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NOTES

THE VIRGINIA PASSENGER RATE CASES.

The recent decision of the Supreme Court of the United States in *Prentis* v. *Atlantic Coast Line Company, etc., etc.,* is of interest in determining the power of the Federal Courts to enjoin the actions of state rate-making commissions.

It has already been decided that such commissions cannot be enjoined from establishing and fixing rates, on the ground that to grant an injunction would be to restrain legislation.[1] But on the other hand an injunction will issue to restrain the

[1] *McChord* v. *Louisville, etc., Railroad Company,* 183 U. S. 483 (1901).

enforcement of the order when fixed if the rates are so low as to be confiscatory.[2]

The Constitution of Virginia[3] provides for a Corporation Commission. The Commission, among other things, has power to fix rates for transportation. The method of procedure is briefly as follows: Notice is first given of the contemplated action; the Commission then hears objections and evidence against the proposed change. If an order is passed it is published and then goes into effect. An appeal is given as of right to any person deeming himself aggrieved by such action and to the Commonwealth.[4] The appeal is directly to the Court of Appeals of the State and this Court may substitute for the order of the Commission such order as in its opinion the Commission should have made, and "such substituted order shall have the same force and effect (and none other) as if it had been entered by the Commission at the time the original order appealed from was entered."[5] During the appeal a *supersedeas* may be granted under certain conditions.

If no appeal is brought within six months the order of the Commission is final. The Commission is also given power to enforce its orders, and to hear and try cases arising under them.

The Prentis case arose as follows: A preliminary hearing was held at which the six railroad companies, that ultimately came before the Supreme Court, gave evidence. The Commission then entered an order lowering the passenger rates of these railroad companies. Publication of the order was directed, and at this stage the six companies filed bills in the Circuit Court of the United States to restrain the members of the Commission from publishing or taking any other steps to enforce the order on the ground that the rates fixed by the order were confiscatory. The Commission pleaded among other things that the proceedings before them were proceedings in a court of the state, which the courts of the United States were forbidden to enjoin.[6] The Circuit Court granted the injunction. The Supreme Court[7] reversed the decree of the Circuit Court on the ground that the fixing of rates is a legisla-

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[2] *Reagan* v. *Trust Company*, 154 U. S. 362 (1893). See also *Western Union Tel. Co.* v. *Myatt*, 98 Fed. 335.

[3] Sections 155 and 156.

[4] Constitution of Va., sec. 156d and Pollard's Code, sec. 1313a (34).

[5] Constitution of Va., sec. 156g.

[6] Revised Statutes, par. 720.

[7] Mr. Justice Holmes delivered the opinion.

tive act, and that the railroad companies should have appealed to the Court of Appeals of Virginia to make final the legislative act.

The Court assumed that some of the powers of the Commission are judicial, such as the power to hear cases arising under their orders when the rates should be finally fixed. But until the rates are fixed the Commission is only acting as a legislative body. The distinction between legislative and judicial acts is thus stated: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind." And in another part of the opinion: "The nature of the final act determines the nature of the previous inquiry. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." It follows that when an appeal from the order of the Commission is taken, and a *supersedeas* granted, the Court of Appeals becomes the body that fixes the rate and its decision, therefore, must be legislative, and in the words of the Court: "It seems to us only a just recognition of the solicitude with which their (the companies') rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the Courts of the United States." The Court has to admit that it cannot be stated as a general proposition that a right to resort to the Federal Courts must depend on whether the complainant has used every effort to prevent unconstitutional legislation. "But this case can hardly be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that affects private persons who may never have heard of it till it was passed." The Court admits, however, that if the Court of Appeals affirms a rate, or makes one which is confiscatory, an injunction will issue to restrain its enforcement.

The difference between this case and cases where a corporation commission has been restrained is brought out by a com-

parison with *Reagan* v. *Trust Co.*[8] In that case an appeal was allowed from the rates fixed by the Commission to certain courts, but no provision was made that these courts could modify or revise the order of the Commission. The Supreme Court of the United States declared that the rates fixed were unreasonable and therefore of no effect, but that it could not fix rates itself or restrain the Commission from establishing other rates.

The Prentis case then differs from this case in the fact that the Court of Appeals of Virginia, the Court to which appeals from the Commission must be taken, when it hears such an appeal is, in the opinion of the Supreme Court of the United States, a legislative body.[9]

Smythe v. *Ames*[10] contains some elements from both of the above cases. In the Smythe case an act of the legislature of Nebraska fixed the rates. The same act allowed an action to be brought in the Supreme Court of the State to show that the rates so fixed were unreasonable. If the Court found the rates unreasonable it issued its order to a transportation board directing them to permit the complaining company to raise its rates to any sum in the discretion of the board.

Here we have power in the Court as in the Reagan case to act judicially and to declare the rate unreasonable, but yet it has authority to order a different law to be made, that is, that the board shall fix a higher rate for that company.

The Supreme Court of the United States held that an injunction would issue to restrain the enforcement of the act of the legislature, in spite of the contention of the board of transportation that the Federal Courts had no equity jurisdiction because of the special remedy provided by the statute.

Speaking of the appeal to the Court of Appeals the Court in the Prentis case says: "They (the companies) might very well have taken the matter before the Supreme Court of Appeals. No new evidence and no great additional expense would have been involved."

This suggests the question as to the relative advantages of an

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[8] 154 U. S. 362.

[9] In *Chicago, etc.*, v. *Minnesota*, 134 U. S. 418 (1889), the Act of the Legislature of Minnesota creating a corporation commission came before the Supreme Court. By the Act the State Court on appeal is allowed to modify the orders of the commission (see the report of the case, pages 431-2) as in the Prentis case. But the Supreme Court did not pass upon the question now presented.

[10] 169 U. S., 466.

injunction over the method of procedure provided by the Virginia Constitution.

The Constitution provides[11] that upon the granting of an appeal a writ of *supersedeas* may be awarded by the Appellate Court suspending the operation of the order appealed from, until the final disposition of the appeal. But the company appealing must file a suspending bond, which has been approved by the Commission (or on review by the Court of Appeals).

"The Commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make such reports, verified by oath, as may, in the judgment of the Commission, suffice to show the amounts being charged or received by the company, * * * together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal be not sustained."

Suppose the Commission requires an unreasonable suspending bond, or makes such requirements in regard to keeping accounts that the company cannot comply with them and at the same time operate the railway profitably. In the first case, that of the suspending bond, it seems that during the appeal the rates fixed by the Commission could be enforced against the railway. And in the second case, that of keeping the accounts, apparently no appeal on this question is provided for.

The practical effect of the decision seems to be, that where it is in the power of a railway company by reasonable means to prevent a legislative act being passed against them, they must avail themselves of these means before seeking the aid of the Federal Courts.

The Liability of an Agent without Authority.

Ordinarily when an agent has contracted without authority from his principal, the latter is unanswerable unless he subsequently ratifies such act. An effort is then made to attach liability to the agent himself. Three situations may arise: (1) where the agent knowingly and falsely represents that he has authority from the principal, and a third party contracts with

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[11] Const., sec. 156e.

him; (2) where he honestly and *bona fide,* thinking he has authority, makes similar representations; (3) where both parties with knowledge of his lack of authority contract.

An indefinite number of variations of these three situations may be conceived which in turn multiply problems. The problems, however, in their last analysis reduce themselves to the three states of facts mentioned.

In the first case there never appears to have been any doubt that the agent is liable in an action of deceit.[1] His representations may be made either by word or conduct. He is none the less responsible because he contracted with the thought that his master would ratify his act and with not one scintilla of intention to defraud.[2]

In the third case he incurs no liability.[3] Whatever may have been the thoughts of the parties, as for example, to have the principal subsequently ratify the agreement, if there was any knowledge on the part of the third party of the agent's want of authority he voluntarily assumed a risk and can demand reparation from no one.

The perplexing situation arises in the second case, where the representations are made in perfect innocence, with a total absence of connivance. This question was met in the English courts in the case of *Collins* v. *Wright,*[4] where the agent was mulcted in damages. Although morally exculpated from all guilt, he had nevertheless caused the third party a loss. He was held answerable on the ground of an implied representation that he had authority. Another reason often advanced is that the agent is in closer touch with his principal; consequently it becomes his duty, if he chooses to act, to know whether in fact an agency exists or not.[5]

Some doubt was entertained whether this principle remained intact after the decision of *Derry* v. *Peek.*[6] This doubt was dispelled in the case of *Oliver* v. *Bank of England,*[7] when it was definitively decided that whatever may be the law as to representations made by persons in other relations, an agent is

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[1] *Kroeger* v. *Pitcairn,* 101 Pa. 311 (1882); *Polhill* v. *Walter,* 3 B. & A. 114 (1833).

[2] *Downman* v. *Jones,* 9 Jurist, 454-458 (1845).

[3] *Murry* v. *Carothers,* 58 Ky. 71 (1 Met. 1858).

[4] 8 E. & B. 645 (1857).

[5] *Firbank's Executors* v. *Humphries* (1886), 18 Q. B. D. 54.

[6] 14 App. Cas. 337 (1889). For an incisive criticism of *Collins* v. *Wright,* see 18 L. Quarterly Rev. 364 (1902).

[7] 1 L. R. Ch. Div. (1902) 610.

responsible for representations of authority which prove false, however honestly they be made. The American rule accords with this proposition.[8]

Apropos of this, it may be stated that there is a line of cleavage on the question of procedure. The majority of courts hold that no suit can be brought on the contract, for the reason that the agent did not make a contract for himself and therefore the courts will not make one for him.[9] The better action is *assumpsit* on an expressed or implied assertion of authority.[10]

A variation of the third situation may be stated, viz., where the agent discloses all the facts relative to his authority and makes no representations. In that case the law says that the party complaining has had full knowledge, or what amounts to knowledge of the agent's lack of authority, and hence cannot recover.[11]

The question under consideration was before the Court in the recent case of *Sourwine* v. *McRoy Clay Works*.[12] The plaintiff, a physician, contracted with B, the superintendent of the defendant corporation, to attend an employe who had been injured while in the service of his corporation. The plaintiff was ignorant of the lack of authority on the part of B to bind his principal, the corporation, to such a contract. Neither the corporation nor B were held. In sustaining the demurrer to the averments against B the following language was employed: "If such want of authority was known to both parties, or unknown to both parties—there being a mutual mistake—the agent would not be personally liable." In support of this proposition a case involving an agent of a municipal corporation is cited.[13] Space will not allow a digression into the very proper reasons why agents of public corporations acting *bona fide* cannot be held.[14] But these reasons, whatever they may be, cannot be marshalled in aid of an agent of a private corporation, the defendants in the above case.

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[8] *Cochran* v. *Baker*, 56 Pac. Rep. 641 (Oregon, 1899); *White* v. *Madison*, 26 N. Y. 117 (1862); *May* v. *Tel. Co.*, 112 Mass. 90 (1876).

[9] *Ballou* v. *Talbot*, 16 Mass. 461 (1819); *Duncan* v. *Niles*, 32 Ill. 532 (1863); *Hall* v. *Crandall*, 29 Cal. 567 (1865).

[10] *Dung* v. *Parker*, 52 N. Y. 494 (1873). See Pollock on Torts, 60 note K, pointing out the advantage of assumpsit.

[11] *Smout* v. *Ilberg*, 10 M. & W. 1 (1842); *Ware* v. *Morgan*, 67 Ala. 461 (1880).

[12] 85 N. W. Rep. 782 (Ind. 1908).

[13] *Newman* v. *Sylvester*, 42 Ind. 106 (1873).

[14] *Dunn* v. *MacDonald* (1897), 1 Q. B. 40.

There is considerable confusion attaching to the statement quoted. If what is meant by the Court is the variation of the third situation, of which we have spoken, we concede to its soundness with all readiness. The quotation, when dissected, may, however, with equal aptitude meet the second state of facts. There is no particular magic in the words "mutual mistake," for they simply mean that the agent acted honestly thinking he had authority from his principal, while the plaintiff contracted with him, likewise believing he had authority—in other words we may call it a mutual mistake, or whatever appellation we wish, but that does not make it any the less the second situation. In short if it be simply the second proposition clad in new garments, it is, with due deference to the Court, a doctrine the boldness of which is somewhat startling, for it is a decided leap from the sound trend of authority, and militates against the well-recognized rule of *Collins* v. *Wright*.[15]

MALICE IN CONDITIONALLY PRIVILEGED COMMUNICATIONS.

What is a privileged occasion and what is a proper use of such occasion is decided differently in England from the general authority in America. This difference may perhaps be due to the long continued struggle for the right of freedom of speech and the late recognition of the middle and lower classes. England restricts the privileged occasion,[1] but is liberal in the use[2] of such occasion; while in this country, the occasion[3] is more broadly construed and its use[4] restricted. This difference has been overlooked by some jurisdictions which adhere to the American rule as to the occasion but have followed the English rule as to its use.

The recent case of *Barry* v. *McCollom*[5] follows this English rule as to the use and holds that, "it is enough if he honestly and in good faith, at the time when he made the accusations believed them to be true. This required nothing more than that there were grounds for the belief which then seemed to him to be sufficient and that his motive in making the publication was

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[15] 8 E. & B. 645 (1857).

[1] Odgers on Libel and Slander (4th ed.), 248, 272, 282.

[2] *Clark* v. *Molineux*, 3 Q. B. D. 246 (1877).

[3] Townshend on Slander and Libel, 395, 414, 419.

[4] 18 Amer. & Eng. Enc. 1048; 25 Cyc. 411.

[5] 70 Atl. (Conn.) 1035.

an honest desire to discharge the duties of his office with fidelity."

It is established in England that "honest" belief is all that is necessary where the use is in "good faith." [6] Stupidity, obstinancy, or reasonableness of the belief are not considered.[7] There are some cases which appear to hold that there must be some grounds for the assertion; that they should not be made wantonly or recklessly; and that they must be warranted by some circumstances reasonably arousing suspicion.[8] In slander to title [9] and accusations against public officers,[10] reasonable and probable cause appear to be necessary. This English rule obtains in New York, New Jersey, Wisconsin, Virginia, and other states.[11]

The so-called "Pennsylvania rule" [12] that libel and slander are governed by the same rules as malicious prosecution, requiring reasonable and probable cause for the belief, is followed by the majority of jurisdictions in this country.[13] A false assertion, manifestly injurious to the rights of another, is generally ground for a cause of action except where public policy has denied such right. For the protection of society, an absolute right to accuse before a public judicial officer has been granted, and malice is immaterial. It was found that the protection of private interests sometimes required that accusations be made; and from this grew the conditional privilege. With the development of our elective system and the increased association of individuals for social, professional, or business reasons, the scope of an interest common to two or more widened and the conditional privilege increased more in America than in England.

Broad general principles of law should, when possible, control the question; what is and has been primarily a tort should be treated and controlled as such; special rules for particular kinds of torts should be avoided if possible. Reasonable and probable cause, care, or prudence have always been the criteria

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[6] *Clark* v. *Molineux, supra.*

[7] *Pater* v. *Baker,* 3 C. B. 860 (1847); *Hesketh* v. *Brindle,* 4 T. L. R. 199 (1888).

[8] Odgers, 340, 342.

[9] *Leslie* v. *Cave,* 3 T. L. R. 584 (1887).

[10] Odgers, 342; *Howard* v. *Thompson,* 21 Wend. 319 (1839).

[11] 18 Amer. & Eng.. Enc. 1048.

[12] *Briggs* v. *Garrett,* 111 Pa. 404 (1836); *White* v. *Nicholls,* 3 How. 267 (1845).

[13] Newell on Libel and Slander, 476, *et seq.*

in the exercise of the right to do injury to another. "Good faith," "honesty," and *"bona fides"* are not generally any justification for a direct and intended injury to the personal or property rights of another. Unless imperative public policy demands such freedom of speech or press, it should not be any justification in the case of libel or slander. It is difficult to discover, in this country at least, the public policy which demands that the honest belief and good faith of one who has not based such belief on reasonable and probable cause, or due care, should be permitted to deprive the teacher, or other professional person, of the means of following his calling, the business man of continuing his business, the public candidate of living among his fellows with respect, or the servant of the opportunity of employment.

Mr. Justice Holmes has well said,[14] "Good faith is not a sufficient answer for a libel. One publishes libellous matter at his peril. Its liability is the usual liability in tort for the natural consequences of a manifestly injurious act. Reasonable cause is no justification where there is no privilege." Though the statement made in deceit is not a manifest or intended injury to the plaintiff, yet many jurisdictions hold that the defendant must have reasonable and probable cause for the belief in the assertion made; good faith is not enough. Even accidental injuries are actionable unless the person causing the injury be free from all fault. Carelessness which causes an injury is generally sufficient foundation for an action. But a person may through carelessness or negligence commit a wrongful act, and honestly think or believe he is doing no wrong. In order to clear himself from the imputation of carelessness, he should show not only that he acted in an honest belief that the story communicated by him was true; but also that there were reasonable grounds to induce such belief. "Honest belief" should be founded on reasonable and probable cause.[15]

Lindley, J.,[16] in affirming a decision of Jessel, J.,[17] held: "An action for slander to title will not lie unless the statements made by the defendant were not only untrue, but also were made without what is ordinarily expressed as reasonable and probable cause; and the rule applies not only to actions for slander to title, strictly and properly so called, with reference to real

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[14] *Burt* v. *Advertiser,* 154 Mass. 242 (1891).

[15] *Holmes* v. *Clisley,* 121 Ga. 246 (1904); *Toothaker* v. *Conant,* 91 Me. 439 (1898).

[16] *Halsley* v. *Brotherhood,* 19 Ch. D. 386 (1881).

[17] 15 Ch. D. 579.

estate, but also to cases relating to personalty or personal rights or privileges." Mere lies are not privileged and in the absence of reasonable and probable cause, *scienter* should be presumed.[18]

It is submitted that for a communication to be privileged it must be made on a proper occasion, from a proper motive, and must be based upon a reasonable and probable cause. Even under the English rule the instructions to the jury frequently go to this extent.[19]

WHEN THE IMITATION OF ONE MAN'S GOODS BY ANOTHER TRANSGRESSES THE RULE AGAINST UNFAIR TRADE COMPETITION.

The law of unfair trade competition has been unnecessarily confused by not keeping it distinct from the law of trade marks. Thus it is common legal knowledge that one cannot acquire a trade mark in the mere shape of an article,[1] but clearly this does not say because the unfair trade competition is by means of the similarity in shape of defendant's to complainant's article, that it should not be restrained.[2] Following out the trade mark idea, however, there are decisions holding that there can be no unfair trade competition in copying the structural advantages of another's product, irrespective of the intent to deceive the public,[3] while other decisions reasoned solely along the lines of unfair trade competition come to the opposite conclusion on the same statement of facts.[4]

This confusion also explains certain opinions that have been expressed "that there seems to be a strong tendency to-day to admit that an exclusive right may be acquired in certain distinguishing devices, which would have been held some years ago to be non-exclusive marks and open to all the world." [5] The cases cited as so holding are cases where "the principles of unfair trade competition rather than those appertaining to trade marks were the bases of judgment." [6]

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[18] *Briggs v. Garrett, supra.*

[19] *Regal* v. *Perkinson,* 1 Q. B. D. 431 (1892).

[1] *Moorman* v. *Hoge,* 2 Sawyer 78 (C. C. A. 1871).

[2] *Coates* v. *Merrick Thread Co.,* 149 U. S. 562 (1892).

[3] *Globe-Wernicke Co.* v. *Fred. Macey Co.,* 119 Fed. 696 (C. C. A. 1902).

[4] *Cook* v. *Bernheimer,* 73 Fed. 203 (Circ. Crt. 1896).

[5] See article. "Fraud as an Element of Unfair Competition," 16 Harv. L. Rev. 272, at p. 274.

[6] A Treatise on the Law of Trade-marks, by W. H. Browne, 2nd ed., sec. 89c.

The two branches of the law should be kept clearly separated because the rules applied differ greatly. In trade mark cases, all that the complainant need prove is a violation of a right of his connected with a certain article of sale, and from this arises a conclusive presumption that fraud has been worked on the public because the trade mark being non-functional no other result could be obtained by its use than the deception of the public.[7] To be sure, there is no property in the trade mark as such but there is when it is used in connection with an article which it designates; and for equity to intervene there need be shown only that that property right has been infringed.[8] In unfair trade competition cases, on the other hand, the complainant must show that the public has been, or is likely to be deceived by the use of the similar article.[8] There is the same exclusive right that there is in the case of a trade mark,—to be protected from injury to complainant's business, but the fact of the likelihood of the deception of the public must be proved in one case, while it is presumed in the other.[9] From this it can be seen that while the law might well refuse to grant one a trade mark in an unpatented device of mechanical utility because this would make it exclusive in him and be virtually giving him a patent, yet with perfect logic it could grant an injunction to restrain another from using that device if he did it in such a way as to deceive the public to the complainant's injury.

It has long been settled that one shall not be permitted to sell his goods under the pretense that they are the goods of another.[10] The basis of the equitable jurisdiction is the injury to the complainant's business through the fraud on the public and not the fraud itself that has been or is likely to be perpetrated on the public, as is shown by the fact that no one of the public can bring the bill unless his private business is harmed.[11] The ordinary case of unfair trade need only be stated to be acquiesced in: the difficult case is where A makes an article useful from a mechanical standpoint having no non-functional characteristics to distinguish it and puts it on the market without patenting it, thereby dedicating his newly found

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[7] *Hueblin* v. *Adams*, 125 Fed. 782, at p. 785 (Circ. Crt. 1903).

[8] A Digest of the Law of Trade-marks, etc., by N. F. Hesseltine, p. 89, and cases there cited.

[9] *Kann* v. *Diamond Steel Co.*, 89 Fed. 706 (C. C. A. 1898).

[10] *Perry* v. *Truefitt*, 6 Beav. 66 (1842).

[11] *Weemer* v. *Brayton*, 152 Mass. 101 (1890). But see A Treatise on Eq. Remedies, by J. N. Pomeroy, vol. 2, sec. 578.

idea to the public; B constructs and puts on the market an article exactly like A's—under what circumstances if under any, can B be restrained? It has been held that there can be no restraint in such a case even though B sells with the intent to deceive the public and thereby to trade on A's reputation.[12] The reasons given are that the imitator has an absolute right to do that which is complained of and his intent is immaterial; further, that this would allow the complainant in such a case to gain a monopoly in a shape of mechanical advantage to which he has no right without a patent. Another view holds that there should be restraint where the defendant has the intent to deceive and thereby increase his sales by purchasers from the defendants having "a reasonable expectation that the ultimate consumer deceived by the shape will mistake" the article for one of the complainant's.[13] Here it is denied that the right of the defendant to copy is absolute, and the complainant is not given a monopoly because he cannot prevent competition carried on *bona fide,* and with no intent to deceive the public as to the origin of the goods. In a recent English case where the imitation was of a descriptive name, this rule was applied.[14] Where there is merely a copy of an article's shape which is of mechanical utility and made with no intent to deceive the public it has been generally agreed that there could be no restraint;[15] however, in a recent decision the Court granted a bill to restrain a defendant from selling automobile searchlights enclosed in a shell imitative of complainant's unpatented shell, although the shell had the name of the defendant prominently appearing thereon as the maker, and although the defendant had never represented that his lamps were made by the complainant. *Rushmore* v. *Manhattan Screw and Stamping Works,* 163 *Fed.* 939 (*C. C. A.*). Unless here there was imitation of non-functional parts of the shell or the intention to deceive the public, which the statement of facts leaves in doubt, the Court would be undoubtedly correct in saying as it did, that "this carries the doctrine of unfair competition to its utmost limit," although there would seem to be authority for the position.[16]

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[12] *Globe-Wernicke Co.* v. *Fred. Macey Co.,* 119 Fed. 696 (C. C. A. 1902).

[13] *Cook* v. *Bernheimer,* 73 Fed. 203 (Circ. Crt. 1896).

[14] *Reddaway* v. *Banham,* L. R. (1896), A. C. 199.

[15] *Marvel Co.* v. *Pearl,* 133 Fed. 160 (C. C. A. 1904).

[16] *Edison Co.* v. *Gladstone,* 58 Atl. 391 (N. J. Eq. 1903).

Acts Constituting an Assault.

"I further charge you that if you find the defendant, without justification, shot a pistol in the direction of the witness, within carrying distance of the pistol, not intending to hit him but intending to scare him, he would be guilty of a (criminal) assault:" Held, to be a correct instruction. *Edwards* v. *State*, 62 S. E. Rep. 565 (Ct. of App. Ga., Oct. 12, 1908).

The above decision brings up the old but interesting question of what are the necessary elements of a criminal assault. Definitions of criminal assault are almost as numerous as the cases. The one most generally accepted, however, is that of Hawkins, "An attempt or offer, with force or violence, to do a corporeal hurt to another." Bishop defines it as an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being. These two definitions differ widely. The one judges the assault from the standpoint of the actor, the other makes the defense depend on the outward demonstration and its effect upon the person against whom it was directed. According to the latter view the defendant in the case under discussion could be guilty of an assault only if in fact he did frighten the witness—while under the former definition he might be guilty of an assault even though the witness upon whom the alleged assault was attempted was wholly ignorant of the attempted assault, and therefore free from alarm.[1] It is difficult to reconcile all the authorities upon this point. The question may be answered either way according to definition followed. The dictum of Baron Parke in a *nisi prius* case is that if a person presents a pistol which has the appearance of being loaded and puts the party into fear and alarm, he is guilty of an assault—for that is what it is the object of the law to prevent.[2] In 1843 Baron Rolfe expressed doubt upon this dictum,[3] and a year later Tindal, J., held it to be an assault only when the pistol was in fact loaded.

The lack of uniformity of view is still greater in America. In the case of *Chapman* v. *State* (78 Ala. 463), the Court holds that the pointing of an unloaded pistol at a person within shooting distance, in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a

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[1] *People* v. *Lilley*, 43 Mich. 525.

[2] *R.* v. *St. George*, 9 C. & P. 491.

[3] *R.* v. *Baker*, 47 Eng. C. L. R. 253.

civil action for damages. The case of *Com.* v. *White,* 110 Mass. 407 arrives at an exactly different conclusion upon identical facts. The one line of case proceeds upon the theory that an act does not become a criminal assault because it puts another in fear or tends to cause a breach of the peace; the other upon the theory that, "it is not the secret intention of the assaulting party nor the undisclosed fact of his inability to commit the battery that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

This conflict of view is due, in a considerable degree, to a failure to discern the distinction between civil and criminal assaults. The civil action for assault rests upon the invasion of a person's "right to live in society without being put in fear of personal harm." On the other hand the action for criminal assault must, upon the fundamental principles of the criminal law, rest upon the union of an act with a criminal intent or with criminal negligence. The object of the civil action is to compensate the injured party and therefore the law looks primarily to him and to the effect of the defendant's act upon him, rather than to the wrongdoer. In the criminal action the state is concerned with the wrongdoer and if the act was done with the necessary intent, the crime has been committed irrespective of the effect of the act upon the witness.

That the "effect upon the person against whom the act was directed," cannot be the test for a criminal assault, is shown by the class of cases which hold that an offer of violence conditioned may amount to an assault, although because of the condition stated at the time of the act no fear can be said to result from the act. "If you do so again, I will knock you down," held an assault although no fear was alleged by the party threatened.[4] All authorities are agreed that such a threat and act constitutes an assault because it shows that the defendant intends to apply the unlawful force unless the other forbears to do something he has a right to do. The courts are likewise agreed that the defendant who put his hand upon his sword and said, "If it were not assize time, I would not take such language from you," was guilty of no assault because he clearly had no intent to offer corporal violence to the witness.[5] These cases clearly show that the intent of the actor

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[4] *U. S.* v. *Myers,* 1 Cranch. C. C. 310.

[5] *Com.* v. *Eyre,* 1 Serg. and R. 347.

and not the effect of the act upon the other party is the test for a criminal assault.

Applying this test to the case in hand it is clear that the defendant is not guilty of a criminal assault in shooting in the direction of the witness, within carrying distance of the pistol, not intending to hit him but only to scare him; unless it be held that the intent necessary need not be to do corporal injury but may be merely to frighten him. While the definitions practically all hold that the intent must be to do corporal injury to another, yet there are a few cases that hold that an intent to frighten or scare is sufficient.[6]

In the *State* v. *Tripplett*,[6] the Court said, "when the attitude or action of a party is threatening toward another, and the effect is to terrify, the offense of assault is complete." In *State* v. *Baker*,[6] the Court held in respect to an instruction similar to the one under review that, "firing a pistol in the direction of another with the intention of frightening him, or with the intention of wounding him, are equally assaults. There must be an intent to commit an assault, or else there can be no assault. Committing an assault need not be wounding. It may consist in frightening as well." Thus again we see that the difference of view rests upon the difference in the definition followed.

While the last line of cases is in direct accord with the instruction given by the lower court in the case under consideration, yet the instruction can hardly be reconciled with the cases that hold that there must be an actual intent and ability to commit a battery, and which seem to be more in accord with the fundamental conceptions of the criminal law. That shooting a gun in the direction of another within range and intending to scare him is a civil assault if it does frighten or that it may result in a breach of the peace and amount to a misdemeanor, is agreed. But such should not be held sufficient to sustain an action for criminal assault.

The cases in accord and contrary to the necessity of a present actual intent are collected in 4 Cent. Dig., Sec. 69; and in 3 Cyc. of Law & Pro., page 1020.

The Extent of Property Right in a Trade Mark.

The facts in the case of *Correro* v. *Wright*, 47 Southern Reporter 379 (decided in the Supreme Court of Mississippi)

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[6] *State* v. *Tripplett*, 52 Kansas 678; *State* v. *Baker*, 20 R. I. 275.

were these: A was a manufacturer of bottled drinks, using bottles in which were blown his name, together with the words, "This bottle never sold." He claimed to retain title in the bottles and required dealers to return them to him. B obtained some of these bottles, and was putting up a drink somewhat similar to that made by A, and was selling it on the market, thus injuring A's business. A brought a bill in equity alleging that he had a property right in the bottle and in his trade mark, and asking that the acts of B be enjoined. B demurred, setting up among other objections, that A was not entitled to the exclusive use of the bottles unless he had a patent right on them, properly registered, and further that the relief prayed for was in restraint of trade, since it sought to prevent competition. The Court overruled the demurrer, holding that there is a common law property right in a trade mark, and if used or imitated by others, restraint by injunction could be had. The Court went on to say that the bill showed that the bottles were the complainant's property, and that the demurrer admitted that to be the fact.

There is no doubt that the complainant was entitled to an injunction, as the acts of the defendant were clearly wrongful, and intended to deceive the public.[1] The case, however, suggests several queries as to what the Court might have held had a different state of facts been presented for judicial action. The bottles contained the words, "This bottle never sold." Did these words mean that the complainant never sold the bottles, but retained title in himself, merely leasing them to the retailer, to be in turn leased to the consumer, or did they mean that the transaction between the manufacturer and the retailer was one of sale, with a covenant on the part of the retailer not to sell the bottles? The fact that complainant required his dealers to return them would indicate that he leased the bottles, but although the facts do not so show, the transaction may have been one of sale, the manufacturer charging a price sufficient to compensate himself for the bottles and their contents, and trusting to have some of them at least returned. Looking at the transaction as a lease, the defendant, even though he may have taken as a *bona fide* purchaser from the retailer, would have been put on notice of the defective title by the words in question, and would have had no right to sell the bottles, either filled or emptied. But regarding the transaction as one of sale, with a covenant on the part of the retailer not to sell the bottles, the matter takes on a different aspect. The question then would

[1] *Rose* v. *Loftus*, 38 L. J. Rep. (N. S.) 409.

be whether such a covenant would bind anyone into whose hands the bottles might come, it being admitted that the retailer would be bound by its terms.

It has been held that a covenant in regard to land, made for the benefit of other lands of the grantor, will bind the assigns of the grantee.[2] It would seem, however, that in considering the question of whether or not covenants run with personal property, the courts have not used reasoning analogous to that on which they proceeded with regard to covenants for lands, but have held that either the covenant did run or that it did not, irrespective of whether or not it was a benefit to other property of the grantor. In a leading case decided in New York in 1895,[3] it was held that such a covenant did run, the Court saying that "the party purchasing under such circumstances takes the property burdened with the contracts made by its owner in reference thereto and which he had the power to make." The weight of authority, however, seems to be *contra* to this case, and to follow what is, perhaps, the leading case[4] on the subject, wherein it was early laid down that a covenant could not run with personalty. In a comparatively recent case,[5] decided in the Superior Court of Pennsylvania in 1902, the Court said that "a manufacturer may control by contract the trade sales of proprietory articles to his direct purchasers, but he cannot retain the title to his property, and impose unreasonable restrictions on its transfer after he has received the price he designates as the full purchase price therefor." Looking at the case of *Correro* v. *Wright* (*supra*) as one of out-and-out sale, and applying the reasoning of the Pennsylvania case just mentioned, it would follow that the defendant, not having contracted with the plaintiff with regard to the bottles, would not be bound by the words placed thereon by the complainant.

This leads to a consideration of the ground on which the Court mainly rested its decision, namely, that the defendant's acts constituted an infringement of the plaintiff's rights in his trade-mark. The defendant's acts were clearly restrainable, but under a different state of facts, the Court's statement that there is a common-law property right in a trade mark, use or imitation of which will be restrained by injunction, might be

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[2] *Peck* v. *Conway*, 119 Mass. 546.

[3] *New York Bank Note Co.* v. *Hamilton Bank Note Co.*, 83 Hun. (N. Y.) 593.

[4] Spencer's Case, 5 Coke, 16.

[5] *Garst* v. *Wissler*, 21 Super. 532.

difficult to apply. What is the nature of that property right, and to what extent does it protect the owner? In an English case presenting facts similar to those of *Correro* v. *Wright,* the Court said that an injunction would lie although the defendant put a label of his own on the bottles marked with plaintiff's design.[6] This would seem to indicate that plaintiff's right in his trade-mark was not such a right as extended merely to preventing another's product being sold as his, but was an absolute right. To the contrary are the dicta contained in a later case decided in the United States Circuit Court.[7] It was there said that while "the defendant may bring into the market these bottles, and sell them again filled with anything but lime juice, he should not be permitted to put his own lime juice into a bottle stamped with complainant's name and sell it." It would seem that the above dicta would be the sounder doctrine and more consonant with the real object of a trade-mark, to wit, the protection given a manufacturer or dealer as indicating the origin and ownership of his goods, and preventing another from palming off on the public similar goods by representing them to be the goods of the manufacturer or dealer in question. Besides this, the application of a doctrine which would confine actions for infringement of a trade-mark to cases where it has been appropriated and used to indicate origin and ownership of goods, would be but carrying out the policy of the common law, which has always been opposed to monopolies, and would clearly indicate that the courts would not permit the protection of a trade-mark to be carried to the extent of interfering with legitimate competition.

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[6] *Rose* v. *Loftus,* 38 L. T. Rep. (N. S.) 409.

[7] *Evans* v. *Von Laer,* 32 Fed. Rep. 153.