ought to have seen the plaintiff *approaching* a position of imminent peril, and regardless of whether plaintiff was oblivious. If carried to the extreme, the practical effect of this ruling will be to force the trains to "stop, look and listen" for approaching autos.

A. K. S.

UNFAIR COMPETITION—RECOGNITION OF PROPERTY RIGHT IN IDEAS AND METHODS—[Federal].—The plaintiff had originated the advertising plan "Bank Night," and had expended money and effort in its promotion, deriving profit by licensing its use.[1] The defendant was engaged in licensing a similar scheme. The plaintiff sued to restrain defendant from unfair competition in appropriating its alleged property right in the system. The bill was dismissed on the grounds that to sustain the bill would result in a monopoly and that plaintiff's property right in the system was lost when disclosed to the public.[2]

The courts have found the extent of protection to be accorded this type of business scheme an extremely perplexing problem.[3] While recognition of property rights in economically valuable ideas and methods has frequently been sought, courts have been reluctant to extend such recognition.[4] The early common law was in conflict as to property in purely intellectual creations.[5] However a "reduction to practice"[6] of an idea is apparently

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1. The plaintiff licensed or vended the plan to commercial establishments, especially motion picture theatres. The plan involved the award of a prize at stated periods to the patron or person whose name was drawn from a receptacle in which the names or serial numbers of all patrons or registered persons were contained. The lower court's dismissal of the bill on the ground that the plan was a gambling transaction was held erroneous on this appeal. This comment is not concerned with the legality of the system. See comment, 22 WASHINGTON U. LAW QUARTERLY 126 (1936).

2. Affiliated Enterprises, Inc., v. Truber et al., 86 F. (2d) 958 (C. C. A. 1, 1936). The plaintiff also alleged infringement of its copyrights on its instructions and publications. The allegations of infringement were held insufficient.

3. Handler, Unfair Competition (1936) 21 Iowa L. Rev. 175, 190; note 47 Harv. L. Rev. 1419 (1934).

4. Globe Wernick Co. v. Fred Macey Co., 119 Fed. 696 (C. C. A. 6, 1902) (system of sectional bookcases); Einstadt Mfg. Co. v. J. M. Fisher Co., 232 Fed. 957 (D. C. D. R. I., 1916), aff'd 241 Fed. 241 (C. C. A. 1, 1917) (bracelet to be built by purchase of individual links); Harvey Hubbell, Inc., v. General Electric Co., 262 Fed. 155 (D. C. S. D. N. Y., 1919) (interchangeable electric sockets); Hamilton Mfg. Co. v. Tubbs Mfg. Co., 216 Fed. 401 (C. C. W. D. Mich., 1908) (manufacturing methods).

5. Compare Lord Mansfield's holding in Millar v. Taylor, 4 Burr. 2303, 2311, 98 Eng. Rep. 201, 253 (1769) with Lord Brougham's opinion in Jeffery v. Boosey, 4 H. L. Cas. 814, 965, 10 Eng. Rep. 681, 740 (1854). See also Rogers, A Chapter in the History of Literary Property (1911) 5 Ill. L. Rev. 550.

6. A "reduction to practice" involves the employing of the abstraction in a definite concrete form as a source of profit in business. Note, 47 Harv. L. Rev. 1419 (1934); note, 42 Harv. L. Rev. 258 (1929).

now necessary to create any recognizable interest in it.[7] Literary property before publication is protected as personal property.[8] If not literary property, the courts usually require that the idea be accompanied by particular physical devices for carrying it out,[9] or that it be guarded as a trade secret[10] before protecting against appropriation of any property right therein. Thus courts have sanctioned honest appropriation of formulae,[11] advertising schemes,[12] methods of conducting business,[13] styles,[14] designs,[15]

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7. Liggett & Meyer Tobacco Co. v. Meyer, 194 N. E. 207 (Ind., 1935) (billboard advertising idea); Fisher v. Star Co., 231 N. Y. 414, 132 N. E. 173 (1921) (names and figures of cartoon characters). The ideas in the following were held not to be sufficiently "reduced to practice": Bristol v. Equitable Life Insurance Co., 5 N. Y. Supp. 131 (1889), aff'd 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568 (1892) (system of selling insurance); Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (1906), amended bill dismissed 75 N. J. Eq. 330, 78 Atl. 566 (1908), aff'd 75 N. J. Eq. 623, 73 Atl. 1118 (1909) (plan of industrial organization); Universal Saving Corp. v. Morris Plan Co., 234 Fed. 382 (D. C. S. D. N. Y., 1916) (banking plan); Stein v. Morris, 120 Va. 390, 91 S. E. 177 (1917) (same); Moore v. Ford Motor Co., 28 F. (2d) 529 (D. C. S. D. N. Y., 1928) (sales plan); Outcalt v. N. Y. Herald, 146 Fed. 205 (C. C. S. D. N. Y., 1906) (cartoon characters).

8. Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177 (1887) (operetta); Baker v. Lillbie, 210 Mass. 599, 604, 97 N. E. 109 (1912) (private letters); Taft v. Smith, 134 N. Y. Supp. 1011 (1912) (manuscript); Wright v. Eisle, 83 N. Y. Supp. 887 (1887) (architect's plans); Dodge Co. v. Construction Information Co., 183 Mass. 62, 66 N. E. 204 (1903) (confidential information); Thompson v. Famous Players Lasky Corp., 3 F. (2d) 707 (D. C. N. D. Ga., 1925) (scenario); Jenkins v. News Syndicate Co., 219 N. Y. Supp. 196 (1926) (synopsis of contemplated news articles). For general discussion see note, 19 ST. LOUIS LAW REVIEW 323 (1934).

9. Meyer v. Hurwitz, 5 F. (2d) 370 (D. C. E. D. Pa., 1925) (defendant restrained from selling copies of plaintiff's post cards to sell in plaintiff's machine); Meccano Ltd. v. Wagner, 234 Fed. 912 (D. C. S. D. Ohio, 1916), aff'd 246 Fed. 603 (C. C. A. 6, 1918) (defendant enjoined from selling additional parts to plaintiff's complete sets); Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692 (C. C. A. 7, 1914) (filling plaintiff's exchangeable tanks with defendant's gas enjoined); Fonotipia Ltd. v. Bradley, 171 Fed. 951 (C. C. E. D. N. Y., 1909) (reproduction of plaintiff's original records enjoined); Bitterman v. Louisville & N. R. R., 207 U. S. 205, 28 S. Ct. 91, 52 L. ed. 171 (1907) (scalping of plaintiff's non-transferable tickets forbidden); Sperry & Hutchinson Co. v. Mechanic's Clothing Co., 128 Fed. 800 (C. C. D. R. I., 1904) (defendant forbidden to reissue plaintiff's trading stamps); contra Meccano, Ltd. v. John Wannamaker, New York, 250 Fed. 450 (C. C. A. 2, 1918), aff'd 253 U. S. 136 (1920) (sale of model building outfits usable in plaintiff's sets permitted); cf. cases supra, note 4.

10. Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236, 25 S. Ct. 637, 49 L. ed. 1031 (1904) (market quotations). The distinction drawn by courts between trade secrets and other business ideas is somewhat blurred and is often criticized. See note, 42 Harv. L. Rev. 254 (1929); comment, 21 Cornell L. Q. 488 (1936).

11. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442 (1890).

12. Westminster Laundry Co. v. Hesse Envelope Co., 174 Mo. App. 238, 156 S. W. 767 (1913) (blind advertising scheme); Armstrong Seatag Corp.

and other commercially valuable ideas.[16] Appropriation that is fraudulent, in breach of contract or trust, or that results in passing off one's own goods as those of a competitor has been consistently enjoined.[17] While the existence of such unfair competition strengthens the case for giving protection, the lack of that element should not preclude recognition of any legal right in such ideas.[18]

The case of *International News Service v. Associated Press*[19] has often been cited, as it was by the plaintiff in the instant case, as declaring a new "free ride" theory of unfair competition, *viz.*, that a competitor shall not appropriate the benefits of another's efforts and expenditures.[20] But the court here, as have nearly all courts, declined to apply the principle to types of appropriation other than of news.[21]

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v. Smith's Island Oyster Co., 224 Fed. 100 (C. C. A. 2, 1915) (tagging oysters).

13. Kaeser & Blair, Inc., v. Merchants Ass'n, Inc., 64 F (2d) 575 (C. C. A. 6, 1933) (selling by catalogue directly to customer).

14. Montegut v. Hickson, 164 N. Y. Supp. 858 (1917) (relief was given here against appropriation because of the fraudulent means employed in the appropriation).

15. Cheyney Bros. v. Doris Silk Corp., 30 F. (2d) 279 (C. C. A. 2, 1929), cert. denied 281 U. S. 728, 50 S. Ct. 245, 74 L. ed. 1145 (1930) (silk designs); Keystone Type Foundry Co. v. Portland Publishing Co., 186 Fed. 690 (C. C. A. 1, 1911) (type designs); Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26 (C. C. A. 6, 1911) (unpatended stove design); Clipper Lacer Co. v. Detroit Lacer Co. 223 Mich. 397, 194 N. W. 125 (1923) (unpatented carded belt lacing hooks).

16. Supra, note 6; Burnell v. Chown, 69 Fed. 993 (C. C. N. D. Ohio, 1895) (symbolic rating system); Keller v. American Chain Co., Inc., 255 N. Y. 94, 174 N. E. 74 (1930) (idea for saving money); Booth v. Stutz Motor Co., 56 F. (2d) 962 (C. C. A. 7, 1932) (automobile plans).

17. Montegut v. Hickson, 164 N. Y. Supp. 858 (1917) (fraudulent purchase and copying of dress models restrained); Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090 (1910) (fraudulent appropriation and use of customers lists restrained); Margolis v. National Bellas Hess Co., 249 N. Y. Supp. 175 (1931) (dress kept and copied in breach of contract and trust held ground for relief); Irving Iron Works v. Kerlow Steel Flooring Co., 143 Atl. 145 (N. J. Eq., 1928) (filching of employer's secret processes held illegal); Maas & Waldstein Co. v. Walker, 135 Atl. 275 (N. J. Eq., 1926), aff'd 140 Atl. 921 (N. J. Eq. 1928) (formulae acquired through breach of trust); Moore v. N. Y. Cotton Exchange, 291 Fed. 681 (C. C. A. 2, 1923) (purloining of market quotations restrained); Globe Ticket Co. v. International Ticket Co., 90 N. J. Eq. 605, 104 Atl. 92 (1919) (trade secret disclosed by employee, but relief refused because of laches); Saalfield Pub. Co. v. G. & C. Merriam Co., 238 Fed. 1 (C. C. A. 6, 1917) (imitation of long established characteristics of plaintiff's dictionary enjoined to prevent palming off of defendant's dictionary as plaintiff's).

18. Note, 42 Harv. L. Rev. 258 (1929); note, 45 Harv. L. Rev. 545 (1932).

19. 248 U. S. 215, 39 S. Ct. 68, 63 L. ed. 211, 2 A. L. R. 293, (1918).

20. Handler, Unfair Competition (1936) 21 Iowa L. Rev. 175, 190; note, 47 Harv. L. Rev. 1419 (1934).

21. Cheyney Bros. v. Doris Silk Corp., 35 F. (2d) 279 (C. C. A. 2, 1929) (principle held inapplicable to appropriation of fabric designs); B. F. Crump Co. v. J. L. Lindsay, Inc., 130 Va. 144, 107 S. E. 679 (1921) (cata-

It is unlikely, however, that the courts will not continue to extend the scope of protection of business ideas.[22] Plans of action, as here presented, have an exchange value in modern business,[23] and, as such, deserve recognition and a limited protection.[24] While there are analogies in the protection afforded the creations of authors, artists, and musicians, the vital public interest in the free use of ideas and freedom from stifling monopoly must be the test. This, however, should be finally applied by the creative force of the legislature.[25] The instant case is an example of the recognition by a court of judicial limitations and of the weighty considerations of public policy as obstacles to judicial protection of plaintiff's interests.

F. R. K.

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logues of motor accessories concern held not analogous to news); Hughes v. West Publishing Co., 225 Ill. App. 58 (1922) ("Key Number System" of arranging legal material permitted to be copied); see Fathchild, Static and Dynamic Concepts of Law of Unfair Competition (1936) 1 Mo. L. Rev. 299. Cf. National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 60 A. L. R. 865 (C. C. A. 7, 1902); Kiernan v. Market Quotation Co., 50 How. Prac. 194 (N. Y., 1876).

22. Note, 47 Harv. L. Rev. 1419 (1934).

23. See Commons, *Legal Foundations of Capitalism* (1924) c. 2, noting especially pp. 14-18, for a discussion of the development of the exchange value definition of property.

24. Comment, 21 Cornell L. Q. 488 (1936).

25. See Mr. Justice Holmes' separate opinion and Mr. Justice Cardozo's dissent in the International News Service case, supra, note 19; Handler, Unfair Competition (1936) 21 Iowa L. Rev. 175, 195; note, 47 Harv. L. Rev. 1419 (1934).