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THE steps which have recently been taken, both through federal and state legislation, to regulate trade practices by outlawing what have been denominated "unfair methods of competition" have brought to the fore a problem that has vexed lawyers and legal writers for a long time. The question is whether a competitor who has been injured as a result of a rival's use of one of the condemned methods of competition can maintain any action either at law or in equity against the wrongdoer. Contrary to what has always been the practice in drafting so-called "anti-trust" laws,[1] the legislation dealing with unfair competition does not embody any provisions relating to suits by private persons injured by conduct which violates those statutes.[2]

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[1] The phrase "anti-trust laws" is defined in section 1 of the Clayton Act, 38 Stat. 730, U. S. C. tit. 15, sec. 12. Sections 4 (38 Stat. 731, U. S. C. tit. 15, sec. 15) and 16 (38 Stat. 737, U. S. C. tit. 15, sec. 26) of that act provide for the bringing of suits at law and in equity, respectively, by private persons injured by violations of the "anti-trust laws."

The analogous state statutes usually contain similar provisions. See DAVIES, TRUST LAWS AND UNFAIR COMPETITION 216 (1915).

The conduct prohibited by these statutes may, and in fact usually does, involve what we would call "unfair methods of competition." To that extent, therefore, "unfair methods of competition" are clearly actionable.

[2] The only sanction provided for in the parent act, The Federal Trade Commission Act, 38 Stat. 717-724, U. S. C. tit. 15, secs. 41-51, is an order to cease and desist by the Federal Trade Commission.

The National Industrial Recovery Act, 48 Stat. 195-199, U. S. C. (1933 Supp.) tit. 15, secs. 701-708, provides for the following remedies: (1) Orders to cease and desist by the Federal Trade Commission [48 Stat. 196, U. S. C. tit. 15, sec. 703 (b)]; suits in equity to restrain violations of the act brought by United States district attorneys [48 Stat. 196, U. S. C. tit. 15, sec. 703 (c)]; and criminal prosecution [48 Stat. 196, U. S. C. tit. 15, sec. 703 (f)].

Two lines of inquiry suggest themselves at the outset. (1) Has the common law developed any general principles which justify the conclusion that a man is committing a legal wrong against his competitor when he engages in what we today know as unfair competition? (2) Assuming such general principles to exist, is there anything in the applicable state or federal statutes which would preclude the application of those principles either in general or specifically to those types of cases in which the competition alleged to be legally unfair is so only because it is made unfair by statute? [3]

THE SITUATION AT COMMON LAW

It is perfectly clear that no nominate tort of unfair competition, in the sense in which we use that phrase today, has ever been recognized by the common law. The later common law of this country, it is true, did know a tort which it sometimes called "unfair competition," but the phrase so used was simply another name for one particular kind of unfair competition, namely, "passing off," as distinguished from what is known as trade mark infringement.[4]

On the other hand, there is a fundamental principle running through the law of torts which would justify our saying that unfair competition is actionable. This is the principle that when one man intentionally inflicts temporal damage upon another he must make recompense to that other, unless he can justify his conduct. While it has been asserted that such a generalization is not warranted by the decided cases,[5] there is weighty authority in its support.[6] Certainly he who makes this assertion has the burden of proof, since he casts a reproach upon our law which it ought not to have to bear. It is inconceivable that a matured legal system such as ours should be so inflexible as to adhere indefinitely to the view that relief for an injury can be had only if the particular conduct falls within the limits of some nominate tort, such as assault, deceit, defamation, etc.

I apprehend that it would not be seriously contended that one who

[3] It is to be observed that a great many types of conduct that clearly would not have been regarded as "unfair competition" when judged by the prevailing common law standards have been made unfair by the codes adopted under the National Industrial Recovery Act.

[4] See Burdick, LAW OF TORTS, 2d ed., 384 (1908); 63 C. J. 324 ff.; 2 COOLEY, TORTS, 4th ed., sec. 285 (1932); POLLOCK, TORTS 13th ed., 322 (1929).

[5] SALMOND, TORTS, 7th ed., sec. 2 (1928).

[6] See POLLOCK, TORTS, 13th ed., 20-23 (1929); Winfield, "The Foundation of Liability in Tort," 27 COL. L. REV. 1 (1927); Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194 at 204, 25 Sup. Ct. 3 (1904); McCardie, J., in Pratt v. British Medical Ass'n, [1919] 1 K. B. 244.

deprives another of his expectation of custom, who diverts another's patronage or defeats his expectation of patronage by conduct which he knows will have that result, and which is intended to have that result, has not inflicted temporal damage upon that other. Therefore, if the principle just stated be accepted, justification for such conduct would seem to be necessary if liability is to be avoided. Fair competition would, of course, be a sufficient justification; unfair competition could hardly be so regarded.

Obvious as this would seem to be, it will have to be admitted that the courts have been slow to recognize this general principle as applicable in cases involving trade relationships. Even when they have recognized it, they have hesitated to admit that a trader's interest in anticipated business relationships with others is one that is in general entitled to recognition and protection by the law. Moreover, they have been singularly reluctant to recognize any proprietary interest in one's expectation of custom, or good will, for the purpose of giving a remedy to a competitor. That these things are so is clear from the cases to which I shall call attention. Relief against certain kinds of unfair competition has always been given, but seldom on the avowed basis that a trader has a general right to be protected in his interest in the good will of his business against unjustifiable invasions. Relief, when grudgingly given, has usually been predicated on the protection of some other interest of the plaintiff, as, for example, his interest in his reputation; or his proprietary interest in certain trade marks or devices for capitalizing good will; or on the fact that an interest of some third person has been invaded by conduct which is undeniably tortious as to him, and which has resulted in incidental damage to the plaintiff through the loss of custom.[7]

This reluctance on the part of our courts to recognize that a trader has any general right to be protected in his interest in anticipated business relationships becomes especially apparent when we consider the evolution of the law relating to trade marks and trade names. In this field, it has given rise to the anomalous distinction between "trade marks" and "trade names" with its concomitant distinction between an action for trade mark infringement and one for so-called unfair competition. In the earliest cases dealing with this question it was held that one was not entitled to relief against "passing off" through the use

[7] The confusion and lack of careful analysis which exist in regard to the basis for granting relief in these cases is well illustrated in NIMS, UNFAIR COMPETITION AND TRADE-MARKS 3rd ed., c. 3 (1929), where he purports to set forth the basis of the action for unfair competition in the present-day sense.

of one's trade marks unless the wrongdoer was guilty of fraud and deceit. Deception has, of course, always been recognized as tortious conduct. The only difficulty encountered in working out the trade mark user's right to relief on this theory was that it was not he who had been deceived. The one deceived was the prospective customer whose patronage the wrongdoer had diverted. The circumstance, however, that the deceit was vicarious did not deter the courts from basing the right to relief on the theory of injury due to deceit. But this theory proved to be inadequate in that it did not protect the competitor whose custom had been diverted by one who had no fraudulent intent. To get around this difficulty the courts began to say that the trade mark user has a proprietary interest in his mark: accordingly they gave relief on the theory of the infringement of that interest. This approach was fairly satisfactory in those cases in which the name or mark in question was unique. It did not serve so well in those cases where the name or mark was of a kind which the wrongdoer could plausibly say he had a legitimate excuse for using, as for example, when it happened to be his personal name, a descriptive term, or a geographical name. For a time it loooked as if no relief at all would be given in these cases. But after a while the courts began to revert to the fraud theory in such cases with the result that we have the distinction made between the so-called technical or common law trade mark, for whose infringement an action can be brought without proof of fraud, and the non-technical trade mark, for the simulation of which it usually has been said that no action can be brought without proof of fraudulent intent. It is only recently that judges have begun to appreciate the anomaly of this distinction and to recognize that the two types of cases are fundamentally the same — that the real basis for protecting the competitor against the simulation of his marks or other devices is his interest, not in those symbols, or in the freedom from deception of the customer whose patronage has been diverted, but rather his interest in the good will or habit of patronage of his prospective customers on which he capitalizes through the medium of his trade marks and trade names. Had this interest been recognized in the first instance as the basis of relief, it is probable that a more rational law of trade marks would have evolved.[8]

Strangely enough, the theory of relief based upon vicarious deception was not applied, and no relief at all was given, until very recently at any rate, in those cases where the diversion of custom was accomplished by deceptive advertising which did not involve the use of

[8] For a review of the cases supporting the views expressed in this paragraph, see Grismore, "Fraudulent Intent in Trade Mark Cases," 27 MICH. L. REV. 857 (1929).

simulating trade marks, trade names or other demand-creating devices.[9]

It has been the law from a very early day that if one diverts a competitor's patronage by intimidating his customers by means of an assault, an action will lie.[10] An assault is of course tortious. But again, the difficulty in giving the competitor relief on this theory is that it is not he who has been assaulted. In spite of this fact, it has been asserted that the basis of relief is the assault and not the fact that the competitor has a right not to have his custom diverted through unfair means.[11] There has recently been a tendency to broaden the basis of relief here somewhat by holding that the more gentlemanly forms of intimidation that are indulged in nowadays are also actionable.[12]

The common law has, of course, always recognized as deserving of legal protection one's interest in having his reputation unsullied. Consequently, the diversion of custom through what amounts to a slander or libel has long been actionable.[13]

So-called slander of title and disparagement of property appear to be off-shoots, in part from those cases in which the interest protected

[9] American Washboard Co. v. Saginaw Mfg. Co., (C. C. A. 6th, 1900) 103 Fed. 281. The court in this case seems to have proceeded on the theory that an injured competitor can have no relief unless his so-called property interest in a name, mark or other device has been infringed. It refused to recognize a property interest in mere expectation of patronage. It naively opines that it would be unthinkable that "A person who undertook to manufacture a genuine article could suppress the business of all untruthful dealers, although they were in no wise undertaking to pirate his trade" (p. 286). Apparently piracy is regarded as commendable if accomplished by mere misbranding.

Contra, on similar facts, see Ely-Norris Safe Co. v. Mosler Safe Co., (C. C. A. 2d, 1925) 7 F. (2d) 603, commented on in 26 COL. L. REV. 199 (1926); reversed for want of a showing of damages through loss of custom in Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132, 47 Sup. Ct. 314 (1927). The Supreme Court did not express any opinion on the question whether an action would lie were actual damage through diversion of custom shown.

[10] Tarleton v. M'Gawley, Peake 270, 170 Eng. Rep. 153 (1793); Garret v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485; Evenson v. Spaulding, (C. C. A. 9th, 1907) 150 Fed. 517.

[11] See the majority opinions in Allen v. Flood, [1898] A. C. 1, particularly that of Lord Watson.

[12] See, Emack v. Kane, (C. C. N. D. Ill. 1888) 34 Fed. 46 (intimidation of prospective customers by threat of patent infringement suits); Price-Hollister Co. v. Warford Corp., (D. C. S. D. N. Y. 1926) 18 F. (2d) 129 (threats of patent infringement suits); Wren v. Weild, L. R. IV Q. B. 730 (1869) (threats of patent infringement suits). *Contra,* so far as the right to sue in equity is concerned, Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873). These cases are, however, usually predicated on the theory of slander of title.

See also the cases cited in par. 2 of note 18, infra.

[13] See POLLOCK, TORTS, 13th ed., c. 7 (1929); "Unfair Competition—Disparagement of Competitor's Goods as Libel Per Se," 26 MICH. L. REV. 587 (1928).

is the personal reputation of the plaintiff, and in part from the cases holding that the plaintiff is entitled to protection against harm resulting incidentally from the deception of third persons.[14]

After considerable hesitation our law has come to recognize and to give legal protection to a proprietary interest in contract relationships. So far has this development now gone that mere competition is under no circumstances a justification for inducing breach of contract.[15] However, it is to be noted that the basis of relief is found in the invasion of the proprietary interest in the existent contract and not in an unjustifiable invasion of the general interest in freedom to enter into business relationships. In other words, inducing breach of contract is itself regarded as a special kind of wrong rather than as merely one species of unfair competition.[16]

So also it is generally agreed that one who obtains a competitor's trade secret, either by fraud or by inducing a breach of confidence, is guilty of an actionable wrong. Here again the right to relief is usually predicated either upon the theory of a property interest in the trade secret or else upon the theory of a breach of contract or of the inducing of a breach of contract.[17]

On the other hand, diversion of custom by coercion of a competitor's customers by conduct not tortious as to others or criminal has generally been held not to give the competitor a right of action. Thus it has usually been decided that a combination in restraint of trade, although admittedly illegal and hence presumably unfair, which carries out a boycott against a particular competitor, cannot be sued by that competitor for the destruction of his business where there is no evidence of the existence of a criminal conspiracy.[18] The same conclusion

[14] See POLLOCK, TORTS, 13th ed., 316 (1929); Smith, "Disparagement of Property," 13 COL. L. REV. 13 and 121 (1913).

[15] The cases are collected and discussed in Carpenter, "Interference with Contract Relations," 41 HARV. L. REV. 728 at 754 (1928); and in Savre, "Inducing Breach of Contract," 36 HARV. L. REV. 663 (1923).

[16] See, e.g., Lord Herschell in Allen v. Flood, [1898] A. C. 1 at 119 ff.

[17] The cases are collected and discussed in 19 COL. L. REV. 233 (1919), and 42 HARV. L. REV. 254 (1928).

[18] Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A. C. 25 (The judgments delivered in this case do not make clear the underlying theory on which they proceed. Whether it was meant to hold that no legally protected interest of the plaintiff had been invaded, or merely that while there had been an invasion of a legally protected interest that invasion was justified, is not apparent.); Sorrell v. Smith, [1925] A. C. 700 (in this case, also, the judges were not agreed on the underlying theory); Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119 (1893); Macauley Bros. v. Tierney, 19 R. I. 255, 33 Atl. 1 (1895).

Contra, see, Reeves v. Decorah Farmer's Cooperative Society, 160 Iowa 194, 140

has sometimes been reached in the field of labor relations when one group of laborers has carried out a boycott against another group. In the leading case of *Allen v. Flood* [19] one of the principal points in dispute between the majority and the minority judges was the question whether the law recognizes the existence of a general right of freedom to enter into anticipated business relationships. The minority judges insisted that it does, and that consequently relief should be given. Most of the majority judges, on the other hand, asserted that it does not; that relief can be had by a competitor only when he can show the invasion of some other legally protected interest, or where conduct tortious as to others has resulted in incidental damage to the competitor.[20]

Somewhat inconsistently, it would seem, it has been held that one who is not a rival is liable if he diverts another's patronage unless he has a valid justification for his conduct.[21] While there is evident in some of these cases a tendency to regard the general interest of the trader in anticipated business relationships as the basis of relief, the cases have also and more often perhaps been explained on the theory of conspiracy.[22]

Apparently for a time it was thought that the cases in which relief for unfair competition had been given could be generalized on a theory of malice — on the basis of the idea that a person has a legal right to be free from injuries caused by acts done maliciously, and that therefore malicious acts are *per se* tortious.[23] It soon became clear, however,

N. W. 844 (1913); Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N. W. 472 (1901); Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029 (1906); Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14 (1893). Some of these cases seem to be based on the theory that a criminal conspiracy is involved, although the facts in them are no different than in the cases cited in the first part of this note.

[19] [1898] A. C. 1.

[20] Of the eight puisne judges who were asked to give an opinion on the question by the House of Lords, six said that the law does recognize such a general right; two said that it does not. Of the nine Lords who rendered opinions, six said the right exists, although three of these voted for the defendant on other grounds. See Wilgus, "The Authority of Allen v. Flood," 1 MICH. L. REV. 28 (1902).

See also Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900), in which apparently the whole court was willing to admit that such a general right exists. The majority held for the plaintiff that no justification for its invasion had been shown.

[21] Quinn v. Leathem, [1901] A. C. 495; Temperton v. Russell, [1893] 1 Q. B. 715.

[22] See Lord Dunedin and Lord Buckmaster in Sorrell v. Smith, [1925] A. C. 700; SALMOND, TORTS, 7th ed., sec. 153 (1928).

[23] See Freund, "Malice and Unlawful Interference," 11 HARV. L. REV. 449 (1898).

that no such general right had ever been recognized. Moreover, were it to be recognized, it would not cover all of the cases in which relief for unfair competition has been given without giving the term "malice" connotations which it can hardly be said to bear, so that it would be worthless as a guide to decision. As Mr. Justice Holmes has made clear, malice in its true sense is not itself the basis of tort liability. It is only one factor, albeit an important one, to be taken into account in determining whether there is any justification in the particular case for permitting the intentional invasion of some other legally protected interest.[24] If we are to generalize the unfair competition cases successfully it will have to be done on a more comprehensive theory, namely, that the law does protect the trader in his interest in anticipated business relationships against unjustifiable invasions.

What is the explanation of this unwillingness of the courts, especially in suits by a competitor, to recognize as worthy of legal protection the trader's general interest in freedom to enter into anticipated business relationships? It cannot be said that they do not regard the interest as a legitimate one. We have already seen that they did give it indirect protection in many cases and direct protection in cases in which the defendant was not a rival. Also, the common law gave this interest a proprietary character for some purposes. It was early recognized that what was called "good will," which was simply another name for this interest, is a valuable asset, capable of legal transfer by barter or sale.[25] Indeed, the common law was willing to facilitate its transfer by making an exception to its usual doctrines as to contracts in restraint of trade. It recognized that the seller might properly enter into an agreement that would be in unlawful restraint of trade, were it not for the fact that his agreement was essential to enable the trader to make the most out of his good will.[26]

Undoubtedly, as was said by Mr. Justice Bradley in *Butchers'*

[24] Holmes, "Privilege, Malice, and Intent," 8 HARV. L. REV. 1 (1894).

Of course, if competition is indulged in for the sole purpose of destroying the competitor's business, it is not justifiable and is actionable. Tuttle v. Buck, 107 Minn. 260; 119 N. W. 946 (1908); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N. W. 371 (1911); Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta, 256 U. S. 350, 41 Sup. Ct. 499 (1921). *Contra*, see Passaic Print Works v. Ely & Walker Dry-Goods Co., (C. C. A. 8th, 1900) 105 Fed. 163. But one who competes fairly because he wants to engage in that line of business is not liable for the destruction of the plaintiff's business even though he was in part motivated by a wanton desire to ruin that business. Beardsley v. Kilmer, 236 N. Y. 80, 140 N. E. 203 (1923).

[25] Many cases are collected in 28 C. J. 730.

[26] Mitchel v. Reynolds, 1 P. Williams 181, 24 Eng. Rep. 347 (1711). See also Carpenter, "Validity of Contracts Not to Compete," 7 ORE. L. REV. 127 (1928).

Union Co. v. Crescent City Co.,[26a] "The right to follow any of the common occupations of life is an inalienable right," protected by the Constitution of the United States. This being so, it follows that even as between competitors each has a right to strive for the business of a particular customer. It might be thought, therefore, that neither can have any superior right or proprietary interest in that customer's patronage unless he has bound him by contract. However, this is not a necessary conclusion. If we are to make of our economic life something other than a mad scramble, we will have to recognize that a point is reached in the struggle for a particular customer's business, short of the actual capture of that business, at which one of the competitors acquires a right to it, so that the other should not be permitted to invade that right except on the plea of special privilege exercised in fair competition.[26b] It is submitted that this point is reached when it appears that a particular customer would patronize the plaintiff were it not for the fact that the plaintiff's rival so conducts himself as to draw him away. That is to say, if the competitor can show with a reasonable degree of certainty that through his rival's conduct he has lost business that would normally have come to him, he should have a right of action, unless his rival can justify his conduct by showing that his competition was fair.[26c]

The probabilities are that the law, as it did in fact develop, was the result of a subconscious but perfectly natural reaction against the state of affairs that existed in England prior to the Industrial Revolution. In those days monopoly was the rule and competition the exception. What with the market monopolies, the guild monopolies, and monopolies based upon the royal patent, both in national and international trade, there was but little opportunity for the free play of competition.[27] It was only after a long struggle that these fetters were

[26a] 111 U. S. 746 at 762, 4 Sup. Ct. 652 (1884). See also, Wyman, "Competition and the Law," 15 HARV. L. REV. 427 (1902); New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

[26b] Certainly the Constitution does not prohibit reasonable regulations equally applicable to all. See New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932); "Constitutional Law — Right to Competition," 32 MICH. L. REV. 547 (1934).

[26c] See the concurring opinion of Sims, J., in Crump Co. v. Lindsay, 130 Va. 144 at 165, 107 S. E. 679 (1921). On the question as to what is a sufficient showing of such a loss, see Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359, 47 Sup. Ct. 400 (1927); Mosler Safe Co. v. Ely-Norris Safe Co., 273 U. S. 132, 47 Sup. Ct. 314 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 Sup. Ct. 248 (1931); American Can Co. v. Ladoga Canning Co., (C. C. A. 7th, 1930) 44 F. (2d) 763.

[27] For the historical background, see Jones, "Historical Development of the Law

cast off and men became free to engage in trade and business at will. It is not strange that in the course of that long struggle freedom to engage in business should have become a fetish; that it should have come to be looked upon as one of man's God-given or natural rights. It was the interest of the individual in being free to compete that had constantly to be emphasized if progress was to be made. Consequently, it was easy to lose sight of the fact that the competitor with an established business and good will also had a real claim to retain that which he had developed. The result was that courts became reluctant to qualify the right to compete, although they were willing to admit that the interest of a trader in an established business was entitled to some legal protection.[28]

This is in accord with the history of the development of human institutions in general. In that history we find that the reaction from one extreme usually leads to the other. It is only after both extremes have been tested and found wanting that we are able to reach the safe middle ground. It is true there are not wanting those who, having forgotten this history, contend that competition is an outworn and outmoded conception; that what we need is regulated monopoly. However, we do not need to go so far in order to espouse the view that a competitor should have relief against the excesses of competition. All we need to do is to recognize that the pendulum swung too far in its reaction from monopoly when it refused to recognize as basic and as worthy of legal protection the general interest in freedom from diver-

of Business Competition," 35 YALE L. J. 905 (1926), 36 YALE L. J. 42 and 351 (1926-27).

[28] For a good illustration of this point of view, see Fry, L. J., in Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q. B. D. 598 at 625-626 (1889), where he says,

> "We have then to inquire whether mere competition, directed by one man against another, is ever unlawful. It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is not an absolute but a qualified right — a right conditioned by the like right in the defendant and all Her Majesty's subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants — I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing: it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. I say mere competition, for I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation."

sion of expected patronage. All we need to say is that he who would compete must justify his competition by showing that it is fair as judged by the prevailing standards of business conduct. The difficulty in the past has grown very largely out of the fact that judges have been wont to speak in terms of absolutes, particularly as regards the right to compete. Of course, there is no absolute right either to compete or to be free to enter into anticipated business relationships. Both interests are worthy of legal recognition within limits that can be satisfactorily defined and reconciled on the basis of the principle of fair competition.

There are strong indications that we are about to enter upon this third stage in the evolution of the law on this subject. The leading case for this view is that of *International News Service v. The Associated Press* [29] in which the Supreme Court of the United States held that it was actionable unfair competition for the International News Service to appropriate and to sell to its own clients, without independent verification, news taken from the bulletin boards and the early editions of the members of the Associated Press. It was admitted that the Associated Press had no property either in the content or in the form of this news once it was published by a member.[30] Neither was there any fraud or deception or any other element which made it possible to say that the case came within the limits of one of those categories of unfair competition which, as we have already seen, had theretofore been held to be actionable.[31] Nevertheless, relief was given and on the broad ground, as stated in the language of Mr. Justice Pitney, that "the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. . . . It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." [32] At another place he says, "The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other." [33]

[29] 248 U. S. 215, 39 Sup. Ct. 68 (1918).
[30] 248 U. S. 215 at 236, 39 Sup. Ct. 68 at 71 (1918).
[31] 248 U. S. 215 at 241-242, 39 Sup. Ct. 68 at 73 (1918).
[32] 248 U. S. 215 at 236-237, 39 Sup. Ct. 68 at 71 (1918).
[33] 248 U. S. 215 at 235, 39 Sup. Ct. 68 at 71 (1918).

Five of the eight Justices who heard the case concurred in the majority opinion written by Pitney, J. It is worthy of note that at one or two points in his opinion Pitney, J., speaks as if the basis of relief might be the fact that the Associated Press had

That it is actionable unfair competition to divert another's patronage by acts that are prohibited by criminal statutes has also been decided in a few recent cases. Thus, the Michigan and Texas courts have held that a competitor may enjoin the operation of a lottery which is prohibited by the criminal statutes where the effect of the lottery is to divert some of the plaintiff's trade.[34] The Supreme Court of Michigan in dealing with the objection that this was an attempt to enforce the criminal law by injunction says:

> "Of course, equity has no inherent jurisdiction to restrain the commission of criminal acts, but equity has jurisdiction to protect property rights, even in instances where such rights are injured by criminal acts. . . .
>
> "Have plaintiffs property rights of a pecuniary nature here involved? It would astound the business world to hold that an established business is barren of property rights of a pecuniary nature. Merchants, and others engaged in business, feel that they have property rights therein, and we must hold that an injury to such rights, through criminal acts, is an injury to property rights of a pecuniary nature.
>
> "No one should be permitted to employ criminal means in trade rivalry. . . . Courts do not depart from the rule that equity may not interfere, except to protect property rights of a pecuniary nature, in enjoining criminal acts exercised by one dealer to enhance his sales to the calculated pecuniary injury of a law-abiding competitor." [35]

a "quasi-property" in its news. However, a complete reading of the opinion makes it clear that the decision was based on the broader ground indicated in the quotations in the text above. Mr. Justice Holmes, with whom concurred McKenna, J., while concurring in the view that relief should be granted, did so on the narrow ground that the defendant had been guilty of deception in that it had sold the plaintiff's goods as its own. Brandeis, J., not only refused to admit the premises of the majority but also denied that there was any basis for relief since the case could not be brought within any of the historical categories of actionable unfair competition which he described as follows, at page 258 (39 Sup. Ct. at p. 79): "The unfairness in competition which hitherto has been recognized by the law as a basis for relief, lay in the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud or force or the doing of acts otherwise prohibited by law."

For another recent case which proceeds on the broad ground of the Associated Press case, see, Louis Kamm, Inc. v. Flink, (N. J. 1934) 175 Atl. 62, which holds that it is actionable unfair competition for one real estate dealer to take away a competitor's customer by making use of confidential information unfairly acquired.

[34] Glover v. Malloska, 238 Mich. 216, 213 N. W. 107 (1927); Featherstone v. Independent Service Station Ass'n, (Tex. 1928) 10 S. W. (2d) 124.

[35] 238 Mich. 216 at 220. See also Lord Bramwell in Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A. C. 25 at 46, where he indicates clearly that injury of a competitor by diversion of custom through criminal means is actionable.

One of the chief objections urged against the adoption of the broad principle applied in these cases has been that it would be too difficult and too dangerous for a court to determine what constitutes unfair competition, except within the very narrow limits within which it has exercised that prerogative in the past. It is said that the problem is so complex and involves so many considerations of economic and social policy that it can be properly dealt with only through legislation defining and delimiting the boundaries of any interest of the competitor which it may be desirable to recognize and protect.[36] One may properly question whether experience has demonstrated that the legislature, motivated as it too often is by mere political expediency, is any more qualified to solve complex economic and social problems than are the courts with their so-called trial and error methods. Be that as it may, the argument loses its force in view of the fact that Congress when faced with the problem did not attempt to define and delimit unfair competition. Instead, it delegated the duty of doing so to the Federal Trade Commission and to the President. In view of the attitude of the Supreme Court toward the determinations of the Federal Trade Commission in the past, it is fair to assume that the ultimate solution of the problem necessarily rests with the courts.[37]

Contra, see Motor Car Dealers' Ass'n of Seattle v. Haines Co., 128 Wash. 267, 222 Pac. 611 (1924) (suit to enjoin the violation of a statute prohibiting the doing of business on Sunday).

[36] See, for example, the dissenting opinion of Brandeis, J., in International News Service v. Associated Press, 248 U. S. 215 at 262-267, 39 Sup. Ct. 68 at 80-82 (1918). Also the following cases, which indicate that there has been a good deal of resistance to the broad principle suggested, and a tendency to limit its application to the precise facts involved in that case: Cheney Bros. v. Doris Silk Corp., (C. C. A. 2d, 1929) 35 F. (2d) 279 (Defendant unfairly copied plaintiff's silk patterns which had been developed at considerable expense. No relief given.); Gotham Music Service v. D. & H. Music Pub. Co., 259 N. Y. 86, 181 N. E. 57 (1932) (Defendant copied a new name under which plaintiff had, at great expense, popularized an old song. No relief given.); Crump Co. v. Lindsay, 130 Va. 144, 107 S. E. 679 (1921) (Suit to prevent defendant from copying *D's* uncopyrighted catalog. No relief given.); Westminster Laundry Co. v. Hesse Envelope Co., 174 Mo. App. 238, 156 S. W. 767 (1913) (Defendant appropriated plaintiff's blind advertising. No relief given.). In the following cases relief was given but on the narrow ground that there had been fraud or bad faith: Fonotipia Ltd. v. Bradley, (C. C. E. D. N. Y. 1909) 171 Fed. 951 (defendant copied plaintiff's uncopyrighted phonograph records and represented them to be equal to the originals, which they were not); Montegut v. Hickson, 178 App. Div. 94, 164 N. Y. S. 858 (1917) (defendant copied plaintiff's dress models after securing originals by false pretenses).

[37] It is to be noted that, except for the two types of conduct specifically prohibited by sections 2 and 3 of the Clayton Act, the legislation dealing with this matter not only does not determine what kind of conduct constitutes unfair competition but it does not even so much as set a standard of fair conduct. Under the Federal Trade Com-

EFFECT OF THE STATUTES

Is there anything in the applicable federal statutes which prevents our holding, in conformity with these principles, that a competitor who has been injured, either by the criminal act of another in violating a code of fair competition adopted in conformity with the provisions of the National Industrial Recovery Act, or by the "unlawful" act of another in violating section 5 of the Federal Trade Commission Act, may sue for redress at law or in equity? [38] It is submitted that there is not. It is true, it has been held by several federal district courts that the federal courts do not have jurisdiction to entertain any suits in equity brought by private litigants to enforce the provisions of the National Industrial Recovery Act; also that the Act itself has created no right in the individual injured by its violation which enables him to seek redress.[39] These conclusions have been justified on two grounds: first, on the basis of the general principle "that, where a statute gives a new right and declares the remedy, any one seeking or relying on the right so given is confined for his remedy to that which is prescribed in the statute" [40] (the idea seems to be that if any method of enforcement at all is provided all other possible remedies are by implication excluded); second, on the ground that section 3 (c) of the National Indus-

mission Act it is the Federal Trade Commission that is to determine this question; under the NIRA it is the President's approval of a code that makes the particular conduct therein prohibited unfair competition. The Supreme Court very early made it clear that it was determined to have the last say on this question so far as the Federal Trade Commission Act itself is concerned. See Federal Trade Commission v. Gratz, 253 U. S. 421 at 427, 40 Sup. Ct. 572 at 575 (1919), where it is said, "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include." It is more than likely that the Court will find a reason for itself setting the limits for what shall constitute unfair competition under the codes adopted in conformity to the provisions of the NIRA. It may possibly find such a reason either in the due process clause of the Constitution or in the statutory provision "That such code or codes shall not permit monopolies or monopolistic practices." 48 Stat. 196, U. S. C. (1933 Supp.) tit. 15, sec. 703 (a).

[38] It is to be noted that a criminal penalty is imposed for violation of a code of Fair Competition adopted in conformity with the provisions of the NIRA. On the other hand, a method of competition may be "unlawful" because it violates section 5 of the Federal Trade Commission Act even though it is not prohibited by a code of fair competition. As has been pointed out in note 2, above, no criminal penalties are imposed for violation of the Federal Trade Commission Act alone.

[39] Progressive Miners of America v. Peabody Coal Co., (D. C. E. D. Ill. 1934) 7 F. Supp. 340; Purvis v. Bazemore, (D. C. S. D. Fla. 1933) 5 F. Supp. 230; Stanley v. Peabody Coal Co., (D. C. S. D. Ill. 1933) 5 F. Supp. 612; Western Powder Mfg. Co. v. Interstate Coal Co., (D. C. E. D. Ill. 1934) 5 F. Supp. 619.

[40] Wham, J., in Progressive Miners of America v. Peabody Coal Co., (D. C. E. D. Ill. 1934) 7 F. Supp. 340 at 345.

trial Recovery Act,[41] which purports to confer jurisdiction on the federal courts and directs federal district attorneys to institute suits to enforce the provisions of the act, is similar to a provision contained in the earlier Sherman Anti-Trust Act.[42] This provision in the Sherman Act had been interpreted by the Supreme Court to exclude suits in equity by private persons.[43] The argument made is that since Congress adopted language which had previously been interpreted in this way, it is reasonable to infer that it did so with the idea that its interpretation under the present law would be the same.

One may question whether these arguments are valid. Against them there is this to be said. It is also a general principle of the law, of great antiquity, that one for whose benefit a statute has been enacted is entitled to sue for injuries caused to him by its violation,[44] and this is so even though other means for its enforcement are provided, such as a criminal penalty. Thus, for example, it is generally agreed that criminal statutes enacted for the protection of particular persons may furnish the basis of a private action for damages on the theory that the violation of the statute constitutes negligence *per se*.[45] It is quite clear that the National Industrial Recovery Act, whatever may have been the purpose of the earlier Federal Trade Commission Act, was enacted, in part at least, for the protection of competitors.

[41] 48 Stat. 196, U. S. C. (1933 Supp.) tit. 15, sec. 703 (c).

[42] 26 Stat. 209, 36 Stat. 1167, U. S. C. tit. 15, sec. 4.

[43] Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718 (1917); Gen. Investment Co. v. Lake Shore and Mich. So. R. R., 260 U. S. 261, 43 Sup. Ct. 106 (1922); Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 35 Sup. Ct. 398 (1915); Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 41 Sup. Ct. 209 (1921).

[44] Thus, Mr. Justice Pitney, in dealing with the right of an injured employee not at the time engaged in interstate commerce to recover for an injury resulting from a violation of the Federal Safety Appliance Act, said, in Texas & Pacific Ry. v. Rigsby, 241 U. S. 33 at 39, 36 Sup. Ct. 482 at 484 (1916),

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee. . . . A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, Ch. J., Anonymous, 6 Mod. 26, 27.)"

[45] Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482 (1916); Schendel v. Chicago, Great Western R. R., 159 Minn. 166, 198 N. W. 450, 199 N. W. 84 (1924). For other cases, see U. S. C. A. tit. 45, p. 213, note 332.

It is also to be observed that the analogy based upon the interpretation of the Sherman Act is not perfect. In the first place, that act did expressly give the injured private person a remedy in the form of a suit at law for treble damages.[46] It was therefore arguable that since a specific private remedy was provided, that remedy was by implication exclusive. In the second place, Congress in effect indicated its intent to overrule the interpretation given to that act by enacting section 16 of the Clayton Act [47] which gave the private litigant a suit in equity.

But even though we should accept this narrow interpretation of the National Industrial Recovery Act as correct, it does not follow that an injured competitor has no private remedy at all. The only necessary conclusion would be that no special jurisdiction has been conferred upon the federal courts to grant a private remedy on the basis of that statute. As we have seen, a state court has jurisdiction on the basis of the general principles of the law of torts to give a private remedy when a competitor has been injured by unfair competition. So also the federal courts have a like jurisdiction where there is diversity of citizenship between litigants. It is one thing to say that no private person has any remedy to enforce the rights created by this statute; it is quite a different thing to hold that because the statute created certain new rights and provided certain specific remedies for their enforcement, a private litigant is deprived of remedies based on the general principles of the law of torts which would have been his, had it not been for the remedies created by this statute. In other words, to take this view is to say that Congress intended to make the remedies provided by the National Industrial Recovery Act exclusive, not only for the enforcement of the rights created by it, but also for the enforcement of any rights that exist by virtue of the general principles of the common law. Such a position is untenable. It goes further than is warranted by anything contained in the applicable decisions of the Supreme Court.[48] Moreover, the fact that the conduct which infringes the common law right here contended for becomes unfair competition only because it is a violation of a federal statute, which itself creates other rights and other remedies for the enforcement of those rights, is not material. Viewed from this standpoint the statute does not create any rights; it simply sets a standard of fair competition.

These views find support in recent decisions of the federal courts dealing with an analogous problem under the Sherman Act. Thus, it

[46] 26 Stat. 210.
[47] 38 Stat. 737, U. S. C. tit. 15, sec. 26.
[48] See the cases cited in note 43, supra.

has several times been held that a state court has general jurisdiction, and that the federal courts have a limited jurisdiction, to entertain an action brought by an officer and stockholder of a corporation seeking an accounting by the directors of the corporation for alleged breaches of trust growing out of violations of the Sherman and Clayton Acts. In dealing with such a case in *Hand v. Kansas City Southern Ry.*, the federal district court for the Southern District of New York says:

> "plaintiff is not here seeking to enforce a right created by that act. On the contrary, he is seeking merely to redress an injury to the corporate defendant, and which was inflicted as a result of an effort on the part of the defendant directors to accomplish a public wrong. There is therefore no occasion to measure plaintiff's remedial rights by the statutory penalties of the Sherman and Clayton Acts."

It was said further that it has been held,

> "in effect, that, at the suit of a private party, courts are not without power to protect invaded rights merely because such invasion may also constitute a public wrong which carries exclusive statutory remedies. As was said by Judge Grubb (De Koven v. Lake Shore & M. S. Ry. Co. [D. C.] 216 F. 955, 958): 'The providing of such a statutory remedy, which could be availed of only by the government, ought not to be construed to take away by implication the existing remedy of the individual stockholder under general equity principles.' This is sound doctrine and ought to be good law." [49]

It appears, therefore, that unless we are prepared to reject the principle which was accepted by the Supreme Court in the *Associated Press* case, and to revert to the irrationality and inflexibility that resulted from the accidental, historical fact that our legal principles in their infancy had to develop in the framework of a rigid formulary system of procedure, there is no reason for saying that a competitor may not have redress for injuries caused by the use of an "unfair method of competition." [50]

[49] (D. C. S. D. N. Y. 1931) 55 F. (2d) 712 at 713-714. See also, Guiterman v. Penn. R. R., (D. C. E. D. N. Y. 1931) 48 F. (2d) 851. The state statutes, in so far as they concern the present problem, in the main contain provisions similar to the federal statutes after which they have been modeled. In so far as they differ in their enforcement provisions, it is in the direction of providing a direct remedy in terms to a private person injured by their violation. Some of these statutes will be found collected in MAYERS, A HANDBOOK OF N. R. A., 2d ed. (1934).

[50] For the discussion of a somewhat different but related problem, see Billig, Fridinger, and Herrick, "The Worker's Day in Court: Employee's Right to Code Wages," 3 GEO. WASH. L. REV. 1 (1934).