Unfair Competition and Penal Violations: Status in Ohio--Part I

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jurisdiction of the courts to issue the necessary decree is expressed or implied. In lieu of the property forfeiture provision of section 6 of the Sherman Act, state antitrust legislation, particularly of early vintage, provides for the forfeiture of domestic corporation charters and the revocation of foreign corporations' privilege of doing business in the state.

CONCLUSION

State antitrust enactments present a bewildering variety of minor variations in form. A close examination, however, reveals at least three distinct classifications. First, legislation is expressed in terms of monopoly avoidance and the preservation of competition in the market as a whole. This emphasis on the preservation of competition is a generality, since regard for the small businessman always has been an important element in antitrust philosophy and enforcement. The second classification pertains to the protection of the individual competitor. Here, statutes speak of competition as that of a regularly established dealer or even a person attempting to become a dealer. In this area, however, there is generally no reference to the actual or potential competition involved. The third classification is that of the unfair discrimination statutes. The statutes in this area speak of territory-splitting and favored dealing only in the broadest sense and leave much to be desired concerning what specifically is prohibited.

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Part I

He who successfully evades his legal obligations obtains a competitive advantage over his law-abiding rivals.

INTRODUCTION

Viewed Morally

When a competitor disregards either a penal or civil statute directed at the operation of his business, his noncompliance certainly places his competitor at a disadvantage. In principle, this is true regardless of first, the purpose of the statute; second, whether the statute is prohibitive or directive; and third, the financial cost incurred in observance of the

Texas, Vermont, Virginia, and Wisconsin. 4 TRADE REG. REP. §§ 30201-35585.
Thus, statutes which promote public health, safety, or welfare, raise revenue, or regulate competition are reducible to a single plane; an "unlawful" advantage is gained when each is avoided. Even more obvious is the fact that it is the intention of the unlawful competitor to succeed over his rival by acquiring this "unlawful" advantage. Professor Callmann has succinctly stated:

[O]ne may reasonably assume that quacks who disregard license requirements are not driven by a malevolent desire to endanger public health, even though the licensing statute may have been enacted as a means of minimizing that likelihood.

Reasonably viewed, are there any circumstances wherein the unlawful competitor should be allowed to retain this unlawful advantage? In a free competitive society, both logic and justice demand that the rewards must go to the competitor who succeeds over his rival by directing his skills towards improving business operations in a manner not prohibited by law. The competitor who directs his skills towards concealing penal violations to realize a competitive advantage over his rival must be condemned.

Present Status

The foregoing, while seemingly at least morally right, is not the law. Factually, a competitor may violate penal laws which result in a direct ascertainable loss to his rival for which the rival cannot collect damages. Moreover, he cannot enjoin future violations. Paradoxically, the only relief for the law-abiding competitor in many instances is also

1. Handler, Trade Regulation 787-88 (3d ed. 1960). The reader's attention is directed to 2 Callmann, Unfair Competition and Trade-Marks 926 (2d ed. 1950) (hereinafter cited as Callmann), for the most complete and comprehensive treatment that research revealed concerning unfair competition and penal violations. Professor Callmann's ideas were borrowed extensively and appear throughout this note. Interest regarding unfair competition through penal violations also has been expressed in other states. See Chicago B.A., The Laws of Illinois Relating to Competition 143-281 (1960); N.Y.S.B.A., Second Report of the Special Committee to Study the New York Antitrust Laws 2a-21a. See also Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

2. There certainly should be some de minimis doctrine to avoid spurious suits. "[T]he would be unwise to encourage vigilante activity or private detective work by competitors against each other. But continued violations of noncompetitive law do have an undeniable effect upon the competitive struggle." 1 Callmann 142. See also Chafee, Unfair Competition, 53 Harv. L. Rev. 1289, 1320 (1940). While the task of filing or keeping reports at the state's request is ordinarily a minimal one, witness the recent hue and cry from industry concerning cost directed at the FTC's request for more detailed reports on the interlocking relationships of many large corporations in reference to future antitrust action.

3. See Lane, Why Business Men Violate the Law, 44 J. Crim. L., C. & P.S. 151 (1953). Therein the author advances that "need" rather than "opportunity for gain" may be the explanation as to why businessmen run afoul of the law. See also Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423 (1963), where the author states: "[such unlawful competition] is calculated and deliberative and directed to economic gain."

4. 2 Callmann 929.
to violate the penal law. Free competition and its benefits thus are restored to the public only where both perform acts which the legislature previously has not declared unlawful. It obviously is time for both the legislature and the judiciary to take a fresh look at this quagmire of law which promotes the violation of one manifestation of public policy to serve another.

**Resulting Confusion**

A clear and cogent statement in explanation or justification for this status of the law does not exist. In terms of generalities, vague at best, the sources of confusion are "inconsistencies," "influences," and "vagueness."

"Inconsistencies" best describe the conflicting terminology, definitions, and policies with which the judiciary is forced to cope within the area. The judiciary alternately speaks of unfair competition, unfair trading, unfair methods of competition, trade restraints, and unfair trade practices. While these terms have a common genesis, their interchangeability varies with the jurisdiction. More important, a concise definition or theory of unfair methods of competition does not exist. It is simply a body of case law which developed out of the common law. Accordingly, few courts have analyzed the welter of precedents to ascertain governing principles where the plaintiff urges a new method of unfair competition. Most often, the traditional defense — the lawful competitor has not shown any "property" or "property right" — is cited summarily.


6. 1 CALLMANN 71-72. See 52 Ohio Jur. 2d *Trademarks, Tradenames, and Unfair Competition §§ 61-88* (1962), where the section on unfair competition includes the following topics: palming off, unethical and illegal trade practices, unfair advertising, spurious patent suits, substitution of goods, competing unfairly with former employer, violations of fair trade act, minimum prices, trading stamps, fair labeling, and trademark and tradename infringement.

7. 1 CALLMANN 71.

8. *Id.* at 151.

ily as dispositive of the issue.\textsuperscript{10} Finally, what policies are deserving of primary status in enforcement? Who is to be protected, the honest trader or the public? Or, is it sufficient to deny profits only to the dishonest trader? What acts or injuries should be sufficient to warrant relief? These are but a few policies which must be weighed and placed in their proper perspective.\textsuperscript{11} The policies which rightfully controlled competition in the past are not prima facie the correct policies today.

"Influences" best describes the confusion resulting from the roles that equity, tort law, criminal law, and stare decisis have played in the development of the law of unfair competition.\textsuperscript{12} Equity required some affirmative showing of irreparable damage and inadequacy of the remedy at law. Moreover, equity originally had little power to enjoin a crime. Tort law added the flavor of nuisances and negligence, which complicated the tort of unfair competition. Criminal law introduced the right of a jury trial when a criminal violation is charged. Equity was reluctant to enjoin the unlawful competitor since he would be denied this valuable right. Also, the equity court was hampered by the rule that criminal statutes were to be strictly construed. "Precedents" include the benevolent respect given to the common law. Relief, furthermore, was curtailed by such judicial and legislative clichés as the "legislature did not intend to protect the person or interest advanced by the plaintiff," or, the "legislature acts only through a valid exercise of police power in protection of public health, safety, and welfare."

Finally, "vagueness" describes the unascertainable boundaries of the law involved when an attempt is made to enumerate the multitude of penal violations which could result in an unfair trade practice. Given any penal law, a factual situation can be constructed wherein a violation gives a competitive advantage over a rival.

Were all such laws to be included in a casebook on unfair competition, we would find that the "seamless web" had enmeshed virtually the entire legal domain.\textsuperscript{13} A delimitation process is necessary, if only to stay within reasonable bounds in the length of this paper.\textsuperscript{14} A general division\textsuperscript{15} can be made

\begin{itemize}
  \item \textsuperscript{10} Pierstorff v. Board of Embalmers, 68 Ohio App. 453, 41 N.E.2d 889 (1941).
  \item \textsuperscript{11} Pollack, \textit{Unfair Trading by Product Simulation: Rule or Rankle?}, 23 OHIO ST. L.J. 74 (1962). See also \textit{CALLMANN} 30-55.
  \item \textsuperscript{13} \textit{HANDLER, TRADE REGULATION} 788 (3d ed. 1960).
  \item \textsuperscript{14} Professor Handler's delimitation restricted discussion to regulations governing selling methods. \textit{Ibid.} One court has observed: "Unfair competition can exist in any endeavor to which human ingenuity lends itself." Pocket Books v. Meyers, 178 Misc. 39, 33 N.Y.S.2d 39, 40 (Sup. Ct. 1942).
  \item \textsuperscript{15} An alternate useful division is: (1) Direct attack against a competitor, including dis-
concerning penal statutes and their relation to unfair competition: first, statutes specifically directed towards traditional forms of unfair competition, e.g., trademark infringement; second, statutes specifically declaring certain business methods as unfair competition which formerly were not subject to legal action, e.g., fair trading; and third, statutes which are not directed towards competition, but violation of which necessarily yields a competitive advantage to the wrongdoer, e.g., minimum wage requirements. The judiciary has difficulty enjoining criminal violations only when they arise from the latter class. It is principally to this class of penal statutes that this note is directed.

The order of topics is as follows: the development of penal violations as unfair methods of trade; the general noncompetitive penal statutes which are recognized as unfair methods of trade; and examples of Ohio decisions. The Ohio Revised Code has been researched for penal law violations which possibly could serve as the basis for an action in unfair competition. This note purposely does not distinguish between unfair competition, unfair methods of competition, or restraints of trade in reference to liability incurred because of penal violations.

UNFAIR COMPETITION — DEVELOPMENT

The judicial development of unfair competition has been reviewed most adequately by the leading authorities in the field. Sufficient for present purposes is the following brief summary. Unfair competition law developed judicially from the law of torts or civil wrongs. Two somewhat antithetical theories of tort liability developed at common law. First, all actionable wrongs must fall within one of the nominate torts, e.g., fraud, misrepresentation, disparagement of business, conspiracy, and inducing breach of contract. Second, courts had judicial discretion to recognize new claims of unfair competition. The latter theory embraced conduct prohibited by the nominate torts theory but was broader and independent of the rigid classifications. The early cases constructed generally boycott, price war, and litigation; (2) denying a customer the opportunity to judge freely, including use of force or threats of detriments, grant or promise of benefits, misrepresentation and misbranding, and false judgment; (3) misappropriation of a competitor's business values; and (4) unlawful conduct of business. See 1 CALLMANN 136.


17. Oppenheim, supra note 16, at 118.
eral outlines utilizing the two theories, which later cases attempted to supplement.

A third coexistent and independent method of relief recognized at common law was unfair competition. In its strictest interpretation, unfair competition only prohibited “passing off,” i.e., the use of an identical or confusingly similar mark to pass off goods as those emanating from another. This strict interpretation was expanded by the United States Supreme Court in International News Serv. v. The Associated Press. The Court held that unfair competition may include instances where one business misappropriates what equitably belongs to another. Presently, unfair competition generally means something more than “passing off.” Its exact boundaries, however, remain undefined.

In Aikens v. Wisconsin, Justice Holmes drew upon the rationale of the previous cases.

This doctrine, commonly called the prima facie tort theory, rejected the notion that all actionable conduct must fall within one particular tort.

The prima facie tort doctrine has been used chiefly to supplement,
not to supplant, the substantive rules of common law. Many states have
either adopted the doctrine or have showed signs of its influence; its
application has covered numerous diverse situations.

The law of unfair competition, stemming from the three doctrines
of nominate tort, prima facie tort, and unfair competition, is a growing
body of law which the judiciary and legislatures have expanded and
strived to keep in check.

UNFAIR COMPETITION AND PENAL VIOLATIONS — DEVELOPMENT

Parallel to the development of the above three doctrines, recognition
was sought for a doctrine of unfair competition through penal viola-
tions. The struggle was immense, however, due to the antithetical doc-
trines of the various fields of law which paradoxically served as the basis
for the tort. Advances in the commercial world presented new methods
of business. This in turn presented cases of first impression for the judi-
ciary. Invariably, a remedy at law was lacking, and the wronged com-
petitor turned to equity and its injunctive powers. Equity, however, re-
quired numerous prerequisites before extending its aid: the necessity of
a clear case; some "right, title, or interest"; a legal injury, usually irrepara-
able; exhaustion or inadequacy of other remedies such as a fear of multi-
plicity of suits; a balance of conveniences in favor of the plaintiff; and
an absence of acquiescence, waiver, or estoppel; all of which were subject
to the discretion of the court. Because of these technicalities of equity,
the wronged competitor seldom was successful during the early develop-
ment of unfair competition through penal violations.

27. Id. at 504 n.13. A case in which the influence was exerted in Ohio is Reichman v.
Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951).
28. See, e.g., Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943)
(false statements designed to induce breach of contract); Shell Oil Co. v. State Tire & Oil Co.,
126 F.2d 971 (6th Cir. 1942) (fraudulent statements designed to induce severance of business
relationship); Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913)
(simulated competition); Memphis Steam Laundry-Cleaners, Inc. v. Lindsey, 192 Miss. 224,
5 So. 2d 227 (1941) (malicious interference with trade via price cutting).
29. "[T]he judicial expansion of unfair competition doctrines has been conservative rather
than daring." Oppenheim, supra note 16, at 129. The warning against succumbing to the
"monopoly-phobia" also has been raised. Compare Judge Frank's description of the "mo-
nonopoly-phobia" as "both a symptom and a cause of a neurotic tendency which, in refusing
bravely to face facts, cannot yield intelligent advice," with Judge Learned Hand's comment
that "in the guise of protecting against unfair competition, we must be zealous not to create
perpetual monopolies," in Oppenheim, supra note 16, at 129. See Hayes, Unfair Compe-
tition — Another Decade, 51 CALIF. L. REV. 51 (1963); Lunsford, Unfair Competition — Uniform
State Law Needed, 44 VA. L. REV. 583 (1958); Pollack, A Projection for the Revaluation
of Unfair Competition, 13 OHIO ST. L.J. 187 (1952). See also Bunn, The National Law of
Unfair Competition, 62 HARV. L. REV. 987 (1949); Pollack, The Law of Trade Practices,
25 OHIO ST. L.J. 1 (1962); Note, Implying Civil Remedies from Federal Regulatory Stat-
30. 28 AM. JUR. Injunctions §§ 24-66 (1959); accord, 29 OHIO JUR. 2d Injunctions §§
12-44 (1958).
By contrast, equity's power traditionally had assisted the state in enjoining common-law public nuisances which also were crimes. Through legislation and the judicial process equity's power was expanded to include certain unlawful commercial activities, such as prostitution, gambling, bullfights, prize fights, and saloons. The power of equity supplemented the state's right to enjoin public nuisances.

Gradually, equity relaxed its requirements, and thoughts of protecting business values gained recognition. The United States Supreme Court gave protection to business values by denoting them as "property rights" incident to the lawful operation of a business. It also affirmed that equity, in certain instances, could enjoin the commission of a crime in the realm of lawful business operations. In a suit to prevent illegal and forcible obstruction of interstate commerce by a union organizer, the Court stated:

There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.

In a second labor case, involving pickets, the Court held that the plaintiff's business was a "property right," and free access to his plant was incident to the right.

Notwithstanding older authorities, it became common for the judiciary to allude that where the requisites of equitable relief were present and such relief was necessary to protect "property rights" incident to a

32. Intervention by equity into criminal matters has been increased. See Caldwell, Injunctions Against Crime, 26 Ill. L. Rev. 259 (1931); Dunbar, Government by Injunction, 13 L.Q. Rev. 347 (1897); Gregory, Government by Injunction, 11 Harv. L. Rev. 487 (1898); Leflar, Equitable Prevention of Public Wrongs, 14 Texas L. Rev. 427 (1936); Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 339 (1903); Ralston, Government by Injunction, 5 Cornell L.Q. 424 (1920). For a series of Notes concerning the use of the injunction to prevent crime, see Note, 21 Ky. L.J. 332 (1933) (catalog of criminal areas in which equity operates); Note, 21 Ky. L.J. 178 (1933) (nuisances); Note, 21 Ky. L.J. 73 (1932) (historical); Note, 20 Ky. L.J. 329 (1932) (prostitution, gambling, bullfights, prize fights, and saloons); Note, 20 Ky. L.J. 66 (1931) (historical). See also Note, 1953 Wis. L. Rev. 163 (repeated criminal violations).
34. In re Debs, 158 U.S. 564, 593 (1894) (relying on decisions permitting an injunction against a house of ill-fame). (Emphasis added.)
lawful business, equity would enjoin criminal acts.\textsuperscript{37} Furthermore, the right to conduct a business without unlawful interference was a "property right."\textsuperscript{38}

In 1938 the Restatement of Torts, concerned with unfair methods of competition in business, sought to

present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.\textsuperscript{39}

The Restatement\textsuperscript{40} promulgated rules regarding engaging in business "in good faith,"\textsuperscript{1} "for the purpose of causing harm,"\textsuperscript{42} and "in violation of legislative enactment."\textsuperscript{43} The latter rule is accorded the dubious distinction of being one of the major obstacles to the development of a principle that would allow competitors the right to seek injunctions against the violations of penal statutes.\textsuperscript{44}

Under the rule, liability is incurred only where "one of the purposes of the [penal statute] . . . is to protect the other against unauthorized competition . . . ."\textsuperscript{45} The plaintiff therefore must show that he is a member of the class intended as beneficiaries of the statute. When he is "intended to be protected" the plaintiff has a "property right." However, a very minimal number of property rights in business would exist if such was the law. Fortunately, all courts have not adhered to the Restatement's view.\textsuperscript{46} Unfortunately, some courts have blindly accepted the rule without even token analysis of the true issues before them.\textsuperscript{47}

Presently, the judiciary generally has required proof of a "property right," irreparable damage, and an inadequate remedy at law. It is submitted that the requirement of a "property right" is an outdated fiction which should be abandoned. When the judiciary "finds" a "property right," they are stating their decision, not the true rationale of their de-

\textsuperscript{37} Note, 7 Texas L. Rev. 638 (1929).
\textsuperscript{38} 5 POMEROY, EQUITY JURISPRUDENCE § 2024 (2d ed. 1919).
\textsuperscript{39} Introduction to RESTATEMENT, TORTS at vii (1938).
\textsuperscript{40} Id. at 519. The complete description of the Restatement Chapter was "Division Nine, Interference with Business Relations, Part 1, by Trade Practices, Chapter 34."
\textsuperscript{41} RESTATEMENT, TORTS § 708 (1938).
\textsuperscript{42} Id. § 709.
\textsuperscript{43} Id. § 710.
\textsuperscript{44} 2 CALLMANN 951.
\textsuperscript{45} RESTATEMENT, TORTS § 710 (1938).
cision — the conduct of the unlawful competitor simply is incompatible with fair business methods.

**Penal Violations as Unfair Competition — Generally**

A general classification of regulatory statutes wherein the issue of unfair competition through penal law violations has been raised includes the following: franchises, such as common carriers and public utilities; licenses, from law and medicine to garbage collecting; Sunday closing laws; lotteries; convict made goods; liquor laws; and false advertisements.

*Franchises*

The decisions involving franchises present a near unanimous rule: unlawful invasion by a competitor into a business area regulated by franchises will be enjoined at the insistance of a lawful franchise holder.48 This rule most often has protected common carriers, including railroads, buses and taxis, and public utilities, such as gas, oil, and water.49 The franchise decisions have evidenced very strong language protecting the law-abiding competitor, e.g., "destructive and forbidden competition,"50 and "acts detrimental to both the public and competitors."51 The basis for relief has varied, e.g., impairment of valuable property rights,52 public nuisance,53 special damage,54 and loss of a public service.55 Relief is not guaranteed, however. Some courts have required proof of "direct" injury,56 systematic diversion,57 or inadequacy of remedy at law.58 Also, recent cases have demonstrated a hesitancy by some

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48. The leading case is Frost v. Corporation Comm'n, 278 U.S. 515, 521 (1929), wherein the operation of an unlawful cotton gin was enjoined. The Court expressly granted the same rights to both exclusive and nonexclusive lawful franchise holders.

49. See 2 CALLMANN 931.


58. The timidity of some courts is evidenced when every possible equitable objection is circumvented: "where ... [a violation of a franchise] results ... in special damages to property rights which it would be difficult ... to ascertain, equity, in order to prevent a multiplicity of prosecutions, the legal remedy being inadequate, will grant complete relief by injunction." Long's Baggage Transfer Co. v. Burford, 144 Va. 339, 332 S.E. 355 (1926). (Emphasis added.)
courts to enjoin the unlicensed competitor where an administrative agency had some control. The franchise decisions generally have not allowed such defenses as "but for the franchise or license, anyone could lawfully compete," or plaintiff's "property right" was a "mere license."

**Licenses**

Judicial analysis of penal violations involving the unlicensed practice of an occupation or profession have produced diverse results. First, distinctions have been drawn between franchises, licenses, and privileges. Second, the emphasis placed on the purpose of the license requirement may be decisive. Third, the nature of the occupation or profession apparently is influential, relief being accorded in some instances only to "professions."

The first obstacle for the lawful competitor is standing to sue. Three separate and distinct proper parties have been recognized by the courts: private individuals, law enforcement officers, and regulatory agencies.

The licensed practitioner has attempted suit on three bases: interference with a property right, nuisance, and express authorization by statute. Two property rights generally are alleged: interference with the operation of the license and interference with profits.

Courts granting relief have done so on several theories: the licensed competitor has a franchise, valuable privilege, property right, special privilege, or a right in the nature of a franchise. When stand-
ing to sue is denied, courts have reasoned that occupational regulation stemming from a state's police power is designed to protect the public health and welfare. Thus a public, not private, right is invaded.\textsuperscript{73} Alternatively, the courts have held that plaintiff has not shown any "legislative intent" to confer a "property right."

Relief predicated upon the nuisance theory seldom is granted.\textsuperscript{74} First, the lawful competitor must show special harm,\textsuperscript{76} which is not easily proven.\textsuperscript{76} Second, where the nuisance issue has been raised, it has been avoided by either granting an injunction to protect a "property right" or denying standing to sue.\textsuperscript{77}

Suits by prosecuting officials also have raised difficult problems. Some courts distinguish between competent and incompetent unlicensed practitioners, enjoining only the latter.\textsuperscript{78} Others have enjoined every unlicensed practice as a nuisance per se.\textsuperscript{79} Where suit is based on the nuisance theory, a continuous violation must be shown.\textsuperscript{80} Thus, the unlawful competitor who performs isolated acts goes free. Prosecuting officials also are restricted by the right to jury trial. Some courts have hesitated to use unlimited injunctive power to enjoin all crimes.\textsuperscript{81}

Finally, successful suits by regulatory agencies are by no means assured. Courts generally strictly construe any power given to a regulatory agency. The agency may be required to show a continuous violation or a clear probability that future violations will occur.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{73} Note, 18 OHIO ST. L.J. 402, 405 n.14. In franchise and utility cases, the plaintiff's right to sue is not questioned despite the fact that regulation therein also results from a state's police power. It is reasoned that competition was intended to be regulated. \textit{Id.} at 405. The state, however, does not possess a "commerce power"; it regulates all activity through its police power. Thus, the test is still "statutory intent," and not "public" versus "private" right.
\item \textsuperscript{74} Note, 18 OHIO ST. L.J. 402 (1957).
\item \textsuperscript{75} PROSSER, TORTS §§ 70-74 (2d ed. 1955).
\item \textsuperscript{76} The obvious special injury is competitive financial loss. But proof of dollar loss by plaintiff and dollar gain by defendant, standing alone, may not suffice. \textit{Moon v. Clark}, 192 Ga. 47, 14 S.E.2d 481 (1941).
\item \textsuperscript{77} Note, 18 OHIO ST. L.J. 402, 407 (1957).
\item \textsuperscript{78} Arkansas State Bd. of Architects v. Clark, 291 S.W.2d 262 (Ark. Sup. Ct. 1956). See Note, 18 OHIO ST. L.J. 402, 410 n.40 (1957).
\item \textsuperscript{79} Boggs v. Werner, 372 Pa. 312, 94 A.2d 50 (1953).
\item \textsuperscript{80} Hudkins v. Arkansas State Bd. of Optometry, 208 Ark. 577, 187 S.W.2d 538 (1945) (criminal remedy adequate).
\item \textsuperscript{81} Other courts have avoided this problem by considering the statutes as primarily regulatory in nature and only incidentally penal. See Dean v. State ex rel. Bd. of Examiners, 233 Ind. 25, 116 N.E.2d 503 (1954).
\item \textsuperscript{82} See Note, 18 OHIO ST. L.J. 402 (1957), concluding that the licensed practitioner should not have any standing to enforce statutes regulating professions, since "public," not "private," rights are involved.
\end{itemize}
Concerning individual professions, lawyers generally have been allowed to enjoin unlicensed competitors.\textsuperscript{83} Several theories have been advanced as the basis for this relief.\textsuperscript{84} An occasional decision, however, has denied the individual practitioner standing to sue.\textsuperscript{85} Also, some courts have allowed suit only because it was on behalf of a class.\textsuperscript{86} Other courts have required a showing of special damages.\textsuperscript{87}

Optometrists

Optometrists, in certain instances, have been able to enjoin unlicensed competitors.\textsuperscript{88} The decisions, however, are characterized by discord.\textsuperscript{89} Undoubtedly the leading case denying relief is New Hampshire Bd. of Registration v. Scott Jewelry Co.\textsuperscript{90} Therein, the court listed a virtual catalog of defenses available to the defendant: the illegal practice of optometry was not a public nuisance; there was an adequate remedy at law; the statute did not intend to confer a "property right" or rights of a pecuniary nature; enforcement of the statute was a duty of public officials; but for the requirement of a license, anyone can practice; the purpose of the statute was to protect public health; and the license requirements can be changed by the state.\textsuperscript{91} Defenses such as these have plagued every profession that has sought to enjoin unlicensed practice.

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\item \textsuperscript{83} See, e.g., Unger v. Landlord's Management Corp., 114 N.J. Eq. 68, 168 Atl. 229 (Ch. 1933); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934).
\item \textsuperscript{84} See 2 CALMANN 945-46. "[I]t has been held, that they are franchise holders; or that they have a right in the nature of a franchise; or, at any rate, a valuable property right; and in some courts lawyers are especially protected as 'officers of the court.'" \textit{Ibid.} (Citations omitted.)
\item \textsuperscript{85} Hulbert v. Mybeck, 220 Ind. 530, 44 N.E.2d 830 (1942).
\item \textsuperscript{86} See Dworken v. Apartment House Owners' Ass'n, 38 Ohio App. 265, 176 N.E. 577 (1931).
\item \textsuperscript{87} Wollitzer v. National Title Guar. Co., 148 Misc. 529, 266 N.Y. Supp. 184 (Sup. Ct. 1933) (mere allegation of damage insufficient).
\item \textsuperscript{89} In McMurdo v. Getter, \textit{supra} note 88, at 364, 10 N.E.2d at 139, the court reasoned: "No question is made of the right of the plaintiff and the intervenor to relief if the defendants are practicing optometry illegally." (Citing Frost v. Corporation Comm'n, 278 U.S. 515, 521 (1929)). However, in Georgia Bd. of Optometry v. Friedmans' Jewelers, Inc., 183 Ga. 669, 189 S.E. 238 (1936), the state could not enjoin the operation of a store practicing optometry through licensed optometrists. The court reasoned the statute was designed to protect public health and safety and not to create a monopoly for individuals. \textit{Cf.} Essell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938) (Competitors, and not the state are, the proper party to bring suit.).
\item \textsuperscript{90} 90 N.H. 378, 9 A.2d 513 (1939).
\item \textsuperscript{91} The court recognized that injunction was proper, but limited its application to cases where (1) irreparable injury to a property right existed; (2) criminal proceedings were inadequate; (3) common-law remedies afforded inadequate protection; (4) unlawful practice was a public nuisance; or (5) plaintiff was in a position to show damage.
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Chiropodists

Decisions concerning chiropodists also have evidenced havoc. Unlicensed practice has been enjoined as a nuisance. But relief has been denied where plaintiff had a "mere" license and not a franchise or where a nuisance per se was not proven. Recently, a lower court surprisingly inferred that the real purpose of the competitor's suit was to restrain the commission of a crime and, therefore, the court refused to issue an injunction. Fortunately, on appeal, the court stated: "[W]e are convinced that there are sound, compelling reasons for bringing Illinois in line with the majority position and granting relief in a case of this nature."

Doctors, Dentists, Veterinarians, Photographic Examiners, Public Weighers, and Vessel Pilots

Doctors and dentists also have been granted relief. A veterinarian was denied injunctive relief against an unlicensed competitor. Similarly, the Board of Photographic Examiners was denied relief, as they had not shown a "private right" or an inadequate remedy at law. Public weighers and licensed vessel pilots, however, have successfully enjoined unlicensed competitors.

93. Mosig v. Jersey Chiropodists, 122 N.J. Eq. 382, 194 Atl. 248 (Ch. 1937); cf. Unger v. Landlord's Management Corp., 114 N.J. Eq. 68, 168 Atl. 229 (Ch. 1933) (lawyers have franchise amounting to a "property right").
96. Burden v. Hoover, 9 Ill. 2d 114, 137 N.E.2d 59, 61 (1956). The court noted that there are two prevailing theories upon which relief is granted: first, the license is a franchise in the nature of a property right which equity would protect; and second, the unlicensed practice is a public nuisance which equity would abate. "Other reasons have been suggested, such as the prevention of unfair competition, but rarely constitute the basis of a decision." Id. at 61.
100. Matthews v. Lawrence, 212 N.C. 537, 193 S.E. 730 (1937).
101. Davidson v. Sadler, 23 Tex. Civ. App. 600, 57 S.W. 54 (Civ. App. 1900). Plaintiffs alleged and the court agreed that there was irreparable damage and an inadequate remedy at law. There was no discussion of "property rights" or unfair competition.
Garbage Collectors

Unlicensed garbage collecting has been enjoined by the state.103 A garbage collector demonstrated foresight in a recent decision.104 Assumedly recognizing the difficulties in establishing his trade as a "profession" entitled to enjoin unlicensed competitors, the garbage collector had the city covenant that they would sue all violators. An alleged violator subsequently not only was enjoined in a suit by the city, but also was forced to respond in damages.

Lotteries

Lotteries as a method of unfair competition have proven to be a fertile area of litigation. As a general rule, lotteries may be enjoined at the instance of a competitor.105 In the leading case of Glover v. Malloska,106 the court stated:

It would astound the business world to hold that an established business is barren of property rights of a pecuniary nature . . . . No one should be permitted to employ criminal means in trade rivalry.107

Defenses such as "equity would not enjoin a crime,"108 and "the plaintiff has not shown a right or interest in future trade" have been overruled.109 Relief has been denied in certain instances where the competitor could

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108. "The injunction in this case was not issued on the theory that it was to restrain the appellant from committing a crime, but on the theory that the contemplated plan was a violation of law and that the same would be unfair competition of trade ...." Jones v. Smith Oil & Ref. Co., 295 Ill. App. 519, 523, 15 N.E.2d 42, 44 (1938).
109. "Yet a competitor may ask for the restraint of acts and conduct prohibited by law, that unreasonably interfere with, divert patrons from, and injure his business. . . . [The] plaintiff . . . is entitled to have his business protected from unfair competition produced by the unlawful means employed by this competitors . . . ." Featherstone v. Independent Serv. Station Ass'n, 10 S.W.2d 124, 128 (Tex. Civ. App. 1928).

The problem of computing damages in an action at law as compared to injunctive relief was recognized in California Gasoline Retailers v. Regal Petroleum Corp., 322 P.2d 945, 955 (Cal. Ct. App. 1958): "It is apparent that it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiffs . . . . [Plaintiffs] have an interest of pecuniary nature and rights of economic substance and economic value in the businesses which they conduct."
prove neither special injury\textsuperscript{110} nor that the loss of business was traceable directly to the growth of defendant's business.\textsuperscript{111} The lawful competitor also may be denied relief on the basis of the older equitable defenses.\textsuperscript{112}

In a recent decision, a violator in a suit by a competitor successfully avoided an anti-lottery statute with a somewhat novel defense. The court reasoned that the purpose\textsuperscript{113} of the statute was to prevent \textit{impoveryishment} of persons participating in the lottery and not to regulate competition. As indicated in the dissenting opinion, this is contrary to all previous reasoning.\textsuperscript{114}

\textit{Sunday Laws}

Repeated attempts to enjoin continuous violations of Sunday laws generally have been unsuccessful.\textsuperscript{115} Successful defenses have included absence of "property rights,"\textsuperscript{116} not a nuisance per se,\textsuperscript{117} deprivation of the right to jury trial,\textsuperscript{118} adequate remedy at law,\textsuperscript{119} no right to future trade,\textsuperscript{120} and no special damage.\textsuperscript{121} Relief has been granted, however, on the public nuisance theory.\textsuperscript{122}

\begin{itemize}
\item 110. Moon v. Clark, 192 Ga. 47, 14 S.E.2d 481 (1937). Plaintiff proved (1) loss of sales and (2) diversion of trade to the defendant. The court required proof of (1) public nuisance and (2) special damage. The court reasoned that plaintiff's proof did not demand a finding of special injury.
\item 112. Eckdahl v. Hurwitz, 56 Wyo. 19, 103 P.2d 161 (1940) (adequate remedy at law in police prosecution).
\item 116. York v. Yzaguirre, 31 Tex. Civ. App. 26, 71 S.W. 563 (Civ. App. 1902) (barbershop). This is a leading case within the area of unfair competition and penal violations wherein relief was denied.
\item 117. Motor Car Dealers Ass'n v. Fred S. Haines Co., 128 Wash. 267, 222 Pac. 611 (1924) (selling cars legal on other days).
\item 118. Ibid.
\item 119. State \textit{ex rel.} Taylor v. Iola Theater Corp., 136 Kan. 411, 15 P.2d 459 (1932). Although the action was brought by the state, the court required a clear showing of a nuisance. The dissent reasoned: (1) where a public statute is openly and continuously violated, a public nuisance existed; and (2) the continuous violations indicated there was no adequate remedy at law.
\item 121. Chapter 215, \textit{Associated Master Barbers \& Beauticians} v. Brown, supra note 120.
\item 122. Rose Theater, Inc. v. Lilly, 185 Ga. 53, 193 S.E. 866 (1937) (based on information filed by citizens).
\end{itemize}
Unfair Competition & Penal Violations

Convict-made Goods

A competitor generally can enjoin the sale of unmarked convict-made goods. One court reasoned that the penal statute was "civil in nature" when used to protect private pecuniary interests. Relief has been denied on grounds that the statute was enacted primarily for the protection of the public and that the lawful competitor has not shown any special damage.

Liquor Laws

Finally, there have been unsuccessful attempts to enjoin the unlicensed sale of liquor. The few cases arising in this area follow the general reasoning evidenced in other license cases, i.e., no special damage, no "property right" shown, or characterization as a mere license and not a franchise.

OHIO LAW — GENERALLY

In Ohio, as elsewhere, the general rule is that

a court of equity will not interfere by injunction to restrain or prevent the commission of criminal acts or the violation of the penal laws of the state merely upon the ground that the threatened act is illegal.

The courts have reasoned that as equity lacks criminal jurisdiction, its power of injunction is not the proper remedy to compel obedience to the

124. Choctaw Pressed Brick Co. v. Townsend, supra note 123. The court reasoned the purpose of the statute was twofold: first, protection of free labor against competition with convict labor; and second, protection of the public against deception in the sale of convict goods not labeled as such.
125. Smith v. Lockwood & Wood, 13 Barb. 209 (N.Y. 1852). This was the earliest case research revealed. Needless to say, it has been cited many times as the basis for denying relief.
129. Ibid. See 54 HARV. L. REV. 1247 (1941).
130. 28 AM. JUR. Injunctions § 157 (1959).
132. 19 AM. JUR. Equity § 142 (1939).
criminal laws of the state. Prosecution is thus the proper remedy even where lax enforcement can be shown. The defendant cannot be denied the right to a jury trial.

The foregoing limitations upon equity power are valid only where the plaintiff's case rests solely upon the violation of a penal law. Where he can demonstrate a civil or "property right," assuming irreparable injury and an inadequate remedy at law, equity has jurisdiction. This property or civil right generally will arise from principles of common law. Other sources include legislative enactments and judicial interpretation, i.e., a new form of unfair competition is recognized. It is stated generally that recognition of a new right does not alter principles of equity. Rather, the character of the right requires the application of equitable remedies to insure adequate enforcement or protection. Few decisions have discussed the fact that the new cause of action may, in fact, deny the right of trial by jury.

Thus, injunctive relief generally depends on the existence of a "property right." Ohio considers "all contract rights and civil rights of a pecuniary nature, whether technically property or not," as being within the term "property rights." Decisions indicate that the right of a person to pursue a business calling or profession is a "property right."
Regarding legislative enactments, where injunctive power is expressly included, little difficulty is experienced in granting relief to the lawful competitor.\textsuperscript{143} The perplexing issues arise where either the existence of a “property right” or the right to injunctive relief is not manifested.

\textbf{Ohio Decisions — Examples}

Considering only the area of unfair competition based upon penal violations, the total number of Ohio decisions is at a minimum. The large majority of Ohio cases involving “noncompetitive” statutes have been concerned with alleged unauthorized practice of a trade or profession.\textsuperscript{144} Outside of this area, the plaintiff has little chance of success. Even within the area of professional or trade protection, success is far from guaranteed. The earlier cases indicate a total lack of recognition of an injury to a “profession” through unlawful practice.\textsuperscript{145} The later cases only accord recognition of the “elite” professions.\textsuperscript{146}

\textit{Merz v. Murchison (Physicians)}

The early attitude of the judiciary is demonstrated in \textit{Merz v. Murchison}.\textsuperscript{147} A licensed physician sought to enjoin an unlicensed practice. He urged that the practice of medicine was a “property right” conferred by statutory license and that interference with such was unlawful competition.\textsuperscript{148} The court held that in absence of legal prohibitions, one person would be as free as another to practice medicine without interference from the courts; and that the benefit derived from the statute by those engaged in the practice of medicine was only “incidental.” “The

\textsuperscript{143} The issue of false advertising often is interwoven, as the unauthorized person in many instances attempts some promotional scheme. See Taylor \textit{v. New Sys. Prosthetic Dental Lab., Inc.}, 29 Ohio N.P. (n.s.) 451 (C.P. 1931).

\textsuperscript{144} Protection generally extends only to doctors, lawyers, and other professional men. See Fierstorff \textit{v. Board of Embalmers & Funeral Directors}, 68 Ohio App. 453, 41 N.E.2d 889 (1941) (no “property right” in embalmer’s license).

\textsuperscript{145} Id. at 460.
circle of competition may be narrowed ... but that is not the purpose of the law."

**Goodman v. Western Bank & Trust Co. (Attorneys)**

A contrary view was taken in *Goodman v. Western Bank & Trust Co.*, a case involving lawyers. The court rejected the view that the purpose of the statute forbidding unlicensed practice was to protect the community from the consequences of a want of professional qualifications. Instead, it held that the right to practice law conferred "a right to reap the privileges and emoluments of . . . [ones] office . . . free from competition of others, [who are] not such officers of the court . . . ." The following arguments of the defendant, previously traditional defenses, also were rejected: equity will not restrain the violation of a penal law; the criminal remedy was sufficient; absent a "property right" or special injury, equity would not interfere; and the defendant was deprived of a jury trial. Since the profession of dentistry has been protected by injunctive relief, it is unlikely that the *Merz* decision remains sound law today.

149. *Ibid.*, citing State v. Gardner, 58 Ohio St. 599 (1898) (constitutionality of statute requiring licenses for plumbers); Palmer & Crawford v. Tingle, 55 Ohio St. 423, 445 (1896) (constitutionality of mechanics lien). The court also relied on the now antidated authorities which traditionally denied relief: Lord Mansfield in *Rex v. Robinson*, 2 Burr. 799, 803 (K.B. 1759) (where a statute creates a new offense against conduct which previously was lawful and also provides a specific remedy, that remedy is exclusive); Smith v. Lockwood & Wood, 13 Barbour 209 (N.Y. 1852); York v. Yzaguirre, 71 S.W. 563 (Tex. Civ. App. 1902); 1 HIGH, INJUNCTIONS § 20 (4th ed. 1905) (injunction solely against diminution of profits not allowed).

150. 28 Ohio N.P. (n.s.) 272 (C.P. 1931).

151. *Id.* at 276. Once this argument was accepted, courts held that they would not interfere merely because the practice was unskillful. See *Merz v. Murchison*, 11 Ohio C.C.R. (n.s.) 458, 459-60 (Gir. Ct. 1908).


155. The court cited with approval: "This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property." *New Method Laundry Co. v. McCann*, 174 Cal. 26, 31, 161 Pac. 990, 991 (1916).

156. "It is obvious that if such objection is tenable none of the numerous proceedings could have been maintained wherein Courts of Equity have enjoined the commission of acts notwithstanding there was a punishment or penalty for the same." *Goodman v. Western Bank & Trust Co.*, 28 Ohio N.P. (n.s.) 272, 281 (C.P. 1931).


Unfair Competition & Penal Violations

The less "elite" professions or occupations have experienced difficulty in achieving relief from unlicensed practice. In *Perstorff v. Board of Embalmers*, a suit by competitors to enjoin unprofessional conduct of an unlicensed embalmer, relief was refused. The court stated:

A license, such as held by appellant, is not a *property right*; it is not a contract, and the Legislature may "impose new or additional burdens on the license," and reserves the right to "alter the license, or to revoke or annul it," even though the licensee has expended money in reliance thereon.

The decision, regardless of outcome, would have been far better reasoned had the court relied on decisions involving unlicensed professions or occupations rather than adding confusion by relying on cases involving public transportation. A reasonable assumption is that the court was legally unaware of the distinction.

*Floyd & Co. v. Cincinnati Gas & Elec. Co. (Discrimination)*

Partial fault emanates from the infrequency with which the judiciary is confronted with the subtleties arising from the tort of unfair competition. The judicial unawareness of unfair competition via penal violations is poignantly demonstrated in *Floyd & Co. v. Cincinnati Gas & Elec. Co.*

Plaintiff, a dealer in gas heating appliances, was denied the right to sue a gas company for the preferred treatment of the plaintiff's competitors in violation of statute. The statute forbids a utility from giving any undue or unreasonable advantage to any corporation. The defendant admitted it had wilfully failed to comply with an order of the Public Utilities Commission requiring all utilities to refrain from supplying gas to new or prospective consumers until the consumers first had made written application and obtained written consent from the utility. The court turned directly to the Restatement of Torts, section 286, as the basis for denying relief. This section denies liability when a violation of a legislative enactment is shown, unless "the intent of the enactment is . . . to protect an interest" of the injured as an individual and "the interest invaded is one which the enactment is intended to protect."

159. 68 Ohio App. 453 (1941).
160. *Id.* at 455, citing Sylvania Busses v. Toledo, 118 Ohio St. 187, 197, 160 N.E. 674, 677 (1928) (motor busses operating in violation of city ordinance). (Emphasis added.)
161. The court could have merely cited Merz v. Murchison, 11 Ohio C.C.R. (n.s.) 458 (Cir. Ct. 1908). Note also that the public transportation cases may involve a certificate of convenience, which is usually more significant than a mere license. See 2 CALLMANN 940 n.71.
163. CODE § 4905.35. A violation of this statute incurs a liability of treble damages. See CODE § 4905.61.
We think the sole purpose of the statute was to regulate public utilities in discharging the obligation they had assumed to consumers of gas. . . . It seems to us that the only interest contemplated was that which might result from the consumption of gas. . . . And the rules or orders were promulgated to regulate and conserve gas so as to enhance the ability of the defendant to supply it in such a way as to promote the public welfare to the greatest possible extent. . . . It was not the appliance business that the legislature intended to regulate and protect.\footnote{165}

Inexcusably, the court failed to cite a single decision involving unfair competition as precedent.\footnote{166}

\textit{Cuyahoga County Funeral Directors Ass'n v. Sunset Mortuary, Inc.}

Most recently, in \textit{Cuyahoga County Funeral Directors Ass'n v. Sunset Mortuary, Inc.}, an embalmer unsuccessfully sought to enjoin a competitor's unlawful advertisement. The Ohio Revised Code forbade the establishment of a funeral home other than in the name of a licensed funeral director.\footnote{167} Again, traditional defenses were honored by the court: the statute did not intend to bestow any franchise or "property right"; plaintiff had no right or interest injured which was different from that of the public; and the statute was a valid exercise of police power.\footnote{168}

The court added that the plaintiffs were not the real parties in interest and, therefore, had no standing to sue.

When a regulatory statute purportedly enacted under the police power of a state does not provide for its enforcement by private individuals, or create a course of action in private individuals, its enforcement ordinarily is left to the executive branch of the government.\footnote{169}

\footnote{165. Floyd & Co. v. Cincinnati Gas & Elec. Co., 96 Ohio App. 133, 120 N.E.2d 596, 603 (1954). (Emphasis added.) The court indicated that any other interpretation, \textit{i.e.}, an intent to regulate the appliance industry, would deprive the defendant of the privilege of operating its utility and as such, would be beyond a state's police power. \textit{Id.} at 144-45, 120 N.E.2d at 603-04. The court appeared relieved to discuss a "recognized" tort — the interference with contractual relations which plaintiff did \textit{not} raise. \textit{Id.} at 146, 120 N.E.2d at 604.}


"None of \textit{these cases} . . . involved a public utility bound to furnish a service or commodity against which the charge was made of a failure to perform causing damage to a non-user of the service or commodity. It seems to us that the most that can be said is that \textit{those} cases are of some value as examples of statutory interpretation." Floyd & Co. v. Cincinnati Gas & Elec. Co., 96 Ohio App. 133, 140-41, 120 N.E.2d 596, 602 (1954).

\footnote{167. 181 N.E.2d 309 (Ohio Ct. App. 1962).}

\footnote{168. Code \textsection{4717.11. The State Board of Embalmers and Funeral Directors had authority to make and adopt rules for the enforcement of Code \textsection{4717.17. See Code \textsection{4717.04.}

\footnote{169. Plaintiff did not question the validity of the statute. The court, however, in finding an absence of unfair competition, was prone to recite anything remotely connected with unfair competition to buttress its position.}

\footnote{170. Cuyahoga County Funeral Directors Ass'n v. Sunset Mortuary, Inc., 181 N.E.2d 309, 313 (Ohio Ct. App. 1962).}
This probably is the largest obstacle a plaintiff may encounter. Very few statutes expressly provide that an injured party may sue.\textsuperscript{171} The end result is that an injured plaintiff who belongs to the class protected by the statute is denied relief.\textsuperscript{172} The instant decision hampers the policing of a profession by its members in an area where public health is certainly involved.

**Ohio Revised Code Section 1.16**

The exact number and nature of specific acts which may be termed "unfair competition" or "unfair trade practices" remains unknown and undefined. It generally is recognized that the violation of certain criminal statutes may be a method of unfair competition. The problem is well stated as follows:

> When and to what are the courts willing to recognize the violation of such legal obligations as acts of unfair competition; under what circumstances will the violation of a statutory duty give rise not only to a civil action or a criminal prosecution instituted on behalf of the government or those who were intended as the beneficiaries of the statute, but also to a cause of action instituted by a competitor.\textsuperscript{173}

The legislature of the State of Ohio has most succinctly stated the "solution" to the above problem in the Ohio Revised Code section 1.16:

> Any one injured in person or property by a criminal act may recover full damages in a civil action, unless specifically excepted by law.\textsuperscript{174}

The statute purportedly guarantees full recovery in damages in a civil action to any person where (1) an injury (2) to a property right (3) proximately caused by the violation of a criminal act can be shown.\textsuperscript{175} Nothing in the previous enactments of section 1.16 or the

\textsuperscript{171} It is submitted that such a defense is unwarranted. Where an act is deemed illegal by the legislature and plaintiff's injury is eminent or actual he should not be required to wait for what may be the slow and sometimes unwilling machinery of the law or an administrative body.

\textsuperscript{172} The court recognized that the purpose of the statute was to prevent the unskilled from practicing a profession wherein contagious diseases are possible. Ignoring the unfair methods of competition aspect, clearly it is to the public benefit to allow the plaintiff to institute an action. An adjacent property owner, because of proximity, probably could demonstrate an injury different than that of the general public and thus could sue for an injunction. The competitor who loses only money is deemed socially inferior.

\textsuperscript{173} 2 Callmann 926.


\textsuperscript{175} The various annotations reveal little. See 1 Page's Ohio Rev. Code Annot. 13 (1953), citing Commissioners v. Bank of Findlay, 32 Ohio St. 194 (1877) and Howk v. Minnick, 19 Ohio St. 462 (1869). In Commissioners v. Bank of Findlay, supra, the court utilized a statute making certain acts unlawful which were not so at common law. The statute provided a specific remedy: a fine to the person injured of double the amount embezzled and
decisions arising thereunder suggests a different interpretation. The Ohio judiciary thus is equipped to deal with new forms of unfair trade practices.\textsuperscript{176}

Presently, the Ohio judiciary will enjoin penal violations of competitive penal statutes, absent an express grant of authority.\textsuperscript{177} It also will enjoin the violation of noncompetitive penal statutes where a "property right" is proven.\textsuperscript{178} The existence of a "property right" thus becomes the issue. And this test is operable, if at all, only where it is interpreted very liberally. The right to compete in business in absence of injury proximately caused by a penal violation should be a "property right." Viewed in this manner, all cases can be reduced to a simple principle.\textsuperscript{179}

[Treat] a violation of a penal statute affecting the conduct of business as an unfair method of competition, enjoinable at the suit of a competitor.\textsuperscript{180}

This principle would recognize that a business relationship exists

imprisonment of the wrongdoer. Held, the remedy given by statute was exclusive. The court cited the famous quote of Lord Mansfield: "That where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and a particular method of proceeding must be pursued and none other." (Rex v. Robinson, 2 Burr. 799, 803 (K.B. 1759)). Id. at 200-01. In the Howk case, the court held that the owner whose property had been stolen need not await the commencement of criminal proceedings before instituting a civil suit. Obviously neither case explains the full import of CODE § 1.16. Nor can this section be construed as limited to the principle that a tort is not merged in a felony. See Story v. Hammond, 4 Ohio 376 (1831). Witness the previous wording of § 1.16: "Nothing in Part Fourth [Penal laws] contained shall be construed to prevent a party injured, in person or property, from recovering full damages." 74 Ohio Laws 243 (1877), R. S. (Ohio) § 6803 (1882); "Nothing contained in the penal laws shall prevent anyone injured in person or property, by a criminal action from recovering full damages, unless specifically excepted by law." OHIO GEN. CODE § 12379. It is submitted that the full import of § 1.16 is unknown only because of disuse and unfamiliarity by members of the bar and the judiciary.

176. An unfortunate result was reached in Hackney v. Fordson Coal Co., 230 Ky. 362, 19 S.W.2d 989 (1929). The statute provides: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation ...." KY. REV. CODE § 446.070 (1963). Defendant paid its employees in scrip redeemable only at its store in direct violation of a penal statute — an obvious unfair trade practice. Plaintiff-competitor, having an actual sales loss of $3000, was denied recovery. Held, only employees could sue as the statute prohibiting scrip was for their benefit. The court seemingly was unaware of the property right incident to plaintiff's business and the injury to the consumer when he is denied the opportunity to judge freely. \textit{But see CHICAGO B.A., \textit{op. cit. supra} note 174. See also 1 CALLMANN 139.}

177. Renner Brewing Co. v. Rolland, 96 Ohio St. 432, 118 N.E. 118 (1917) (unlawful refilling of plaintiff's containers by competitor).


179. 2 CALLMANN 949.

180. Handler, \textit{Unfair Competition}, 21 IOWA L. REV. 175, 236, 290 (1936). (Emphasis added.) See 2 CALLMANN 949 n.95 (list of cases recognizing the above theory). Professor Callmann strenuously argues that the "property right" and "intent of statute" test should be disregarded in favor of injury to the "competitive relationship." \textit{Id. at} 950-51.
unfair competition & penal violations

whereby competitors are limited to lawful means of competition. It also would eliminate traditional defenses of another economic and judicial era which today serve no useful purpose other than to encourage unlawful competition.

The fiction of a “property right” proved useful, initially, as the procedural basis for equity intervention. But it also operates contrary to a substantive principle of equity of much older duration: a court of equity will accord relief where an injured plaintiff is without a remedy.

Recognizing competitor relationships would not be without precedent. The law already accords protection to many relationships, e.g., master and servant, principal and agent. Moreover, it provides a sound basis for the total doctrine of unfair competition — inequitable conduct which is enjoined as “unfair competition” even in the absence or presence of the conventional forms of competition.

The judiciary obviously should take a fresh look at any situation where the violation of a penal statute yields a profit at the expense of a competitor. As a minimum, the law abiding competitor should be allowed injunctive relief to prevent future losses.

The test of “intent of the statute” only provides a pitfall for the unwary. Theoretically, a state acts only through its police power, which is reserved to the protection of public health, safety, and welfare. Virtually every penal statute has as its primary purpose the protection of the public. Consider one purpose of trademark statutes: to protect the public against one businessman substituting his inferior goods for those of a competitor whom the public respects as a supplier of superior quality goods. Thus, even the penal statutes specifically intended to regulate competition are potential victims of the “intent of statute” doctrine.

To discard the “intent of statute” test and the “property right” test in favor of the business relationship test would not promote monopolies or greatly increase litigation. First, the penal violation must affect the business relationship before relief can be granted; second, antitrust law is a very effective policing agent; and third, the defendant who is enjoined from committing illegal acts only is forced to comply with the statute before such action proves detrimental to his law abiding competitor. Allowing injunctive relief as a minimum leaves open the issue of whether the penal law violator should be forced to respond in damages for the injuries caused to his law-abiding competitor.

It is submitted

181. See 1 CALLMANN 31-41.
182. See Callmann, Unfair Competition Without Competition?, 95 U. PA. L. REV. 443 (1947). “In the freedom of trade . . . the property concept is expendable. It may serve a useful purpose in strengthening the position of the plaintiff by adding the noncompetitive cause of action for property violation to the competitive one which is derived from the violation of duties arising out of the competitive relationship.” 1 CALLMANN 38.
that by reason of the hodgepodge character of the Ohio legislation on trade regulation, inferences as to the availability or unavailability of a civil remedy under Ohio Revised Code section 1.16 may not be drawn from the statutory granting or withholding of a civil remedy in connection with any particular criminal prohibition. As will appear hereinafter, civil damages are granted in connection with some criminal penalties.

The remainder of the note is devoted to a discussion of penal violations provided in the Ohio Revised Code which, given the proper factual situation, could involve an allegation of unfair competition. In considering the various Ohio code sections listed below, it is well to note that "an injunction against the violation of a penal statute would be entirely unnecessary if the penalty is adequate and is properly enforced."

**FALSE AND MISLEADING ADVERTISEMENTS**

The judiciary has experienced difficulties in recognizing false and misleading advertisement as a method of unfair competition. Where the dishonest competitor untruthfully infers through advertising or the like that his goods emit from his rival, relief may be obtained. The basis for an action is generally trademark or tradename infringement and the wrong is to the rival, i.e., a violation of a "property right" — the rival's name and good will. Where the dishonest competitor falsely infers the quality or capabilities of his own product, the wrong is considered a public wrong via the duped consumer, not an invasion of any "property right" of the rival. And, in many instances, the remedies of even the duped consumer are illusory.

184. 2 CALLMANN 956-57 nn.34 & 35, citing Corchine v. Henderson, 70 S.W.2d 766 (Tex. Civ. App. 1934) (district attorney joined because penal statute did not afford an adequate remedy); State ex rel. Taylor v. Iola Theater Corp., 136 Kan. 411, 415, 15 P.2d 459, 461 (1932) (dissent: "Probably the profits they had derived from the operation of the theater left a good margin after paying the fines imposed."). See also People ex rel. Shepardson v. Universal Chiropractors Ass'n, 302 Ill. 228, 134 N.E. 4 (1922) in which fifty-two unlicensed chiropractors formed an association to collect dues to pay fines, costs, and attorney's fees incurred in defending the members.

185. "The need for a clear-cut theory of unfair competition is particularly manifest in the field of false and misleading advertising. Because the courts have not yet evolved a concept of unfair competition consistent with the understanding of the honest trademan, they have almost completely abdicated their positions as arbiters of original jurisdiction. The cases that evidence this development make sad reading indeed." 1 CALLMANN 297. The leading case is American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900).


187. The issue is basic in that, traditionally, equity would issue injunctions only to protect "property rights." See discussion p. 139-41 supra.

188. See Dyer, supra note 186, at 10.
General Prohibitions

Generally, the courts which have granted relief to the rival have required proof of a "property right"; that is, the existence of a customer who the dishonest competitor has secured by falsely describing his goods, and who would have purchased from the complainant if the dishonest competitor had been truthful.\textsuperscript{189} The practicalities and probabilities of sustaining such a burden of proof are readily apparent.\textsuperscript{190}

The judiciary obviously disliked its solution requiring the rival to show the loss of a "sure" sale.\textsuperscript{191} It felt, however, that the legislature should provide the remedy.\textsuperscript{192} "[L]egislative efforts to protect honest competition and the public were inevitable,"\textsuperscript{193} but the results have been largely negative.\textsuperscript{194}

The statutes generally prohibit misrepresentations of fact. Convictions have been dismissed summarily merely by alluding to the advertisements as statements of opinion,\textsuperscript{195} or promissory statements,\textsuperscript{196} and not false advertisements. Moreover, because the statutes are penal in nature, the tendency has been for strict and narrow construction.\textsuperscript{197} Thus the judiciary, while disliking its own solution, has not looked with favor upon the legislature.

The quandary of the legislature is not unreal. The judiciary quickly enforces legislative intent directed against the more flagrant misrepresentations, such as those found in the food and drug acts. The obvious purpose of the statutes is the protection of public health and welfare through a valid exercise of police power.\textsuperscript{198} These areas, however, gen-

\textsuperscript{189} Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603 (2nd Cir. 1925), rev'd, 273 U.S. 132 (1927).


\textsuperscript{191} An exception to the rule that equity would not enjoin false statements concerning a product arose in cases of product description by geographical location. Obviously, the honest competitor had not lost a "sure" sale. The courts granted relief, however, but on the basis of passing off. See Gage-Dowans Co. v. Featherbone Corset Co., 83 Fed. 213 (W.D. Mich. 1897). For a discussion of this exception see 1 CALLMANN 299; Handler, False and Misleading Advertisement, 39 YALE L.J. 22, 37-38 (1929).

\textsuperscript{192} American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 284-85 (6th Cir. 1900). "Absent special legislation or evidence of disparagement or an intent to drive a competitor out of business, the Washboard decision has, with few modifications, remained the law of the land." 1 CALLMANN 300. (Citations omitted.)

\textsuperscript{193} 1 CALLMANN 309. For a digest of approximately 2,000 state statutes, see ROPER, STATE ADVERTISING LEGISLATION (1945). See N.Y.S.B.A., op. cit. supra note 174, at 7a. See also CHICAGO B.A. op. cit. supra note 174.

\textsuperscript{194} 1 CALLMANN 309-14. Therein the author criticizes the ease with which the statutes may be avoided.


\textsuperscript{198} "Judicial thinking has been molded by the still fascinating influence of the antiquated
erally are far removed from the area of unfair competition. Where the legislature desires to legislate in the area of unfair competition, however, and provides penal provisions, the judiciary seems less willing to enforce the same. 199

Analysis of the situation in Ohio begins with consideration of its statutory prohibition against fraudulent advertisement. 200 The original enactment, passed in 1913, 201 has given way to a recent amendment. 202 The amended statute seemingly indicates an attempt to eliminate a point of confusion in prior case law. 203 Specifically, the new statute excuses "such advertisement made in good faith without knowledge of its false, deceptive, or misleading character." 204 Hopefully, the new statute will place the burden of proof of good faith upon the advertiser.

The statute has been utilized in five cases, all of which were prosecuted by the state. 205 Research failed to reveal any recorded case where a third party competitor availed himself of the statute. A possible rationalization is that the code provides that any prosecutor may bring forms of action, that the courts are loath to deal with the realistic impact of advertising in trade, and that they have failed to appreciate the fact that advertising, if indeed it is an evil, is a necessary incident of our capitalistic economy." 1 CALLMANN 306-07. (Citations omitted.) Professor Callmann considers and rejects (1) mere moral wrong, (2) business cens

199. The problem is surprisingly shrouded in principles of constitutional law and fundamentals. Both the federal and state governments exercise commerce and police power. The federal government exercises an express commerce power over competition and a disguised police power derived from the commerce clause. The states, not having an express commerce power, have derived one from their police power. The success of the complainant depends in many instances on the "intent" of the statute. To summarily state as the basis of a decision that the statute merely is a valid exercise of police power in regulating public health, safety, peace, or morals without examination of statutory intent obviously is wrong. First, competition necessarily is exercised through a state's police power; and second, the intent of the statute possibly could be directed at regulation of both public health and competition. Clearly many statutory offenses exist because of the efforts of competitors and not because of the possible future victim's existence in the public at large. For an excellent discussion of the constitutional issues involved, see 1 CALLMANN 158-208. Whether statutory "intent" is the best test to determine whether a penal violation is an act of unfair competition is considered p. 142 supra.

201. OHIO GEN. CODE § 13193-2.
202. CODE § 2911.41 (Supp. 1962). The penalty is a fine of not less than $200 nor more than $1000 and/or twenty days imprisonment.
204. CODE § 2911.41 (Supp. 1962).
205. See note 18 supra.
suit to enjoin fraudulent advertisements. Moreover, the code also provides that one's business license may be suspended after conviction for fraudulent advertisement.

Specific Statutory Provisions

Food Products

Apart from the general prohibition against false advertising, other provisions in the Ohio Revised Code forbid false advertisement in specific industries or concerning certain products. Frozen desserts may not be advertised for sale if they contain any non-natural fats, oils, or paraffin. Also, "fresh eggs" must conform to certain standards before they may be advertised and sold as such.

Agricultural Seeds

The legislature also has been active in the area of seeds. In a most concise fashion, the code defines "advertisements," "false labeling," and "false advertisement." The code prohibits the use of the words "certified" or "registered" where such is false. Words such as "State tested" or "State" may not be used when advertising. It also forbids unlawful sale of seeds, and includes sales where a false or misleading advertisement has been used. Furthermore, "no person shall disseminate any false or misleading advertisement concerning agricultural or vegetable seed." The director of agriculture enforces the above provisions.

Naval Stores

The code forbids the use of any false or misleading means in the sale of "naval stores" or similar goods. Advertising turpentine or
The prohibition section enumerates the following products as protected from false advertising: "paints, mixed paints and similar compounds, naval stores, linseed oil or white lead." The prohibition protects the nature, quality, or identity of products sold or offered for sale. Aiders and abettors are treated as principle offenders.

**Tobacco**

The code also prohibits placing foreign substances in tobacco packages. The seriousness of the legislature is beyond question, the penalty being as much as six months imprisonment. It is further provided that the wrongdoer will "be liable in damages to the person injured for the amount of such injury." This is an excellent example of piecemeal legislation. Section 1.16 of the code also provides a civil remedy for injury proximately caused through the violation of any penal statute.

220. CODE § 3741.04(C).
221. CODE § 3741.07. The penalty is a fine up to $50 for the first offense; and $50 to $100 in fines and/or thirty to one hundred days imprisonment for subsequent offenses. CODE § 3741.99(A).
222. CODE § 3741.17.
223. Ibid. The penalty is a fine of not less than $100 and not more than $200 and/or up to thirty days imprisonment for the first offense; and not less than $200 and not more than $500 and/or six months imprisonment for subsequent offenses. CODE § 3741.99(F) (Supp. 1962).
225. CODE § 2911.24.
226. Ibid.
Wool

The sale of wool where foreign substances are contained within the fleece is prohibited.\textsuperscript{227} Case law indicates that a successful prosecution requires the indictment to aver that the fleeces were wrapped in a manner calculated to defraud, and it must describe the substances alleged to have been concealed in the fleeces.\textsuperscript{228}

Crockery Ware and Pedigrees

The adulteration of materials used in the manufacture of crockery ware is prohibited.\textsuperscript{229} An act in violation of the statute must be done "purposely and maliciously," and the statute forbids the addition of "cobalt, soap, salt, sand, earth, or other material which tends to adulterate or injure it."\textsuperscript{230} Violators are subject to one to seven years imprisonment! Finally, the code forbids the willful use of a false pedigree or false certificate of sale for purposes of deceiving.\textsuperscript{231}

Weights and Measures

Similar to the antiadulteration statutes are those controlling weights and measures. It is clear that legislative interest in either of these areas is concerned primarily with protecting the public rather than with regulating competition. Yet it is hard to imagine a more substantial method of unfair competition than where one competitor may increase his profit by ten or twenty per cent, and thus increase his business capital and opportunities by secretly selling short amounts.

A false or short weight is prohibited.\textsuperscript{232} Case law indicates that intent or knowledge is not a necessary element of the offense of selling by false or short weight.\textsuperscript{233} Generally, the weight must be marked on the package.\textsuperscript{234}

The code defines the standard weight of a bushel and lists twenty-two commodities and their bushel weight.\textsuperscript{235} The articles therein defined "shall, when dealt in by the bushel, be bought and sold upon such actual

\textsuperscript{227} CODE § 2911.25. The penalty is a $25 to $100 fine and/or thirty to ninety days imprisonment.

\textsuperscript{228} Hogue v. State, 3 Ohio C.C.R. (n.s.) 315 (Cir. Ct. 1902).

\textsuperscript{229} CODE § 2911.33.

\textsuperscript{230} Ibid.

\textsuperscript{231} CODE § 2911.20. The penalty is a fine of $25 to $500 and/or six months imprisonment.

\textsuperscript{232} CODE § 1327.42. The penalty is a fine up to $500. CODE § 1327.99(G).

\textsuperscript{233} State v. Weisberg, 74 Ohio App. 91, 55 N.E.2d 870 (1943).

\textsuperscript{234} CODE § 1327.43. The penalty is a $25 to $500 fine. CODE § 1327.99(H).

\textsuperscript{235} CODE § 1327.17.
bulk weights." Wheat dealt with by a separate statute must be sold by standard measurement. Solid foods of certain types must be sold only by weight or by count, depending upon their nature. Other solid foods, such as wheat and cornflour, unless sold in bulk, must be sold in standard weights or containers.

**Misrepresentation of Character of Status of Business**

*Generally*

Misrepresentation within this area may occur in a variety of forms. The more obvious forms include misrepresentation as to the size, age, or nature of businesses. Within Ohio, regulation is directed primarily at business corporations and financial institutions. A typical financial regulation which is penal in nature provides that an unauthorized person shall not represent that he can transmit money or its equivalent to a foreign country. Also, all persons, firms, or corporations engaged in the sale of transportation services to foreign countries must post a bond with the state auditor prior to commencing business.

**Specific Business Regulations**

**Banks**

The code prohibits anyone from publishing "a false statement or report relating to the financial condition of a bank with the intent to defraud or injure it or another person or corporation." Bank personnel are prohibited from accepting funds as a deposit where it is known that

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236. *Ibid.* The penalty is a fine of up to $100 and/or not more than six months imprisonment. CODE § 1327.99(A). Further, the president of a corporation or company who violates § 1327.17 may be imprisoned for six months.

237. CODE § 1377.18. The penalty is a fine of $25 to $100 and/or thirty days imprisonment. CODE § 1377.99(B). The constitutionality of this statute has been questioned in Yeazill v. State, 20 Ohio C.C.R. (Cir. Ct. 1898). The court reasoned that as the statute protected only the original producer of the wheat, this was an unreasonable discrimination and not a reasonable classification.

238. CODE § 1327.19. The penalty is a fine of $25 to $50 for the first offense; $50 to $100 for a second offense; and $100 to $200 for subsequent offenses. CODE § 1327.99(F).

239. CODE § 1327.41. The penalty is a $25 to $500 fine. CODE § 1327.99(F).

240. 1 CALLMANN 368-79.

241. CODE § 1115.17. The penalty provides a $5000 maximum fine and/or ten years imprisonment. CODE § 1115.99(A) (Supp. 1962).

242. CODE § 1115.18(A). The penalty provides a $500 maximum fine and/or six months imprisonment. CODE § 1115.99(B) (Supp. 1962).

243. CODE § 1115.19. The penalty provided is a $10,000 maximum fine and/or one to thirty years imprisonment. CODE § 1115.99(C) (Supp. 1962). The statute is directed at officers, employees, agents, and directors. The case law under this statute reveals prosecutions for embezzlement and misapplication of funds only.
the bank is insolvent. In *Pavey v. Fulton,* a depositor who could prove a violation of this statute nevertheless was not given a superior right to the refund of his deposit. He had failed to state a cause of action! Rather, he belonged in the same class as other depositors because of the absence of a "legislative intent" to import special protection. Ohio Revised Code section 1.16 was not considered. Obviously, section 1.16 would have permitted recovery in this instance if it has any effect at all.

The code also provides that "no bank shall advertise by newspaper, letterhead, or in any other way, a larger capital than has actually been paid in." Clearly this section is intended to prevent banks from securing confidence from the investing public to which they are not entitled. Finally, banks not organized under the laws of Ohio cannot use the word "State" as a portion of their name or title.

Loan Associations

Chapter 1153 of the code is directed against building and loan associations. Any declaration of a greater dividend than actually has been earned, for "the purpose of deceiving the people or defrauding the members of the association," is forbidden.

The code also forbids solicitation of businesses by loan associations. A remedy is provided, in that violators of sections 1153.02 through 1153.06 "shall be liable to the person injured to the extent of damage incurred." If section 1.16 has any effect, why have section 1153.06? Is this merely an inadvertent product of piecemeal legislation? Upon consummation of each sale, an itemized statement of sales must be kept. It also is illegal for anyone to "wilfully render any false item-

244. CODE § 1115.21. The penalty is a maximum fine of $5000 and/or one to five years imprisonment. CODE § 1115.99(E) (Supp. 1962).
247. For other prohibitive practices in banking, see Annot., 81 A.L.R.2d 1280 (1962) (payments under ostensibly independent contract as usury); Annot., 57 A.L.R.2d 630 (1958) (taking or charging interest in advance as usury).
248. CODE § 1153.02. The penalty is one to ten years imprisonment. CODE § 1153.99(A).
249. CODE § 1153.03. The penalty is one to ten years imprisonment. CODE § 1153.99(A).
250. CODE § 1153.07.
251. CODE § 1153.08.
252. CODE § 1153.09.
ized account..."254 The above discussed statutes are for the most part devoid of judicial interpretation.

MISREPRESENTATION OF PROFESSION

General Protection

Comparatively, this area of unfair competition has undergone substantial development. This is primarily due to the franchise or license theory. The judiciary generally recognizes a "property right" in a franchise or license in certain areas which equity will protect.255 The Ohio legislature has been quite active in the regulation of professions and occupations. Again, however, case law is at a minimum regarding the amount of protection which any individual occupation or profession may receive from the judiciary when competition exists from persons who have not complied with the regulations.

Specific Professions

Accountants

Accountants are protected from the competition of those not possessing valid certificates.256 The code further forbids false advertisement, such as use of the letters "CPA" or symbols of similar import,257 and prohibits the unlawful practice of accounting.258 The code specifically provides an injunctive remedy.259 It is to be noted that false advertisement does not carry a penalty. The unlawful practice prohibition, however, provides a fine of $25 to $500 and/or a maximum of one year imprisonment.260

Architects

The statutes regulating architects demonstrate a second method of protection commonly employed by the legislature. One section is named "Prohibitions," and it provides that all other sections within the chapter shall not be violated.261 This method contrasts with prescribing penalties selectively throughout the chapter, as is done with accounting.

254. Code § 4711.03. The penalty is a $10 to $200 fine. Code § 4711.99(A).
255. See 2 Callmann § 63.2(b). The areas most generally protected are medicine and law. E.g., Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N.W. 784 (1936) (optometrist); Kentucky State Bd. of Dental Examiners v. Payne, 213 Ky. 382, 281 S.W. 188 (1926) (dentist).
261. Code § 4703.19. The penalty is monetary only, a $50 to $200 fine for a first of-
Attorneys

Attorneys also are given substantial protection. False representation as an attorney is forbidden. The unlawful practice of law has been recognized as a method of unfair competition. The judiciary has reasoned that an equitable remedy is allowable over and above a legal remedy, and equity will afford the legal profession protection from lay competition.

Auctioneers, Barbers and Astrologists

Auctioneers must procure licenses. Barbers must possess certificates of registration. Any attempt to obtain a certificate or practice barbering by fraudulent misrepresentation is forbidden, as is barbering on Sunday. The practices of astrology, fortune telling, clairvoyance, and palmistry also require licensing.

Commission Merchants and Cosmetologists

Commission merchants must use accounting forms. Cosmetologists must be licensed and falsely representing oneself as such is punishable. Practice of cosmetology in any room used for residential purposes is prohibited. Debt pooling companies must operate under a license and stiff penalties are imposed for non-compliance.

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262. CODE § 4705.07 (penalty — $25 to $500 fine).
263. CODE § 4705.08 (Supp. 1962). The penalty is a $100 to $1000 fine and/or thirty days imprisonment. CODE § 4705.99(B) (Supp. 1962). See Warren, Solicitation of Legal Services — a Crime, 22 OHIO ST. L.J. 691 (1960).
265. Ibid.
266. See Goodman v. Western Bank & Trust Co., 28 Ohio N.P. (n.s.) 272 (C.P. 1928).
267. CODE § 4707.01 (penalty — $100 to $500 fine).
268. CODE § 4709.08.
269. CODE § 4709.22(B), (C) (penalty — $25 to $200 fine). CODE § 4709.99(A).
270. CODE § 4709.24. The penalty is not less than a $15 fine for the first offense and $20 to $30 in fines and/or twenty to thirty days imprisonment for multiple offenses. CODE § 4709.99(B).
271. CODE § 2911.16. The penalty is a $25 to $100 fine or imprisonment for thirty to ninety days or both.
272. CODE § 4711.99. The penalty is a $10 to $200 fine.
273. CODE § 4713.20.
274. Ibid.
275. CODE § 4713.21. The penalty for violating either CODE § 4713.20 or CODE § 4713.21 is a $10 to $100 fine.
276. CODE § 4710.02 (Supp. 1962).
277. CODE § 4710.99 (Supp. 1962). (Penalty — $50 to $1000 fine and/or for thirty days to six months imprisonment.)
Dentists

Dentists must possess a license278 and this license must be displayed.279 Further, a dentist may practice only under an individual name.280 Employment of an unlicensed dentist is unlawful281 as is any misrepresentation, impersonation, or submission of a false application.282 A dental hygienist is held to certain qualifications283 and false or counterfeit documents are unlawful.284 The use of a diploma or license with intent to defraud also is punishable.285

Funeral Directors and Gristmillers

There is a prohibition against engaging in the business of embalming and funeral directing unless duly licensed.286 And unlicensed embalming is forbidden.287 Gristmillers also are regulated.288 Assumedly, the prohibition against excessive tolls is for the protection of the public.289

Nurses

Nurses must meet certain requirements290 and may not practice without a current license.291 Unqualified persons may not represent themselves as "registered nurses" or use the letters "R.N."292 Nor may such persons represent themselves as a "licensed practical nurse" or use the letters "L.P.N."293 No person may sell or fraudulently obtain or furnish any nursing diploma, license, or registration.294
Optometrists

The practice of optometry requires a license. An individual has been allowed to sue to enjoin the unlawful practice of optometry. The purpose of the statute, however, is to protect the public from the unskilled and not to prevent unfair competition. In practice, therefore, only “valuable” licenses are the subject of unfair competition actions.

Pawnbrokers

Pawnbrokers are subject to regulation. A common penalty is provided for any violation of the code relating to pawnbrokers. Revocation of a license also is possible.

Pharmacists

Pharmacists must have certificates and must display the same. Retail drug stores must be conducted by legally registered pharmacists. The selling of drugs by non-registered persons is forbidden. Swearing falsely before the State Board of Pharmacy is a felony, as is the use of fraudulent certificates. Penalties also are provided for the unlawful sale of “dangerous” drugs.

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295. CODE § 4725.02. Penalty is a $500 fine for the first offense and $500 to $1000 and/or six months to one year imprisonment for subsequent offenses. CODE § 4725.99.


298. CODE §§ 4727.01-.99.

299. CODE § 4727.99. The penalty is a $50 to $200 fine for the first offense, and not more than a $500 fine and/or six months imprisonment for subsequent offenses.

300. CODE § 4727.16. The responsibility of enforcement is given to the division of securities. CODE § 4227.14. It is open to question whether an individual could bring suit.

301. CODE § 4729.22 (Supp. 1962). The penalty is five to twenty days imprisonment. Each day’s violation constitutes a separate offense. CODE § 4729.99(A) (Supp. 1962).

302. CODE § 4729.27. This statute was upheld as a valid exercise of police power in State v. Knecht, 28 Ohio N.P. (n.s.) 1 (P. Ct. 1930).

303. CODE § 4729.28.

304. CODE § 4729.35 (penalty — one to three years imprisonment). CODE § 4729.99(D) (Supp. 1962). An example of piece-meal legislating is found in CODE ch. 4729. Requirements for the sale and advertising of alcohol are stated in CODE §§ 4729.32-34 and are hardly related to pharmacy.

305. CODE § 4729.61 (Supp. 1962). The penalty is a $100 to $300 fine for the first offense and $300 to $500 in fines for subsequent offenses. CODE § 4729.99(F) (Supp. 1962).

306. CODE § 4729.51(A), (B), (D), (E) (Supp. 1962). The penalty is a $50 to $100 fine for the first offense and $100 to $300 in fines for subsequent offenses. CODE § 4729.99(E) (Supp. 1962).
Physicians

Physicians are treated extensively. The practice of medicine or surgery, or midwifery, or osteopathy without a certificate is prohibited. Filing a false diploma or forged affidavit, or swearing falsely before the state board is forbidden. Issuing or selling a false medical diploma also is forbidden. A physician may neither issue a false certificate of disability nor make an unlawful prescription for intoxicating liquors. A chiropodist is regulated in his advertisement, but no penalty is provided. He must, however, under penalty, have a certificate.

Physical Therapists

Physical therapists must be registered, the non-registered are prohibited from representing themselves as such by using such letters as "Ph." or "P.T." Fraud or deception in applying for a certificate is prohibited.

Professional Engineers and Real Estate Brokers

Professional engineers must be registered. Real estate brokers must be licensed and only the licensed may advertise as such. Illegal

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307. CODE § 4731.41. The penalty is a fine of $25 to $500 for the first offense and $50 to $500 for the first offense and $50 to $500 in fines and/or thirty days to one year imprisonment for subsequent offenses. CODE § 4731.99(A) (Supp. 1962).

308. CODE § 4731.42 (penalty — fine of $25 to $100). CODE § 4731.99(B) (Supp. 1962).

309. CODE § 4731.43. The penalty is a $25 to $500 fine and/or thirty days to one year imprisonment. CODE § 4731.99(C) (Supp. 1962).

310. CODE § 4731.44. The penalty is one to five years imprisonment. CODE § 4731.99(D) (Supp. 1962).

311. CODE § 4731.45. The penalty is one to five years imprisonment. CODE § 4731.99(D) (Supp. 1962).

312. CODE § 4731.46. The penalty is a $100 to $1000 fine and/or one to three years imprisonment.

313. CODE § 4713.47. The penalty is a $100 to $1000 fine and/or one to three years imprisonment.

314. CODE § 4731.48 (penalty — up to a fine of $50). CODE § 4731.99(F) (Supp. 1962).

315. CODE § 4731.49. The penalty is a fine of $200 to $500 for the first offense and $500 to $1000 in fines for subsequent offenses. CODE § 4731.99(G) (Supp. 1962).

316. CODE § 4731.59 (Supp. 1962).

317. CODE § 4731.60. The penalty is a fine of $25 to $500 and/or thirty days to one year imprisonment. CODE § 4731.99(H) (Supp. 1962).

318. CODE § 4731.73(A) (Supp. 1962). The penalty is a fine of $25 to $500 and/or thirty days to one year imprisonment.

319. CODE § 4731.73(B) (Supp. 1962).

320. CODE § 4731.72 (Supp. 1962). The penalty is a $25 to $500 fine and/or thirty days to one year imprisonment. CODE § 4731.99(I) (Supp. 1962).

321. CODE § 4733.22. The penalty is a fine of $100 to $500 and/or not more than ninety days imprisonment. CODE § 4733.99(A) (Supp. 1962).

322. CODE § 4735.02 (Supp. 1962). The penalty is a $25 to $1000 fine and/or one year imprisonment. CODE § 4735.99(A) (Supp. 1962).

323. Ibid.
commissions may lead to license revocation,\textsuperscript{324} no further penalty being provided. Any guarantee of resale profit on the sale of cemetery lots also is forbidden.\textsuperscript{325}

**Second Hand Dealers and Steam Engineers**

Second hand dealers have prescribed duties\textsuperscript{326} under threat of penalty.\textsuperscript{327} The code expressly forbids dealing with minors or dealing at certain hours.\textsuperscript{328} Steam engineers must exhibit a license\textsuperscript{329} and any violation of Chapter 4739 of the code incurs a penalty.\textsuperscript{330}

**Veterinarians**

Veterinarians must have a license\textsuperscript{331} procured in absence of fraud\textsuperscript{332} The code contains certain health requirements\textsuperscript{333} and forbids any false or misleading advertisement.\textsuperscript{334}

\textbf{WILLIAM T. BULLINGER}

\textbf{Part II}

\textbf{LABELS AND BRANDS}

The Ohio Legislature regulates the branding and labeling of many products, primarily those items for human consumption. In addition, many miscellaneous sections of the Ohio Revised Code are devoted to the branding and labeling of such non-food items as silver and bedding. This section of the note will point out regulatory sections pertaining to

\begin{itemize}
  \item \textsuperscript{324} \textsc{Code} § 4735.20 (Supp. 1962).
  \item \textsuperscript{325} \textsc{Code} § 4735.22. The penalty is a fine of $100 to $1000 and/or six months imprisonment. \textsc{Code} § 4735.99 (B).
  \item \textsuperscript{326} \textsc{Code} § 4731.01. See Annot., 45 A.L.R.2d 1391 (1956).
  \item \textsuperscript{327} \textsc{Code} § 4737.99.
  \item \textsuperscript{328} \textsc{Code} § 4737.03.
  \item \textsuperscript{329} \textsc{Code} § 4739.08 (penalty — up to a fine of $5). \textsc{Code} § 4739.99 (A).
  \item \textsuperscript{330} \textsc{Code} § 4739.09. The penalty for first offenses is a fine up to $15 and for subsequent offenses, $10 to $100 in fines. \textsc{Code} § 4739.99 (B).
  \item \textsuperscript{331} \textsc{Code} § 4741.19 (Supp. 1962). The penalty is a $100 to $300 fine and/or ninety days imprisonment for the first offense; $300 to $500 in fines and/or five months imprisonment for subsequent offenses. \textsc{Code} § 4741.99 (Supp. 1962).
  \item \textsuperscript{332} \textsc{Code} § 4741.18 (Supp. 1962). The penalty is a $100 to $300 fine and/or ninety days imprisonment for the first offense; $300 to $500 in fines and/or five months imprisonment for subsequent offenses. \textsc{Code} § 4741.99 (Supp. 1962).
  \item \textsuperscript{333} \textsc{Code} § 4741.22 (Supp. 1962).
  \item \textsuperscript{334} \textsc{Code} § 4741.21 (Supp. 1962). However, no penalty is provided. \textit{Cf. Code} § 4741.27 (Supp. 1962), which limits the use of the name of a prior licensee to two years. A veterinarian can trade \textit{legally} on the good name of his predecessor for only two years. However, no penalty is provided.
\end{itemize}
branding and labeling and their applicable penal provisions. It must be remembered, of course, that these regulations could be used in conjunction with Ohio Revised Code section 1.16.¹

**Food**

The Ohio Legislature enacted a new provision against misbranding in 1957 which prohibits the “manufacturing, sale, or delivery, holding or offering for sale of any food” that is misbranded.² Food is deemed “misbranded”³ if, for example, its labeling is false or misleading,⁴ it is sold under the name of another food,⁵ or its container is misleading.⁶

**Bread**

In addition to the above general provisions, the code sets forth branding regulations for special varieties of foods. For instance, bread is specifically regulated by the code.⁷ Each loaf of bread must be labeled to show its weight and the name of its manufacturer. The label must be either on its wrapper or, in the case of unwrapped bread, by pan impression or by some other sanitary means. Furthermore, the weight cannot be less than sixteen ounces per unit.

An injunction was sought unsuccessfully against the enforcement of the bread weight provision in *Wonder Bakeries Co. v. White.*⁸ The plaintiff alleged that he was subjected to unfair competition by those who offered larger and hence more attractive loaves under one pound labels. The court, however, said that even if this practice were unfair, injunction would not be the proper remedy.⁹ What the proper remedy would be never was suggested by the court. Here is an excellent example of where the civil remedies provided by Ohio Revised Code section 1.16

1. OHIO REV. CODE § 1.16 (hereinafter cited as CODE §) provides a civil remedy for one injured because of a criminal act. Thus, under a literal interpretation of the statute, any one may recover damages when a competitor commits an unfair trade practice in violation of a penal statute. See Part I supra, at 155.
2. CODE § 3715.52 (Supp. 1962). The penalty for violation is a $100 to $300 fine for the first offense and $300 to $500 in fines and/or imprisonment from thirty to one hundred days for subsequent offenses. CODE § 3715.99(A) (Supp. 1962). This statute also prohibits the misbranding of drugs and cosmetics.
3. CODE § 3715.60 (Supp. 1962). The code specifically lists eleven examples of misbranding.
4. CODE § 3715.60(A) (Supp. 1962).
5. CODE § 3715.60(B) (Supp. 1962).
6. CODE § 3715.60(C) (Supp. 1962).
7. Ibid; CODE § 911.18. The penalty is a $25 to $100 fine for the first offense and $100 to $300 in fines for subsequent offenses. CODE § 911.99(A). There is no provision for imprisonment.
8. 3 F. Supp. 311 (S.D. Ohio 1933).
9. Ibid.
could have been used quite effectively. But whether the court would recognize and apply the full literal meaning of this section in the instant case is a matter of conjecture.

Meats

There are a few provisions applicable to the specific branding or labeling of meats. A person selling or manufacturing a meat or meat product with intent to defraud is prohibited from falsely representing it as "kosher." In addition, the fraudulent use of a sign displaying the word "kosher" is illegal. Another provision requires the disclosure of horse meat wherever the meat is sold or served for consumption to the public. The slaughterer also must label the horse meat as such. All food products placed in cold storage must be labeled.

Maple Products

Fraudulent use of the word "maple" on a label in an attempt to suggest that the contents are actually maple syrup or maple sugar is prohibited. In complying with this prohibition, the packer must affix his name and address to any article sold as maple syrup or maple sugar.

Soft Drinks

The labeling of soft drinks also is covered by statute. The label of a product which uses synthetic flavors must show that it is "artificially flavored." The statute also requires that certain phrases be placed on the label or on a placard whenever imitation fruit flavor or artificial coloring is used. Injunctive relief against the unauthorized use of labels on bottles may be obtained.

10. See note 1 supra.
11. CODE § 1329.29. The penalty provided by CODE § 1329.99 (B) is a fine of $25 to $500.
12. CODE § 919.07. A $100 to $1000 fine and/or thirty days to fifteen months imprisonment is the penalty for the violation of this statute. CODE § 919.99.
13. CODE § 919.03. The penalty is the same as the penalty for violation of CODE § 919.07, supra note 12.
14. CODE § 915.05. The penalty for this section calls for a fine not to exceed $500 for the first offense and not to exceed $1000 and/or thirty to ninety days imprisonment for subsequent offenses. CODE § 915.99 (Supp. 1962).
16. CODE § 3715.27. The penalty in CODE § 3715.99 (H) (Supp. 1962), supra note 15, is applicable to this statute as well.
17. CODE § 913.25.
18. CODE § 913.25 (A).
19. CODE § 913.25 (B).
20. CODE § 913.25 (E).
21. CODE § 913.25 (F).
Vinegar

Specifically prohibited is the brand of vinegar which is not in accordance with the standards set forth in the statute.22 A fine of $50 to $100 and imprisonment for thirty to one-hundred days may be imposed for violation of this statute.23 In various sections of the foregoing chapter, the code describes in great detail labeling requirements for such vinegars as wine,24 malt,25 and cider.26

Eggs

In 1959, the Ohio Legislature enacted stricter requirements encompassing advertising, labeling, and grading of eggs.27 For example, the package must contain an accurate statement of the quantity, size, and grade of the eggs.

Dairy Products

Labeling and branding regulations are treated extensively in the code's chapter on dairy products. The code specifically prohibits a person from selling or possessing a dairy product or imitation thereof which falsely states the place of processing, name, cream value, composition, or ingredients of the product.28

The words "butter," "creamery," "dairy," or a combination of these words may not be placed on a package containing an imitation dairy product.29 "Renovated butter" or "process butter"30 must be conspicuously labeled or marked under threat of penalties providing a $50 to $100 fine for the first offense and $100 to $300 and/or imprisonment for thirty to sixty days for subsequent offenses.31 Packing a superior grade of butter or cheese to conceal an inferior grade by placing the finer grade upon the surface of the lesser is forbidden.32 The code generally prohibits the

22. CODE § 3715.36.
24. CODE § 3715.30.
25. CODE § 3715.31.
26. CODE § 3715.29.
27. CODE §§ 925.02-08 (Supp. 1962). The applicable penalty is a $25 to $50 fine for the first offense, $50 to $100 for the second offense, and $100 to $200 for subsequent offenses. CODE § 625.99(A).
28. CODE §§ 3717.33, .34. The Code provides a fine of $50 to $200 for the first offense and $100 to $500 and imprisonment from ten to ninety days for subsequent offenses. CODE § 3717.99(E).
29. CODE § 3717.36. The penalty for violation of this statute is the same as that for the above statutes. CODE § 3717.99(E), supra note 28.
30. CODE § 3717.39.
31. CODE § 3717.99(M).
32. CODE § 3717.32. The penalty is contained in CODE § 3717.99(E). See note 28 supra.
sale of imitation butter or cheese, unless the substance is distinctly labeled. The sale or serving of oleomargarine, however, is specifically prohibited unless identifying placards are displayed. Similarly prohibited is the serving of individual patties of oleomargarine unless they are marked with a capital “M.”

The sale or offering for sale of impure or unwholesome milk is prohibited. Furthermore, the sale of milk which has been branded or labeled falsely as to grade, quantity, or place where produced or procured is illegal. Different kinds of milk such as skimmed, evaporated, evaporated skimmed, plain condensed, or sweetened condensed must be labeled distinctly or stamped as such on its container. Also subject to labeling requirements are ice cream, ice sherbet, and other frozen desserts.

**Fruits and Vegetables**

Every person who packages or sells fresh fruit or vegetables must mark the container with his name, address, and the weight or numerical count of the contents, unless the container has been constructed in accordance with the federal statute on standard containers. Like requirements are imposed on packers of peaches, potatoes, dry onions, and apples. Also regulated is the labeling of "soaked" goods.

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33. CODE § 3717.25. The penalty is in CODE § 3717.99 (E). See note 28 supra.
34. CODE § 3717.14. The penalty is provided in CODE § 3717.99(E). See note 28 supra.
35. CODE § 3717.15. CODE § 3717.99 (E) provides the penalty for violation of this statute. See note 28 supra.
36. CODE § 3717.19. The penalty is a fine of $10 to $50. CODE § 3717.99 (E).
38. CODE § 3717.11.
39. CODE §§ 3717.05, 44-49. Violation of CODE § 3717.05, the skimmed milk labeling provision, provides for a $50 to $200 fine for the first offense, $100 to $300 or thirty to sixty days imprisonment for second offenses, and a fine of $50 and imprisonment of between sixty and ninety days for subsequent offenses. CODE § 3717.99 (B). The violation of any section in CODE §§ 3717.44-49 is covered in CODE § 3717.99 (E). See note 28 supra.
40. CODE § 3717.54. The penalty provided by CODE § 3717.99 (N) is a fine of $100 to $500.
41. CODE § 925.22. A fine of less than $25 for the first offense and $50 to $200 for subsequent offenses is provided. CODE § 925.99 (B) (Supp. 1962). The packing of any package to expose a surface or face which gives a false representation of the contents as to size, color, or quality of the remaining portion of the package is specifically prohibited. CODE § 925.25. The penalty is provided in CODE § 925.99 (B) (Supp. 1962), supra.
42. CODE § 925.32. The penalty is in CODE § 925.99(B) (Supp. 1962), supra note 41.
43. CODE § 925.42. When the apples do not meet the standards as set forth in CODE § 925.46, CODE § 925.45 requires that these apples be labeled with word "culls." The penalty for violation of any statute of CODE §§ 925.42-48 calls for a fine of $5 to $25 for the first offense, $40 to $50 for second offenses, and $100 to $200 for subsequent offenses.
44. CODES §§ 3715.18, 19. The penalty for the violation of CODE § 3715.18 is a fine of $50 to $1000. CODE § 3715.99 (E) (Supp. 1962). Violation of CODE § 3715.19 is a fine of not less than $50. CODE § 3715.99 (C) (Supp. 1962).
Throughout the code, various labeling requirements have been enacted to regulate such miscellaneous items as bedding, silver or sterling silver products, rebuilt storage batteries, "convict made" goods, and petroleum products.

SALE AND ADVERTISING OF ALCOHOLIC BEVERAGES

Since the Ohio Legislature has authorized a state monopoly of the retail liquor market, there are very few regulations dealing with this segment of the industry. One such statute deals with the power of the Liquor Control Commission to fix wholesale and retail prices. Of course, such retail prices must be the same in all state liquor stores. Also regulated is the false or fraudulent making, forging, altering, or counterfeiting of any wrapper or label of any alcoholic beverage. Moreover, a wrapper may be used only once.

A manufacturer is forbidden to assist a wholesaler or retail permit holder by giving him gifts, loans, property, premiums, rebates, or any other thing of value. Similarly restricted is the assisting of a retailer by a wholesaler. The same statute outlaws credit sales to retailers or wholesalers of any malt, brewed beverage, or wine manufactured in the United States. This statute also applies to sales between wholesalers and retail permit holders.

Under the newly enacted liquor control laws, the Liquor Control...
Commission is given full power to regulate all advertising dealing with alcoholic beverages. The statutes, however, specifically permit manufacturers or wholesale distributors to furnish inside signs or advertising to retail permit holders.

Strictly prohibited is the use of exclusive contracts whereby any person engaged in the sale of beer or intoxicating liquor agrees to confine his sales to a particular product of a specified manufacturer or wholesaler or to give preference to such products. These contracts are void by statute and may be cause for suspension or revocation of the permit.

Other restrictions in the liquor area should be carefully noted. Prohibited are sales of liquor to minors, intoxicated persons, and habitual drunkards. Sunday sales are similarly restricted. These often-violated sanctions continually give rise to unfair competition among retail permit holders.

**SALE OF SECURITIES**

The Ohio Securities Act, while precluding civil liability for non-compliance with orders, requirements, rules, or regulations made by the Division of Securities, specifically provides that the act shall not limit or restrict common-law liabilities, fraud, or deception. Since the Ohio Securities Act carries criminal penalties, section 1.16 of the Ohio Revised Code should provide a civil cause of action to persons injured as a result of a violation of the act.

**LOTTERIES**

Lotteries are illegal in Ohio by virtue of both constitutional and statutory provisions. Three elements are necessary for a scheme to be considered a lottery: consideration, chance, and a prize.
Only one Ohio case\textsuperscript{70} can be found where the use of a lottery was enjoined. The court did so on the theory that it is permissible to enjoin the commission of a criminal act when the primary object of the injunction is the protection of property rights and interests.\textsuperscript{71}

In an excellent article on the use of lotteries to promote business as an unfair trade practice,\textsuperscript{72} the author indicated the lack of authority in Ohio for enjoining the use of lotteries as an unfair trade practice. He cites cases in other jurisdictions, however, which have enjoined the use of lotteries to promote business as an unfair trade practice.\textsuperscript{73} The basic problem is whether injunctive relief can be granted to enjoin an act which is criminal in nature. One of the general principles of equity is that an injunction cannot be used to enforce a criminal statute. However,

the basis for injunctive relief is not to enjoin violation of a criminal law but rather to enjoin the use of a method of sales promotion which constitutes an unfair method of competition to the detriment of competitors, and which may also constitute a violation of a criminal statute.\textsuperscript{74}

Finally, he states that the only adequate and practicable remedy is that of injunction. Here also is an excellent situation for the utilization of section 1.16 of the code to recover damages for an illegal act by a competitor to promote business.\textsuperscript{75}

**ATTACKS UPON ANOTHER'S BUSINESS**

There is, of course, the usual criminal statute in the code dealing with libel and slander.\textsuperscript{76} But like many of the other chapters in the code, there are no reported cases dealing with the utilization of section 1.16 to recover civil damages for violation of the libel and slander statute.\textsuperscript{77}

**CONCLUSION**

There is a noticeable lack of case law in the utilization of section 1.16 of the Ohio Revised Code as a basis for recovery when violation of any of

\textsuperscript{70} Shaw & Simpkinson v. Inter-State Sav., Loan & Trust Co., 8 Ohio Dec. 510 (Super. Ct. 1898).
\textsuperscript{71} Ibid.
\textsuperscript{72} Reda, \textit{Lotteries As A Business Promotion}, 23 OHIO ST. L.J. 698 (1962).
\textsuperscript{74} Reda, supra note 72, at 703; Renner Brewing Co. v. Rolland, 96 Ohio St. 432, 118 N.E. 118 (1917).
\textsuperscript{75} See note 1 supra.
\textsuperscript{76} CODE § 2901.37 (Supp. 1962). The penalty for violation of this statute is a fine not to exceed $500 and/or imprisonment for not less than one nor more than five years.
\textsuperscript{77} See CODE 3999.09 (Supp. 1962) for special protection given to insurance companies in this area.