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## EFFORTS TO DEFINE UNFAIR COMPETITION

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### THE LEGAL CONCEPT OF UNFAIR COMPETITION

Certain vague and indefinite phrases have a rather significant place in the development of various branches of the law. Among such phrases are "unreasonable conduct" in the law of negligence, "undue influence" in the law of wills, "unreasonable restraint of trade" in the effort to check the growth of monopoly, and "unfair discrimination" in the regulation of affairs of public carriers. A phrase similar to these and even more indefinite is that now coming to be known as "unfair competition." However uncertain and indefinable the term may be, unfair competition has gradually become of such import in statute law-making and in judicial decisions that an attempt to discover the legal definition of the phrase is necessary to understand certain parts of modern commercial law.

The use of unfair and dishonest practices parallels the growth of commerce, and the keen rivalry of modern commercial methods has brought a great increase in fraudulent methods of competition. Many attempts have been made to condemn unfair commercial practices and to foster honest trading. The first statutes and judicial decisions appear to have served as an obstacle to the grosser forms of monopoly and of unfair trading, and with the growth of commerce and of industry accompanying the Industrial Revolution came a demand for free and unrestricted competition which swept away practically all of the statutes and almost removed the restraint formerly exercised by the courts. For a long time it was assumed that the best interests of society were subserved by the regulation of prices and the control of business through the operation of the economic laws of supply and

demand. In England and in the United States, courts and legislatures were slow to take note of unfair methods of trade and to place restrictions upon the use of fraudulent and dishonest practices. The law of unfair trade in connection with trade-marks is largely the result of a development of the last half of the nineteenth century, and the regulation of unfair competition as distinct from the law of trade-marks has come in the last quarter of a century.<sup>1</sup>

Unfair competition appears to have been used at first in connection with the efforts of the courts to protect trade-marks. When the law relating to trade-marks was specifically defined by statutes and by judicial decisions unfair competition was hit upon as the phrase to designate the wrong of a trader who attempted to pass off the goods of another for his own. In this sense unfair competition was defined in the *dictum* that "nobody has any right to represent his goods as the goods of somebody else."<sup>2</sup> Recently unfair competition has been extended in its legal import to include not only the passing off of goods for those of another but also "any conduct on the part of one trader which tends unnecessarily to injure another in his business."<sup>3</sup> In order to determine the legal significance of this phrase it is necessary to note briefly the steps in its evolution. Before seeking the meaning of the term as developed in the course of judicial decisions a brief analysis is required of the relevant phrases in the Clayton Anti-Trust Act and the Federal Trade Commission Act. These federal statutes, the primary aim of which is to prevent unfair business practices, render imperative a more exact definition of unfair competition.

#### UNFAIR COMPETITION IN THE CLAYTON ANTI-TRUST AND FEDERAL TRADE COMMISSION ACTS

A notable step in the regulation of business in the United States was taken in the passage of the Trade Commission and the Clayton Anti-Trust Acts by which Congress declared illegal "unfair methods of competition" and made provision for the prevention of such practices.<sup>4</sup>

<sup>1</sup> For a brief history of the origin of the term consult 1 Chenevard, *Traité de la Concurrence Déloyale en matière industrielle et commerciale* (1914) 24; see also Davies, *Trust Laws and Unfair Competition* (1915). Extensive use was made of this publication in the preparation of this article.

<sup>2</sup> Lord Halsbury in *Reddaway v. Banham* [1896] A. C. 199, 204; Hopkins, *Trade-Marks* (3d ed. 1917) sec. 1.

<sup>3</sup> Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139, 141.

<sup>4</sup> Sec. 5 of the Trade Commission Act not only declares unlawful unfair methods of competition in commerce but also directs the commission to prevent such practices by persons, partnerships, or corporations, except banks and common carriers. The commission is authorized after due hearing to issue orders requiring the cessation of unfair practices. To secure the observance of such an order, the commission may apply to the federal courts, submitting

Instead of defining specifically unfair competition, Congress, by general decree, condemned unfair practices and left it to the Federal Trade Commission to determine what practices are unfair. In the preparation of the Trade Commission bill, it was claimed that the term unfair competition had a legal significance which could be enforced by the commission and by the courts. It was thought no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or an unjust discrimination. The conclusion finally reached was that it would be better to put in a general provision condemning unfair practices than to attempt to define the numerous unfair methods.<sup>5</sup>

It has been suggested that while Congress refused to define the term unfair methods of competition and left to the Trade Commission the task of giving meaning to the term in the handling of individual cases, the object was to prohibit acts, which may be described as "economically unfair."<sup>6</sup> What is fair competition in the economic sense is a question for the economist, and is one with which this paper is not

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the entire record in the case, and the court may affirm, modify or set aside the order. If new evidence is presented to the court, the case is to be returned to the commission. A party ordered by the commission to cease unfair methods of competition may likewise appeal to the courts for a review of the order.

The prohibition of unfair practices is further extended by various sections of the Clayton Anti-Trust Act. Sec. 2 of this act declares it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities sold for use, consumption, or resale within the jurisdiction of the United States, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly and that nothing shall prevent discriminations in prices made on account of differences in the cost of selling or transportation, or in order to meet competition, in good faith, and, with the further proviso that this shall not prevent persons from selecting their own customers in *bona fide* transactions not in restraint of trade.

Sec. 3 declares it unlawful for any person engaged in commerce to lease or sell commodities, patented or unpatented, or to fix a price therefor or a discount from such price on the condition that the lessee or purchaser shall not deal in the commodities of a competitor, where the effect of the lease or sale may be to substantially lessen competition or tend to create a monopoly and that large corporations except banks and common carriers may not have common directors. Labor, agricultural or horticultural organizations are by a separate section excepted from these provisions.

<sup>5</sup> "The committee," says Senator Newland, "gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce, and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. I concluded that the latter course would be the better for the reason—that there were too many unfair practices to define, and after writing twenty of them into the law, it would be quite possible to invent others." (1914) 51 CONG. REC. 12136. For an excellent summary of the discussion in the United States Senate, see Montague, *Unfair Methods of Competition* (1915) 25 YALE LAW JOURNAL, 20.

<sup>6</sup> Stevens, *Unfair Competition* (1917) 4, 5.

primarily concerned. But it is obvious that competition may be considered from the legal point of view as well as from that of economics.

"For the law must deal with men as it finds them; the law must recognize that men are in a state of competition; concerning rights and wrongs in that competition, the law must have something to say."<sup>7</sup>

It is the present purpose to discuss some of the problems involved and a few of the difficulties encountered in the attempt to give legal significance to the vague and evasive phrase "unfair competition." The chief question for consideration is the legality or illegality of various methods of business designated as unfair. The discussion will be based primarily upon court decisions and legislative acts with a brief reference to the advantages of an administrative tribunal to carry out the specific mandates of legislation. Efforts to define unfair competition will be considered under the following headings:

- (a) The common law and unfair methods of competition.
- (b) Attempts to prevent unfair competition by provisions in state constitutions and state statutes.
- (c) Unfair competition and the Sherman Anti-Trust Act.
- (d) Difficulties and problems involved in the legal definition of unfair competition.
- (e) Preventing unfair competition through an administrative commission.
- (f) Some comparisons with respect to the methods of regulating unfair competition in foreign countries.

#### THE COMMON LAW AND UNFAIR METHODS OF COMPETITION

Both by judicial decisions and legislative acts, monopolies were declared illegal in England about three centuries ago.<sup>8</sup> The criminal statutes of the realm also declared illegal and attempted to forbid engrossing, regrating and forestalling.<sup>9</sup> Similarly conspiracies and agreements to fix prices, wages and hours of labor were condemned.<sup>10</sup>

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<sup>7</sup> Wyman, *Competition and the Law* (1902) 15 HARV. L. REV. 427. There is no agreement as to the precise scope of unfair practices in the economic sense. A list of various practices designated by different economists as unfair practices is given in Davies, *op. cit.*, 311.

<sup>8</sup> Parliamentary protest for abolition of monopolies was granted by Elizabeth in 1601; Crown patent of monopoly for playing cards was declared illegal in *Darcy v. Allen* (1602) 11 Coke 84; the Anti-Monopoly Act was passed in 1624; and in 1689 monopoly by patent of Crown was abolished.

<sup>9</sup> Engrossing was defined as the purchase of large quantities of a commodity for the purpose of selling at an unreasonable price; regrating as every practice or device to enhance the price of victuals; forestalling as the buying of victuals on their way to market in order to sell again at a higher price. 5 & 6 Edw. VI. ch. 14.

<sup>10</sup> 2 & 3 Edw. VI. ch. 15.

With the commercial development of the latter half of the eighteenth century, these statutes were repealed and the principle of free and unrestricted competition was considered in force,<sup>11</sup> with the sole exception that according to a principle of the common law, "agreements tending to fix prices or to control the market may be null and void as in restraint of trade." Under this principle, the courts have developed the doctrine of unfair competition, and have built it up largely on the theory that business rules and agreements must not be unreasonable or against public policy. The English cases declaring the meaning and significance of unfair competition are not numerous,<sup>12</sup> and the consequent restrictions placed upon business methods were relatively slight; nevertheless, in these precedents are found the beginning of a far-reaching division of judicial decisions and legislative acts in the United States and in the British Self-Governing Colonies.

In the growth of the law of unfair competition in England, we find two lines of decisions. One of these culminates in the recognition of the trend toward free and unrestrained business competition evidenced in the repeal of the restrictive laws on trade and monopoly, and in the judicial declaration of a *laissez faire* policy. A legal *laissez faire* policy was announced by the High Court speaking through Lord Morris, who regarded competition as the life of trade, and thought that judges were not to be considered "specially gifted with prescience of what may hamper or what may increase trade," and that he was not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would, he thought, be relegated to the idiosyncrasies of individual judges.<sup>13</sup> The case involved an effort to establish a monopoly and to ruin competitors by special rebates to customers, by lowering of freights, by sending ships to compete and by indemnifying other ships. But, since the association did not forcibly interfere with the business and property of others, it was held that there was no malicious intent and consequently no legal

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<sup>11</sup> In 1772 criminal statutes against engrossing, regrating and forestalling were repealed. Such acts were criminal under the common law until 1844. Cf. 1 Bishop, *New Criminal Law* (1892) sec. 518; *Doolubdass Pettamberdass v. Ramlooll Thackoorseydass* (1850) 7 Moore, P. C. 239. In 1824 criminal statutes against conspiracies and agreements to fix prices, wages, and hours of labor were repealed. It is interesting to note that the war has resulted in many statutes purporting to prevent and punish acts similar to those condemned under the former statutes against engrossing, regrating and forestalling. Space forbids an attempt to analyze these new acts or to undertake to review the efforts to carry the laws into effect.

<sup>12</sup> The cases on which the doctrine of unfair competition is founded are *Hogg v. Kirby* (1803, Eng. Ch.) 8 Ves. 215; *Blofeld v. Payne* (1833, K. B.) 4 B. & Ad. 410; *Crawshay v. Thompson* (1842, C. P.) 4 Man. & G. 357; *Knott v. Morgan* (1836, Eng. Ch.) 2 Keen, 213; *Croft v. Day* (1843, Eng. Ch.) 7 Beav. 84.

<sup>13</sup> *Mogul Steamship Co. v. McGregor, Gow & Co.* (1892) A. C. 25, 50.

damage. With such a ruling the business struggle for existence might be waged with comparatively little legal interference.

Although the general tendency of the English courts was to accord to those engaged in business a type of competition quite free and unrestricted, the courts were inclined at other times to regard certain acts as unreasonable and unfair. Among these were libelous statements regarding a competitor, bribery and corruption of employees, inducing the breaking of a contract and palming off goods under a false designation.<sup>14</sup> The term unfair competition at common law had its origin in the broad principle of reasonableness and fairness whereby the courts aimed to prevent injury to a rival competitor by misrepresentation. The definition of the term was begun by the English courts and was later taken up by the courts of the United States with a tendency in the new world to give the words wider scope and more definite application in the condemnation of unfair business practices.

Among the acts condemned as illegal and unfair, separate from the infringement of trade-marks, by both English and American courts are: first, inducing a breach of a competitor's contract, holding it unlawful to induce one party to a legal contract to refuse to perform it to the damage of the other party.<sup>15</sup> The cases at first held that there was ground for action on breach of contract only when unlawful means were employed or when the violation of the contract was secured deliberately to injure a competitor. Later some justices held parties liable for procuring a breach of contract regardless as to whether fraud, misrepresentation, coercion, or other unlawful means were employed and supported the proposition that it was a

"violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."<sup>16</sup>

Second, the inducing of an employee to violate his contract was held unlawful and a cause of action for damages.<sup>17</sup> As a rule courts have held that damages could be recovered only if fraudulent or otherwise unlawful means were used.<sup>18</sup> Third, courts of equity have restrained the disclosure or use of a trade secret by one who became familiar with it through confidential employment, or have enjoined its use by one who has acquired it.<sup>19</sup>

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<sup>14</sup> Cf. *Crutwell v. Lye* (1810, Eng. Ch.) 17 Ves. 335; *Croft v. Day*, *supra*; *Lumley v. Gye* (1852, Q. B.) 2 El. & Bl. 216; *Lee v. Haley* (1870, Eng. Ch.) 21 L. T. Rep. (N. S.) 546. For summary of English and American decisions, consult Davies, *op. cit.*, ch. vii.

<sup>15</sup> For citation of cases, see Davies, *op. cit.*, 336ff.

<sup>16</sup> *Schonwald v. Ragains* (1912) 32 Okla. 223, 122 Pac. 203.

<sup>17</sup> *Walker v. Cronin* (1871) 107 Mass. 555; see also *Kinney v. Scarbrough Co.* (1912) 138 Ga. 77, 74 S. E. 772.

<sup>18</sup> *De Jong v. Behrman Co.* (1911) 146 App. Div. 936, 131 N. Y. Supp. 1083.

<sup>19</sup> For citation of leading English and American decisions, see Davies, *op. cit.*, 335ff.

The progressive development of the idea of unfair competition may be discovered in the opinions of judges who first held that the court would interfere solely for the purpose of protecting the owner of a trade-mark and that fraud upon the public was no ground for coming to court and that both fraudulent intent and actual injury to a competitor had to be proved. Subsequently the courts began to regard acts as constructively fraudulent if the result would tend to unfair trade.<sup>20</sup>

The general principle on which American courts based their decisions was that whenever any agreement between competitors appeared to involve an undue restriction of competition and which was therefore detrimental to the public interest, the courts would refuse to aid in its enforcement. Common-law principles favorable to the freedom of trade and commerce were further extended by American courts where restrictions were placed upon agreements as in restraint of trade and against public policy largely because of the element of unfairness involved in such business transactions. For example, an agreement for the sale of a business involving a restraint not to exercise a trade over an extensive territory was held void; and, likewise, an agreement among competitors to restrict competition, particularly in such efforts as might involve an attempt to secure a monopoly or to corner the market, or to consolidate under common ownership. Furthermore, efforts to control the entire supply or to combine to divide territory and to shut out competitors or to attempt to fix prices were sometimes condemned as involving not only restraint of trade against public policy, but an element of unfairness contrary to common-law principles.<sup>21</sup>

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<sup>20</sup> See especially *Helmet Co. v. Wrigley Co.* (1917, C. C. A. 6th) 245 Fed. 824; *Pa. Central Brewing Co. v. Anthracite Beer Co.* (1917) 258 Pa. St. 45, 101 Atl. 925; *McVay & Son Seed Co. v. McVay Seed & Floral Co.* (1918, Ala.) 79 So. 116.

<sup>21</sup> Contracts to increase price, to limit supply and to control market were held illegal or void in the following cases: *India Bagging Association v. Kock & Co.* (1859) 14 La. Ann. 168; *Arnot v. Pittston and Elmira Coal Co.* (1877) 68 N. Y. 558; *Santa Clara Valley Mill & Lumber Co. v. Hayes* (1888) 76 Calif. 387, 18 Pac. 391; *People v. Milk Exchange* (1895) 145 N. Y. 267, 39 N. E. 1062; *More v. Bennett* (1892) 140 Ill. 69, 29 N. E. 888; *Knight & Jillson Co. v. Miller* (1908) 172 Ind. 27, 85 N. E. 1049; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* (1891, C. P. N. Y. C.) 14 N. Y. Supp. 277; *People v. Sheldon* (1893) 139 N. Y. 251, 34 N. E. 785; *Charleston Gas Co. v. Kanawha Gas Co.* (1905) 58 W. Va. 22, 50 S. E. 876; *Salt Co. v. Guthrie* (1880) 35 Ohio St. 666; *Emery v. Ohio Candle Co.* (1890) 47 Ohio St. 320, 24 N. E. 660; *Nester v. Continental Brewing Co.* (1894) 161 Pa. St. 473, 29 Atl. 102; *Texas Standard Oil Co. v. Adoue* (1892) 83 Tex. 650, 19 S. W. 274; *Slaughter v. Thacker Coal & Coke Co.* (1904) 55 W. Va. 642, 47 S. E. 247.

Agreements to divide profits have been held void. *Stanton v. Allen* (1848, N. Y.) 5 Den. 434; *Craft v. McConoughby* (1875) 79 Ill. 346; *Mallory*

In the effort to draw the line between competition that is fair and competition that is unfair, the courts have been formulating a few propositions from which the modern doctrine of unfair competition is being developed. Foremost among these propositions are:

(1) The doctrine of unfair competition in trade rests on the principle that equity will not permit any one to palm off his goods on the public as those of another.<sup>22</sup> When trade-marks and trade-names are defined and protected by special statutes, which is now usually the case, the courts lay down the next proposition.

(2) Unfair competition is distinguishable from the infringement of trade-marks. The legal concept applies in all cases where fraud is practiced by one in securing the trade of a rival dealer.<sup>23</sup>

(3) To establish unfair competition deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances and a property right must be invaded to constitute a basis for a legal action.<sup>24</sup> There is a tendency to relax the rigor of this principle and to assume fraudulent intent where the natural consequences of the acts complained of would be to cause unfair injury and damage, and to extend the property concept to include injuries to goodwill or interferences with the enjoyment of the rightfully earned

*v. Hananer Oil-Works* (1888) 86 Tenn. 598, 8 S. W. 396; *Anderson v. Jett* (1889) 89 Ky. 375, 12 S. W. 670.

Agreements to secure corner were held illegal. *Sampson v. Shaw* (1869) 101 Mass. 145; *Raymond v. Leavitt* (1881) 46 Mich. 447; *Samuels v. Oliver* (1889) 130 Ill. 73, 22 N. E. 499.

Agreements to create a monopoly and thereby stifle competition were held invalid. *Chicago Gas-Light Co. v. People's Gas-Light Co.* (1887) 121 Ill. 530, 13 N. E. 169; *Chaplin v. Brown* (1891) 83 Iowa, 156, 48 N. W. 1074; *State v. Standard Oil Co.* (1892) 49 Ohio St. 137, 30 N. E. 279; *Harding v. American Glucose Co.* (1899) 182 Ill. 551, 55 N. E. 577.

Contracts not to carry on business were held void. *Alger v. Thacher* (1837, Mass.) 19 Pick. 51; *Chappel v. Brockway* (1839, N. Y.) 21 Wend. 157; *Lawrence v. Kidder* (1851, N. Y.) 10 Barb. 641; *Taylor v. Blanchard* (1866) 95 Mass. 370; *Western Wooden-Ware Ass'n v. Starkey* (1890) 84 Mich. 76, 47 N. W. 604.

Partial restraints have been held valid. *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473, 13 N. E. 419; *Watertown Thermometer Co. v. Pool* (1889, N. Y.) 51 Hun. 157.

<sup>22</sup> *Dennison Mfg. Co. v. Thomas Mfg. Co.* (1899, C. C. Del.) 94 Fed. 651, 656.

<sup>23</sup> *Cole Co. v. American Cement & Oil Co.* (1904, C. C. A. 7th) 130 Fed. 703, 705; *Weinstock, Lubin & Co. v. Marks* (1895) 109 Calif. 529, 42 Pac. 142.

<sup>24</sup> *Church & Dwight Co. v. Russ* (1900, C. C. Ind.) 99 Fed. 276, 279; *Wrisley Co. v. Iowa Soap Co.* (1903, C. C. A. 8th) 122 Fed. 796, 797; *Hires Co. v. Villepigue* (1912, C. C. A. 8th) 196 Fed. 890, 891; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* (1891) 138 U. S. 537, 11 Sup. Ct. 396; *Goldsmith Silver Co. v. Savage* (1916, C. C. A. 1st) 229 Fed. 623; *Armstrong Cork Co. v. Ringwalt Linoleum Works* (1916, D. N. J.) 235 Fed. 458, 466. "The basis of an action for unfair competition is fraud or deceit, inducing the public to believe that defendants' goods are those of complainant." *Keystone Type Foundry v. Portland Pub. Co.* (1911, C. C. A. 1st) 186 Fed. 690.



fruits of one's toil.<sup>25</sup> Nevertheless, in most jurisdictions, it is necessary to prove fraudulent intent, and to give evidence that actual damage has resulted from unfair tactics.

(4) It is conceded that fixed rules are lacking for the clear guidance of the court, and that to a considerable extent each case must depend upon its own facts and be judged by the special circumstances involved.<sup>26</sup> In accordance with this view it is thought that unfair competition like due process of law is subject to the method of inclusion and exclusion without a clearly definable line between the fair and the unfair, but each case must depend for its correct solution upon its own peculiar facts and circumstances.

The grounds for giving relief in cases of unfair competition are held to be: to promote honesty and fair dealing;<sup>27</sup> to protect the purchasing public;<sup>28</sup> to protect the rights and property of individuals.<sup>29</sup>

It is a matter of considerable difficulty to define the relation of trade-mark law and the law of unfair competition. The law of unfair competition has been usually considered as a development from and a branch of trade-mark law. Until quite recently unfair competition was classified in the digests under the trade-mark heading and most cases on unfair competition are still to be found under this designation. But efforts to take a rival's business unfairly by other ways than the infringement of a trade-mark such as the imitation of packages and the use of some deceptive name or label became more common. And while at first the courts were not inclined to afford a legal remedy for such a wrong it was finally conceded that equity should accord relief for other ways of stealing goodwill than by infringement of trade-marks. For want of a better name "unfair competition" was applied to these forms of commercial dishonesty.<sup>30</sup>

Not infrequently, however, unfair competition was used in a general sense to include trade-mark infringement, passing off, and other business practices regarded illegal. And this general, all-inclusive meaning seems to be gaining ground. From an analytic point of view, it is contended that:

<sup>25</sup> *German-American Button Co. v. Heymsfeld* (1915) 170 App. Div. 416, 421, 156 N. Y. Supp. 223, 227.

<sup>26</sup> *Burrow v. Marceau* (1908) 124 App. Div. 665, 669, 110 N. Y. Supp. 1124; Robertson, C. in *Schonwald v. Ragains*, *supra*, puts the situation thus: "it seems to be impossible to formulate any general rule or definition that will answer for all cases."

<sup>27</sup> *Palmer v. Harris* (1869) 60 Pa. St. 156; *Shaver v. Heller & Merz Co.* (1901, C. C. A. 8th) 108 Fed. 821.

<sup>28</sup> *Singer Manufacturing Co. v. Loog* (1882) 8 A. C. 15; *Vitascope Co. v. U. S. Phonograph Co.* (1897, C. C. N. J.) 83 Fed. 30.

<sup>29</sup> *American Washboard Co. v. Saginaw Mfg. Co.* (1900, C. C. A. 6th) 103 Fed. 281; *Levy v. Walker* (1879) 10 Ch. 436; *cf.* also, Nims, *The Law of Unfair Competition and Trade-Marks* (2d ed. 1917) ch. ii.

<sup>30</sup> *Cf.* (1919) 17 MICH. L. REV. 490.

"unfair competition is the genus, and the infringement of technical trade-mark a species. In each case the redress is based upon the right to be protected in the goodwill of a trade or business."<sup>31</sup>

The view supported by Justice Pitney, that "the common law of trade-marks is but a part of the law of unfair competition,"<sup>32</sup> is in accord with that of other justices who consider unfair competition as the *genus* and trade-mark infringement as the *species*.<sup>33</sup> Thus while unfair competition has been quite generally associated with the idea of "passing off," in its broader meaning it has been regarded as including all remedies heretofore available either at law or equity covering

"the entire field of infringement in patent law, trade-marks, and copyrights; the protection of goodwill, trade-names, and trade secrets; and all undue interferences with the normal current of a business enterprise."<sup>34</sup>

#### ATTEMPTS TO PREVENT UNFAIR COMPETITION BY PROVISIONS IN STATE CONSTITUTIONS AND STATE STATUTES

While the first efforts to prevent unfair competition were made by the courts either under some general principles of the common law or as an expansion of the law protecting trade-marks, the subject has been dealt with extensively in state statutes and constitutions. Statutory provisions have had a two-fold object: first, to protect business men from competitive practices harmful to them; second, to protect the public from dishonest or fraudulent practices.

State constitutions occasionally provide that legislatures shall regu-

<sup>31</sup> (1916) 29 HARV. L. REV. 763.

<sup>32</sup> *Hanover Star Milling Co. v. Metcalf* (1915) 240 U. S. 403, 413, 36 Sup. Ct. 357.

<sup>33</sup> Cf. *United Drug Co. v. Theodore Rectanus Company* (1918) 39 Sup. Ct. 48.

<sup>34</sup> (1919) 13 ILL. L. REV. 708, 717.

<sup>35</sup> *Alabama*. Sec. 103. The legislature shall provide by law for the regulation or reasonable restraint of combinations to prevent them from making scarce articles of necessity, unreasonably increasing the cost thereof or of "preventing reasonable competition in any calling, trade or business."

*Georgia*. Art. IV, sec. 2, par. iv. General Assembly shall have no power to authorize a corporation "to defeat or lessen competition."

*Kentucky*. Sec. 198. General Assembly shall have the power to prevent combinations from depreciating "below its real value any article or to enhance the cost of any article above its real value."

*Montana*. Art. XV, sec. 20. No combination to be allowed "for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for the consumption of the people. A similar provision is found in the Constitutions of *Idaho*, Art. XI, sec. 18, of *North Dakota*, sec. 146, of *Utah*, Art. XII, sec. 20, of *Washington*, Art. XII, sec. 22, of *Wyoming*, Art. X, sec. 8.

*New Hampshire*. Art. 82. Fair and free competition in the trades and in-

late corporations so as not to prevent or to interfere with competition,<sup>85</sup> but as a rule the matter is left to the legislature for such regulations as may seem necessary.

Anti-trust laws in the various states attempt to cover a multitude of alleged business wrongs. Chief among this class of enactments are the prohibition of monopolies and pooling; agreements or conspiracies in restraint of trade; restraint of competition as distinct from restraint of trade such as price control, increasing prices, fixing a standard price or local price discriminations, limitation of output, division of territory or restraint on resales. While monopolies and agreements in restraint of trade involve the principle of unfair competition, it is with the last of the three classes of acts that we are now chiefly concerned. It is this type of law which is designed to provide that there may be "reasonable competition," and that aims to enact into law the doctrine of "free and fair competition," as an inherent right of the people.

It is difficult to summarize the laws relating to unfair competition. The prohibition of unfair competition is usually combined with the prohibition of combinations and agreements in restraint of trade. Recently, the statutes have dealt more fully and specifically with such unfair practices as are coming to be designated unfair competition. As a result of the experience of the last thirty years almost every state now has statutory provisions covering monopolies or restraint of trade or unfair discrimination and in a majority of the states an effort is made to cover all three of these types of misdemeanors. There is a tendency to declare illegal all combinations to restrain trade, to limit production, to fix prices or to prevent competition. Usually a penalty is imposed for a violation of the statute and not infrequently the Attorney-General is charged with the enforcement of the law by criminal prosecution or by *quo warranto* proceedings or by both remedies against offending combinations.<sup>86</sup>

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dustries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder and destroy it.

*Oklahoma.* Art. IX, sec. 45. No combination to destroy competition or to discriminate unfairly between sections is to be permitted.

*South Dakota.* Art. XVII, sec. 20. No combinations are permitted to fix prices, to control production, or to prevent competition. Legislature is to pass adequate laws.

<sup>85</sup> Ala. Code, 1907, sec. 7579; Iowa Code, 1897, sec. 5067; N. M. St. 1915, sec. 1686; N. D. Compiled Laws, 1913, sec. 9951; Ohio Gen'l Code, 1910, sec. 6391; S. C. Code, 1912, sec. 2441; S. D. Compiled Laws, 1908, sec. 772; Tenn. Code, 1896, secs. 3191, 6622; Tex. Rev. Civ. St. 1911, art. 7796.

*California.* Combinations, which restrain trade, limit production, prevent competition in manufacture or sale, and fix prices are prohibited. In fact, any agreement which directly or indirectly precludes a free and unrestricted competition is declared illegal. By a proviso the act is not to apply to agreements "the purpose and effect of which shall be to promote, encourage or increase competition in any trade." Reasonable profit is to be permitted in the conduct

The attempt to extend the law on trusts and monopolies so as to cover unfair practices which interfere with competition by individuals as well as by combinations may be illustrated by the Mississippi statute of 1908 and the New Jersey acts of 1913. The Mississippi statute declares that any corporation, partnership or person which shall destroy or attempt to destroy competition in the manufacture or sale of a commodity by offering the same for sale at a lower price at one place in this state than another, or rendering service at a lower price in one locality than another, is condemned. A trust or combine is defined as follows: a combination, between two or more persons, with the following objects, all of which are held inimical to the public welfare and unlawful: in restraint of trade; to limit the price of a commodity; to limit the production of a commodity; to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity; to engross or forestall a commodity; to issue, own or hold the certificate of stock of any trust or combine; to unite or pool interests in the importation, manufacture, production, transportation or price of a commodity.

The New Jersey act is made to apply not only to trusts and monopo-

of business. Acts, 1907 and 1909. A similar statute was enacted in *Colorado* in 1913.

*Connecticut.* Combinations to fix prices "for ice, coal, or any other necessity of life" are deemed illegal. Conn. Rev. St. 1918, sec. 6503.

*Florida.* Combinations to restrain or interfere with the sale of Florida meats are condemned. Gen. St. 1906, sec. 3160.

*Idaho.* Combinations to fix prices or to regulate production were first declared illegal. Two years later agreements in restraint of trade were added to the prohibitions and a provision covering other unfair practices was enacted, as follows: any combination which gives any direction or authority for the purpose of driving out of business any other person engaged therein, or who for such purpose shall in the course of such business sell any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions or who shall sell any article upon a condition, or restrain such sale by the purchaser shall be subject to a fine or imprisonment. Acts, 1909 and 1911.

*Indiana.* Combinations to lessen full and free competition or to fix prices are void; likewise agreements not to furnish an article, to charge more than the ordinary price or to interfere with a competing manufacturer; also effort to restrict competition in the letting of contracts for private or public work. Ind. St. 1908, sec. 3866.

*Kansas.* Combinations which tend to prevent full and free competition, to fix prices or to control the rate of interest and all contracts in pursuance of these ends are declared unlawful. Gen. St. 1901, sec. 2440. Any person, or corporation, doing business in the state and engaged in the production, manufacture or distribution of any commodity in general use, that shall for the purpose of destroying competition, discriminate between different sections of the state, by selling at a lower rate in one section than is charged in another section, after equalizing the distance from the point of production and freight rates therefrom, shall be deemed guilty of unfair discrimination. A similar provision was enacted in *Louisiana*, 1908; *Massachusetts*, 1912; *New Jersey*, *Nebraska*, *Oklahoma*, and

lies as was customary in previous legislation, but also to individuals, and the title affirms as the object of the act to promote free competition in commerce and in all classes of business.<sup>37</sup>

The original notion of unfair competition, namely passing off the

*Utah, 1913.* In 1913 provisions relating to unfair discrimination and competition in the sale of dairy products, poultry and eggs were enacted in *Wisconsin* and *Wyoming*.

*Kentucky.* Agreements in restraint of trade or competition are deemed illegal, also agreements to control prices, to boycott, to lessen lawful trade or full and free competition. No discrimination is to be permitted between sections which is intended to destroy the business of a competitor. Statutes, 1916.

*Massachusetts.* Provision for a hearing in equity on complaints as to monopolies or efforts to restrain competition. Statutes, 1911.

*Michigan.* Contracts to restrain trade, control production, prevent competition and fix prices are declared illegal. Contracts for exclusive use or sale of an article and agreements not to engage in any business, are illegal. Unfair discrimination as between localities is prohibited. Compiled Laws, 1897, ch. 253.

*Missouri.* Combinations in restraint of trade, to fix prices, limit production and sale and "all agreements which tend to lessen lawful trade or full and free competition are illegal." A separate section is added to prevent unfair discrimination between sections. Statutes, 1913, ch. 98.

*Montana.* In addition to statutes condemning combinations to fix prices and to control production a special act of 1913 prohibits unfair competition and discrimination in buying or selling commodities. Statutes, 1913.

*New York.* Agreements to create a monopoly or to restrain competition are declared void. Agreements to raise wages are excepted, also collective bargaining among farmers and fruit growers. Statutes, 1918.

*North Dakota.* Art. 66 on Trade Discrimination and Unfair Competition. Sec. 3043, Unfair Competition: any person or corporation engaged in business relating to any commodity in general use which shall aim to create a monopoly, or to destroy the business of a competitor, or to prevent competition, or to discriminate between different sections in the purchase or sale of any commodity shall be guilty of unfair discrimination. Compiled Laws, 1913.

*Washington.* Combinations among commission merchants in the marketing of farm and dairy products are prohibited. Code, sec. 7032.

<sup>37</sup> The definition of a trust is thus extended in the New Jersey statute:

A trust is a combination or agreement between corporations, firms or persons, any two or more of them, for the following purposes, and such trust is hereby declared to be illegal and indictable:

- (1) To create or carry out restrictions in trade or to acquire a monopoly, either in intrastate or interstate business or commerce.
- (2) To limit or reduce the production or increase the price of merchandise or of any commodity.
- (3) To prevent competition in manufacturing, making, transporting, selling and purchasing of merchandise, produce or any commodity.
- (4) To fix at any standard or figure, whereby its price to the public or consumer shall in any manner be controlled, any article or commodity or merchandise, produce or commerce, intended for sale, use or consumption in this state or elsewhere.
- (5) To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumer, in the sale or transportation of any article or commodity, either by pooling,

goods of one person or corporation as those of another, was made a misdemeanor in New York. Unauthorized use of names of corporations or of individuals is made a criminal offense in a few states, while counterfeiting or the fraudulent use of labels or trade-marks is prohibited in the majority of the states. False or misleading advertising which encourages passing off is now generally prohibited. Statutes relating to this matter were chiefly enacted in 1913 and 1914. Any effort to place before the public an advertisement which is untrue, deceptive or misleading is also declared to be a misdemeanor. A number of states prohibit false marking as to number, kind, quantity, weight, measure, quality, grade or place of production. Similarly, conducting business under an assumed name is sometimes prohibited. Among other practices relating to unfair competition and often included under the term are bribery and enticement of employees which are made criminal offenses in about one-third of the states. The New York law which declares a misdemeanor punishable by fine the giving of a bonus to influence an employee has been followed in the states enacting this provision. Other groups of enactments are closely related to unfair competition but it is impossible to deal with them at this time.<sup>38</sup>

From a survey of the statutory provisions, it appears that efforts were first directed toward enlarging and extending the common-law prohibition against contracts in restraint of trade and of repressing the grosser forms of monopoly, subsequently unfair discrimination between sections and localities was prohibited, and finally statutes were enacted attempting to cover other unfair practices under the general term unfair competition. The first laws were so drastic that they were virtually unenforceable and were frequently disregarded, or mollified by the courts when combinations were assailed thereunder. Judging from the number and scope of the laws on unfair practices comparatively few of the wrongful acts of business combinations have received judicial disapproval and have thereby been effectively prohibited. Courts as well as legislatures have gradually realized that in order to check unfair practices the nature of the offense must be more clearly defined and the specific acts to be condemned must be well

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withholding from the market or selling at a fixed price, or in any other manner by which the price might be affected.

(6) To make any secret oral agreement or arrive at an understanding without express agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumer, in the sale or transportation of any article, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected.

Furthermore, discrimination in commercial transactions by either persons or corporations between persons or different sections of the state is prohibited.

<sup>38</sup> For a summary of the laws enacted prior to 1915 consult Davies, *op. cit.*, ch. ix.

understood. To draw the line between fair and unfair, between reasonable and unreasonable in business methods is very difficult, but this difficulty must be faced before legislation on unfair competition may result in improving business ethics.

#### UNFAIR COMPETITION AND THE SHERMAN ANTI-TRUST ACT

The law of unfair competition as developed by the courts under principles of the common law was materially extended by the enactment and interpretation of the Sherman Anti-Trust Act. The manifold business practices condemned under the Sherman law are too numerous to permit of consideration except in so far as the decisions of the courts have aimed to define restraint of trade in terms of what is now regarded as unfair competition. While unfair competition is generally considered as differing from restraint of trade, the federal courts have recently defined restraint of trade so as to embrace a number of offenses usually designated as unfair competition. There is a difference of opinion as to the intent of the Sherman law, but the prevailing view is that its object was to support and render more specific the common-law rule on restraint of trade. This rule involved two principles, one the principle of reasonableness in the making of business contracts with respect to the interests of the parties concerned and the other that agreements contrary to public policy are void. Although the courts differed widely on the application of the principle of reasonableness there was pretty general agreement in the United States in holding void as in restraint of trade and as contrary to public policy agreements restricting output, cornering the supply, dividing markets or profits, fixing prices or establishing a common selling agency. In the light of these decisions the federal act of 1890 laid down no new principle. Its chief purpose was to make more explicit the condemnation of business conduct regarded as contrary to public policy and to strengthen the condemnation by making infractions thereof subject to a criminal penalty.

The Sherman act as originally applied was given quite a narrow interpretation.<sup>39</sup> With the change which came in the interpretation of the act through the *Trans-Missouri Freight Association*<sup>40</sup> and the *Northern Securities*<sup>41</sup> cases and finally the more specific decrees of the *Standard Oil Company* and the *Tobacco Trust* cases<sup>42</sup> the Sherman act has become an important factor in prohibiting unfair commercial methods. The court in *Nash v. the United States* said: "that only such contracts and combinations are within the act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interests

<sup>39</sup> *United States v. Knight Co.* (1895) 156 U. S. 1, 15 Sup. Ct. 249.

<sup>40</sup> (1897) 166 U. S. 290, 17 Sup. Ct. 540.

<sup>41</sup> (1904) 193 U. S. 197, 24 Sup. Ct. 436.

<sup>42</sup> (1910) 221 U. S. 1 and 106, 31 Sup. Ct. 502, 632.

by unduly restricting competition or unduly obstructing the course of trade."<sup>43</sup>

The federal courts have condemned under the act business dealings which operate to destroy the potentiality of competition and according to the dominant line of decisions the courts hold that it is the power to destroy competition and not its exercise which is the test. In the determination of what is judicially held to constitute unfair competition the provisions of the act, says Chief Justice White, are founded in broad conceptions of public policy to prevent not only injury to individuals, but also harm to the general public,<sup>44</sup> and in not a few cases the court has definitely decided that unfair conduct toward competitors constituted the violation of the statute. That unfair conduct toward competitors was the basis of the decree condemning a combination was especially evident in the *Standard Oil Company*, the *Tobacco Trust* and the *Keystone Watch* cases.<sup>45</sup> The object of the Sherman act is held to be not only to prevent combinations but also to preserve and restore free competition.<sup>46</sup>

In so far as the act is held to prevent unfair practices a comprehensive plan of relief is provided as follows: first, criminal prosecution by the government under sections one and two for all violations past and present; second, an injunction on complaint by the Attorney-General under section four against all present and threatened violations of the act; third, civil suits under section seven by any one injured against a violator of the act.

The extent to which unfair practices may be condemned under the Sherman law is illustrated by the decree of the federal court in the case of *United States v. Bowser & Co.*<sup>47</sup> By order of the court the offending company was enjoined from making to customers false representations concerning the standing or business methods of competitors, from bribing individuals to use their influence in promoting sales of defendants' products or in preventing sales of competitors' products; from procuring parties to take employment with competitors for the purpose of securing information; from inducing or hiring any person to secure names and addresses of competitors' customers; from attempting to secure cancellation of orders secured by competitors; from agreeing to indemnify customers from losses from litigation, on condition that they cancel contracts with competitors; from reducing the price of their product below cost of production, or giving it away, in order to prevent sales by competitors; or discriminating in price

<sup>43</sup> *Nash v. United States* (1913) 229 U. S. 373, 376, 33 Sup. Ct. 780.

<sup>44</sup> *Wilder Mfg. Co. v. Corn Products Co.* (1915) 236 U. S. 165, 174, 35 Sup. Ct. 398, 401.

<sup>45</sup> (1915, E. D. Pa.) 218 Fed. 502.

<sup>46</sup> *United States v. Chesapeake & O. Fuel Co.* (1900, C. C. S. D. Oh. W. D.) 105 Fed. 93.

<sup>47</sup> (1916) 63 THE ANNALS, 10.



between different persons or localities with the purpose to injure the business of competitors; from committing any other similar acts of unfair competition, the purpose of which shall be to injure or destroy the business of any competitor, to substantially lessen competition in the product or otherwise restrain interstate trade or commerce, or tend to create a monopoly therein in favor of defendants.<sup>48</sup>

At first the courts in the interpretation of the Sherman law were inclined to hold that in order to constitute restraint there must be control over the entire commodity.<sup>49</sup> Later it was held sufficient to condemn a combination if it really tended to monopolize and to deprive the public of the advantages of free competition.<sup>50</sup> This country, the court said on one occasion, has always been committed to the principle of fair competition and the Sherman act has been interpreted as a means to bring about this desired condition.<sup>51</sup> Finally in far-reaching decrees the federal courts have condemned most of the practices commonly considered as unfair methods of competition. Among the methods which have been especially attacked as unfair under the Sherman law are: agreements to fix prices, restrict production and divide markets.<sup>52</sup> Furthermore, by consent decrees under the authority of the Sherman law various companies were enjoined from the use of bogus independents to maintain the appearance of competition, from the use of fighting brands, from exclusive dealing and various forms of tying contracts, from inducing breach of competitor's contract, from corruption and bribery of employees, and from boycotting and blacklisting by trade associations. The prohibition of unfair competitive methods by the courts under the Sherman law has been accomplished in large part by such consent decrees wherein the combination charged with a violation of the act admitted the violation and agreed to the terms of a decree satisfactory to the Department of Justice.<sup>53</sup>

The criminal clauses of the Sherman act have resulted in a considerable number of charges and prosecutions but in relatively few and almost totally ineffective indictments. At first the federal courts were

<sup>48</sup> *Ibid.*, II.

<sup>49</sup> *United States v. Nelson* (1892 D. Minn.) 52 Fed. 646; *Dueber Watch-Case Manuf'g Co. v. Howard Watch & Clock Co.* (1895, C. C. A. 2d) 66 Fed. 637.

<sup>50</sup> *United States v. Addyston Pipe and Steel Co.* (1898 C. C. A. 6th) 85 Fed. 271; *Montague & Co. v. Lowry* (1904) 193 U. S. 38, 24 Sup. Ct. 307.

<sup>51</sup> *United States v. United States Steel Corporation* (1915, D. N. J.) 223 Fed. 55, 155.

<sup>52</sup> *National Harrow Co. v. Hench* (1896, E. D. Pa.) 76 Fed. 667; *United States v. Coal Dealers' Ass'n* (1898, N. D. Calif.) 85 Fed. 252; *Chesapeake & Ohio Fuel Co. v. United States* (1902, C. C. A. 6th) 115 Fed. 610; *Gibbs v. McNeeley* (1902, C. C. A. 9th) 118 Fed. 120; *Addyston Pipe and Steel Co. v. United States* (1899) 175 U. S. 211, 20 Sup. Ct. 96; *Continental Wall Paper Co. v. Voight & Sons Co.* (1909) 212 U. S. 227, 29 Sup. Ct. 280; *United States v. Patten* (1913) 226 U. S. 525, 33 Sup. Ct. 141; *United States v. Great Lakes Towing Co.* (1914, N. D. Oh. E. D.) 217 Fed. 656.

<sup>53</sup> For a brief review of consent decrees, see Davies, *op. cit.*, 478ff.

disposed to dismiss criminal indictments under the act because of the uncertainty as to the specific acts that constituted a crime.<sup>54</sup> When the act was so interpreted as to make it an effective weapon in checking certain types of monopoly there was an effort to apply the criminal clauses to the grosser wrongs committed by the managers or directors of large combinations. The courts refused at times to convict for criminal charges although it was clear that restraint was exercised over competitors by force, slander and libel and that there was an evident purpose to drive out competitors by violence, annoyance and intimidation.<sup>55</sup> But it was later decided that the vagueness in the definition of the crime did not render the Sherman law inoperative on its criminal side and that it is not necessary to give evidence of overt acts in an indictment charging a conspiracy to restrain trade.<sup>56</sup>

While the number and scope of the decrees of the federal courts is not extensive enough to cover any more than a small part of wrongful business practices, the increasing number of convictions, the more extended character of the restraining decrees and the great expense of fighting a government prosecution have forced many business establishments to change their methods in certain respects so as to meet the demands of the government.<sup>57</sup>

#### DIFFICULTIES AND PROBLEMS INVOLVED IN THE LEGAL DEFINITION OF UNFAIR COMPETITION

The definition of unfair competition and the prohibition of the manifold unfair practices connected therewith have raised some intricate legal problems. One of the chief difficulties has been aptly characterized by Professor Freund in discussing the attempt to make restraint of trade an offense with a criminal penalty. If left by the statute without any qualification it is an economic absurdity and if qualified by requiring injury to the public it is too indefinite, for purposes of criminal enforcement.<sup>58</sup> The same objection can be raised to many of the prohibitions against unfair trade which also frequently include criminal penalties for their violation. Despite these difficulties the legislatures continue to formulate enactments to prohibit unfair practices and the courts are being called upon in an increasing number of cases to render the vague terms of statutes specific and effective.

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<sup>54</sup> "It is not sufficient," said the court, "to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth." *In re Greene* (1892, S. D. Oh. W. D.) 52 Fed. 104. See also *In re Corning* (1892, N. D. Oh. E. D.) 51 Fed. 205; *United States v. Patterson* (1893, D. Mass.) 55 Fed. 605.

<sup>55</sup> *United States v. Patterson* (1912, S. D. Oh. W. D.) 201 Fed. 697, (1915, C. A. 6th) 222 Fed. 599.

<sup>56</sup> *Nash v. United States*, *supra*.

<sup>57</sup> Montague, *Business Competition and the Law* (1915) 4.

<sup>58</sup> Freund, *Standards of American Legislation* (1917) 76.

## CRITICISM OF VAGUENESS OF LEGAL MEANING OF UNFAIR COMPETITION

In the words of a foreign authority

"there does not exist a law on unfair competition: the legislator, in fact, can not codify a matter whose elements present an extreme diversity without a sufficient bond to unite them."<sup>59</sup>

The same sentiment is expressed by one of the English justices who observed, "to draw a line between fair and unfair competition; between what is reasonable and unreasonable, passes the power of the court."<sup>60</sup>

Probably no exact definition of the term can be given. What is unfair depends too much upon the special circumstances and conditions of each case. We do not find anywhere, says a Swiss authority, an official definition of these words, "the laws, the codes and the regulations are silent in this regard. Authors have proposed definitions, but none has received general approval."<sup>61</sup>

According to Justice Hough, unfair competition consists of selling goods by means that shock judicial sensibilities.<sup>62</sup> Quotations might be multiplied showing general agreement as to the uncertainty of the meaning of the term.

Despite these difficulties however the courts try to distinguish between what is fair and what is unfair in numerous judicial pronouncements. In affirming that legal protection is afforded not only to trademarks and trade names, but also to other evidences of goodwill the court in *Winestock, Lubin & Co. v. Marks* observes that the law applies "to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these are as many and as various as the ingenuity of the dishonest schemer can invent."<sup>63</sup> Unfair competition is held to be dependent upon principles of law<sup>64</sup> and upon principles of common business honesty.<sup>65</sup>

In the effort to define and to prohibit unfair practices the ineffective enforcement of the laws enacted is a matter of common observation. While this difficulty no doubt grows in part from the vagueness of the term, it also involves considerations respecting the special evils and complexities which seem to be inseparably connected with modern

<sup>59</sup> Allart, *Traité théorique et pratique de la concurrence déloyale* (1892) ch. v.

<sup>60</sup> *Mogul Steamship Co. v. McGregor, Gow & Co.* (1891) A. C. 25, 49.

<sup>61</sup> Chenevard, *op. cit.*, 15.

<sup>62</sup> *Steiff v. Bing* (1914, S. D. N. Y.) 215 Fed. 204.

<sup>63</sup> *Supra.*

<sup>64</sup> *West Publishing Co. v. Edward Thompson Co.* (1909, E. D. N. Y.) 169 Fed.

833.

<sup>65</sup> *Eastern Outfitting Co. v. Manheim* (1910) 59 Wash. 428, 110 Pac. 23; *Sartor v. Schaden* (1904) 125 Iowa, 696, 101 N. W. 511; *Dyment v. Lewis* (1909) 144 Iowa, 509, 123 N. W. 244.

business methods. To quote the opinion of one of the leading authorities on this branch of law:

"It seems sometimes as if the progress of the unscrupulous merchant and manufacturer in inventing new schemes for filching away the trade of others unfairly has been far more rapid than that of the courts in finding ways of protecting the honest business man against such schemes."<sup>66</sup>

In comparison with the number of statutes passed and the multitude of cases before the courts comparatively few business practices have been ultimately condemned and prevented through legal procedure. Furthermore, the application of criminal penalties under these statutes has been so infrequent as to render the criminal clauses largely useless. It is quite apparent that equity can restrain unfair practices by means of the injunction and damages may be assessed and collected for injury to goodwill or to business values. But courts will seldom impose the drastic remedies of fines and imprisonment and very rarely indeed are such judgments actually enforced.

Part of this ineffectiveness comes no doubt from the nature of unfair competition. Another part comes from the extreme sensitiveness of the courts in dealing with wrongs against business ethics. If, as has been claimed, unfair competition involves methods which shock judicial sensibilities, then it seems that justices must frequently have been shock proof so far as affronts to business ethics are concerned. Unquestionably a large part of the ineffectiveness of enforcement results from the efforts of courts and legislatures to deal with that which can be regulated only by business interests themselves. We are just beginning to realize that:

"No unfair or dishonest practice will long survive the condemnation of the men engaged in that trade. The men engaged in business make the rules of the game, legislatures and courts to the contrary notwithstanding. The most that legislative bodies do or can do is to write into statute law more or less imperfectly what the great body of business men regard as the approved rules of practice among intelligent and high-minded business men."<sup>67</sup>

Perhaps in this observation we have a reason for much of the confusion, loss and inefficiency in the effort of judicial bodies to pass upon the right or wrong of infractions of business morals.

European nations have recognized this difficulty in the preparation of a special code for commerce and business, this code being developed in large part from the practices and customs of traders themselves. Furthermore, they have frequently placed the enforcement of trade restrictions in the hands of special tribunals composed of representatives

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<sup>66</sup> Nims, *op. cit.*, ch. v.

<sup>67</sup> Williams, *The Federal Trade Commission Law* (1916) 63 THE ANNALS, 3.

selected from those engaged in business and commerce who are thus charged with the development of a code of business ethics. Such rules prepared and enforced by active participants in business pursuits are not so likely to become verbose prohibitions of wrongs which no one seems able to define but to develop into practical restrictions which honest and reputable business men find necessary to enforce against the unscrupulous and the vicious who pray upon the orderly progress of industrial society.

Not many years ago relief was refused unless infringement of a technical trade-mark was shown.<sup>68</sup> But occasionally a judge applying principles of common honesty and sportsmanship began to decide cases in favor of the complainant which did not involve a trade-mark. More recently unfair competition has been regarded by some judges "as a convenient description of offences against commercial morals not included in trade-mark infringement."<sup>69</sup>

"The tendency of the courts at the present time seems to be to restrict the scope of the law applicable to technical trade-marks, and to extend its scope in cases of unfair competition."<sup>70</sup>

Formerly unfair competition was assumed to involve actual or constructive fraud. But here again there is a tendency to enjoin acts of unsportsmanlike dealing not involving the element of deception.<sup>71</sup> Although the term is slowly acquiring a new meaning it is still largely used in the United States to correspond with the wrong of passing off.<sup>72</sup>

Unfair methods of competition then from a legal standpoint are found primarily "to consist mainly in some form of untrue, deceptive or misleading publicity."<sup>73</sup> Any statement which is designed or calculated to deceive or defraud, speaking in a legal sense, the lawful business of another, is held to be evidence of unfair trade.<sup>74</sup> Certain forms of competition are with few exceptions now regarded as clearly illegal, such for example, as inducing another trader to break his contract, bogus competing concerns, bribery to secure trade secrets, railroad rebates, intimidation and coercion.<sup>75</sup> Other unfair practices are more subtle and the legality or illegality of these is somewhat uncertain. Among such practices are refusal to sell to retailers who

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<sup>68</sup> *Stokes v. Landgraff* (1853, N. Y.) 17 Barb. 608; *Candee, Swan & Co. v. Deere & Co.* (1870) 54 Ill. 439.

<sup>69</sup> *Rogers, op. cit.*, 139.

<sup>70</sup> *Church & Dwight Co. v. Russ* (1900, D. Ind.) 99 Fed. 276, 278.

<sup>71</sup> *Fonotipia Limited v. Bradley* (1909, E. D. N. Y.) 171 Fed. 951; *Prest-O-Lite Co. v. Davis* (1913, S. D. Oh. W. D.) 209 Fed. 917; *Fair & Carnival Supply Co. v. Shapiro* (1919, E. D. Penn.) 257 Fed. 558.

<sup>72</sup> *Cf.* 38 Cyc. 756; *White Studio v. Dreyfoos* (1917) 221 N. Y. 46, 116 N. E. 796.

<sup>73</sup> *Williams, op. cit.*, 6.

<sup>74</sup> *Ibid.*, 8.

<sup>75</sup> *Kales, Good and Bad Trusts* (1917) 30 HARV. L. REV. 830.

persist in buying of a rival manufacturer, offering a lower price in certain localities where competition has appeared, and fixing prices at which the product may be resold.<sup>76</sup>

However, through the extension of trade-mark cases, special statutes dealing with unfair competition, and the broadening of the meaning of these terms by the courts, the law of unfair competition is slowly being extended "to include the suppression of all deceptive artifices by which one trader's customers are taken away from him and transferred to another." The law of unfair competition is beginning to be conceived as the body of rules designed to regulate the conduct of those striving for goodwill and trade advantages for themselves.<sup>77</sup> And with slow and halting steps the courts have been approaching the formulation of a principle now definitely recognized by the Supreme Court of the United States,<sup>78</sup> namely "that no one shall be permitted to appropriate to himself the fruits of another's labor."<sup>79</sup> This view if carried out and extended, as seems likely, will, it is readily understood, basically alter the former conception of unfair competition. The term was first used in connection with the infringement of trade-marks and then as trade-marks were protected by special legislative acts it was applied to the wrongful passing off of goods for those of another. Now federal and state courts are developing a meaning for unfair competition of even greater significance to the business world. There is a tendency to accept the *dictum* of Lord Esher that an act of commercial rivalry done not for the purpose of competition but with intent to injure a rival, is not "an act done in ordinary course of trade, and therefore is actionable, if injury ensues."<sup>80</sup> American courts are arriving at the conception that in the competitive process the individual has rights which, whether regarded as property or not, are entitled to protection and that business practices unfair to both the injured party and the public must be declared inequitable and prevented by judicial process.<sup>81</sup> In the language of Justice Pitney when parties are competitors and the rights of one are liable to conflict with those of the other "each party is under a duty so to conduct its own business as not necessarily or unfairly injure that of another." It is declared to be the duty of the court to prevent interferences with the normal operation of legitimate business which result in diverting profits from those who have earned them to those who have not.<sup>82</sup>

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<sup>76</sup> Crowell, *Trusts and Competition* (1915) 30; Wyman, *Unfair Competition by Monopolistic Corporations* (1912) 42 THE ANNALS, 68; Stevens, *Resale Price Maintenance as Unfair Competition* (1919) 19 COL. L. REV. 265.

<sup>77</sup> Nims, *op. cit.*, 31.

<sup>78</sup> *International News Service v. The Associated Press* (1918) 248 U. S. 215, 39 Sup. Ct.

<sup>79</sup> *Ibid.*, 2.

<sup>80</sup> See *Mogul Steamship Co. v. McGregor, Gow & Co. supra.*

<sup>81</sup> Cf. Nims, *op. cit.*, ch. ii.

<sup>82</sup> See (1919) 32 HARV. L. REV. 566; (1919) 4 CORN. L. QUART. 255.

## PREVENTING UNFAIR COMPETITION THROUGH AN ADMINISTRATIVE COMMISSION

The most recent method of attacking the evils of unfair competition is to establish an administrative board whose duty it is to pass upon unfair practices and to correct so far as possible the evils resulting therefrom. The former method of procedure was to declare illegal unfair methods and to provide a private right of action against the offender. The nature of the remedy was an injunction to prevent the wrongful act or damages to cover losses resulting from such action. The common-law decisions with regard to unfair competition have been confined very largely to passing off and misrepresentation with the result that the scope of the common law was a decidedly restricted one in the effort to prevent unfair methods. While the Sherman Anti-Trust Act and state legislation relating to trusts gave a more extensive application of the general principles for the courts and rendered it possible to prevent certain unfair practices which would not have been held void under the common law, nevertheless the ineffectiveness of the private right of action has become notorious. Owing to the conservatism and the slowness of action in the determination of such questions before the courts, many cases have dragged on for a period of ten years or more and often cases were either dropped or inadequate relief was accorded. Moreover, those who suffer from unfair practices are often the small but efficient business establishments which find it impossible to carry their cases to the courts.

The enforcement of the provisions of such laws may be rendered somewhat more effective by giving special authority to the Attorney-General to prosecute on behalf of the state on complaint of private parties or corporations. But despite these attempts to secure a better enforcement of trust legislation cases on unfair competition often involve economic and statistical facts as well as legal principles, and to secure an effective enforcement of restrictive business laws, it has been found necessary to provide additional agencies. For the purpose of enforcing federal legislation the Federal Trade Commission was established whose duties were briefly summarized previously. The work of the Federal Trade Commission has demonstrated the peculiar advantages in having unfair methods passed upon by an administrative body rather than leaving the condemnation of such methods solely to the courts whether under common-law rules or the Sherman Anti-Trust Act. It is not within the scope of this article to undertake an analysis of the results accomplished by the Federal Trade Commission nor to deal with the meaning of unfair methods of competition as defined by the Commission. However the nature of the work of the Federal Trade Commission may be indicated by a brief summary of the complaints issued through the Commission for the year ending June 30, 1918. Among the unfair methods condemned by the Commission are:

exclusive contracts, maintenance of resale prices, commercial bribery, passing off, misrepresentation, false advertising, accumulative rebates, tying contracts, intimidation of competitors and inducing cancellation of orders from competitors.<sup>83</sup>

The particular advantage of the Trade Commission in passing upon business practices with respect to fairness or unfairness is due to the consideration that in a large measure the facts involved are economic as well as legal. The staff of the Federal Trade Commission includes experts in economics and statistics as well as attorneys. In the final preparation of a case the complaint with the evidence and reports of investigators is turned over to a board of review made up of both economic experts and attorneys. As a result of the consideration of the economic as well as the legal aspect of unfair competition combined with broad powers of investigation, it is thought that "more adequate criterions for the determination of what constitutes unfair competition than could possibly be developed through any other agency than an administrative board,"<sup>84</sup> will be secured. The advantages of the commission are that the procedure is easy, expeditious, and inexpensive, that the services of the commission are available to the small as well as to large concerns, and that greater freedom and flexibility may be secured through administrative machinery. The rules of practice announced by the Commission in its annual reports give an expeditious method of pressing complaints, making answer thereto, of the issuance of orders, of the calling of witnesses and of the preparation of briefs with the presentation of evidence. The tendency of the Commission is to make the procedure direct and to open the way for the consideration of any meritorious complaint.

Owing to the care exercised by the Commission in the issuance of its orders very few of the orders have been contested. Thus far only a few cases have been appealed to the Circuit Court of Appeals against the orders of the Commission. Moreover, the courts availing themselves of section seven of the Federal Trade Commission law have called upon the Commission to act as a master in chancery to present a plan for dissolution of an illegal combination, the plan to be presented to the District court for confirmation.<sup>85</sup> In a majority of cases in which the Commission has brought a complaint against a company for the use of unfair methods the parties involved have not undertaken to defend the condemned practices and the Commission's order has not only been respected but has also formed a rule to guide business men in similar establishments. While it is too early to attempt an estimate of the probable results to be accomplished through the establishment of the Federal Trade Commission, it is believed "that the construction of un-

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<sup>83</sup> For this summary I am indebted to W. H. Stevens who gives a very valuable discussion of the work of the Commission in (1919) 82 THE ANNALS, 232.

<sup>84</sup> Stevens, *op. cit.*, 242.

<sup>85</sup> *United States v. Corn Products Co.* (1916, S. D. N. Y.) 234 Fed. 964.



fair methods of competition by the Commission will tend to gradually establish itself in the law of the country" and that the Commission will prove itself a useful and necessary adjunct to the courts and other agencies engaged in the effort to prevent illegal and unfair business tactics.<sup>86</sup>

SOME COMPARISONS WITH RESPECT TO THE METHODS OF REGULATING  
UNFAIR COMPETITION IN FOREIGN COUNTRIES

Certain methods of dealing with unfair competition in foreign countries are of such significance that it seems desirable to give a few noteworthy comparisons. Under the designation of such terms as "*concurrency déloyale*" or "*Unlauterer Wettbewerb*"<sup>87</sup> the regulation of unfair business practices has had an interesting development in continental European countries.<sup>88</sup>

In Europe these terms apply chiefly to the passing off of goods or to an intent to cause confusion. The law was originally developed from broad general provisions of the civil code which by progressive adaptation of the courts was made applicable to the changing types of unfair business practices. Later, specific forms of unfair competition were declared illegal by statute; and, in a few instances, an effort has been made to combine the chief provisions against unfair business into a single statute.

The most interesting development is found in France where *concurrency déloyale*, a term not defined in code or statute, is nevertheless in common use by the courts.<sup>89</sup> This branch of law has been developed from two sections of the civil code, neither of which relates directly to business. The articles on which the court decisions are based are 1382 and 1839 which are: any act whatever by a person which causes injury to another obliges him by the fault of whom it happened to compensate it; and, each one is responsible for the injury which he has caused not only by his act, but also by his negligence or by his imprudence.

Under these general phrases, courts have condemned numerous unfair practices relating chiefly to acts intended to produce confusion, defamatory statements, disloyalty of employees, and acts resulting from the violation of contracts and agreements. According to the French courts, an intent to injure is a necessary element of *concurrency déloyale*, but acts not involving a wrongful intent are often held unlawful

<sup>86</sup> Consult, Stevens, *op. cit.*, 265ff.

<sup>87</sup> Cf. Pinner, *Gesetz gegen den unlauteren Wettbewerb* (5th ed. 1910).

<sup>88</sup> Cf. Francis Walker, *Policies of Germany, England, Canada and The United States Towards Combinations* (1912) 42 THE ANNALS, 183.

<sup>89</sup> Chenevard, *op. cit.*, Allart, *op. cit.*; Pouillet, *Traité des marques de fabrique et de la concurrence déloyale en tous genres* (1912).

under the designation "*concurrence illicite*."<sup>90</sup> The latter act is regarded as a tort, and involves merely a right of action for damages to the injured party. Special tribunals of commerce are constituted to try cases of unfair practices.<sup>91</sup> Supplementary to the above provisions of the civil code are a number of special statutes declaring certain practices illegal. These laws condemn chiefly the misuse of names, titles, and trade-marks. A recent statute makes illegal the practice of fraud in the sale of merchandise particularly when such fraud results in injury to the public health.

In Germany, unfair practices were dealt with by separate statutes dealing with patents and trade-marks and finally by special enactments in 1896 and 1909 defining in detail and declaring illegal unfair business methods.<sup>92</sup> The recent law of 1909 adds a general clause similar to the sections of the French code whereby acts are declared unfair which are against good morals. Among the practices condemned are deceptive advertising, bribery of employees, misrepresentations, misuse of trade names and disclosure of secrets. Special boards of arbitration are formed to decide cases of unfair practices.

The federal government and cantons of Switzerland have passed numerous acts relating to unfair trade. In the main they follow the plan of the French and German systems.

Among the recent foreign enactments are the Greek Law of December 26, 1913, Denmark's Law of 1912, the Australian Industries Preservation Act of 1906-10, all of which aim to prohibit certain specific forms of unfair business.

Three steps are readily discernible in the growth of the law of unfair competition: first, statutes and judicial decisions relate to trade-marks and trade names; second, special laws are enacted covering false advertisements, bogus sales, corruption of employees and betrayal of business secrets; third, unfair competition is extended to include combinations and agreements that interfere with competition such as exclusive dealing and tying contracts. The latter type of law has been enacted especially in the British Self-Governing Colonies, and in the United States.

The present tendency in foreign legislation appears to be to have a general provision of law under which varying forms of unfair competitive practices may be suppressed and then by special laws to condemn certain obnoxious practices. The basic idea of unfair competition in most foreign countries is an act which injures unjustly a competitor and little consideration is given as a rule to the effect of an

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<sup>90</sup> "*Il y a concurrence déloyale lorsque l'acte a été accompli de mauvaise foi; il y a concurrence illicite lorsqu'il a été accompli sans mauvaise foi.*" Chenevard, *op. cit.*, 17.

<sup>91</sup> For a summary of French laws on unfair trading and a brief account of unfair competition in other foreign countries, see Davies, *op. cit.*, 559ff.

<sup>92</sup> Chenevard, *op. cit.*, 28ff.

act upon the general public.<sup>93</sup> The courts of the United States are foremost in the tendency to hold that the effect of acts upon the general public must be taken into account.<sup>94</sup>

Unfair competition has been the subject of several important international agreements including a convention for the protection of industrial property signed in Washington in 1911 and acceded to by the majority of the great nations and an international agreement for the regulation of trade-marks also signed at Washington in 1911.<sup>95</sup>

Chambers of commerce and various commercial bodies have discussed the advisability of international action against unfair competition. Special efforts have been made to secure the general adoption of a system similar to that of France and to secure the recognition of unfair competition as a matter for common regulation in all countries. The plan of an international trade commission whose duty it is to prescribe regulations whereby the competition between nations may be made fair is strongly recommended by those interested in securing a higher standard of commercial ethics.<sup>96</sup>

In so far as unfair competition is based upon principles of law the determination and application of which are relatively clear, the enforcement of rules against unfair practices may be dealt with by the courts with a fair degree of effectiveness. But some of the so-called legal principles with respect to unfair competition are too vague and uncertain and too many differences of opinion arise to render satisfactory the results of the legal effort to define unfair competition. Moreover, in so far as the courts claim it their duty to protect an honest trader and restrain a dishonest one from carrying out his schemes or to repress any act which is unjust, inequitable or dishonest, the determination of the dividing line between fair and unfair grows out of economic conditions and business relations on which it is very difficult if not impossible for the courts to pass intelligent judgments. It is in this field that administrative commissions with the assistance of economists and lawyers and with a more elastic procedure can more effectively reach and prevent wrongs for which the slow and cumbersome process of the law affords inadequate remedies. But the attempt to define unfair competition in the United States both by decrees of courts and administrative action through a trade commission shows the prime necessity of the co-operation of business organizations and commercial bodies through special commerce courts or commissions whose duty it is to formulate more specifically a code of business ethics and then to join with the courts and with other government agencies in securing their enforcement. It seems desirable in this regard to give careful con-

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<sup>93</sup> Davies, *op. cit.*

<sup>94</sup> *Wilder Mfg. Co. v. Corn Products Co.*, *supra*.

<sup>95</sup> Davies, *op. cit.*, 700ff; Chenevard, *op. cit.*, 39ff.

<sup>96</sup> See address by William Smith Culbertson on *The Open Door and Colonial Policy* before the American Economic Association, at Richmond, Virginia, 1918.

sideration to the practice of certain European countries which have developed a commercial code the enforcement of which is left in large part to specially constituted courts. Whatever method is pursued it seems likely that laws and judicial decisions on unfair competition will multiply, that the functions of administrative trade commissions will increase and that a larger share in the formulation of principles of business law and in their enforcement will be assumed by the organized business interests. The law dealing with unfair business competition remains in large part yet to be developed but sufficient progress has been made to indicate the main principles and characteristics of this development.