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Book Reviews

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BOOK REVIEWS

THE LAW OF UNFAIR BUSINESS COMPETITION. By Harry D. Nims. New York: Baker, Voorhis & Co., 1909, pp. xlvi, 581.

It was not so long ago that it was supposed that one trader could not compete unfairly with another unless he stole a technical trade mark. A trade mark was considered property which could be possessed by one person to the exclusion of all others and the courts exercised their jurisdiction on the theory of protecting property, and on that theory alone. The relief, of course, was complete, for in the assumption that a mark or brand was an exclusive property right, any use by another was a violation of that right and unlawful.

The legal theory so devised worked beautifully as long as the trade pirate confined himself to stealing technical trade marks, but when he was graduated from this primary grade of commercial thievery and began the crafty imitation of labels, the deceitful use of identifying names and devices not technically trade marks, the courts at first were at a loss to know how to meet the conditions thus created. The exclusive property theory could not be invoked for it was obvious that no exclusive property could be claimed by any trader in the size or shape of his package, the color or appearance of his label, the name of the town where he carried on business or even in his own name. It was equally apparent that business and trade could be stolen by the use by another trader of these things. The courts in their haste to arrest the depredations of the commercial highwaymen did not stop to figure out whether their property theory as applied to technical trade marks was sound, but invented what was supposed to be a new sort of thing which they compendiously termed "unfair competition," and it was asserted that the relief decreed in such cases differed radically from that in cases of infringement of trade marks; that the trade mark cases depended upon property, the unfair trade cases upon fraud. The modern development of the law makes it probable that neither of these postulates is sound. In assuming a trade mark to be property, what a trade mark really is was lost sight of. A trade mark is an outward sign of business good will, it is simply visible reputation, and it is the thing itself, the good will or reputation that is or ought to be the property and not the symbol. Now, this good will or reputation can be represented in many different ways, and not alone by technical trade marks. It is symbolized by any means, whatever they may be, which enable a purchaser to distinguish a particular trader's goods. It makes no difference whether in a particular instance it be color of label, form of goods, appearance of label, personal, geographical, or descriptive name, if any of these things is a means by which a purchaser can and does in fact exercise his choice and distinguish the commercial origin of the article he wants, then the particular feature whatever it may be represents good will, and is just as much entitled to protection as if it were a technical trade mark. This identifying significance is always a matter of evidence. The identifying

significance of a technical trade mark is a matter of presumption, for being arbitrary its only function is to identify. This is the only sound distinction between cases of infringement of technical trade mark and cases of passing off. The only property right involved in either is the property that every trader has in the good will of his business. The question of the intention of an infringer is concededly immaterial in technical trade mark cases and ought to be equally so in "passing off" cases. The question always ought to be not what has the defendant intended, but what has he done. If he has passed off his goods as those of another, the important thing ought to be to put a stop to it rater than to inquire if the passing off was with deliberate fraudulent purpose or with the best intentions in the world. The cases are, however, irreconcilable both on this question[1] and on the property theory of trade marks.[2]

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[1] That actual fraud is an essential element in passing off cases, see: Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 674. See discussion by Judge Whitehouse in W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (Me.) 62 At. 499, 505. Wrisley v. Iowa Soap Co., 122 Fed. 796. Galena Signal Oil Co. v. Fuller, 142 Fed. 1002, 1007. Goodyear v. Goodyear, 128 U. S. 604. Lawrence Mnfg. Co. v. Tennessee Co., 138 U. S. 537, 549.

That actual fraud is not essential, see: Cellular Clothing Co. v. Maxton & Murray (1899) A. C. 326; 16 R. P. C. 397, 404. New England Awl Co. v. Marlboro Co., 46 N. E., 386. Fox v. Glynn, 78 N. E. 89. Saxlehner v. Siegel, Cooper Co., 179 U. S. 42, 21 Sup. Ct. Rep. 16. Stuart v. Stewart, 85 Fed. 778. R. Heinisch's Sons Co. v. Baker, 86 Fed., 765, 768. Cuervo v. Owl Cigar Co., 68 Fed. 541, 542. McCann v. Anthony, 21 Mo. App., 83; Price & Steuart Am. Trade Mark Cas. 1054, 1061. Liggett v. Hynes, 20 Fed., 883. Collinsplatt v. Finlayson, 88 Fed. 693. Nesne v. Sundet, 101 N. W. 490 (an excellent statement of the true rule and a full citation and analysis of cases). North Cheshire & Manchester Brew. Co. v. Manchester Brewery Co. (1899) A. C. 83. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462; 39 N. E. 490; 27 L. R. A. 42. Holmes, Booth & Hayden v. Holmes, Booth & Atwood, 37 Conn. 278, 296. Armington v. Palmer, 42 At. 308, 311, 43 L. R. A. 95. American Clay Manfg. Co. v. American Clay Manfg. Co. of New Jersey, 47 At. 936. Enoch Morgan's Sons v. Whittier-Coburn Co., 118 Fed. 657, 661. Red Polled Cattle Club v. Red Polled Cattle Club, 78 N. W. 803, 805. Bissell Chilled Plow Works v. T. M. Bissell Co., 121 Fed. 357, 371. Glucose Sugar Refining Co. v. American Glucose Sugar Ref. Co., 56 At. 861. Viano v. Baccigalupo, 67 N. E. 641. Kinnell v. Ballantine, 26 R. P. C. 12, 19. Manitowoc Co. v. Wm. Numsen, 93 Fed. 196.

[2] That a trade mark is property, see: Hoyt v. Hoyt, 143 Pa. St., 623, 22 At. 755. Lawrence v. Tenn. Co., 138 U. S., 537, 549. Brown v. Seidel, 153 Pa. 60, 25 At. 1064. Gaines v. Sroufe, 117 Fed. 965, 967. Daviess County Distilling Co. v. Martonini, 117 Fed. 186, 188. Gorham Mfg. Co. v. Emery-Bird-Thayer Co., 104 Fed. 243. Galena Signal Oil Co. v. Fuller, 142 Fed. 1002, 1007.

There is abundant authority holding the contrary: "The word 'property' has been sometimes applied to what has been termed a Trade Mark at common law. I doubt myself whether it is accurate to speak of there being property in such a Trade Mark though, no doubt, some of the rights which are incident to property may attach to it." Lord Herschel in Reddaway v. Banham (1896) A. C. 199, 209, 210. 13 R. P. C. 218, 228.

To the same effect are the following cases which hold that a trade mark is not property: Royal Co. v. Raymond, 70 Fed. 376, 380. Cohen v. Nagle, 76 N. E. 276, 282. Chadwick v. Covell, 151 Mass. 190, 194. 23 N. E. 1068, 1069. 6 L. R. A. 839. Singer Co. v. Loog, L. R. 18 Ch. D. 412, 413. Canada Pub. Co. v. Gage, 3 Can. Com. L. Rep. 119, 129. Commonwealth v. Ky. Distilleries Co., 116 S. W. 766. Turton v. Turton, 42 L. R. Ch. Div. 128. Esher M. R. Collins Co. v. Brown, 3 Kay & J. 423, 69 Full Reprint 1174.

The next step which ought to follow the acceptance of the doctrine that a trader has a property in the good will of his business, and is entitled to be protected against any device by which this good will or any part of it is being stolen away from him, is that he is also entitled to the custom which would naturally come to him. That he should be protected against any interference with his business by means of which this custom is diverted or prevented. He should be protected against any acts by which his customers are taken away from him, by fraud, actual or constructive; by force, intimidation, threats or even by meddlesome persuasion. It may be a long time before these principles are fully recognized, but recognition of them is bound to come. Mr. Nims in his book "Unfair Competition in Business" has not fully perhaps accepted the theories here advanced, but that he has acted upon them is evident from the fact that in a book entitled "Unfair Business Competition" he has included technical trade marks, passing off by means of personal names, corporate names, simulation of articles themselves, dress or get-up of goods, including labels, wrappers, bottles, cartons, etc., interference with a competitor's contracts and business, libel and slander of business names and reputation, false representation, threats of prosecution, trade secrets and confidential relations.

Mr. Nims' book is the first attempt to treat comprehensively unfair business competition in its broad sense. Previous authors seem to have considered that the subject begins with trade mark infringement and ends there, though some investigators have included chapters under titles such as "Rights analogous to trade marks" and the like, contenting themselves however with a cursory discussion of passing off actions without going into the broader field at all, and, without exception, stating or assuming that unfair competition is the equivalent of passing off and is a branch of the law of trade marks, whereas Mr. Nims' attitude and the true conception of the subject is that "unfair competition" is the genus and trade mark infringement, passing off, interference with competitor's business or contracts, trade libel and the like are but the species.

Mr. Nims' book is correct in theory and excellent in execution. In these days of enormous advertising expenditures, the purpose of which is to establish business good will, represented by brands, trade marks and other identifying indicia and the establishment of business over wide areas and among great numbers of customers, the matter of their protection against assaults has become of the utmost importance, and a book on the subject in a broad way is a necessity. It is fortunate that the first should be as well done as this is. The cases on the subject are nowhere else collected in a single volume so as to be readily accessible, but are scattered through the digests under various headings, such as "Trade Marks and Unfair Competition," "Corporations," "Libel and Slander," "Literary Property," "Injunctions," "Trade Secrets," etc., making the law on the subject difficult of access, and not always recognizable when found, and the search for it in the nature of a missing word contest. Mr. Nims' citation of cases is adequate, though not exhaustive, for instance the list of words held to infringe in sections 135, 136 is not as full as it could be made, though it is

a fairly comprehensive list. It was perhaps not the author's intention to cite exhaustively, for instance the chapter on similarity (Chap. III.) where is discussed the attitude of the ultimate purchaser, the degree of care required of him, his judicially assumed capacity for acquiring and recalling mental images of the article he wants to buy and its identifying features are fully and correctly treated in the text, although a large number of cases where these questions are interestingly and instructively discussed, and which would bear out and illustrate the text are not cited. Here too is a promising field for the "new psychology."

There are also some branches of the general subject which might well have been included in the book which are not directly touched on, for instance the ingenious methods of diverting custom and injuring a competitor, shown in *White* v. *Mellen* [1894] 3 Ch., 276, [1895] A. C. 154; *Van Horn* v. *Van Horn*, 52 N. J. Law., 284, 20 Atl. 485. *Tuttle* v. *Buck*, 119 N. W., 946. *Passaic Print Works* v. *Ely & Walker Dry Goods Co.*, 105 Fed., 163. *Magnolia Metal Co.* v. *Tandem Smelting Syndicate*, 17 R. P. C., 477, 485. *Gregory* v. *Spieker*, 42 Pac. 576. *Singer Co.* v. *British Empire Co.*, 20 R. P. C., 313.

Mr. Nims' book is, however, such an excellent one and includes so many things not elsewhere adequately discussed, if discussed at all, that the wonder is not that he has omitted a few cognate subjects, but that he has covered an exceedingly wide and almost unexplored territory as thoroughly as he has.

EDWARD S. ROGERS.

A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE. By Charles C. Moore. In two volumes. Northport, Long Island, N. Y.: Edward Thompson Company, 1908, pp. clxviii, 1612.

Few books published in recent years give evidence of more painstaking research not only in the field of legal literature but in other branches of literature as well, and all have yielded tribute. The Bible is often quoted, as are books of science in many branches. The poets, romancers, philosophers, psychologists, statesmen, orators, journalists, historians, all have furnished their contributions until there is a wealth of material so rich as to be appreciated only by extended examination.

Most of this material was hidden away so as to be of little practical value until we find it gathered, arranged and classified in these two large volumes by Mr. Moore.

The primary object of the author was evidently to make available for the court and practitioner the discussion of judges found in reported cases on questions of fact, on the weight of evidence and the credit of witnesses. But the author has done much more, having gathered largely from other fields as well.

The work is of so unusual a character to be found in a lawyer's office that one might question on first impression whether it ought to be bound in law sheep—whether indeed it is a "law book." That it is a lawyer's book, a useful work for the trial lawyer, is certainly true. *What* uses the

trial lawyer may make of it, or what are the limitations on the use of its materials, are questions as to which there may be an element of doubt. The writer is not quite ready to agree with the English reviewer who says that "Mr. Moore's work is an elaborate, exhaustive and successful assault" on the late Mr. Best's position that it is impossible to lay down rules for estimating the credit of witnesses or the probative value of each particular fact in the "innumerable combinations of nature and human action." That there are certain rules of law, limited in scope, which a court may give to a jury to guide them in weighing evidence is doubtless true. But it is not these rules which the author has discovered and which furnish the *raison d'être* of his book.

It is difficult to conclude that because one court in a particular case has said that "a disinterested lawyer with nothing shown against his character is entitled to credit," or because another in another case has said that "the sin of incontinence in men is compatible with the virtue of veracity, while in the case of women the contrary is true," that there is any legal obligation on another court in another case to say the same thing. In other words it is seriously questionable as to whether many of the judicial utterances from which the author quotes are really declarations of law and within the doctrine of *stare decisis.*

But it may be said that it is not the thought of the author that such use should be made of them and that may be true. In his preface he says: 'They" (the opinions of courts on questions of fact) "ought to have great weight with juries, and should be especially useful in jurisdictions where the presiding judge is forbidden to charge on the facts." * * * * * "And it may be expected that juries will listen with interest to the philosophical observations of eminent judges instructing juries in like situations, which may unquestionably be read by counsel in argument as freely as he would quote the proverbs of Solomon or the utterances of any other wise man." It seems to the writer more than questionable that courts will permit counsel in argument to take the opinion of another court, and urge the jury, by reason of the declaration of that court, to give a particular measure of credit to one witness as against another, or to give particular weight to any specific fact. Particularly would this seem true in jurisdictions where the court itself is forbidden to give such instructions. If it is a rule of law applicable it should come from the judge and not the attorney, and if it is not a rule of law which should control the jury, the use suggested is objectionable as naturally producing that effect. But whether the use suggested in the author's preface is permissible or not, the work has a use for the practitioner which amply justifies the author's labor. The trial lawyer could scarcely better employ his time than in a careful study of this work for its wealth of information and suggestion on the development and interpretation of facts, and on the credit of witnesses.

Competent persons might differ in opinion as to whether the arrangement of matter could be improved upon, or as to whether the pruning has been close enough, but on the whole the profession is to be congratulated that so good and so useful a book has been put within its reach. V. H. L.

RATE REGULATION, AS AFFECTED BY THE DISTRIBUTION OF GOVERNMENTAL POWERS IN THE CONSTITUTIONS. By Robert P. Reeder, of the Philadelphia bar. Philadelphia: T. and J. W. Johnson Co., 1908, pp. 44.

The subject of railway rate regulation continues to inspire the making of many books. The present monograph might well have been called an inquiry as to the extent to which rate regulation may be delegated to commissions or other administrative bodies. Within the scope thus indicated, and considering the brevity of Mr. Reeder's essay, it is safe to say that no better piece of writing has appeared in a long time. The work, as evidenced by the scholarly quality of the text and the copious citations in the notes, is based upon an exhaustive study not only of the cases, and of ordinary law text books, but also of the pertinent literature, periodical and otherwise, in political science and other allied subjects. The author undertakes to show that, "within their respective jurisdictions and within constitutional bounds, both congress and the state legislatures may limit the charges for railroad transportation, either specifically or by definite general rules; and that if the legislative department of government establishes such rules it may empower a commission to name specific rates in accordance therewith; but that, on the other hand, such rules may be established only by the legislative department, and until they are so established no commission may constitutionally ordain specific rates." (Page 1) This, of course, is not a novel proposition, and the value of the book lies largely in its effort to state definitely the range of powers which may be given to commissions. The text is so condensed and so compactly interwoven, that all of it must be read to comprehend and to fairly criticise it; but one or two quotations may be made, perhaps, as indicating with substantial accuracy the author's argument. Thus on page 28, he says: " * * * * While a legislature certainly may authorize such a commission to investigate questions concerning rates which may be charged thereafter, if it has clearly established the principles which are to be applied by the commission, the cases which we have just considered do not warrant the assertion that the legislature may endow the commission with a wide discretion as to the rates which shall be fixed." Some pertinent suggestions for obviating the difficulties resulting from unrelated and unadjusted rates which may be established in the different states and by the United States Commission are made on pages 28-35. The general proposition is embodied in the following sentence from page 32: "In view of the cases as to the contingent treatment of foreign corporations, it seems that a state might make the local railroad rates to depend upon the rates which the federal government might establish for interstate transportation, and conversely, the federal government might make the interstate rates to depend upon the rates which the state might establish for local transportation." That there are difficulties about this, the author admits.

Mr. Reeder points out the wide and important differences in the range of possible regulations, from which "it necessarily follows that, unless legislative power may be delegated, when the legislature entrusts to a commission the power of naming specific rates, it must state definitely what principles are to be made effective by that commission. * * * * But none of those courts" (which have sustained statutes authorizing commissions to name rail-

road rates) "realized that important differences in rate regulation are constitutionally possible. Consequently, of course, none of those courts sufficiently considered the question whether in the statute before it the legislature had actually established definite principles for the guidance of the commission in naming specific rates. And for that reason it cannot be said that that question has been finally settled as to any particular statutory provision.".

The essay is a strong argument from the legal point of view of the necessity of strictly limiting the authority of commissions to ministerial and quasi-ministerial functions. It concludes in two or three paragraphs, in which the author descends from the admirably judicial and scholarly plane on which the rest of the book is written, the gist of which is that expediency requires the same limitation upon the powers of these commissions, as that which the author contends is imposed by law. H. M. B.

A TREATISE ON THE LAW OF REAL PROPERTY.. By Alfred G. Reeves, A.M., LL.B., professor of law in the New York Law School, author of "A Treatise on Special Subjects of the Law of Real Property," and editor of "Reeves' Leading Cases on Wills." In two volumes. Boston: Little, Brown & Co., 1909, pp. cxxiv, 1659.

This is no digest of the decisions on the law of real property of all the United States nor of any state. It is no compilation of the late law of the subject. We have here the mature work of the mature student. It is manifest also that the author is and for years has been a leader of students. The student is never out of his mind. His analysis of the subject, his selection of illustrations and citations, are always with a view to exposition. In the first place he devotes his first hundred and nine pages of his text to a general prospectus of the subject. He seems convinced that there is no way of getting at the subject that does not presuppose a knowledge by the student in a general way at least of other branches of the subject; and to overcome this difficulty, well known to all who have tried to teach this branch, he has chosen to give this general survey before attempting to present any topic in detail. Then he has tried to give the student a graphic picture of the whole by means of charts. Coming now to take up the topics in detail, we discover that he is familiar with the writings of the masters who have dealt with the subject before him, Coke, Cruise, Kent, Williams; nothing found by Digby or Pollock and Maitland in their researches has escaped him. He knows and shows the decisions out of which the law grew, what decision gave rise to that doctrine, how this statute was induced and what was its effect. The historic development of the law is kept before the student continually. The advantage it possesses over the older works, lies principally in the elimination of the obsolete portions treated by Cruise, the more compendious treatment of the developments of the seventh and eighteenth centuries, the incorporation of the older discoveries of Digby, Pollock, and Maitland, and the addition of citations to important American decisions. In discussing the statutory changes in this country he has emphasized the statutes of New York, from which those of Michigan, Wisconsin, Minnesota, Iowa, the Dakotas, and other states, were directly or indirectly derived. No topic

is given an encyclopedic treatment; but it is doubted if in any other place will be found a better elementary statement of the general principles of the American Law of real property than in these 1588 pages of text and notes. It is much easier to find fault than to do good work, and we are all prone to the line of least resistance; which impels the final remark that the usefulness of the work would, in the opinion of the critic, have been greatly increased by parallel references in the citations to the various series of selected cases in which the decisions cited have been reported, including the American Decisions, American Reports, American State Reports, and L. R. A., in all of which extended notes on the points discussed are often found; but more than all others, it is believed, reference should have been made to the various publications of leading cases on the law of real property selected and published for the use of law students. Reference to these not only gives weight to the citation, but affords a ready reference to many and directs the attention of all to the best collections of original authorities. J. R. R.

CASES ON THE CONFLICT OF LAWS. Selected from Decisions of English and American Courts. By Ernest G. Lorenzen, Ph.B., LL.B., J.U.D. Professor of Law in George Washington University. St. Paul: West Publishing Company, 1909. pp xxi, 784.

This is one of the American Case-book series of which Professor James Brown Scott of George Washington University, is general editor. The aim is "to supply scholarly case-books for instruction in the class-room" on all branches usually taught in law schools which "shall be uniform and symmetrical in plan and treatment" and show the "origin and development" of the law.

A company of well known legal educators have been enlisted to prepare these several case-books under the direction of the general editor. This work of Professor Lorenzen is worthy of commendation. While the real test of the pudding is in the eating, so that of the case-book is the class-room, still it is easily seen that the cases are selected with discrimination, and well develop and illustrate this branch of the law. The notes evidence an acquaintance with the Continental as well as with the English and American law of the subject quite beyond that available at many law schools.

The editor has found it necessary to eliminate much matter from the opinions in cases used from the statements of facts and in general the briefs of counsel. Doubtless most judges would prefer that their opinions should be read as a whole rather than that any one however competent, should extract particular portions and make such portions speak the law for the court. But with most subjects this editing is imperative from a practical point of view. To use cases enough to fairly develop the fundamental principles, in the time the law school gives to particular subjects if the full reports of cases are to be given, would require an amount of reading on the part of the student almost if not quite physically impossible. It seems a rule of necessity incident to the case-book system. And just here does Professor Lorenzen seem to have used excellent judgment. In the opinion of the writer little will be lost to the student by such abbreviations as are made. V. H. L.