bank notes, bought up and kept out of circulation a large amount of plaintiffs' notes and from time to time refused to exchange them for currency, but on various occasions presented large amounts for payment in specie in order to drain their

[1] H. W. Johns-Manville Co. *v.* Lovell-McConnell Manufacturing Co., 212 Fed., 923, 924–925 (C. C. A., 1914).

[2] South Royalton Bank *v.* Suffolk Bank, 27 Vt., 505, 508 (1854).

vaults, keep their bills out of circulation, and thus embarrass and perplex them. A judgment sustaining a demurrer to the declaration was affirmed, the court saying in part:

> * * * It was morally and legally the duty of the plaintiffs at all times to be ready and willing to redeem their bills, and if it has operated to their injury to be called upon at any particular time to redeem a particular amount, it is "damnum absque injuria." Here was no unlawful conspiracy by the defendants with others, either to do a lawful act in an unlawful manner, or an unlawful act to the injury of the plaintiffs; but the declaration charges, in effect, that the acts were done from bad motives in the defendants. This, we think, is not enough. Motive alone is not enough to render the defendants liable for doing those acts which they had a right to do. It is too well settled to need authority that malice alone will not sustain an action for a vexatious suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits maliciously to collect pay upon the plaintiff's bills which they lawfully held, much less could they be sued for simply calling upon the defendants for pay, without the intervention of a suit, though done with malice. It may be true that sometimes the consequences attending an act may serve to give character to that act, and the rule has become established and grown into a maxim that a man must use his own rights with due regard to the rights of others; but this principle does not apply to the present case. Here the act of presenting the plaintiff's bills for payment has no natural connection with any injurious consequences to follow from it, and if such consequences follow, they must be fortuitous, and can not give character to the act so as to render it unlawful.

The Trow City Directory Co., a corporation whose principal business was the publication and sale of a directory of the city of New York, had been undersold by one Goulding, who published what was said to be an inferior directory. In order to prevent the further publication of Goulding's directory, the trustees, constituting a majority of the board of the corporation, passed a resolution authorizing an agreement with the printers of Goulding's directory (to whom he was indebted in the sum of $7,000 of dishonored notes) to the effect that the corporation should buy $3,000 of such indebtedness and pay that sum therefor, and $1,000 in addition, and that such printers should refuse to print any more directories for Goulding, and should sue him upon the whole of said indebtedness, get judgment as speedily as possible, and thereby prevent Goulding, by destroying his credit, from publishing and selling directories in competition. One of the trustees voted and protested against the resolution and sought an injunction to prevent the use of the funds of the corporation for such purposes.[1] It was alleged in substance by the defendants that "Goulding was able to undersell them and create an unfair competition because he did not pay for the printing of his books." An order denying the injunction was reversed, the court

[1] Colles *v.* Trow City Directory Co. et al., 11 Hun, 397, 398, 399 (N. Y. Sup. Ct., 1877).

holding that the agreement was ultra vires and void. The court, by Davis, P. J., said in part:

The corporation was not created for the purpose of destroying competition and establishing a monopoly in any way other than such as might be incidental to the superiority of its manufactures and their cheapneses and excellence. That way was legitimately open to them at all times. But to pervert the funds of the corporation to the purchase of the worthless notes of a competitor, for the purpose of embarrassing his business and injuring his credit by a lawsuit, and to the payment of a bonus to induce his printers to refuse to do his printing, is something altogether outside of the legitimate corporate business. It was no part of the corporate business to pay bad debts and dishonored notes, and still less to pay premiums to prevent the creditors of competitors from giving further credit or doing work which they might otherwise be willing to undertake.

It is no answer to say that Goulding's competition was unfair; that he was selling what he did not pay for, and, therefore, could injure defendant's business by underselling. "To fight the devil with fire" is sometimes said to be fair in theology and politics; but corporations are not created for such purposes and their trustees have no power to use their funds for objects of that nature.

ENGLISH DECISIONS.

In Forrest *v.* Manchester, Sheffield & Lincolnshire Railway Co.[1] it appeared that the plaintiff, a shareholder in the defendant company, filed a bill on behalf of himself and the other shareholders to enjoin that company from running boats to a certain point, urging that this was ultra vires. The plaintiff was also a large shareholder in the Gainsborough United Steam Packet Co. (Ltd.), which was prejudiced by the action of the railway. The defendants contended that all the other shareholders were opposed to the bill and the plaintiff, on cross-examination, admitted that the directors of the packet company had directed the institution of the suit and indemnified him against costs. The lord chancellor treated the suit as an imposition on the court and dismissed it accordingly.[2]

In Barley *v.* Walford[3] the plaintiff, a dealer in printed silk goods, declared, in substance, that he had sent the defendant divers lots of such goods, the last of which contained handkerchiefs printed with a certain pattern, and that he was about to print others; yet the defendant, contriving to injure and defraud the plaintiff and induce him to desist from so printing the same and deprive him of the profits, and to acquire the same for his own sole use and benefit, falsely and deceitfully represented to the plaintiff that in the said last lot there was a copy of a registered pattern and that the parties interested intended to proceed against the plaintiff in the court of

[1] 4 De Gex F. & J., 126 (1861).

[2] Cf. Funck *v.* Farmers' Elevator Co. of Gowrle, p. 168; Colles *v.* Trow City Directory Co. et al., p. 287; Filder v. London, Brighton and South Coast Ry. Co., 1 Hem. & Miller Ch. 489 (1863); Waterbury *v.* Merchants' Union Express Co., 50 Barb., 157 (N. Y., 1867); Belmont *v.* Erie Ry. Co. et al., 52 Barb. 637 (N. Y., 1869); and Kuhn et al., *v.* Woolson Spice Co., American Sugar Rfg. Co. et al., 8 Ohio N. P. 686, 13 Ohio C. C. 547 (1897).

[3] 9 A. & E. (Q. B.), 197, 208 (1846).

chancery (meaning that the pattern was copyrighted) whereas, in fact, no such pattern had been registered and no parties did so intend. It was further alleged that in consequence of this representation the plaintiff was induced to journey from Glasgow to London for the purpose of inquiring into these matters and of satisfying such supposed parties, and was also induced to abstain from printing 20,000 handkerchiefs with said design, which he had orders to do, and from disposing of 10,000 handkerchiefs which he had already printed; and, further, that the defendant caused to be printed and sold 20,000 handkerchiefs with the said design, without the competition of the plaintiff. On general demurrer it was held that a cause of action had been stated.

Lord Denman, C. J., said in part:

> * * * On minutely examining the allegations, though not very scientifically made, we think it sufficiently appears that the defendant uttered knowingly a deliberate falsehood on this subject, with a view to his own lucre. It is averred that he did so with the design to deprive the plaintiff of the benefit of the last lot of goods and to acquire it for his own sole use; and it is very plain that this object might have been effected in the manner alleged (by deterring plaintiff from bringing his goods into the market). The defendant has no right to say that the plaintiff was wrong in giving him credit for the truth of what he said; and there is no doubt that the special damage naturally flowed from the plaintiff's confidence in the defendant's false assertion.

In Ajello *v.* Worsley [1] the plaintiffs sought an injunction to restrain the defendant from advertising for sale any pianos of the plaintiffs' manufacture unless he had in his possession a piano of the plaintiffs' manufacture and of the class advertised. It appeared that the defendant, a furnishing contractor, in order to attract the public, offered certain goods at prices yielding little or no profit, while offering other goods at prices which yielded considerable profit, and that at the date he began to advertise pianos he had one of the plaintiffs' instruments in stock, but that the advertisement had been continued after the piano had been sold. In explanation of this the defendant stated that for a time he was prepared to take orders from customers for the plaintiffs' pianos since, although he could not get them direct (the plaintiffs having refused to sell to him), he knew several dealers who would supply him, and, further, that it was difficult, or at all events caused additional expense, to alter the advertisements. The court was of opinion that the defendant's advertisement, though highly colored, was not an absolutely inaccurate description of the piano originally in the defendant's stock. It was established that the plaintiffs suffered damage by reason of the defendant's advertisements. One dealer stated that, although he had ordinarily no difficulty in selling the plaintiffs'

[1] L. R. (1898), 1 Ch. 274, 280; considered and approved in Spalding & Bros. *v.* A. W. Gamage (Ltd.) et al., 110 Law Times Reps., 530 (Ct. of Appeal, 1914).

pianos, yet, after the advertisements, he was unable to sell the one in stock, and ultimately sent it away to an agent in Yorkshire, where it was sold.

Having come to the conclusion that there was no sufficient ground for disbelieving the defendant's account of the circumstances which led to the insertion of the advertisements, the court denied the injunction, being of the opinion that as a general rule any person, acting honestly, may sell or offer for sale at any price whatsoever goods of which he is not the owner but which he expects or hopes to acquire, and may make such offer by advertisement or in any other lawful way [1]; and further, that although the advertisements amounted to a representation that the defendant had in his possession a piano of the advertised description, such misrepresentation was not the cause of the damage to the plaintiffs' trade and consequently gave no right of action. Mr. Justice Stirling said in part:

* * * By confining their claim to an injunction so limited, they virtually admit, and I think rightly, that if the defendant had in his possession a piano of the plaintiffs' manufacture and of the class advertised he might offer it for sale at any price he chose. It is obvious that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit and either at a profit or at a loss. I take it to be settled by Allen *v.* Flood that the motives of the owner for so acting can not be inquired into.

I further think that as a general rule any person may sell or offer for sale at any price whatsoever goods of which he is not the owner but which he expects or hopes to acquire. * * * If a seller may contract to sell future goods, he must be at liberty, as the first step to such a contract, to offer them for sale, and I see nothing to prevent him from making the offer by advertisement or in any other lawful way. Again, it seems to me that he is entitled to make the offer at any price he chooses, whether remunerative or not; it may be worth a trader's while to sell some goods at a loss so long as he is able to sell other goods at a countervailing or more than a countervailing profit.

In all this I assume that the seller is acting honestly; if what he does is tainted with fraud, he may be guilty of an actionable wrong. * * *

* * * The defendant could not get from the plaintiffs directly any of their new pianos; but, in my opinion, he might have acquired new pianos of theirs otherwise upon terms which would not, indeed, enable him to sell them at a profit, but which need not have involved a ruinous loss. If, then, the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture of the Brittania Model type, I think that he would have been within his legal rights. * * *

* * * The question then arises, Is the damage complained of by the plaintiffs attributable to the misrepresentation of fact contained in the advertisement? It appears to me that this question must be answered in the negative, for an advertisement such as, in my opinion, the defendant might legally have issued would have produced precisely the same consequences and been followed by the same damaging results. * * *

I can not, however, approve of the defendant's conduct. The advertisement was not such as ought to have been published, and great negligence was shown as regards the withdrawal of it.

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[1] Cf. Rex *v.* Jakeman, 24 Cox's C. C. 153 (1914) and Winchester Repeating Arms Co. *v.* Butler Bros., 123 Fed., 976 (D. C., 1904).

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