UNFAIR COMPETITION AND "PASSING-OFF"

THE FLEXIBILITY OF A FORMULA

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For anyone whose interest is in the part which law plays in the regulation of the economy, a tort which sometimes goes by the name of unfair competition[1] may seem to be of the first importance. It is a view popular at any rate among business men that the satisfaction of the material wants of consumers depends upon the preservation of a state of healthy competition within the economy and a law of unfair competition, one might think, should be a factor in this preservation. Further, if one were to begin one's speculations, not from the starting point of lay opinion, but on a basis of elementary economic theory, this impression would appear to be confirmed. True it is that until relatively recently the dominant neo-classical and marginal utility schools of economic thought tended to support the view that if only the State would limit itself to the negative function of defence against violence and theft and leave men free to pursue their own interests, individual self-seeking directed by market competition would bring about a simultaneous maximum of want-satisfaction for all concerned.[2] But nowadays the economist no longer puts forward a theory of a self-regulating system automatically producing the best for all and the picture of the competitive mechanism which he does present seems not only to allow for but to demand legal regulation.

It is not, of course, that the modern economist has abandoned the classical account of the economy altogether. He is likely even now to expound it at the initial stage of exposition of his subject, as indicating the manner in which particular factors in the economic system, isolated from their real context, are interrelated. But then he will gradually introduce into his account the real factors overlooked in the older treatment and, as he exposes each false assumption of the classical theory, so he will correct and qualify his exposition to bring it closer to reality, and it is at this point that an enquirer may well wonder how far the conditions falsely assumed to exist by the classical theory can be in a measure brought into existence by legal regulation, so that reality comes closer to the ideal state of affairs posited by it.

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[1] *Hubbuck* v. *Brown* (1889) 17 Reports of Patent Cases (here cited as R.P.C.) 148 *per* Kekewich, J. at 154; *Great Tower Street Tea Co.* v. *Langford and Co.* (1887) 5 R.P.C. 66 *per* Stirling, J. at 68; *Huntley and Palmer* v. *The Reading Biscuit Co. Ltd.* (1893) 10 R.P.C. 277 *per* Chitty, J. at 280.

[2] For a summary account see Frank H. Knight, "Marginal Utility Economics" in 5 *Encyclopaedia of the Social Sciences* 357, esp. at 363.

No simple answer could be expected to so broadly stated a problem. At least one of the conditions falsely assumed to exist by the classical theory cannot be brought into existence by legal or any other regulation, namely the condition that changes and readjustments do not take time, and that the economy is therefore constantly in a state of equilibrium rather than readjustment and instability. Others of the false assumptions, though subject to an ill-defined degree to legal regulation, demand an attack on so broad a basis that consideration of them is quite beyond the scope of any law dealing with competition as such. Instances are the assumption of a constant state of full employment and the assumption of a correspondence between the effective *demand* made by consumers for the products of the economy and the *wants* or *needs* of consumers for the products of the economy.

A further assumption of the older theory, however, is that no single competitor is powerful enough significantly to affect the total supply of a particular commodity. The realising of this assumption would seem to demand legal regulation of a more immediate kind directed at the preservation of freer market competition. In fact, however, the objectives of anti-trust law tend to become obscured by the consideration that enhanced profits caused by exploitation of the market cannot be condemned out of hand, for some provision has to be made against some risks of which the older theory took no account by reason of its neglect of the factor of change.[3] And in any case this kind of law is not usually treated as part of the law of unfair competition. Oppenheim explains that the distinction between monopoly law and unfair competition law assumes that there is a range of permissible business behaviour between that which results in the elimination or substantial lessening of competition (undue restraints of trade and monopoly) and that which results in excessive competition (misrepresentation, unfair pricing practices, and the like). "Thought of in this way," he says, "the enforcement of competition and the prohibitions upon unfair trade practices constitute opposite and complementary phases of the over-all public policy of fostering a competitive order."[4]

There remain however two assumptions made by the classical economic theories to which the law of unfair competition as ordinarily understood seems to be directly relevant. The first is that producers and consumers are aware of the nature and qualities of what is being produced throughout the market and the prices at which these commodities are being offered. The second is that each producer's competitive efforts are directed towards buying his raw materials in the cheapest market and supplying profitably at the best price that can be obtained and not towards attacking his competitors' power to compete. Misrepresentation and devious pricing practices, the two examples of unfair competition mentioned in the passage quoted from Oppenheim, clearly have to be suppressed if these assumptions are to be brought closer to reality. The account given by Rudolf Callmann, American author of a standard treatise on the subject of the law of unfair competition[5], provides further support for the above view of its functions. One of Callmann's main principles is that any form of struggle directed *against* rather than *with* a competitor is unfair.[6] Disparagement of competitors' goods,[7] secondary boycotts,[8] price wars,[9] interfering with customers' ability to judge freely,[10] threats of detriments to customers,[11] are

[3] For other factors here involved see J. Stone, *The Province and Function of Law* (1946) 643-644.
[4] S. C. Oppenheim, *Unfair Trade Practices* (1950) 2.
[5] *Unfair Competition and Trade Marks* (2 ed. 1950).
[6] *Op. cit* vol. i, 136. [7] *Id.* at 137. [8] *Id.* at 138.
[9] *Ibid.* [10] *Id.* at 139. [11] *Ibid.*

all therefore considered unlawful. Misbranding,[12] false advertising,[13] and passing off,[14] and misappropriation of competitors' business values[15] are likewise unlawful because they enable the wrongdoer to avoid having to make his sales on the basis of his own constructive effort.[16]

Here, then, at last, we may seem to have a law of unfair competition the function and application of which we can understand, for all the vagueness of the term "unfairness". At least one of the ultimate standards of reference may be taken to be the efficiency of the economy in the interests of the consuming public. The more immediate standards of reference are the requirements for such efficiency that neither consumers nor producers should be deluded about market conditions and that a competitor's weapons of competition should be the straightforward terms he offers rather than interferences of other sorts with customers, suppliers and competitors. But, curiously enough, this is not the manner of Callman's approach, however well his specific principles would fit into such an approach. In part, this seems to be due to natural law assumptions[17] — he gives the impression that he is saying that just as master and servant relationships are natural in society so too are competitive relationships.[18] And he expands on his notion of a competitive relationship as a field in which struggle is natural and essential,[19] a struggle which may be compared with a game in which there are several aspirants, one and the same goal, one prize or a hierarchy of prizes and one or several umpires.[20] Fair competitive conduct consists in struggle according to game-like rules by means of constructive effort subject to the natural conditions of the market.[21] Unlawful competition is a tort *sui generis*, a violation of the order of struggle, an injury to the right of every competitor to require that his competitors act in conformity with the rules of competition.[22] Callmann recognises that this "natural" situation is supported by a public belief in the ideal of free enterprise,[23] but does not make the point that the "materialistic" interests of the public, to use his own terminology, are here deeply involved. He characterises the court's disregard of the interests of consumers in certain branches of the law of unfair competition as "unfortunate",[24] but does not suggest that such disregard strikes at what might appear to be a major justification for the intervention of the law in the competitive process.

This is all the more strange because a main thesis of Callmann's first volume is that the rules affecting this subject should be categorised just as rules of unfair competition and should not be subsumed under more general torts dealing with rights affecting reputation and property. "The principle advantage in applying competitive rules," he says, "arises out of the fact that they offer ready legal protection in accordance with general rules and without reliance upon sundry and unworkable doctrines borrowed from other unrelated branches of the law".[25] The assumption behind this is that the types of problems arising within the field of unfair competition have a general similarity springing from the identity of interests in play, and that thence may spring a coherent body of principles demanding recognition as those of a tort *sui generis*. The same view appears in his argument against the recognition of "unfair trading" as a tort. The

[12] *Id.* at 140.
[13] *Ibid.*
[14] *Ibid.*
[15] *Id.* at 141.
[16] *Ibid.*
[17] "Only from the nature of the relationship can principles be derived which will furnish the basis for a cause of action for unfair competition." *Id.* at 34.
[18] *Id.* at 31-35.
[19] *Id.* at 111.
[20] *Id.* at 116.
[21] *Id.* at 124.
[22] *Id.* at 118.
[23] *Id.* at 65.
[24] *Id.* at 60.
[25] *Id.* at 8.

broadening of the concept, he claims, "augurs for its complete dilution."[26] But unless some satisfactory account is given of what specialised interests are involved in the competitive relationship, and this can hardly be upon any other basis than a close examination of economic doctrine, there can be no demonstration that there is such a special coherence between the problems of unfair competition as can be "diluted".

The failure to push enquiry into the law of unfair competition back to the plane of interest analysis is not confined to Callmann's work. H. D. Nims, author of another standard text book[27], seems content to allow the ultimate arbiter of unfairness to be "public appraisal of such acts as fair or unfair."[28] The lack of any more concrete approach does not strike him as altogether unfortunate:

> The existence of the action, its necessity under modern conditions, its effectiveness, its elasticity, all are accepted without question; but its theoretic basis remains in doubt. It may very well be that this very uncertainty as to its legal character will prove a source of real strength and enable it to meet the changing demands of business upon it all the more efficiently.[29]

Yet is this sort of problem really one for *ad hoc* appraisals by the ordinary man? At least one judge has evidently thought so and has defined unfair competition as consisting in selling goods by means which shock judicial sensibilities.[30] On the other hand, American text writers on this subject are constantly having to claim that many judges tend to define unfair competition simply to cover passing off and refuse to follow such cases as *International News Service* v. *Associated Press*,[31] which give a wider field of operation to the tort.[32] May not the explanation be that judges find the conception too "dilute" for their taste? And the cure must lie either in remaining content with a tort of passing off, the principles of which are supposed to be narrow and precise, or seeking to find a more adequate and concrete conception of unfair competition based on study of the human and technical factors involved.

For English law, as distinct from American, it is commonly supposed that no such dilemmas exist. "In England," says Nims, "this branch of the law has continued, in name and in fact as 'Passing Off,' and its scope largely confined to acts of that character."[33] Yet the picture of an inflexible tort hardly consists with the relative frequency of common law litigation respecting passing off despite the existence of legislation covering much of its original field. Closer examination tends to show that the place of the tort of passing off in the scheme of the English law of torts is not yet finally determined, and that a discussion of its scope with a particular eye on its potentialities for growth may not be without interest.

The origin of passing off is lost in obscurity, it being uncertain whether the Elizabethan case subsequently accepted as a precedent was really an action for passing off at all, and whether, if it was, the judges conceived it as an action for deceit or as an action for defamation. The case is not directly reported, but is recalled by Dodderidge, J. in two seventeenth century cases, *Southern* v. *How*[34]

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[26] *Id.* at 84-85.
[27] H. D. Nims, *The Law of Unfair Competition and Trade Marks* (4 ed. 1947).
[28] *Op. cit.* vol. i, 16.
[29] *Id.* at 2.
[30] *Steiff* v. *Bing* (1914) 215 F. 204 *per* Hough, J. at 206.
[31] (1918) 248 U.S. 215.
[32] See, e.g., 1 Callmann, *Unfair Competition and Trade Marks* (2 ed. 1950) 75-76; 1 Nims, *The Law of Unfair Competition and Trade Marks* (4 ed. 1947) 3; Z. Chafee, "Unfair Competition" (1940) 53 *Harv. L.R.* 1289, 1301; Handler, "Unfair Competition" (1936) 21 *Iowa L.R.* 187; J. A. McLaughlin, "Legal Controls of Competitive Methods" (1936) 21 *Iowa L.R.* 274.
[33] *Op. cit.* 58.
[34] (1618) Cro. Jac. 468, Poph. 143, 2 Roll. Rep. 26.

and *Dean* v. *Steel*.[35] The reports of *Southern* v. *How* differ as to whether Dodderidge, J. said that the action was brought by the eminent clothier whose mark was used to defraud the purchaser of the defendant's poor cloth, or whether the defrauded purchaser himself brought the action.[36] One report, which is perhaps entitled to credence in the circumstances, states that Dodderidge, J. did not specify who brought the action.[37] If it was the purchaser there was nothing remarkable about the case and Schechter in his historical survey is inclined to take this view and therefore to discount its importance.[38] Schechter, however, in common with writers and judges generally, appears to have overlooked the discussion of the same case in *Dean* v. *Steel*,[39] where Dodderidge, J. again called it to mind. Here the report is quite explicit that it was an action by the clothier whose goods were passed off.

Southern v. *How* was itself a case of deceit, while *Dean* v. *Steel* was a case of defamation. The recalling of the Elizabethan case in these later authorities therefore leaves the original classification of passing off by the English courts quite ambiguous. But in the eighteenth century the Courts recalled the Elizabethan case in the context of *Southern* v. *How* rather than the forgotten *Dean* v. *Steel* and came to regard passing off as an action for deceit, though a variety of deceit in which the action was not by the person who was deceived but by the person whose mark was used to deceive.[40] The effect of this was to restrict the operation of the tort to situations where bad faith was proved, and had this restriction proved permanent the tort might well have been reduced to impotence as a means of economic regulation in the public interest. Fortunately, however, this requirement disappeared as the result of the attitudes of the Chancery judges and the confusion of equitable and legal rules after the Judicature Acts. As early as 1838 it was decided that fraud need not be shown in a suit for an injunction to restrain passing off,[41] and this was the beginning of a process whereby passing off ceased, even at common law, to be an action in which proof of fraud was required. The attitude of equity was sometimes reconciled with the common law approach through the argument that equity intervened to restrain what would be a fraud if it were allowed to continue once the Court had determined in the defendant's presence that what he was doing was calculated to deceive.[42] At other times however it was said that equity regarded passing off as the infringement of a proprietary right,[43] a view which was opposed to that of the common law judges and which opened up the possibility of an actual conflict when equity courts did not confine themselves to awarding injunctions and awarded compensation. This they might do either in the form of an account of profits, on the theory that the defendant was constructively an agent of the plaintiff in disposing of goods in a manner infringing the plaintiff's rights,[44] or as damages in lieu of or in addition to an injunction under Lord Cairns' Act.[45] And although the equity judges purported to apply common law principles in awarding compensa-

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[35] (1626) Latch 188.
[36] Contrast Cro. Jac. 471 with Poph. 144.
[37] 2 Roll. Rep. 26, 28.
[38] F. I. Schechter, *The Historical Foundations of the Law Relating to Trade Marks* (1925) 10.
[39] (1626) Latch 188.
[40] *Blanchard* v. *Hill* (1742) 2 Atk. 484.
[41] *Millington* v. *Fox* (1838) 3 My. & Cr. 338.
[42] See, e.g., *M'Andrew* v. *Bassett* (1864) 10 L.T.N.S. 442, *per* Wood, V.C. at 443.
[43] *Millington* v. *Fox* (1838) 3 My. & Cr. 338, *Edelsten* v. *Edelsten* (1863) 1 De G., J. & S. 185 *per* Lord Westbury at 199.
[44] See H. G. Snell, *Principles of Equity* (24 ed. 1954) 574.
[45] 21 & 22 Vict., c. 27, s. 2.

tion, in fact they came to award it where there was no fraud. In *Cartier* v. *Carlile*[46] this was justified by resort to the principle that a man *must be taken to intend* the natural consequences of his acts, and hence mere proof of likelihood of deception is sufficient.[47] In *Edelsten* v. *Edelsten*[48] the argument was that the requirement of "fraud" was satisfied by mere notice of the plaintiff's rights,[49] with the result that a man might be held liable even though he believed that what he was doing did not infringe those rights. At all events, whatever the theory adopted and despite assertions by some judges that fraud remained an element in the tort,[50] the practice grew up after the Judicature Acts of awarding an account of profits or an inquiry into damages where fraud was not proved.[51] Sometimes the reasoning in *Cartier* v. *Carlile* was adopted,[52] sometimes that in *Edelsten* v. *Edelsten*,[53] more often the judges have assumed without discussion that fraud is unnecessary. The practice received the sanction of the House of Lords in *Spalding & Bros.* v. *Gamage Ltd.*[54] and it is submitted that in spite of certain doubts expressed in *Draper* v. *Trist*[55] it is now settled that fraud need not be shown. The only question remaining is whether the defendant is liable in damages if he did not know and could not reasonably have known the circumstances which rendered confusion likely, as for example, where the defendant does not know of the existence of the plaintiff. This question was left open by the House of Lords in *Marengo* v. *Daily Sketch Ltd.*[56] and the authorities at present appear to be opposed to the imposition of liability in such circumstances.[57]

It appears at all events that English law has escaped from the confines which would be imposed by a requirement that a subjective mental state accompanying the passing off should be demonstrated. This however leaves still standing the American criticism that the English law is limited to the narrow class of acts conveyed by the term "passing off". Even this charge is, however, in a measure

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[46] (1862) 31 Beav. 292.

[47] *Per* Sir John Romilly, M.R. at 298.

[48] (1863) 1 De G., J. & S. 185.

[49] *Per Lord Westbury* at 199.

[50] *Jamieson & Co.* v. *Jamieson* (1898) R.P.C. 169 *per* Vaughan Williams, L.J. at 191; *Reddway* v. *Bentham Hemp-Spinning Co.* (1892) 2 Q.B. 639 *per* Lindley, L.J. at 644, *per* Lopes, L.J. at 646, and *per* A. L. Smith, L.J. at 648; *Edge* v. *Johnson* (1892) 9 R.P.C. 134 *per* Lord Esher, M.R. at 136; *Powell* v. *Birmingham Vinegar Brewery Co.* (1896) 2 Ch. 54 *per* Lindley, L.J. at 67.

[51] *Powell* v. *Birmingham Vinegar Brewery Co. Ltd.* (1896) 2 Ch. 54; *Liebig's Extract of Meat Co. Ltd.* v. *The Chemists' Co-op. Society Ltd.* (1896) 13 R.P.C. 736; *Daniel & Arter* v. *Whitehouse* (1898) 15 R.P.C.134; *Hodgson and Simpson* v. *Kynoch, Ltd.* (1898) 15 R.P.C. 465; *Pneumatic Rubber Stamp Co. Ltd.* v. *Lindner* (1898) 15 R.P.C. 525; *Cusenier etc. Co.* v. *Gaiety Bars and Restaurant Co. Ltd.* (1902) 19 R.P.C. 357; *Iron-Ox Remedy Co. Ltd.* v. *Leeds Industrial Co-op. Society Ltd.* (1907) 24 R.P.C. 434; *C. & A. Modes Ltd.* v. *Central Purchasing Association Ltd.* (1930) 48 R.P.C. 163; *Fialho* v. *S. D. Simond & Co. Ltd.* (1937) 54 R.P.C. 193; *Office Cleaning Services Ltd.* v. *Westminster etc. Cleaners Ltd.* (1943) 61 R.P.C. 21; *Wright, Layman & Umney Ltd.* v. *Wright* (1948) 65 R.P.C. 185; *Fawcett* v. *Modern Fiction Ltd.* (1949) 66 R.P.C. 230; *Treasure Cot. Coy. Ltd.* v. *Hamley Bros. Ltd.* (1950) 67 R.P.C. 89. See also *Procea Products Ltd.* v. *Evans* (1951) 68 R.P.C. 210.

[52] See, e.g., *Saxlehner* v. *Apollinaris Co.* (1897) 1 Ch. 893, 900-901; *Chivers & Sons* v. *Chivers & Co. Ltd.* (1900) 17 R.P.C. 420, 426.

[53] E.g., *Van Zeller* v. *Mason, Cattley & Co.* (1907) 25 R.P.C. 37.

[54] (1915) 32 R.P.C. 273, esp. at 283 and 289.

[55] (1939) 56 R.P.C. 429, 441, 443-444.

[56] (1948) 65 R.P.C. 242, 251, 252, 254.

[57] See *Spalding & Bros.* v. *Gamage Ltd.* (1915) 32 R.P.C. 273, 283; *Slazenger & Sons* v.*Spalding & Bros.* (1910) 1 Ch. 257; *Horsfield* v. *Walkden & Co.* (1910) 28 R.P.C. 175; *Young & Co. Ltd.* v. *Holt* (1947) 65 R.P.C. 25. Where the defendant has been misled into believing that goods he is selling are the plaintiff's, an account of profits has been refused: *Vokes Ltd.* v. *Evans* (1931) 49 R.P.C. 140, and in one such case an injunction was refused, *Ainsworth* v. *Walmsley* (1866) L.R. 1 Eq. 518. Neither damages nor an injunction are granted where there has been an isolated mistake by the defendant, *Armstrong Oiler Co. Ltd.* v. *Patent Axlebox and Foundry Co. Ltd.* (1910) 27 R.P.C. 362.

unjustified. The term "passing off" as it stands would appear to connote the act of selling goods, with an accompanying misrepresentation by words or conduct as to the origin of the goods, whereby the purchaser has been misled and business has been diverted from the plaintiff to the defendant. The earlier definitions of passing off, indeed, indicate that it is essential that there should be this composite act of selling together with a misrepresentation before the tort is made out. Lord Langdale's definition was that "a man is not to *sell* his goods under the pretence that they are the goods of another man,"[58] and Lord Cranworth speaks to the same effect.[59] But the definition which has latterly found favour is that of Lord Halsbury in *Reddaway* v. *Banham*,[60] that no man has any right to *represent* that his goods are the goods of another.[61] There is, it must be admitted, no indication that Lord Halsbury considered that this definition differed materially from the earlier ones above quoted, for he often uses the older definition himself in his judgments.[62] The distinction between misrepresentation simpliciter and selling accompanied by misrepresentation has indeed been unimportant in the cases which have ordinarily come before the Courts. The remedy most usually sought has been an injunction and in such a case actual trading accompanying the misrepresentation need not be proved even if the definition which makes selling an essential feature of the tort be adopted. If a defendant has issued an advertisement falsely describing his goods as the plaintiff's this is an attempt to pass off; and even though no actual selling has occurred, there is ground for restraining an apprehended wrong. So in *Reddaway* v. *Bentham Hemp Spinning Co.*[63] A. L. Smith, L.J. expounds the law thus:

> If the Plaintiffs gave evidence that the Defendants *had passed off*[64] their goods with this intention under circumstances calculated to mislead purchasers, then they had a cause of action for damages, even though they proved no special damage. If they gave no evidence of intention, but only of the passing off, or the *attempting to pass off*[64] the defendants' goods under circumstances calculated to mislead purchasers, then they had a cause of action against the Defendants entitling them to an injunction.[65]

Eventually, however, circumstances arose in which the difference between this kind of formulation and that of Lord Halsbury became critical. The defendants in *A. G. Spalding & Bros.* v. *A. W. Gamage, Ltd.*[66] had issued an advertisement announcing a sale of the plaintiff's footballs at a very low price. In fact the balls which the defendants intended to sell belonged to a different class of the plaintiff's balls from those advertised and the plaintiffs claimed that they had suffered damage because the advertisements had spoiled the sales of the genuine footballs. When the action reached the House of Lords, Sir Duncan Kerly for the defendants submitted that the action for damages could not succeed, since there had been no selling before the writ was issued and damage to reputation could be recovered only where the damage was caused by a purchaser's unfavourable reaction to the goods purchased.[67] The plaintiffs were, he argued, trying to recover for losses resulting from the unfavourable reactions of their

[58] *Perry* v. *Truefitt* (1842) 6 Beav. 66, 73.
[59] *Farina* v. *Silverlock* (1856) 6 De G., M., & G. 214, 218.
[60] (1896) A.C. 199.
[61] *Id.* at 204.
[62] *Birmingham Vinegar Brewery Co. Ltd.* v. *Powell* (1897) A.C. 710, 711. Cf. *Cellular Clothing Co.* v. *Maxton & Murray* (1899) A.C. 326, 336.
[63] (1892) 2 Q.B. 639, 648.
[64] Italics supplied.
[65] (1892) 2 Q.B. 639, 648.
[66] (1915) 32 R.P.C. 273.
[67] *Id.* at 282. Cf. *Magnolia Metal Co.* v. *Atlas Metal Co.* (1896) 14 R.P.C. 389, 398.

customers in the Trade who read the defendants' advertisements and thought that the plaintiffs were disposing of their goods at differential prices. In the result the damages were left to the determination of a referee, but the speeches in the House indicate the Lords' disagreement with the submission made to them. Lord Parker stated that he preferred a definition of the tort in terms of representation rather than in terms of passing off, as actual passing off was unnecessary.[68] Lord Parmoor agreed that *offering* to sell constituted of itself an actionable wrong, and there was no artificial limitation on the damages which could be recovered for that wrong.[69]

The litigation between Spaldings and Gamages next came before Younger, J. on an appeal from the finding of the referee. His lordship considered that the House of Lords decision only required that such damages as were recoverable in accordance with legal principle should be awarded, and, taking as he did the view that an advertisement could not constitute the wrong of passing off unless goods were sold as a result of the advertisement, he disallowed the damage arising otherwise.[70] But the Court of Appeal decided that Younger, J. was wrong, and that the House of Lords had decided that the tort was complete with the advertisement. The defendant was therefore liable for all the resulting damage whether resulting from the sale of goods or not.[71]

With the decision in *Spaldings' Case* the way was opened up for the escape of the tort from the confines of the typical commercial situation which gave it its name. It was now a tort dealing with certain kinds of commercial misrepresentations, and it might be expected that ways would be found to exploit the broad possibilities of Lord Halsbury's formula. And the desirability of such a broad approach to the tort of passing off seems evident, firstly because of the public interest in the control of misrepresentation in the economic process referred to at the outset of this article, and secondly because the armoury of English torts law is generally weak in regard to other weapons to deal with misrepresentation. A purchaser who sues for deceit has to prove a fraudulent design which a tribunal will be unwilling to find established,[72] actions for negligence founded on misrepresentation causing economic losses are virtually if not altogether non-existent,[73] and the action for injurious falsehood, though practically unlimited in its area of operation, has its teeth drawn by the requirements that at common law both malice in the defendant and damage to the plaintiff must be proved.[74] Passing off, as it has developed, requires proof neither of damage[75] nor of any subjective mental state in the defendant,[76] characteristics shared only, among torts concerned with misrepresentation, by the action for libel and certain actions for slander.[77]

In certain respects the exploitation of the flexibility inherent in Lord Halsbury's formula has been all that the interest in liberal interpretation could demand. For instance, the formula merely states that the defendant shall not represent *his* goods or *his* business as the goods or business of the plaintiff.

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[68] (1915) 32 R.P.C. 273, 283.
[69] *Id.* at 289-290.
[70] (1917) 34 R.P.C. 289, esp. at 309.
[71] (1918) 35 R.P.C. 101.
[72] *Derry* v. *Peek* (1888) 14 App. Cas. 337.
[73] *Candler* v. *Crane, Christmas & Co.* (1951) 2 K.B. 164.
[74] *Ratcliffe* v. *Evans* (1892) 2 Q.B. 524. In England this is modified by the Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 66), s. 3.
[75] *Draper* v. *Trist* (1939) 56 R.P.C. 429.
[76] See discussion above.
[77] In New South Wales by all actions for slander, owing to what is now the Defamation Act, 1912-1948 (Act No. 32, 1912—Act No. 39, 1948), s. 4.

What is to be understood by the possessive pronouns in this case? The Courts have found it possible to apply the formula in a wide variety of relationships between the defendant and the goods or business about which the misrepresentation is made. The typical situation is that in which the goods are the defendant's goods in the sense that he is offering to sell them, but it has been held that it is sufficient that the goods are the defendant's in the sense that he is using them in some process carried on for reward in his business,[78] or that he is exhibiting them for reward, even where the rewards do not come from persons to whom they are exhibited and who are therefore likely to be misled. This last extension is neatly illustrated by *Illustrated Newspapers, Ltd.* v. *Publicity Services, Ltd.*,[79] a case in which the defendants were held liable for displaying in hotels magazines published by the plaintiffs in which the defendants had inserted additional pages of advertising matter as if these were part of the magazine. The readers of the magazines who were misled were not people with whom the defendant hoped to enter into transactions, nor were they people whom *anybody* hoped to induce by means of the misrepresentation to buy the magazines. But by misleading the readers in this way the defendant was enabled to enter into transactions with advertisers who were not themselves necessarily misled, upon more favourable terms. In this respect the case is similar to *Pryce* v. *Pioneer Press, Ltd.*,[80] in which the defendants were held liable for printing and selling to a political party a poster which appeared to have been printed by the opposing political party. The object of this maneouvre was not to deceive the political party which purchased the poster, or any ultimate purchaser, but to further the scheme of this party to make their opponents appear to condemn themselves out of their own mouths. By making the misrepresentation the defendant was enabled to do business with a person not misled.

So far, then, we encounter a refreshing absence of any attempt to limit the development of the tort to a field narrower than that which liberal interpretation of Lord Halsbury's formula will cover. The circumstances in the cases last mentioned bear only a remote relationship to the typical passing off situation. The fact that they can be made to fit the formula at all is almost accidental, but the result of the holding that they do supports the proposition that a misrepresentation for any business purpose as to the origins of goods which the defendant proposes to or does deal in or employs in the course of his business is passing off. And it may be expected that, when occasion arises, the courts will take a similarly broad view of what is meant by the defendant's business for the purposes of the rule that he may not represent his business as the business of the plaintiff.

A similar flexibility is apparent in the Court's approach to the question of the kind of relationship which must have been asserted, by the defendant to exist between the defendant's goods and the plaintiff in order to satisfy the requirement that the goods must be asserted to be the goods *of* the plaintiff. It is not necessary to show that the goods are asserted to be of the plaintiff's manufacture, it is sufficient that the defendant should have asserted that the plaintiff has played some part in the manufacture or distribution of the goods. Thus the defendant in *Vokes Ltd.* v. *Evans*[81] had purchased goods marked with the plaintiffs' mark from the actual manufacturer to the plaintiffs. It was held that selling the goods so marked was passing off, for there was here an untrue representation

[78] *Sales Affiliates Ltd.* v. *Le Jean Ltd.* (1947) 64 R.P.C. 103.
[79] (1938) Ch. 414.
[80] (1925) 42 T.L.R. 29.
[81] (1931) 49 R.P.C. 140.

that the goods had passed through the plaintiff's hands. Moreover, even in cases where there is no representation that the plaintiff has handled the actual goods passed off, there is a misrepresentation sufficient to constitute the tort if it is represented that the plaintiff is responsible for the idea behind the goods. This is involved when an action is allowed for passing off a literary work,[82] and it is submitted that the same principle would be applied to representations that an article is manufactured in accordance with the plaintiff's invention or prescription. *Clark* v. *Freeman*,[83] an old authority in which an injunction was refused in respect of a false statement that medicine was manufactured according to the plaintiff doctor's prescription, ought now to be regarded either as wrongly decided or founded on the absence of any likelihood of harm in the particular circumstances.[84]

The Courts have approached the problem of the meaning to be attached to the expression the business *of* the plaintiff as used in the rule that no man may represent his business as the business of the plaintiff, on a similarly broad basis. Normally the defendant submerges his own identity completely and represents that the plaintiff actually carries on the defendant's business. But there is ample authority that the defendant is liable if he represents that the plaintiff has an "intimate connection"[85] with the defendant's firm, or that the plaintiff has "any connection"[86] with it, or that the defendant's business is a branch of the plaintiff's or "somehow mixed up with"[87] the plaintiff's business. It is also sufficient that the defendant has held out that the plaintiff is legally responsible for the debts or liabilities of the business or some of them,[88] or that the defendant is a member of the plaintiff's organization,[89] though the rule stops short of catching false assertions that the defendant has been trained by the plaintiff.[90]

While in regard to the above aspects of passing off the action has shown a capacity for expansion, there are certain other aspects of the tort in respect to which the law may be said to be in a state of suspense between expansive and restrictive views. Among these aspects is the problem of how far competition between the plaintiff and the defendant has to exist before one can sue the other. This is another matter which is left vague by Lord Halsbury's definition of the tort. A rule that no man is to represent his goods as the goods of another may or may not be taken to imply that there must be in existence goods of that other with which the defendant seeks to confuse his own. In one particular kind of

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[82] *Lord Byron* v. *Johnston* (1816) 2 Mer. 29; *Archbold* v. *Sweet* (1832) 5 C. & P. 219; *Samuelson* v. *Producers' Distributing Co. Ltd.* (1932) Ch. 201.

[83] (1848) 11 Beav. 112.

[84] *Springhead Spinning Co.* v. *Riley* (1868) L.R. 6 Eq. 551, 561; *Dixon* v. *Holden* (1869) L.R. 7 Eq. 488, 493; *Maxwell* v. *Hogg* (1867) L.R. 2 Ch. 307, 310; *Lee* v. *Gibbings* (1892) 67 L.T. 263, 265.

[85] *Harrods Ltd.* v. *R. Harrod Ltd.* (1923) 41 R.P.C. 74, 76.

[86] *The Clock Ltd.* v. *The Clock House Hotel Ltd.* (1936) 53 R.P.C. 269, 275; *Dutton, Massey & Co. (Liverpool) Ltd.* v. *Dutton, Massey & Co. Ltd.* (1923) 40 R.P.C. 413, 424.

[87] *Ewing* v. *Buttercup Margarine Co. Ltd.* (1917) 34 R.P.C. 232, 237.

[88] *Routh* v. *Webster* (1847) 10 Beav. 561; *Bullock* v. *Chapman* (1848) 2 De G. & Sm. 211, 214; *Clerk* v. *The Motor Car Co. (1905) Ltd.* (1905) 49 Sol. Jo. 418. This principle is sometimes regarded as distinct from that of passing off, *Walter* v. *Ashton* (1902) 2 Ch. 282, 288. It is suggested by Lord Cairns in *Prudential Assurance Co.* v. *Knott* (1875) L.R. 10 Ch. 142 that *Routh* v. *Webster* might apply to circumstances in which the defendant did not pretend that the plaintiff was connected with the defendant himself, but that the plaintiff was connected with a bankrupt partnership with which the defendant had nothing to do. (See his Lordship's reference at 146 to *Dixon* v. *Holden* L.R. 7 Eq. 488.) And in *Webster* v. *Webster* (1916) 1 K.B. 714, Rowlatt, J. assumed for the purposes of his decision that an action might lie against a private person for pledging the credit of another. If either of these propositions is law, a distinction is established between the principle of *Routh* v. *Webster* and passing off. But there is no actual authority for either of them.

[89] *Society of Accountants and Auditors* v. *Goodway* (1907) 1 Ch. 489.

[90] *Cundey* v. *Lerwill & Pike* (1908) 99 L.T. 273.

passing off it is certainly necessary that the plaintiff should actually deal in the goods in question, namely, where the defendant has represented one grade of the plaintiff's goods as another and higher grade.[91] But here the requirement arises out of the nature of the case, and, at all events, this type of passing off occupies but a small section of the field of the tort. In other types of case the authorities support the proposition made by Lord Greene, M.R., that "passing off may occur in cases where the Plaintiffs do not in fact deal in the offending goods."[92] A trader in a different business field may be injured in his trade reputation by the supposition that he is connected with the defendant's business, and the Court of Appeal has on more than one occasion held that in such circumstances there is an action for passing off.[93]

While, however, it is easy to justify the proposition that the plaintiff need not deal in the goods represented by the defendant to be the plaintiff's goods it is unfortunately true that it is more difficult to justify a proposition that the plaintiff need not be in competition with the plaintiff in a broad sense. In *McCulloch* v. *Lewis A. May (Produce Distributors) Ltd.*,[94] a radio announcer known as "Uncle Mac" failed in an effort to restrain the defendant from describing his breakfast food as "Uncle Mac's." Wynn Parry, J. was satisfied that in all the cases in which the Court had intervened there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged, and that it was the presence of that factor which accounted for the jurisdiction of the Court. Similarly in the case of *Clark* v. *Freeman*[95] already mentioned, Lord Langdale, M.R., stated that he could not liken an action between a surgeon and a vendor of pills to one where the parties marketed similar commodities.[96]

It is submitted, nevertheless, that it would be unfortunate if English law were finally to be committed to the proposition that competition, however liberally the requirement might be interpreted, is an essential relationship between plaintiff and defendant in an action for passing off. We have seen that the American writer Callmann is in favour of such a limitation for American law; but only because he envisages separate torts dealing with unfair trading practices outside the area of unfair competition.[97] English law is not, however, susceptible to the facile generation of new torts. F. W. Maitland has claimed that it was originally the jealousy felt by other jurisdictions which stamped on English law the characteristic whereby the King's Courts did the legal work of the realm with a severely limited number of formulae,[98] and this is certainly a characteristic which has survived the historical context of its creation. The point has already been made that the formal resources of English law for dealing with misrepresentation generally are weak, and hence there is here a more than usually strong argument for expansive interpretation.

In the vast majority of cases in which the courts have adverted to the

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[91] *Spalding & Bros.* v. *Gamage Ltd.* (1915) 32 R.P.C. 273; *Teacher* v. *Levy* (1905) 23 R.P.C. 117; *Hunt, Roope, Teage & Co.* v. *Ehrmann Bros.* (1910) 2 Ch. 198. Compare cases in which second-hand goods of the plaintiff are passed off as new goods of the plaintiff, *Gillette Safety Razor Co.* v. *Franks* (1924) 41 R.P.C. 499.

[92] *Saville Perfumery Ltd.* v. *June Perfect Ltd.* (1939) 58 R.P.C. 147, 163.

[93] *Harrods Ltd.* v. *R. Harrod Ltd.* (1923) 41 R.P.C. 74, *Ewing* v. *Buttercup Margarine Co. Ltd.* (1917) 2 Ch. 1.

[94] (1947) 65 R.P.C. 58.

[95] (1848) 11 Beav. 112. See also *Martin v. Wright* (1833) 6 Sim. 297; *Lloyd's Bank Ltd.* v. *Lloyd's Investment Trust Co. Ltd.* (1912) 29 R.P.C. 545, 550; *Turner's Motor Manufacturing Co. Ltd.* v. *Miesse Petrol Car Syndicate Ltd.* (1907) 24 R.P.C. 531, 532; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Motor Co.* (1907) A.C. 430, 438.

[96] (1848) 11 Beav. 112, 118.

[97] 1 R. Callmann, *Unfair Competition and Trade Marks* (2 ed. 1950) 38.

[98] F. W. Maitland, *The Forms of Action at Common Law* (Chaytor and Whittaker ed. 1948) 11.

question whether the parties are in competition they have not treated its existence as a pre-requisite to that of the tort but have rather regarded competition or its absence as a consideration relevant to the question, firstly, of whether there is any misrepresentation,[99] and, secondly, whether there was any likelihood of damage.[100] The less the similarity between businesses carried on by plaintiff and defendant the less the likelihood of confusion, and, in some types of cases though not in others, the less the likelihood of damage if confusion does occur. The type of case which might well be thought to be conclusive on this issue is that in which charitable and welfare institutions, such as an unincorporated body designed to assist seamen,[101] Dr. Barnardo's Homes,[102] and the British Legion,[103] have succeeded in actions for passing off. Usually in such cases the plaintiff's complaint has been that the supposition that the defendant is connected with the plaintiff may injure the reputation of the plaintiff in a way calculated to cause it financial loss, as by inducing people to discontinue their support of the plaintiff, or may involve the plaintiff in legal liability for the acts of the defendant, or may involve it in harassing litigation by persons who are led to suppose that they are so liable. These kinds of damage may be caused quite independently of any relationship of competition and the Courts have not in this type of situation seen fit to restrict the operation of the tort of passing off to the competitive situation so as to deprive the plaintiff of a remedy.[104]

A second aspect of the law of passing off on which there is a conflict of approach in the authorities at the present stage of the tort's history relates to the requirement that there should be a reference in the defendant's statement to the *plaintiff's* goods. In what manner has the plaintiff to be identified in the minds of persons to whom the defendant's misrepresentation is made. Clearly enough, it is not necessary that there should be a reference to the plaintiff by name. From the outset, it has been regarded as sufficient that the goods should be marked in a manner which indicates to the public the goods of the plaintiff. It is not even necessary that the persons who are likely to be misled should know the plaintiff at all by name.[105] Schechter has explained that the function of the ordinary trade mark is not to indicate a known source, but to indicate that goods come from the same source or through the same channels as others.[106] In some cases the public may know nothing either of the actual characteristics of the goods

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[99] *Willox* v. *Pearson* (1901) 18 T.L.R. 220; *Coleman & Co. Ltd.* v. *John Brown & Co.* (1899) 16 R.P.C. 619, 624; *Lucas Ltd.* v. *Fabry Auto Co. Ltd.* (1905) 23 R.P.C. 33, 37; *Ridgway Co.* v. *Amalgamated Press Ltd.* (1911) 29 R.P.C. 130; *Nugget Polish Co. Ltd.* v. *Harboro Rubber Co.* (1911) 29 R.P.C. 133; *Albion Motor Co. Ltd.* v. *Albion Carriage etc. Ltd.* (1917) 34 R.P.C. 257; *Wilson's and Mathieson's Ltd.* v. *Meynell & Sons Ltd.* (1929) 46 R.P.C. 80; *Rolls Razor Ltd.* v. *Rolls (Lighters) Ltd.* (1949) 66 R.P.C. 137; *Warwick Tyre Co. Ltd.* v. *New Motor etc. Co. Ltd.* (1910) 1 Ch. 248.

[100] *Lawson* v. *Bank of London* (1856) 18 C.B. 84, 92-93; *Harrods Ltd.* v. *R. Harrod Ltd.* (1923) 41 R.P.C. 74; *Soc. Motor M'frs. Ltd.* v. *Motor M'frs. etc. Ins. Co. Ltd.* (1925) Ch. 675; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Motor Co.* (1907) A.C. 430, 436; *Borthwick* v. *The Evening Post* (1888) 37 Ch. D. 449, 463-464; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Dunlop Lubricant Co.* (1898) 16 R.P.C. 12; *Outram & Co.* v. *London Evening Newspapers Co. Ltd.* (1931) 48 R.P.C. 526; *Hall of Arts and Sciences* v. *Hall* (1934) 51 R.P.C. 398; *British Legion* v. *British Legion Club (Street) Ltd.* (1931) 48 R.P.C. 555, 563-564.

[101] *Toms and Moore* v. *Merchant Service Guild* (1908) 25 R.P.C. 474.

[102] *Dr. Barnardo's Homes* v. *Barnardo Amalgamated Industries Ltd.* (1949) 66 R.P.C. 103.

[103] *British Legion* v. *British Legion Club (Street) Ltd.* (1931) 48 R.P.C. 555.

[104] In England, by reason of the abovementioned legislation making success in actions for injurious falsehood easier, these decisions may not now be so important, but New South Wales has not yet adopted the legislation.

[105] *Birmingham Vinegar Brewery Co.* v. *Powell* (1897) A.C. 710.

[106] F. I. Schechter, "The Rational Basis of Trademark Protection" (1927) 40 *Harv. L.R.* 813, 816.

in question or of the plaintiff's firm, and yet those goods may be regarded as sufficiently identified with the plaintiff in the minds of the public for an improper use of the plaintiff's trade name to amount to passing off. This has occurred, for instance, in relation to a named cleaning process in connection with which the plaintiff supplies chemicals to the tradesman who cleaned according to the process.[107]

In all cases thus far considered, however, the plaintiff is identified by his personal name or some trade name or mark. It is when this type of identification cannot be claimed to be implied in the defendant's statement that one enters the field of controversy. The recent case of *Serville* v. *Constance*[108] typifies the restrictive approach to this kind of problem. In refusing a remedy to the plaintiff boxer, a newcomer to England and the champion of Trinidad, against the defendant, a boxer who had fought in England for some time under the false description of champion of Trinidid, Harman, J. said:

> The action of passing-off, as I understand it, without going into the metaphysics of it or the origins of it, which appear to be doubtful enough, is essentially a cause of action arising out of confusion. That element seems to be entirely lacking here. There is no confusion here between Hector Constance and Hugh Serville . . . this is the opposite, so to speak, of a passing-off case — it is the unknown seeking remedies against the known.[109]

According to this point of view, the tort of passing off is not to be approached by asking whether the case before the court may be comprehended within the formula used to define the tort — this, presumably, is metaphysical — but by visualising what appears to the judge to be the typical passing off situation and then matching the situation before the court with it. If this is the correct approach, then the American description of the English tort as dealing with one typical commercial situation only is justified. The result of this approach in the particular case is an insistence that the public to whom the statement is made must have a picture of the plaintiff in their minds as a result of previous experience of him before the tort can be made out. Hence a deliberate falsehood about a matter in which the plaintiff might certainly be thought to have some interest is excluded from the field of the tort. And if it is excluded from the field of passing off on the ground that there is no reference to Hugh Serville the plaintiff, it seems that the falsehood would equally be excluded from the fields of defamation and injurious falsehood, in both of which torts a reference of the statement to the plaintiff must be proved.[110] This seems unsatisfactory and it is difficult to see why principle requires it; there can logically be no hard and fast view of what sort of a description is needed to identify the plaintiff and why should it not therefore be said that a reference to the champion of Trinidad is a reference to the plaintiff?

Copydex Ltd. v. *Noso Products Ltd.*,[111] another recent case, illustrates a readiness to contemplate a more expansive approach to this same question of the kind of reference to the plaintiff required for proof of the tort. Goods of the plaintiff were made the subject of a television demonstration whereby numerous persons might have been convinced of their utility, but in which the plaintiff's identity was not disclosed. The defendant, a rival company, falsely advertised its own goods as being "as shown on television." Vaisey, J. held that this was a

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[107] *Sales Affiliates Ltd.* v. *Le Jean Ltd.* (1947) Ch. 295.
[108] (1954) 1 W.L.R. 487, 71 R.P.C. 146.
[109] (1954) 71 R.P.C. 146, 148-149, (1954) 1 W.L.R. 487, 491.
[110] See as to injurious falsehood *Richards* v. *Butcher* (1890) 7 R.P.C. 288, esp. at 291.
[111] (1952) 69 R.P.C. 38.

proper case for an interlocutory injunction, though he added that "whether this is strictly passing off, whether it is strictly slander of title, or whether it is malicious falsehood I am not quite clear."[112] It is submitted that it ought to be held to be passing off, on the ground that a representation by the defendant that it was the firm whose product was the subject of the television demonstration was a representation that it was the plaintiff. The alternative suggestion that it might be slander of title or malicious falsehood would not provide an altogether satisfactory solution, especially in countries like New South Wales where actual damage has to be proved in an action for injurious falsehood to support either a claim for damages or for an injunction.

The older authorities, with one exception to which it may not be unreasonable to attach importance, support the restrictive view on this matter. In *Cambridge University Press* v. *University Tutorial Press*[113] the plaintiff, whose edition of a collection of essays was the edition prescribed for the University of London Matriculation Examination, failed in an action to restrain the defendant from asserting that its own edition of the essays was the prescribed edition. The defendant had indeed asserted that its own edition was the prescribed edition, and the prescribed edition was the plaintiff's, but Maugham, J. refused to draw the inference that the assertion therefore was tantamount to saying that the defendant's edition was the plaintiff's. Similarly in *Browne* v. *Freeman*[114] the Lords Justices of Appeal held that a vendor of chlorodyne could not be restrained by the actual inventor of the drug from representing that the defendant himself was the inventor. The defendant had indeed represented that he was the inventor, and the inventor was actually the plaintiff, but the Court refused to draw the inference that the assertion was therefore tantamount to saying that the defendant's goods were the goods of the plaintiff. Finally, in *Tallerman* v. *Dowsing Radiant Heat Co.*[115] Stirling, J. held that there was no passing off where all that the defendant had done was to represent that testimonials which had in fact been given to the plaintiff's system of hot air treatment had been accorded to its own system. The defendant, it will be seen, did represent that its system was the system to which the testimonials had been given, and the system to which the testimonials had been given was the plaintiff's system, but the judge did not consider that therefore the defendant had represented that its system was the plaintiff's.

The decision of the Court of Appeal in *Plomien Fuel Economiser Co. Ltd.* v. *National School of Salesmanship Ltd.*[116] runs counter to this line of authority. The acts complained of in that case are described in the following passage from the judgment of Lord Greene, M.R.:

> They (the defendants) represented that certain tests which had been made were tests in connection with the Defendant's economiser, whereas in fact they were tests in connection with the Plaintiffs' economiser. They represented that certain economisers which had been fitted for a number of purchasers, and which were in fact the Plaintiffs' economisers, were the Defendants' economisers, and in the correspondence which took place when they were negotiating for an order or had obtained an order for a trial, they repeated in the most barefaced and dishonest manner those suggestions, stating that a number of customers, said to be satisfied cus-

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[112] *Id.* at 39.
[113] (1928) 45 R.P.C. 335.
[114] (1864) 4 New Rep. 476, subsequent proceedings (1873) W.N. (Eng.) 178.
[115] (1900) 1 Ch. 1.
[116] (1943) 60 R.P.C. 209.

tomers, were customers for their article, whereas in fact they were customers who had ordered, and were satisfied with, the Plaintiffs' article.[117]

The legal consequences of these acts are expounded by Lord Greene thus:

> It is perfectly true that there is no evidence that a single person who purchased an economiser had ever heard of the Plaintiffs; but in passing-off there is no necessity that the person who is deceived should have known the name of the person who complains of the passing off. In many cases the name is not known at all. It is quite sufficient, in my opinion, to constitute passing off in fact, if a person minded to obtain goods which are identified in his mind with a certain definite commercial source is led by the false statements to accept goods coming from a different commercial source. Customers were coming with the intention of getting goods from a particular source, namely, the same source as those from which the satisfied customers had got their goods.[118]

Here, surely, in the words of Harman, J., in *Serville* v. *Constance*[119] is an example of the unknown seeking remedies against the known, but, unlike Harman, J., Lord Greene did not feel that this precluded a remedy. There was, in Lord Greene's view sufficient reference to the plaintiff's goods to satisfy the requirements of the action merely in the fact that the defendant's goods were said to have undergone certain experiences which in fact the plaintiff's goods had undergone. There was no other identification of the goods in the defendant's statement either by reference to their source or to their continuing distinctive characteristics.

It is not suggested that the controversy is concluded by the *Plomien Fuel Economiser Case*. There is therein no consideration of previous authorities on the point, a characteristic which, however, is shared by *Serville* v. *Constance*. And it is doubtful how far Lord Greene's remarks are essential to the decision, the chief ground of appeal in the case being on the question of quantum of damages. What is submitted is that the expansive interpretation of the definition is open and desirable. The adoption by the Courts of a policy of liberal interpretation of the definition would in regard to the present matter have large implications. In particular it appears to break down the distinction made by some judges and writers, particularly in the United States, between ordinary passing off and "inverse" or "upside-down" passing off. Chafee, for instance, distinguishes between ordinary passing off, consisting in passing off one's own goods as another's, and "upside-down" passing off consisting in passing off another's goods as if they were one's own.[120] *Dwarkadas* v. *Lalchand*[121] is an Indian example of what is usually regarded as falling within this field. The plaintiff had secured the Indian monopoly for the sale of grey shirtings made by Manchester mills. The defendant, a trade rival of the plaintiff, bought some material from him, cut off his trade mark, and sold it to wholesalers who believed that the defendant had direct connections with the manufacturers. This was held actionable. Here, from one point of view, the defendant had represented that what were actually the plaintiff's goods were his own goods. But the case is susceptible of a different analysis if one proceeds by analogy to the reasoning of Lord Greene in the *Plomien Fuel Economiser Case*. The defendant represented that his business was the business which obtained the goods from the manufacturers. The business

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[117] *Id.* at 213-214.
[118] *Id.* at 214.
[119] (1954) 71 R.P.C. 146, 149.
[120] Z. Chafee, "Unfair Competition" (1940) 53 *Harv. L.R.* 1289, 1310-1311.
[121] (1932) All Ind. Rep. Sind. 222.

which obtained the goods from the manufacturers was in fact that of the plaintiff. Therefore the defendant represented that his business was that of the plaintiff.

The English authorities on the subject of "inverse passing off" are indecisive. In *Green* v. *Archer*[122] the facts were that the defendant represented that a building which he had in fact designed in conjunction with the plaintiff was designed by himself alone, Denman, J. held that this statement could not be actionable unless it was defamatory. In this case the notion of "inverse passing off" was not discussed, but the idea was ventilated in *Bullivant* v. *Wright*.[123] The defendants had issued books containing photographs of aerial cable-ways which they claimed to have constructed but which actually had been built by the plaintiff's predecessor in title. Kekewich, J. said that in the ordinary case of passing off the plaintiff complained that the defendant had said his goods were the plaintiff's. Here the defendant had said the plaintiff's goods were his, which was a different position. However, he did not think that the case must therefore treated as one of injurious falsehood, as urged by the defendant, but would have granted an action on the analogy of passing off if the plaintiff had proved that he himself had built the cable-way. On the reasoning in the *Plomien Fuel Economiser Case* it could be argued that there is here no new tort by analogy to passing off, but an instance of a variety of the tort of passing off itself.

It is interesting to note that Chafee, in the article above cited, instances *International News Service* v. *Associated Press*[124] as an example of inverse passing off.[125] In this case, it will be remembered, the Supreme Court of the United States held that the defendants were liable for copying the plaintiffs' news from their newspapers and presenting it to the public as if it were the defendants' own. This case is not regarded in that country as "standardised passing off," but as authority for the existence of a wider principle of unfair competition and as one of the most forward looking cases within this field. It is a little startling to realise that such a case could not unreasonably be brought within the supposedly rigid and narrow English conception of passing off. The argument would be that the customer who buys the newspaper from the defendant thinks that it comes from a business which is identified in his mind as the business which collected and collated the news. This business is in fact that of the plaintiff.

It is, of course, possible to draw too broad inferences from this one example. Whatever advances are possible in relation to the English tort of passing off it is likely to remain a tort of misrepresentation, not even covering the whole field of business misrepresentations. It is hardly susceptible of expansion, as the American tort in the light of some of the words used in the *International News Service Case*, into a tort protecting against misappropriations of business values where there is no misrepresentation at all. But within its more limited field the tort may well be found to justify the remark of Dean Griswold that the common law develops in its original home as elsewhere.[126]

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[122] (1891) 7 T.L.R. 542.
[123] (1897) 13 T.L.R. 201.
[124] (1918) 248 U.S. 215.
[125] (1940) 53 *Harv. L.R.* 1289, 1310.
[126] Erwin N. Griswold, "The Reciprocal Recognition of Divorce Decrees" (1954) 67 *Harv. L.R.* 823, 827.