THE ORDINARY AND THE ULTIMATE PURCHASER.

In cases of unfair competition the court acts on the ground that the defendant's wrongful conduct will be detrimental to another tradesman, because it is calculated to deceive, or has deceived, persons who desire to purchase the goods of one maker or character, by substituting those of another maker or character. It is, therefore, important to have a standard as to the persons whose deception is sufficient to induce the law to intervene at the instance of the trader who complains of another's wrongful act. This standard has been fixed and the persons likely to be deceived, in order that the courts may act have been held to be the "ordinary purchasers,"[1] "persons of ordinary caution and prudence,"[2] the "ordinary run of persons,"[3] purchasers "of average or of ordinary intelligence using

1. *McCall v. Theal*, 28 Gr. U. C. Ch. 48; *Wheeler v. Johnston*, 13 Ir. L. T. R. 87; *Cal. Fig Syrup Co. v. Worden*, 95 Fed. 132; *Cal. Fig Syrup Co. v. Putnam*, 66 Fed. 750; *Kann v. Dramond Steel Co.*, 89 Fed. 706; *Grossmith, ex parte*, 100 Off. Gaz. 2175; *McLean v. Fleming*, 96 U. S. 245; *Monopol Tob Works v. Gensior*, 66 N. Y. Supp. 155; *Boston Rubber Co. v. Roston Rubber Co.*, 32 Can. S. C. R. 315; *Robinson v. Storm*, 52 S. W. 880; *New Home Co. v. Bloomingdale*, 59 Fed 284; *Estes v. Belford*, 30 Off. Gaz. 99; *Allegretti v.* 100 Off. Gaz. 2175; *McLean v. Fleming*, 96 U. S. 245; *Monopol Tob Works v. Gensior*, 66 N. Y. Supp. 155; *Boston Rubber Co. v. Boston Rubber Co.*, 32 Can. S. C. R. 315; *Robinson v. Storm*, 52 S. W. 880; *New Home Co. v. Bloomingdale*, 59 Fed. 284; *Estes v. Belford*, 30 Off. Gaz. 99; *Allegretti v. Rubel*, 86 Ill. App. 600; *Conrad v. Uhrig*, 8 Mo. App. 277; *Shaw Co. v. Mack*, 12 Fed. 707; *Avery v. Meikle (Ky.)*, 27 Off. Gaz. 1027; *Globe Co. v. Brown*, 121 Fed. 90; *Parlett v. Gugenheimer*, 67 Md. 542; *Crawshay v. Thompson*, 4 Man & Gr. 357; *Morse v. Martin*, Can. Sup. Ct. Dig. 1875 to 93, p. 839; *Blackwell v. Armisted*, Fed. Cas. 1474; *Hostetter v. Vowinkle*, Fed. Cas. 6714; *Con. Fruit Jar Co. v. Thomas*, Fed. Cas. 3131; *Caire ex parte*, 15 Off. Gaz. 248; *Elgin Co. v. Illinois Co.*, 89 Fed. 487; *Columbia Mill Co. v. Alcorn*, 65 Off. Gaz. 1916; *Southern White Lead Co. v. Carey*, 33 Off. Gaz. 624, 39 Fed. 492; *Tuerk v. Tuerk*, 76 Off. Gaz. (N. Y.) 1274.

2. *Hildreth v. McDonald*, 164 Mass. 16; *Ft. Stanwix Co. v. McKinley Co.*, 63 N. Y. Supp. 704; *Leidersdorf v. Flint*, 50 Wis. 401.

3. *Croft v. Day*, 7 Beav. 84.

ordinary care,"[4] men who were "in the ordinary course of purchasing,"[5] "ordinary purchasers exercising the ordinary degree of caution,"[6] buyers who exercise the usual amount of prudence and caution,[7] persons in the ordinary course of purchasing goods,[8] persons who used ordinary precaution,[9] the purchasing public,[10] the general purchaser,[11] the ordinary observer,[12] the ordinary mass of purchasers,[13] persons of ordinary discernment,[14] or the sensible purchasers.[15] These numerous expressions show that the courts do not demand a degree of similarity which would deceive experts, or those giving close examination,[16] but such as would deceive the ordinary person, forming a part of the "unsuspecting public,"[17] buying on "casual sight" of the goods.[18]

Where ordinary attention will enable any one of common sense or average intelligence to discriminate between the two articles,

4. *Welsbach Light Co. v. Adam,* 107 Fed. 463; *Harper v. Lare,* 103 Fed. 203; *Fischer v. Blanch,* 138 N. Y. 244; *Radam v. Capitol Co.,* 81 Tex. 122; *Enterprise Co. v. Landers* 125 Fed.; *Keuffel v. Crocker,* 118 Fed. 187; *Singer v. Charlebois,* 16 Quebec, S. C. 169.

5. *Liggett v. Sam Reid Co.,* 104 Mo. 53; *Consolidated Co. v. Thomas,* Dig. 665; *Barnard v. Pillow,* 1868 W. N. 94; *Seixo v. Provezende,* 12 L. R. Ch. Ap. 192; *Jerome v. Johnson,* 59 N. Y. Supp. 859; *Reeder v. Brodt,* 6 Ohio Dec. 248; *Robertson v. Berry,* 50 Md. 591, 597; *Schmidt v. Brieg,* 100 Cal. 672; *Mumm v. Wittemann,* 95 Fed. 966, 91 Fed. 126; *Hostetter v. Adams,* 10 Fed. 838; *Champion v. Smith,* 21 N. S. W. R. Eq. 110; *Anheuser Busch v. Clarke,* 34 Off. Gaz. 562; *Solio Co. v. Pozo.,* 16 Cal. 388; *Soda Foam B. P. Co., ex parte,* 96 Off. Gaz. 1239.

6. *Liebig Co. v. Walker,* 115 Fed. 822; *Van Hoboken v. Mokus,* 112 Fed. 528; *Nat. Biscuit Co. v. Swick,* 121 Fed. 1007; *Sterling Co. v. Eureka Co.,* 70 Fed. 704, 80 Fed. 105; *Enterprise Co. v. Landers,* 125 Fed.

7. *Colladay v. Baird,* 14 Phil. 139.

8. *Ball v. Siegel,* 116 Ill. 137.

9. *Farrow Re.,* 7 R. P. C. 260; *Peterson v. Humphrey,* 4 Abb. Pr. N. S. 394.

10. *Aspegren, ex parte,* 100 Off. Gaz. 684.

11. *Neva Stearine Co. v. Mowling,* 9 V. L. R. E. 98, 104; *Postum Co. v. Am. Health Co.,* 109 Fed. 898.

12. *Sterling Remedy Co. v. Corey,* 110 Fed. 372.

13. *Blackwell v. Wright,* 73 N. C. 310.

14. *Imbs, ex parte,* 10 Off. Gaz. 463; *Cf. Anglo Swiss Co. v. Swiss Co.,* 1871 W. N. 163.

15. *Liebig v. Anderson,* 1882 W. N. 147.

16. *Wamsutta Co. v. Allen,* 12 Phila. 535; *Kirker v. Mayman,* 1 Aust St. R. Eq. 73; *Witthaus v. Wallace,* 2 W. N. C. 610; *Royal Co. v. Royal,* 122 Fed. 337; *Lawrence v. Lowell,* 129 Mass. 455; *Allegretti v. Rubel,* 86 Ill. App. 600; *Hennessy v. Hogan,* 6 W. W. & A. B. 225.

17. *Metcalfe v. Brand,* 86 Ky. 331; *Wylam v. Clarke,* 1876 W. N. 68.

18. *Clinton Co. v. N. Y. Co.,* 50 N. Y. Supp. 437.

there is of course no remedy[19] and the case is the strongest possible for the defendant when the "casual observer" would not be deceived.[20] The resemblance must be such as would deceive a person making the "ordinary and natural use of his senses"[21] and "possessed of sufficient amount of intelligence to note the difference the senses convey, neither very clever nor a fool.[22] If the name or dress of the defendant's article tends to mislead the most cautious purchaser, *a fortiori,* the defendant will be enjoined.[23] Persons of skill and intelligence, who gave heed to the matter might incur no risk of error, but the law considers not them but rather the general public which has not been forewarned of the danger of deception.[24] Relief is given against such conduct by a tradesman, as would deceive anyone "not thoroughly acquainted" with the two articles.[25] It is not expected that the ordinary purchaser possesses the knowl- of a manufacturer of the goods,[26] nor that he has either time or ability to note detailed variance of the articles.[27] By application of the same test, registration of an alleged trademark may be refused.[28]

It has been held that an equity court will issue an injunction, if any class of purchasers or any considerable number of a class are misled.[29]

In applying the ordinary purchaser test, "we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which they usually order it" and[30] we must ask whether the "ordinary mass of purchasers,

---

19. *Elgin Butter Co. v. Elgin Creamery Co.,* 155 Ill. 127; *Brennan v. Emery Co.,* 99 Fed. 971; *Hygeia Co. v. Hygeia Co.,* 140 N. Y. 94; *Partridge v. Menck,* 2 Sandf. Ch. 622; *Wostenholme v. Woolhouse,* 14 V. L. R. 963; *Ball v. Siegel,* 116 Ill. 137; *U. S. v. Roche,* 1 McCreary 385.

20. *Radam v. Capitol Co.,* 81 Tex. 122.

21. *Munro v. Tracy,* 129 N. Y. 38; *De Long v. De Long,* 74 Off. Gaz. 809 (N. Y.).

22. *Clark v. Sharp,* 15 R. P. C., 141, 268.

23. *Wolfe v. Alsop,* 12 V. L. R., 421; *Cuervo v. Henkell,* 60 Off. Gaz. 440.

24. *Rose v. McLean,* 24 Ont. A. R. 240; *Dunn Re,* 7 R. P. C. 311; *Smith v. Carron,* 13 R. P. C. 108; *Welsbach Light Co. v. Adam,* 107 Fed. 463.

25. *Canada Pub. Co. v. Gage,* 11 Can. S. C. R. 306.

26. *Shrimpton v. Laight,* 18 Beav. 164.

27. *Partridge v. Menck,* 2 Sandf. Ch. 622; *Edge v. Harrison,* 8 R. P. C. 74; *Draper v. Skerrett,* 94 Fed. 912.

28. *Marks Re.,* 63 L. J. Ch. 234.

29. *Davis v. Kennedy,* 13 Gr. U. C. Ch. 523; *Rose v. McLean,* 24 Ont. A. R. 240; *Wolfe v. Alsop,* 12 V. L. R. 421.

30. *Liggett v. Hynes,* 28 Off. Gaz. 809.

paying the usual attention in buying the article in question," would be deceived.[31] Relief should be given the plaintiff, when the defendant's conduct is calculated to deceive an ordinary buyer making a purchase under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates.[32] The age, ignorance, or lack of acquaintance with a foreign tongue on the part of the ordinary purchasers may be an important consideration and it is of little importance whether judge or jury would be deceived.[33]

So, too, the facts will be taken note of as matters of common knowledge that packages were handed buyers wrapped up in paper and with no opportunity of examining the contents,[34] or that the price of the articles is small, so that the attention of the purchaser is not greatly engaged.[35]

Where goods are only sold to the trade,[36] on the other hand, or where only members of an association can buy at a store,[37] a higher degree of care and knowledge may be demanded than from the general public.

The matter of language and race may be important. Where the name of a Spanish newspaper was alleged to infringe that of another, but it was proved that no Spaniard would be deceived, it was held no wrong had been committed.[38] On the other hand the illiterate inhabitants of Singapore or the Hindu natives of India who cannot read English, or even their own language, are to be considered as the ordinary purchasers of goods sold to the countries they inhabit.[39] Consumers of beer, many of whom are foreigners and unacquainted with the English language,[40] or of Hostetter's Bitters, who buy a small quantity at a time for immediate use,[41] have especial consideration from the courts.

---

31. *Rowly v. Houghton,* 2 Brewst. 303; *Talcott v. Moore,* 6 Hun, 106; *Goodman v. Bohl,* 3 Tex. Civ. App. 183.

32. *Brown v. Doscher,* 73 Hun. 107.

33. *Clark v. Sharp,* 15 R. P. C. 141, 268.

34. *Carlsbad v. Thackeray,* 57 Fed. 18.

35. *Centaur Co. v. Robinson,* 91 Fed. 889.

36. *Nicholson v. Buchanan,* 19 R. P. C. 321.

37. *Civil Service Assoc. v. Dean,* 13 Ch. D. 512.

38. *Stephens v. De Conto,* 4 Abb. Pr. N. S. 49.

39. *Wallace v. King,* 68 L. T. 103; *Copley v. Kirk,* 84 L. T. Jour. 140; *Biegel Re.,* 4 R. P. C. 525; *Ralli v. Fleming,* Ind. L. R. 3 Calc. 416; *Wilkinson v. Griffith,* 8 R. P. C. 370; *Badische Fabrik v. Maneckji,* Ind. L. R. 17 Bombay 584.

40. *Kostering v. Seattle Co.,* 116 Fed. 621; *Hires v. Consumers Co.,* 100 Fed. 809.

41. *Myers v. Theller,* 38 Fed. 607.

Where an injunction was granted against the use of an infringing name on a tennis racquet[42] Judge Kekewich said: three classes of persons should be considered (1) "the thoroughly experienced men or women who play lawn tennis frequently . . . who do not choose a racquet because it is called Demon or by any other name, but because they know from experience what is a first-rate article and examine it carefully, inch by inch, and, if they order a second, take care to order one precisely of that kind." These would not be deceived; (2) "less experienced persons who buy racquets frequently" (not much danger); (3) largest class, inexperienced people, who do not play much, hear of Demon racquet and going to a shop see a racquet looking like Demon with Demotic on it and buy it. The court gave the plaintiff protection against the deception of these persons. In other classes of goods, the court has taken notice of the facts that many ignorant and illiterate persons buy Liver Regulator;[43] that bluing is sold "to purchasers in a very humble class in life, to washerwomen, little girls, and cottagers, who do their own washing and who go and buy . . . the smallest quantity of the article;"[44] and that the people who go into "small chemists' shops and buy medicines for themselves and their families" are people of little intelligence.[45] The law protected a trader in Yorkshire Relish, when he proved that the defendant deceived four women who belonged to the class of unwary purchasers. The sauce was largely bought by domestic servants, who asked for the goods by the name of the article and not of the maker, and when the sauce was bought and put into a cruet, detection was almost impossible.[46] Children and servants, who chiefly buy lemonade powder in England out of their pocket money, have been found careful to get the brand they want and to ask for it by name,[47] but articles like washing-powder, which "become associated in the public mind with the general appearance of the package," and of which the ordinary retail purchaser is not, "usually of a high degree of intelligence," have been held more to lend themselves to deception.[48] Children from five to fifteen years of age, who purchase school books and know

42. *Slazenger v. Feltham,* 6 R. P. C. 531.
43. *Simmons v. Simmons,* 81 Fed. 163.
44. *Reckitt v. Kellogg,* 50 N. Y. Supp. 889.
45. *Eno v. Dunn,* 10 R. P. C. 261.
46. *Powell v. Birmingham Brewery Co.,* 11 R. P. C. 563, 12 R. P. C. 496, 13 R. P. C. 235.
47. *Clark v. Sharp,* 15 R. P. C. 141, 268.
48. *Fairbank v. Bell,* 77 Fed. 869; (Buyers of French coffee) *Sparks v. Harper,* 3 Queens L. J. 201.

them better from the pictures on the cover than from the text have been considered as entitled to especial consideration,[49] as have persons for whom detective stories are written.[50] "The unsuspecting and generally ignorant classes who are the purchasers and consumers of lye;"[51] the men who buy matches without examining carefully the box, turning it around on all sides to see differences;[52] snuff takers, who are nowadays usually of the lower classes of society;[53] persons who buy plug-cut chewing tobacco and are usually engaged in manual labor and usually buy without scrutiny of the tag and in small quantities;[54] purchasers of cigars, who make a hurried inspection of the goods in an ordinary store, where the light is not very good;[55] all these are classes of customers, whose habits have been considered important by the courts. Other special classes, who are met in the cases, are stablemen and grooms, who are often unable to read;[56] women who buy thread without critical observation;[57] purchasers of bread, who are frequently illiterate;[58] persons who know the reputation of Wamsutta cloths and do not notice that the other articles are labelled Wamyesta;[59] purchasers of hairpins, who rarely read the entire label on the goods;[60] purchasers of stove polish, many of whom are ignorant people and sometimes servant girls;[61] purchasers of shoe blacking, often old persons whose sight is dim, or young persons who are ignorant or lack experience;[62] persons who buy dry plates for photographic purposes;[63] purchasers of ale;[64] and purchasers of sewing machines,[65] who may be tailors and sempstresses or only common workmen and workwomen, with very limited ideas and imperfect knowledge.

Remembering that the patronage of the unwary is not less profit-

---

49. *Doan v. Am. Book Co.*, 105 Fed. 773.
50. *Munro v. Beale*, 55 Hun. 312.
51. *Pa. Salt Co. v. Myers*, 79 Fed. 87.
52. *Christiansen Re*, 3 R. P. C. 54.
53. *Garrett v. Garrett*, 79 Off. Gaz. 1681.
54. *Drummond Tob. Co. v. Addison Co.*, 52 Mo. App. 10.
55. *Feder v. Brundo*, 5 Ohio N. P. 275.
56. *Beddow v. Boyd*, 4 R. P. C. 310.
57. *Clark v. Armitage*, 67 Fed. 896.
58. *Fleischmann v. Schuckmann*, 62 How. Pr. 92.
59. *Wamsutta Co. v. Allen*, 12 Phila. 535.
60. *Williams v. Brooks*, 50 Conn. 278.
61. *Dixon v. Gugenheim*, 2 Brewst. 321.
62. *Brown v. Mercer*, 37 N. Y. Super Ct. 265.
63. *Derby Co. v. Pollard*, 2 T. L. R. 276.
64. *Bass v. Feigenspan*, 96 Fed. 206.
65. *Singer v. Long*, 11 Ch. D. 656; *Singer v. Wilson*, 3 A. C. 371.

able to the manufacturer than that of the careful,[66] the courts often consider the "uneducated and illiterate person" in questions of unfair competition, especially in dressing up and trademark cases. Lord Selborne[67] said that "imitation of a man's trademark in a manner liable to mislead the unwary cannot be justified by showing, either that the device or inscription upon the imitated mark is ambiguous and capable of being understood by different persons in different ways, or that a person who, carefully and intelligently, examined and studied it might not be misled.

Consequently, we find a number of cases in which conduct is restrained which is likely to deceive the only half wary, casual, unwary, incautious, unobservant, unsuspicious, heedless, or ignorant purchaser, sometimes when he does not even survey the goods at all.[68]

On the other hand, relief is refused when no person in his senses could be deceived[69] and courts will not "interfere for the sake of heedless people who know not and will not take the trouble to see what they are purchasing.[70] English courts seem stricter than the

---

66. *Williams v. Brooks*, 50 Conn. 278; *Colton v. Thomas*, 2 Brewst. 303; *Wolfe v. Harte*, 4 V. L. R. E. 125.

67. *Singer v. Loog*, 8 A. C. 26.

68. *Gillott v. Esterbrook*, 45 Barb. 455; *Saxlehner v. Eisner*, 93 Off. Gaz. 940; *Garde v. Mitchell*, 17 V. L. R. 209; *Saxlehner v. Nielson*, 93 Off. Gaz. 948; *Little v. Kellam*, 100 Fed. 253; *Cauffman v. Schuler*, 123 Fed. 205; *Kinney v. Maller*, 53 Hun. 340; *Barrett Co. v. Stern*, 67 N. Y. Supp. 595; *Ford v. Foster*, 7 Ch. App. 611; *Currie Re*, 13 R. P. C. 681; *Cochrane v. MacNish*, 13 R. P. C. 100; *Champlain v. Stoddart*, 30 Hun. 300; *Colman v. Crump*, 70 N. Y. 573; *Carlsbad v. Schultz*. 79 Off. Gaz. 1360; *Davis v. Reid*, 17 G. R. U. C. Ch. 69; *Johnston v. Orr Ewing*. 7 A. C. 219; *Colton v. Thomas*, 2 Brewst. 308; *Potter Corp. v. Miller*, 75 Fed. 656; *Guardian Co. v. Guardian Co.*, 50 L. J. Ch. 252; *Harrison v. Taylor*, 11 Jur. N. S. 408; *Walker v. Hochstaedter*. 85 Fed. 776; *Battle v. Finlay*, 45 Fed. 796; *Hoff v. Tarrant*, 71 Fed. 163; *Kelly v. Byles*, 28 W. R. 585; *De Youngs v. Jung*, 25 N. Y. Supp. 479; *Electro Silicon Co. v. Levy*, 59 How. Pr. 469; *Electro Silicon Co. v. Trask*, 59 How. Pr. 189; *Glenny v. Smith*, 13 L. T. N. S. 71; *Garrett v. British N. Borneo Co.*, 37 Sol. J. Ill.; *Bissell v. Bissell*, 121 Fed. 357; *Alaska Ass. v. Crooks*, 16 R. P. C. 503; *Boardman v. Meriden Co.*, 35 Conn. 402 ("unwary trader"); *Hawkins Re*, 11 N. Z. R. 688; *Tetlow v. Tappan*, 85 Fed. 774; *Gessler v. Grieb*, 48 N. W. (Wis.) 1098; *McCaw v. Nichols*, 21 R. P. C. 15.

69. *Midland Co. v. Brush Co.*, 26 Sol. J. 465; *Cowen v. Hatton*, 46 L. T. N. S. 897; *Goodall v. Wilkinson*, 90 L. T. J. 357, 91 L. T. J. 29; *Payton v. Ward*, 17 R. P. C., appeal from 16 R. P. C 424; *Payton v. Snelling*, 17 R. P. C. 43, 16 R. P. C. 287.

70. *Bradbury v. Beeton*, 39 L. J. Ch. 57.

American ones in this matter. Especially have they refused[71] to interfere when no intelligent person would be deceived who knew the distinctive features of the plaintiff's goods, though the seller might cover with his hand the distinctive parts. A customer who did not watch what symbol of a head was on a can of salmon was not held worthy of consideration. Yet it was an English judge who said with a sigh: "People are so very careless and the court has, with propriety, been tender of careless people"[72] and the English courts consider that such goods as soap are sold often to persons who cannot read and that those who can read ordinarily do not read the whole wrapper covering the goods,[73] but are injured, if the resemblance in general effect was calculated to deceive the unwary.[74] Persons in a humble station in life and uneducated persons are the ordinary purchasers of certain articles and in respect to those articles deserve and receive especial consideration.[75] So does the man or woman who has not the sharpest eyesight or the most active brains,[76] and the man who has not been accustomed to the general appearance of packages containing the article, but has merely read an advertisement of the goods and remembers the name.[77] In Canada, also, the court has restrained practices in the sale of an article which might deceive "ignorant persons not on their guard," though "no one of ordinary intelligence would be likely to mistake it,"[78] but in a Nova Scotia decision,[79] the court refused to interfere, unless it was shown that a person paying ordinary attention would be deceived and held that it was "not enough that a careless, inattentive, or illiterate purchaser might be deceived." It has been held that, where there has been actual fraud on the part of the defendant,

---

71. *Alaska Co. v. Crooks,* 18 R. P. C. 129.

72. *Sensen v. Britton,* 16 R. P. C. 137; *Upper Assam Tea Co. v. Herbert,* 7 R. P. C. 183; *Paine v. Daniell,* 10 R. P. C. 71, 217. See *Wotherspoon v. Currie,* 42 L. J. Ch. 130; *Edleston v. Vick,* 23 Eng. L. & Eq. 51; *Hart v. Colley,* 7 R. P. C. 93.

73. *Lever v. Goodwin,* 4 R. P. C. 492.

74. *Jones v. Hallsworth,* 14 R. P. C. 225.

75. *Merriam v. Texas Siftings Co.,* 49 Fed. 944; *Hodgson v. Kinloch,* 15 R. P. C. 465; *Sparks v. Harper,* 3 Queens L. J. 201.

76. *Liebig Co. v. Chemists Sec.,* 13 R. P. C. 635. See *Archbold v. Sweet,* 5 Car. & P. 219.

77. *Fairbank v. Leukel,* 102 Fed. 327.

78. *Melchers v. De Keyper,* 6 Ex. C. R. Can. 82. See *Darling v. Barsalou,* 25 Lower Can. J. 31, overruled by 9 Can. S. C. R. 677.

79. *Johnson v. Parr,* Russ. Eq. Dec. 98. See also *Queen v. Authier,* Q. R. S. Q. B. 146.

the remedy may be given, without considering whether the "purchaser be wise or ignorant, careful or careless."[80]

In Canada,[80a], a court restrained a person from selling an article which might deceive the "cursory" observer retaining no very accurate recollection of plaintiff's article.

While many decisions hold that the person applying to the court, for relief, against a colorable imitation of trademark or other indicia of his goods, must show that the resemblance is such as would mislead not only heedless and unobservant persons, but also those of ordinary caution,[81] yet the sounder view is that although such purchasers, who buy hastily and with but little examination of the goods, have no reason to complain, as they must attribute any injury they may suffer to their own want of diligence, yet the trader, who is injured, should receive protection, for he stands on entirely different ground and no amount of diligence on his part will guard against the injury. The right to sell goods includes the sale to the incautious as well as to the cautious.[82] From what has already been said, it necessarily follows that the plaintiff has no remedy given him when the mass of purchasers, paying that attention which such persons usually do in buying the article in question, would not be deceived,[83] or when the difference between the two articles should lead to a distinction being made between them by the "most casual observer at any distance at which he could distinguish the appearance of these labels."[84]

The courts act to protect persons of ordinary intelligence and

---

80. *Mumm v. Frash,* 68 Off. Gaz. 143.

80a. *Whitney v. Hickling,* 5 Gr. U. C. Ch. 605.

81. *Brill v. Singer,* 41 Ohio St. 127; *Cantrell v. Butler,* 124 Fed. 290; *Wrisley v. Iowa Co.,* 122 Fed. 796; *Coats v. Merrick Thread Co.,* 63 Off. Gaz. 1531.

82. *Meriden Co. v. Parker,* 39 Conn. 450; *Brooklyn Co. v. Masury,* 25 Barb. 416; *Godillot v. Am. Grocery Co.* 71 Fed. 873.

83. *Hurricane Co. v. Miller,* 56 How. Pr. 234; *Beddow v. Boyd,* 4 R. P. C. 310; *Alff v. Radam,* 77 Tex. 530; *De Keyper v. De Keyper,* 4 Ex. C. R. Can. 71; *Comm. Adv'r. Ass. v. Haynes,* 49 N. Y. Supp. 938.

84. *Rall v. Siegel,* 116 Ill. 137; *Marshall v. Hawkins,* 4 N. Z. L. R. Ch. 59; *Pratt v. Astral Co.,* 27 Fed. 492; *Tarrant v. Hoff,* 78 Off. Gaz. 1607; *Clotworthy v. Schepp,* 52 Off. Gaz. 161; *Hubinger v. Eddy,* 76 Off. Gaz. 1120; *Centaur Co. v. Marshall,* 92 Fed. 605, 97 Fed. 785; *Van Camp v. Cruickshanks,* 90 Fed. 814; *Phillips v. Ogden,* 12 R. P. C. 325; *Leather Cloth Co. v. Am. Leather Cloth Co.,* 1 H. of L. Cas. 523; *Hazleton v. Hazleton,* 137 Ill. 231, 142 Ill. 494; *Landreth v. Landreth,* 29 Off. Gaz. 1131; *Adams v. Heisel,* 31 Fed. 279; *Pfeiffer v. Wilde,* 102 Fed. 658; *Parker Holmes Co., ex parte,* 100 Off. Gaz. 111; *Lorillard v. Peper,* 86 Fed. 956.

common sense and will not act to prevent a possibility, but rather a probability, of the deception of such persons.[85] Nor will they consider persons affected with color blindness,[86] those lacking intelligence, such as fools and idiots, nor those grossly careless. The fact that experienced witnesses testify that the defendant's goods have long been used and that they never heard of any deception arising through them is probative evidence that they are not deceptive to the ordinary purchaser.[87] The question as to the deception of the ordinary purchaser must usually be decided by the eye[88] and, when such purchaser would be easily deceived, if the two articles were exposed for sale side by side, there is no question that the courts will[89] give a remedy against such fraud. But purchasers are not bound to exercise a high degree of care, are apt to act quickly, and, seldom, have an opportunity of making any comparison whatever of the two articles.[90] The court generally acts on the assumption that there are only the defendant's goods before the purchaser and that he has only a memory of what the plaintiff's goods looked like.[91] Side by side, there may be hardly a probability of deception and the differences between the articles may be wide, but the incautious purchaser does not see them in that way and must trust to a treacherous memory. In many cases, he does not know that there are two similar articles sold, or has never seen the defendant's article before. The purchasing public goes to buy goods with only a general notion, or a

85. *Price v. Jeyes,* 19 R. P. C. 17; *Brown v. Siedel,* 153 Pa. St. 60.

86. *Liggett & Myers v. Finzer,* 45 Off. Gaz. 943 (U. S.); *Lere v. Harper,* 86 Fed. 481; *Singer v. Wilson,* 2 Ch. D. 434; *Wrisley Co. v. Iowa Soap Co.,* 104 Fed. 548; *Marshall v. Sidebotham,* 18 R. P. C. 43; *Wrigley v. Rouse,* 87 Fed. 589; *Sawyer v. Kellogg,* 7 Fed. 720; *Republique Francaise v. Saratoga Vichy,* 99 Fed. 733; *Potter v. Pasfield,* 102 Fed. 490; *Republique Francaise Schultz,* 94 Fed. 500, 102 Fed. 153; *Richter v. Anchor Remedy Co.,* 52 Fed. 455.

87. *Day v. Webster,* 49 N. Y. Supp. 314.

88. *Sen Sen v. Britton,* 16 R. P. C. 137.

89. *Alaska Packer's Ass. v. Crooks,* 16 R. P. C. 503; *Ct. Tower St. Tea Co. v. Langford,* 5 R. P. C. 66.

90. *Paris Co. v. Hill,* 102 Fed. 148; *Pillsbury v. Pillsbury,* 64 Fed. 841; *Stuart v. Stewart,* 85 Fed. 778, overruled by 91 Fed. 243.

91. *Hubbuck v. Brown,* 17 R. P. C. 638; *Centaur Co. v. Hughes,* 91 Fed. 901; *Upper Assam Tea Co. v. Herbert,* 7 R. P. C. 183; *Wellman v. Ware,* 46 Fed. 289; *Hawkins Re,* 11 N. Z. R. 688; *Steinway v. Henshaw,* 5 R. P. C. 77; *Wilkinson v. Griffith,* 8 R. P. C. 370; *Pinto v. Badman,* 8 R. P. C. 181; *Eno's, T. M., ex parte,* 9 V. L. R. L. 335; *Hop Bitters Co. v. Wharton,* 10 V. L. R. L. 377; *Celluloid Co. v. Cellonite Co.,* 41 Off. Gaz. 693; *Champion v. Smith,* 21 N. S. W. R. Eq. 110; *Little v. Kellam,* 100 Fed. 353; *Glen Cove Co. v. Ludeman,* 32 Off. Gaz. 255.

more or less vague reminiscence of what are the salient features of the name or appearance of the desired article and being not well acquainted with the details of the name or appearance thereof, may be deceived, so the courts must be diligent and zealous in preventing such deception.

The ordinary purchaser is not only the one who buys directly from the manufacturer or selector of the goods, but, in this connection, regard must be had to the ultimate, as well as the immediate purchaser of the goods. The law does not regard as material the fact that the immediate vendee is not deceived, if there be put into the latter's hands the means of deceiving the consumers of the goods.[92] The questions of tradesman and customer, of local and general dealers, are to be considered by the courts, who remember that the products may go into the hands of thousands who are ignorant of the circumstances of origin. To put into the hands of another a weapon of fraud, to sell goods to a man, who is not deceived thereby, but who may deceive the ultimate purchaser of the goods, is a wrong to be restrained by law. The person guilty of such "contributory infringement" of his neighbor's rights is an accessory before the fact to the fraud and his conduct is fully as fraudulent as a direct deception. In one important class of cases in unfair competition, namely in those in which relief is asked for "passing off" goods,[93] the ultimate purchaser is not regarded. So representations made on invoices have not been considered, as the ultimate customers rarely see these invoices. In all trade-mark cases, however, the rule is strict that, although the representation between first vendor and purchaser be true, yet false representations through indicia placed on goods will be restrained. The goods were "meant to be sold to others, who would see only the trade-mark and were likely to be deceived by its resemblance" to that of the other trader.

Sometimes an intermediate purchaser[94] must be considered, *e. g.*,

92. *Hennessy v. Herrman*, 89 Fed. 669; *Sparks v. Harper*, 3 Queens L. J. 207; *Wyckoff v. Howe*, 110 Fed. 520; *Anglo Swiss Co. v. Metcalf*, 3 R. P. C. 28; *Wolfe v. Hart*, 4 V. L. R. E. 125; *Cochrane v. MacNish*, 13 R. P. C. 100; *Valentine v. Valentine*, 17 R. P. C. 673; *Manitowoc Co. v. Numsen*, 93 Fed. 196; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Edelston v. Edelston*, 9 Jur. N. S. 479; *Armstrong v. Raynes*, 1876-93 New Bruns. Eq. Cas. 144; *Taylor v. Carpenter*, Fed. Cas. 13, 785; *Le Page v. Russia Cement Co.*, 51 Fed. 941; *Sykes v. Sykes* (1824), 3 B. & C. 541; *Hodgson v. Kynoch*, 15 R. P. C. 465; *U. S. v. Steffens*, Fed. Cas. 16, 384; *Coats v. Holbrook*, 2 Sandf. Ch. 586.

93. *Singer v. Wilson*, 2 Ch. D. 434, 8 A. C. 26; *Singer v. Loog*, 11 Ch. D. 656.

94. *Barlow v. Johnson*, 7 R. P. C. 395. See *Ky. Distilling &c. Co. v. Wathen*, 110 Fed. 641; *Hansen v. Siegel*, 110 Fed. 690.

the wholesale dealer would not be deceived nor the public which only cares for some article of the kind, *e. g.*, thick towels, but the retailer might be deceived as he wishes a certain make of thick towels, *e. g.*, the Osman and he will be protected.

It is not the wholesale or retail dealer, but rather the purchaser at retail in small quantities who is usually the ultimate customer.[95] Often, indeed, the manufacturer is affording "an excuse and a temptation to unscrupulous" retail dealers by furnishing them with goods which enable them to defraud the public, who as a rule do not know who make the goods.[96] The very survey of the two articles may suggest fraud and passing off to an unscrupulous middleman and the instrument of deception is put into his hand by the first vendor. The law reaches those who enable others to deceive the public,[97] even though they may make no direct false representations, but sell their goods as their own. These "true representations in aid of false ones but aggrave the fraud" it has been said, as they make the middlemen accomplices therein,[98] and sometimes even make the possibilities of deceiving ultimate purchasers "persuasive and effective arguments" to sell the goods.[99] "It is a pertinent fact, to be noted in this connection that the respondent's advertisements of his goods were inserted in journals that reached the trade and not the consumer and that his circulars were sent to jobbers and the trade" and to no others.[100]

On the other hand, shopmen's acts are not always proof of the manufacturer's deceit.[101] A dishonest middleman may deceive purchasers by covering the distinctive features of the trader's trademark[102] or an employee may sell goods in bulk and advise that they

95. *Conrad v. Uhrig*, 8 Mo. App. 277; *Wilkinson v. Grffiith*, 8 R. P. C. 370; *Payton v. Snelling*, 16 R. P. C. 283, 17 R. P. C. 48; *Collinsplatt v. Finlayson*, 88 Fed. 693; *Fairbank v. Central Lard Co.*, 70 Off. Gaz. 635; *Fairbank v. Bell*, 77 Fed. 869; *Heinisch's Sons v. Boker*, 86 Fed. 765.

96. *Sawyer v. Horn*, 1 Fed. 24; *Hodgson v. Kynoch*, 15 R. P. C. 465; *Gage v. Canada Pub. Co.*, 6 Ont. R. 68; *Powell v. Birmingham Co.*, 12 R. P. C. 496, 13 R. P. C. 235; *Singer v. Spence*, 10 R. P. C. 297; *Bayer v. Baird*, 15 R. P. C. 615; *Edge v. Johnson*, 9 R. P. C. 134; *Fairbank v. Bell*, 77 Fed. 869; *Sykes v. Sykes* (1824), 3 B. & C. 541.

97. *Saxlehner v. Apollinaris Co.*, 14 R. P. C. 645; *Blair v. Stock*, 52 L. T. N. S. 123; *Lever v. Goodwin*, 4 R. P. C. 492; *N. E. Co. v. Marlborough Co.*, 168 Mass. 154; *Morgan v. Whittier*, 118 Fed. 657; *Hennessy v. White*, 6 W. W. & A. B. E. 216; *Taylor v. Carpenter*, Fed. Cas. 13, 784.

98. *Pillsbury v. Pillsbury*, 64 Fed. 841.

99. *Pa. Salt Co. v. Myers*, 79 Fed. 87.

100. *Baker v. Baker*, 78 Off. Gaz. 1427.

101. *Jones v. Hallworth*, 14 R. P. C. 225.

102. *Payton v. Snelling*, 17 R. P. C. 628.

be placed in the plaintiff's empty bottles without the defendant's knowledge.[103] In such case, there is no restraint against the first vendor. A contract, however, to purchase the plaintiff's labels and bags and then fill them with another's goods, *e. g.*, seeds, is clearly not enforceable.[104]

Certain classes of purchasers are of interest. As the general rule is that "no man, however honest his intentions, has a right to adopt and use so much of his rival's established trade-mark, as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival," so a trade-mark consisting of two elephants and, consequently, known as the Hathi in India, was enjoined, as so similar to another containing the same device as to delude Hindus, though the similarity would not deceive Englishmen, nor dealers in foreign markets.[105]

So people who come into an ordinary shop to buy matches,[106] people who buy one red cross plaster[107] and so have no means of distinguishing the goods through indicia placed on the wrapper of the package, persons who buy snuff,[108] "mere cigarette smokers"[109] are considered as special classes of consuming purchasers.

A printer who strikes off a label for cigars and sells it to anyone to cover such goods as the purchaser chooses[110] is "chargeable with facilitating others in making false representations" and a maker of cigar boxes was enjoined who sold with them imitations of the plaintiff's lithographs that retailers might defraud customers by using them.[111]

Purchasers of shovels,[112] of plows,[113] and of tools[114] are also

103. *Hostetter v. Brunn,* 107 Fed. 707.

104. *Bloss v. Bloomer,* 23 Barb. 604.

105. *Orr Ewing v. Johnston,* 27 W. R. 575, 28 W. R. 330, 7 A. C. 219.

106. *Christiansen Re,* 3 R. P. C. 54.

107. *Johnson v. Bauer,* 82 Fed. 662; *Collins Co. v. Cowen,* 3 K. & J. 428.

108. *Garrett v. Garrett,* 79 Off. Gaz. 1681.

109. *Wood v. Lambert,* 3 R. P. C. 81; *Richards v. Butler,* 8 R. P. C. 37, 249.

110. *Schumacher v. Schwencke,* 36 Off. Gaz. 457. See *Christie v. Foster Brewing Co.,* 18 V. L. R. 292.

111. *Cuervo v. Henkel,* 60 Off. Gaz. 440; *Southern White Lead Co. v. Carey,* 33 Off. Gaz. 624; *Southern White Lead Co. v. Coit,* 39 Fed. 482.

112. *Collins v. Ames,* 18 Fed. 511. See *Lalance &c. Co. v. National &c. Co.,* 109 Fed. 317.

113. *Avery v. Meikle,* 27 Off. Gaz. 1027. In *Putnam Nail Co.'s Appeal,* Dig. 725, this question was not considered and the defendant was not restrained from selling a bronzed nail like plaintiff's. The bronzing was merely for ornament.

114. *Collins v. Walker,* 7 W. R. 222.

classes of ultimate purchasers, which have been considered by the courts and there are a large number of decisions as to the consumers of liquids,[115] such as bitters,[116] liquours,[117] whiskey[118] and root-beer.[119] Thus the wholesale dealer who sells to retailers champagne bottles, so dressed up as to put in their hands an effective means of deception[120] is held to be a co-conspirator with them and the sale of different packages by such wholesalers will not protect them from the law, if the marks of similarity on the bottle which the purchasers of small quantities buy are too numerous and important.[121] It has been held allowable to sell spurious bottles, if truthfully named[122] and the sale of an extract, from which imitation bitters may be made, has been allowed, as in this case the defendants provided only a part of the means employed in effecting fraud,[123] but the person who sells spurious bitters in bulk, advising dealers to make a fraudulent substitution of them for those of another will be enjoined.[124] When a dealer sells spurious bitters in bulk in large demijohns and gives empty genuine bottles with each sale[125] he places in the retailer's hands power to deceive the general public and is guilty of contributory infringement. So too it "is wrong to sell the defendant's goods in the plaintiff's bottles," even though non-infringing labels[126] and boxes branded with the defendant's name are used and it is also wrong to fill plaintiff's bottles with another compound for a man who was going to sell it.[127] In all these cases equity looks beyond the original acts, finds that their ultimate object and effect were to enable retailers to palm off fraudulent imitations on an unsuspecting public, and enjoins the authors of these acts.

Bernard C. Steiner, Ph.D.

---

115. *Brown v. Strauss,* 37 Fed. 361.

116. Especially Hostetter's, *e. g. Myers v. Theller,* 38 Fed. 607.

117. *Grezier v. Antran,* 13 R. P. C. 1 *(Chartreuse). Societe v. Western Distilling Co.,* 42 Fed. 96. *(Benedictine.)*

118. *White v. Miller,* 50 Fed. 277.

119. *Hires v. Consumers Co.,* 100 Fed. 809.

120. *Mumm v. Frash,* 68 Off. Gaz. 143.

121. *Wolfe v. Alsop,* 12 V. L. R. 421. See *Ford v. Foster,* 7 Ch. App. 611.

122. *Hostetter v. Van Vorst,* 69 Off. Gaz. 1648.

123. *Hostetter v. Fries,* 17 Fed. 621.

124. *Hostetter v. Bruggemann,* 56 Off. Gaz. 530.

125. *Hostetter v. Sommers,* 84 Fed. 333; *Hostetter v. Becker,* 73 Fed. 297; *Hostetter v. Schneider,* 107 Fed. 705.

126. *Hostetter v. Anderson,* 1 V. R. E. 7.

127. *Rose v. Loftus,* 47 L. J. Ch. 576.