only so much of the income of a foreign corporation as is earned within its jurisdiction. If in addition to this a further provision were added that in cases of dispute over the fairness of the corporation's allocation, the account should be submitted to an administrative official, presumably of the Treasury Department, whose decision should be final,[21] the courts would be relieved of a material number of cases which are more economic than legal in character.

UNFAIR COMPETITION AT COMMON LAW AND UNDER THE FEDERAL TRADE COMMISSION.—Until the middle of the nineteenth century there were very few cases decided on the doctrine of unfair competition,[1] but with the great increase in competition incident to the rapid development of business in the latter half of that century, men devised innumerable schemes whereby they took unfair advantage of their rivals, and the courts were forced to realize the necessity of protecting a man's business from the sharp practices of his competitor.

Perhaps the most common form of unscrupulous dealing is to appropriate or imitate the trade-mark of a person who has a well-established reputation in the community for the quality of his wares.[2] Although the deception of the public here is often spoken of as part of the wrong committed,[3] most courts regard it merely as a test to determine whether or not the plaintiff has suffered injury, which is the real cause for complaint.[4] Relief is of course granted in such a case, and this is so even where there is no fraudulent intent on the part of the defendant; the plaintiff's right of property in the label or trade-mark being made the basis of the remedy.[5] A right of action exists not only against the person who adopts the trade-mark of another, but also against the one who furnishes him with the labels[6] and against one who manufactures similar labels, although they may possibly be

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[21]A somewhat similar method has been adopted for deciding on the necessity of obstructions in navigable rivers. 26 Stat. 454, 30 Stat. 1151, U. S. Comp. Stat. 1916, § 9910; Monongohela Bridge Co. *v.* United States (1910) 216 U. S. 177, 195, 30 Sup. Ct. 356.

[1]Nims, Unfair Competition and Trade-Marks (2nd ed.) § 2.

[2]See "Singer" Machine Mnfrs. *v.* Wilson (1877) L. R. 3 A. C. 376; Dennison Mfg. Co. *v.* Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651; *cf.* Moet *v.* Couston (1864) 33 Beav. 578.

[3]*Cf.* G. W. Cole Co. *v.* American Cement & Oil Co. (C. C. A. 1904) 130 Fed. 703; Sartor *v.* Schaden (1904) 125 Iowa 696, 101 N. W. 511.

[4]C. F. Simmons Co. *v.* Mansfield Drug Co. (1893) 93 Tenn. 84, 23 S. W. 165; Borthwick *v.* The Evening Post (1888) L. R. 37 Ch. D. 449.

[5]McLean *v.* Fleming (1877) 96 U. S. 245; "Singer" Machine Mnfrs./*v.* Wilson, *supra,* footnote 2; see G. W. Cole Co. *v.* American Cement & Oil Co., *supra,* footnote 3, at p. 705; Leather Cloth Co. *v.* American Leather Cloth Co. (1863) 4 De G. J. & S. *137, *142; *contra,* Blanchard *v.* Hill (1742) 2 Atk. 484; see Crawshay *v.* Thompson (1842) Man. & Gr. *357—the holding and the *dictum* in these last two cases are clearly not law in England today.

[6]Hildreth *v.* Sparks Mfg. Co. (C. C. 1899) 99 Fed. 484; Hennessy *v.* Herrmann (C. C. 1898) 89 Fed. 669.

used to replace those of the plaintiff which are lost.[7] Where the defendant uses not the technical trade-mark of a competitor, but a similar name which is descriptive of the quality of the goods, or which is a geographical name, in which the plaintiff can acquire no property right, many courts refuse to grant relief where no fraudulent intent is proved;[8] while others, on analogy to the trade-mark cases, enjoin him even though his motives may be innocent.[9] Where one injures his rival by a device other than that of passing his goods for those of the latter, the courts often deny relief, confusing the law of trade-marks with the broader doctrine of unfair competition.[10] But this narrow conception has been gradually extended to cover all cases where one's business is harmed by the fraudulent acts of a competitor.[11] Thus the United States Supreme Court gave relief in a case just the reverse of those that have been considered, namely, where the defendant palmed off the property of another as his own.[12] In another case the defendant was enjoined from making his place of business indistinguishable from that of his competitor.[13] Where one adopts the business system of a rival who has built it up at great expense,[14] where one employs similar literature in advertising his wares,[15] where one interferes with

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[7]Farina *v.* Silverlock (1858) 4 K. & J. 650.

[8]Brown Chemical Co. *v.* Meyer (1891) 139 U. S. 540, 11 Sup. Ct. 625; Canal Co. *v.* Clark (1871) 80 U. S. 311. A similarity in name, however, gives rise to a presumption of fraudulent intent. Nims, *op. cit.*, §§ 358, 359; *cf.* N. K. Fairbank Co. *v.* R. W. Bell Mfg. Co. (C. C. A. 1897) 77 Fed. 868, 877. Of course, where the court is satisfied that there is fraudulent intent, the plaintiff can get relief in all jurisdictions. Draper *v.* Skerrett (C. C. 1902) 116 Fed. 206; Reddaway *v.* Banham [1896] A. C. 199; *cf.* Thomas G. Plant Co. *v.* May Co. (C. C. A. 1900) 105 Fed. 375.

[9]Powell *v.* Birmingham Vinegar Brewery Co. [1896] 2 Ch. D. 54; Millington *v.* Fox (1838) 3 Myl. & Cr. 338; see 6 Columbia Law Rev. 244.

[10]Armstrong Cork Co. *v.* Ringwalt Linoleum Works (D. C. 1916) 235 Fed. 458; Westminster Laundry Co. *v.* Hesse Envelope Co. (1913) 174 Mo. App. 238, 156 S. W. 767; *cf.* Weener *v.* Brayton (1890) 152 Mass. 101, 25 N. E. 46.

[11]See Montegut *v.* Hickson (1917) 178 App. Div. 94, 164 N. Y. Supp. 858.

[12]International News Service *v.* Associated Press (1918) 248 U. S. 215, 39 Sup. Ct. 68. In this case the court said that the plaintiff, as between it and the defendant, had a "*quasi* property" in the news which the former had gathered.

[13]Weinstock, Lubin & Co. *v.* Marks (1895) 109 Cal. 529, 42 Pac. 142.

[14]Meccano *v.* Wagner (D. C. 1916) 234 Fed. 912, *aff'd* (C. C. A. 1917) 246 Fed. 603; *cf.* Prest-O-Lite Co. *v.* Heiden (C. C. A. 1915) 219 Fed. 845; but *cf.* Stein *v.* Morris (1917) 120 Va. 390, 91 S. E. 177; Burnel *v.* Chown (C. C. 1895) 69 Fed. 993; see Haskins *v.* Ryan (1906) 71 N. J. Eq. 575, 64 Atl. 436.

[15]Farmers' Handy Wagon Co. *v.* Beaver *etc.* Mfg. Co. (C. C. A. 1916) 236 Fed. 731. But *cf.* Edward Hilker Mop Co. *v.* U. S. Mop Co. (C. C. A. 1911) 191 Fed. 613, in which relief was denied where the purpose of the advertisements was not to induce purchasers to buy, but to secure selling agents.

the employees[16] or customers[17] of another, where suits are brought to harass the plaintiff,[18] in fact, in all such cases where injury to the plaintiff's business is the direct result of the defendant's unscrupulous acts, the courts now give an adequate remedy.[19] The defendant may even be held liable in damages for conducting what would ordinarily be a legitimate business, where his sole motive in so doing is to injure his competitor.[20]

There still remain, however, cases where the methods employed by an unscrupulous rival to deceive the public are more subtle and evasive, and where it is difficult for a single competitor to prove that he has been damaged; and in many such cases the courts have deprecated the immoral practices, but have considered themselves powerless to grant relief.[21] But in recent years statutes of the United States, such as the Sherman Anti-Trust Act[22] and the Clayton Act,[23] and those of the various states[24] have come to the aid of the courts in doing away with some of the chief factors which have stifled competition and created monopolies, and a more adequate remedy has been thereby obtained for suppressing such unfair practices as local price discrimination,[25] rebates,[26] fighting brands,[27] espionage,[28] bogus independent companies,[29] full line forcing,[30] and various forms of boycotts and blacklists.[31]

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[16]Hitchman Coal & Coke Co. *v.* Mitchell (1917) 245 U. S. 229, 38 Sup. Ct. 65; Evenson *v.* Spaulding (C. C. A. 1907) 150 Fed. 517; Standard Oil Co. *v* Doyle (1904) 118 Ky. 662, 82 S. W. 271.

[17]Sperry & Hutchinson Co. *v.* Louis Weber & Co. (C. C. 1908) 161 Fed. 219; Standard Oil Co. *v.* Doyle, *supra,* footnote 16; *cf.* Citizens' Light *etc.* Co. *v.* Montgomery Light *etc.* Co. (C. C. 1909) 171 Fed. 553.

[18]Commercial Acetylene Co. *v.* Avery *etc.* Co. (C. C. 1906) 152 Fed. 642, *aff'd* (C. C. A. 1908) 159 Fed. 935; Standard Oil Co. *v.* Doyle, *supra,* footnote 16.

[19]*Cf.* Harper v. Pearson (1861) 3 L. T. R. (N. S.) 547; Nims, *op. cit.* c. XIX.

[20]Dunshee *v.* Standard Oil Co. (1911) 152 Iowa 618, 626, 132 N. W. 371; Tuttle *v.* Buck (1909) 107 Minn. 145, 119 N. W. 946; but *cf.* Allen *v.* Flood [1898] A. C. 1.

[21]Armstrong Cork Co. *v.* Ringwalt Linoleum Works, *supra,* footnote 10; American Washboard Co. *v.* Saginaw Mfg. Co. (C. C. A. 1900) 103 Fed. 281; Ajello *v.* Worsley [1898] 1 Ch. 274.

[22]26 Stat. 209, U. S. Comp. Stat. 1916, § 8820.

[23]38 Stat. 730, U. S. Comp. Stat. 1916, §§ 8835a-8835o.

[24]N. Y. Consol. Laws c. 20 (Laws of 1909 c. 25) § 340; Comp. Stat. N. J. (1st Supp. 1911-1915) 1589, 1590; Cal. Gen. Laws (Deering 1915) 1987.

[25]United States *v.* Great Lakes Towing Co. (D. C. 1913) 208 Fed. 733.

[26]United States *v.* Eastman Kodak Co. (D. C. 1915) 226 Fed. 62.

[27]United States *v.* Hamburg-American S. S. Lines (D. C. 1914) 216 Fed. 971, reversed on other grounds (1916) 239 U. S. 466, 36 Sup. Ct. 212; United States *v.* Eastman Kodak Co., *supra,* footnote 26.

[28]United States *v.* Eastman Kodak Co., *supra,* footnote 26.

[29]Virtue *v.* Creamery Package Mfg. Co. (1913) 227 U. S. 8, 26, 33 Sup. Ct. 202 (*semble*).

[30]United States *v.* United Shoe Machinery Co. (D. C. 1915) 227 Fed. 507.

[31]Eastern States Lumber Assn. *v.* United States (1914) 234 U. S. 600, 34 Sup. Ct. 951; United States *v.* Keystone Watch Case Co. (D. C. 1915) 218 Fed. 502.

In order to carry out more effectively the purpose of such laws, Congress in 1914 appointed a Federal Trade Commission,[32] whose duty it is to make a thorough investigation of all "unfair methods of competition" which run counter to the public interest, and whenever it finds a concern employing such methods, to order it to desist. While the main purpose in creating the commission was better to curb the illegal practices as defined by the Sherman Act and the Clayton Act,[33] the wording of the statute obviously gives the commission broader powers.[34] The phrase "unfair methods of competition" was purposely left undefined in the statute so that it might include all devices which would tend to deceive or take unfair advantage of the public and so that it might not be confined within the narrow limits of existing law.[35] For that very reason the term "unfair competition" was supplanted by "unfair methods of competition"[36] a very technical meaning often having been placed upon the former term,[37] which the courts have frequently confused with the law of trade-marks. The latter term is of course very broad and inclusive, intended to give the commission wide scope in the exercise of its judgment, yet it is sufficiently definite to guide the board in its interpretation, and thus does not confer legislative power upon the commission;[38] nor is the commission vested with judicial authority, since it is denied the power to enforce its orders except by resort to the courts.[39]

The commission has indeed justified its existence and has adequately coped with unfair practices with which the courts were powerless to deal. Among other things, it has prohibited the lavish entertainment of employees of customers who might otherwise buy of competing concerns;[40] it has stopped the issuance of coupons in order to induce customers to buy, where the certificates are redeemable in prizes of unequal value, the distribution of which is determined by chance;[41] and above all it has suppressed unfair advertisements which tend to injure com-

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[32]38 Stat. 717, U. S. Comp. Stat. 1916, §§ 8836a-r.

[33]Harlan & McCandless, Federal Trade Commission, §§ 26-28; Kales, Contracts and Combinations in Restraint of Trade, § 154.

[34]Harvey & Bradford, Federal Trade Commission, 134:—"The law itself is mainly declaratory of a new ethical code in business dealings."

[35]*Cf.* U. S. Congressional Record, 63rd Congress, 2nd Sess., p. 12217.

[36]*Cf. ibid.*, p. 12150; U. S. Senate Reports, 63rd Congress, 2nd Sess. Vol. 2, No. 597.

[37]See footnotes 10 and 20, *supra.*

[38]*Cf.* Buttfield *v.* Stranahan (1904) 192 U. S. 470, 24 Sup. Ct. 349; Field *v.* Clark (1892) 143 U. S. 649, 12 Sup. Ct. 495. In both these cases the conferring of broad discretionary power upon executive officials was held not to be an unconstitutional delegation of legislative power.

[39]38 Stat. 720, U. S. Comp. Stat. 1916, § 8836e.

[40]Federal Trade Comm. *v.* Rockford Varnish Co. (1918) Fed. Trade Comm. Ann. Rep. 1918, p. 59, No. 41; Federal Trade Comm. *v.* Flood & Conklin Co. (1918) *ibid.*, p. 60, No. 43; Federal Trade Comm. *v.* Warren Soap Mfg. Co. (1918) *ibid.*, No. 44.

[41]Federal Trade Comm. *v.* J. H. Allen & Co. (1918) *ibid.*, p. 65, No. 98; Federal Trade Comm. *v.* C. F. Bonsor & Co. (1918) *ibid.*, No. 99; Federal Trade Comm. *v.* Buddha Tea Co. (1918) *ibid.*, No. 100.

petitors and deceive the public.[42] On the other hand, the federal courts have refused to sustain an order of the commission to desist from unfair practices where the public generally is not affected and where the injured individual has an adequate remedy at law.[43] An order of the commission was also revoked where it interfered with a firm not engaged in interstate commerce.[44] Resale price maintainance was declared by the board to be an unfair method of competition which was injurious to the public,[45] and the Supreme Court seems to have taken this view.[46] In a recent case before the commission,[47] the facts were as follows:— Sears, Roebuck & Co. advertised that they bought sugar in such large quantities that they could secure it at a lower price than their competitors and therefore could sell it more cheaply. As a matter of fact they did not purchase the sugar at a lower price than their competitors, but sold it at a loss on condition that the purchaser buy other commodities on which a substantial profit was realized. The commission ordered them to desist from further advertising in this manner, and on appeal from this ruling the Circuit Court of Appeals in *Sears, Roebuck & Co.* v. *Federal Trade Commission* (C. C. A., 7th Cir. 1919) 258 Fed. 307, affirmed the order, stating, however, that it realized that the business standards of the petitioner were as high as those prevailing in the business world, and that the action of the commission was to be taken as a general illustration of the better methods required in the future.

The advertisements in this case falsely conveyed to the public the impression that as a result of its superior efficiency the petitioner's prices were generally low, and this induced many purchases and incidentally deprived retail competitors of much business. Whether any particular dealer suffered from such misrepresentation is almost impossible to ascertain, and judging from the decided cases he could get no adequate remedy from the courts because the injury is too remote[48] and because it would lead to a multiplicity of suits.[49] The commission

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[42]Federal Trade Comm. *v.* S. M. Hexter & Co. (1918) *ibid.*, No. 97; Federal Trade Comm. *v.* E. J. Brach & Sons (1918) *ibid.*, p. 68, No. 121; Federal Trade Comm. *v.* Ringwalt Linoleum Works (1918) *ibid.*, p. 65, No. 96. Relief against this last concern had previously been denied to a competitor in the courts. Armstrong Cork Co. *v.* Ringwalt Linoleum Works, *supra*, footnote 10.

[43]Federal Trade Comm. *v.* Gratz (C. C. A. 1919) 258 Fed. 314.

[44]United States *v.* Basic Products Co. (C. C. A. 1919) 260 Fed. 472.

[45]Federal Trade Comm. *v.* Colorado Milling *etc.* Co. (1918) Fed. Trade Comm. Ann. Rep. 1918, p. 59, No. 40; Federal Trade Comm. *v.* Cudahy Packing Co. (1918) *ibid.*, p. 127; see 19 Columbia Law Rev. 265.

[46]United States *v.* A. Schrader's Sons, Inc. (U. S. Sup. Ct., Oct. Term., 1919, No. 567, March 1, 1920). But the retailer who has broken his contract has no action against the manufacturer for refusing further sales to him. Cudahy Packing Co. *v.* Frey & Son (C. C. A. 1919) 261 Fed. 65.

[47]Federal Trade Comm. *v.* Sears, Roebuck & Co. (1918) Fed. Trade Comm. Ann. Rep. 1918, p. 63, No. 80.

[48]*Cf.* Borthwick *v.* The Evening Post, *supra*, footnote 4; Weener *v.* Brayton, *supra*, footnote 10, at p. 106; but *cf.* Aunt Jemima Mills Co. *v.* Rigney & Co. (C. C. A. 1917) 247 Fed. 407.

[49]See American Washboard Co. *v.* Saginaw Mfg. Co., *supra*, footnote 21; New York & R. Cement Co. *v.* Coplay Cement Co. (C. C. 1890) 44 Fed. 277; but *cf.* Pillsbury-Washburn Flour Mills Co. *v.* Eagle (C. C. A. 1898) 86 Fed. 608.

is therefore doing a great public service in granting relief in such cases. It has repeatedly stopped the publishing of advertisements which have falsely described the quality of goods for sale.[50] Business morality has recognized that this is an unfair method of competition. Is the deception of the public and the resulting damage to competitors in the instant case to be less condemned because the misrepresentation is more subtle and ingenious? The merchant has always had the undoubted privilege to "puff" his wares, and it is not the intention of the commission to deprive him of the privilege, but this does not include the misrepresentation of material facts, which has always been regarded as a tort where it has caused injury. Although in the principal case no one had been, perhaps, sufficiently injured by the false representations to recover damages, the methods employed by the petitioner were nevertheless intrinsically unfair, and the commission seems to have been clearly within its powers in suppressing the advertisement.

CONTROL AND THE INDEPENDENT CONTRACTOR.—"The real test to determine whether a person is acting as a servant of another is, to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control."[1] "The test is: Whose work is being done, and who, during the course of that work, has or exercises control over the doing of that work?"[2] Again and again do similar statements appear in texts[3] and reports, and decisions are based upon them. "Because", it is said, "the control[4] is in *M*,[5] *S* is a

[50]See footnote 42, *supra*.

[1]Wood, Master and Servant. § 317, quoted with approval in Indiana Iron Co. *v.* Cray (1897) 19 Ind. App. 565, 578, 48 N. E. 803.

[2]McNamara *v.* Leipzig (1917) 180 App. Div. 515, 520, 167 N. Y. Supp. 981, reversed (1919) 125 N. E. 244.

[3]"The test usually applied is whether the employer retains any control, or right to control, over the means or methods by which the work is to be accomplished. If he does, the employee is a servant; if he does not, the other party . . . is an independent contractor." Huffcut, Agency (2nd ed.) 9. See also Mechem, Agency (2nd ed.) § 40; Tiffany, Principal and Agent, § 3, p. 6; Archer, Agency, § 11.

[4]Every employer has a certain control over work contracted for in that he may supervise the work in order to see that it conforms to the specifications of a contract; that is, he can exercise supervisory control as to the results of the work without becoming liable as master. Stagg *v.* Taylor (1916) 119 Va. 266, 269, 89 S. E. 237. The control referred to here is as to the means and method of performing the work. Lake *v.* Bennett (R. I. 1918) 103 Atl. 145; Flori *v.* Dolph (Mo. 1917) 192 S. W. 949; McGee *v.* Stockton (1916) 62 Ind. App. 555, 113 N. E. 388.

[5]For convenience the parties whose legal relationship is in question will throughout be referred to as *M* and *S* respectively—*M* representing the master or the "inactive" contractor, as the case may be, and *S* the servant of *M*, or the independent contractor or his servant. There are three common types of cases: (a) where *M* is master and *S* is his servant; (b) where *M* is the "inactive" contractor—*i.e.*, the contracting party who wishes something done—and *S* is the independent contractor who undertakes to do it; (c) where *M* is the "inactive" contractor and *S* is the servant of *X*, an independent contractor. For the sake of brevity no distinction between (b) and (c) will be made in the discussion, since in both cases *M*'s liability or non-liability as master for the acts of *S* is determinable by the same considerations as to whether the control, etc., is in *M* or not.