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THE LAW OF TRADE PRACTICES

FOREWORD

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The legal control of trade practices is an extension of the law of torts and originated in the judicial concept of unfair competition. Its initial precedents were prohibitive in scope, with the courts of equity restricting the excesses of competition and redressing commercial wrongs created by illegal interferences with business conduct.

The economic philosophy of acceptable standards of business practices, which established a plane of competition, was formulated in 1887 by Henry Carter Adams. He viewed these qualitative standards as media for the reduction of excessive competition and not as instruments which might lessen business rivalry.¹ In this manner, opposition to survival and growth of business by any means gave rise to the obligation to compete fairly.

In its judicial context, the doctrine developed from early English cases, notably *Keeble v. Hickeringill*,² "*The House of Lords Trilogy*,"³ and *Templeton v. Russell*.⁴ Establishing a general principle of liability for certain species of unfair trading, the cases brought forth the modern common law principle that a lawful business may be conducted for profit without unjustified interferences of others, be they competitors or noncompetitors.

This concept is comparable to the American doctrine of *prima facie* tort, as classically presented by Mr. Justice Holmes in *Aikens v. Wisconsin*:

It has been considered that, *prima facie*, the intentional infliction of temporal damages is a cause of action, which, as a matter

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¹ "Relation of the State to Industrial Action," 1 Publications of the Am. Economic Assn. (No. 6) 43.

² 11 East 574, 103 Eng. Rep. 1127 (Q.B. 1706).

³ 23 Q.B. 598 (1889), A.C. 25 (1892).

⁴ 1 Q.B. 435, 715 (1893).

of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.⁵

The *prima facie* tort theory attempts to overcome the restrictiveness of the traditional view that all actionable wrongs must conform to one of the various nominate torts, such as deceit, negligence, malicious prosecution or inducing breach of contract.⁶ Today the concept of unfair competition includes tortious or improper conduct irrespective of the orthodox nominate categories and covers a host of disparate business relations. Among these activities are protection against misrepresentation of commercial source or goods, product simulation, and misappropriation. In addition, a wider range of unfair methods of competition is prohibited under federal and state statutory law.⁷

This extension of business regulation fostered didactic innovations. A course in trade regulation, functional in approach and covering monopoly and unfair business practices, became a standard subject in most law school curricula. In 1950, the subject matter was given distinguishing emphasis by Professor Oppenheim in his separate case books on federal antitrust laws and unfair trade practices.⁸

As the law matured, however, it assumed permissive as well as prohibitive characteristics. Thus, the prescriptive titles of trade regulation, unfair competition, and unfair trade practices no longer accurately described the legal concept. For this reason, a new designation, "The Law of Trade Practices," is proposed here. In conformity with this view, it is used for this symposium.

The phrase, "trade practices," serves a two-fold purpose. It is descriptive of diverse business relationships, omitting an opprobrious diacritical appellation. Thus, legally permissive practices, such as in trade secrets and trading stamps, are not summarily stigmatized by a title connoting unethical conduct.

The exigencies of the present study prompted its expansion to two symposia whose topics are representative of diverse trade practices, covering both the common law and statutes.

In this symposium, the initial article by Professor John C. Sted-

⁵ 195 U.S. 194, 204 (1904). See also Holmes, "Privilege, Malice and Intent," 8 Harv. L. Rev. 1 (1894); Wigmore, "The Tripartite Division of Torts," 8 Harv. L. Rev. 200 (1894).

⁶ See Oppenheim, "The Judicial Process in Unfair Competition," 2 Patent, TM, and Copyright J. of Res. and Ed. 116 (Supp.) (1958).

⁷ E.g., Federal Trade Commission Act, as amended, 15 U.S.C. § 41; California Unfair Practices Act, Cal. Ann. Bus. and Prof. Code § 17000 (West 1954).

⁸ Oppenheim, Federal Antitrust Laws, Cases and Comments (2d ed. 1959); Oppenheim, Unfair Trade Practices, Cases, Comments and Materials (1950).

man presents the effective devices, techniques, and remedies available to implement trade secrets as an alternative to patent protection.

A socio-economic study of trading stamps is provided by Mr. Newell A. Clapp of the Washington, D. C., Bar. His presentation covers such matters as relative cost, savings, and appeal of trading stamps.

My discussion on product simulation is a critical evaluation of aspects of secondary meaning and the jural misapplication of its splintered theories to the copying of features of articles.

Professor James A. Rahl appraises the extension and limitation of the doctrine of misappropriation in the *I.N.S.* case.

The pending Congressional bill on unfair commercial activities is discussed by Mr. Sydney A. Diamond, one of its draftsmen for the Association of the Bar of the City of New York.

The concluding article by Mr. Rudolph Callman of the New York Bar, discusses judicial attempts to define unfair competition in the contexts of boycotts and price wars. The inclusiveness of the law of unfair methods of competition and its administrative vagaries provide the framework of his study.

A forthcoming symposium will include a definitive study of false advertising at the administrative level by Professor Irston Barnes of Columbia University, an article on lotteries by Hon. Russell Leach and Frank Reda of the Ohio Bar, and other writings.

In its fullest meaning, this range of subject matter reflects a deepening sensitivity to business morality. Perhaps we may return some day to the ethical standards embodied in the Hammurabi Code, where heavier penalties were prescribed against merchants and public officials than against persons of lower status or responsibility. Those who possessed the greatest privileges would be subject to the greatest penalties.