

The remote seller in the principal case, although a casual seller, has some of the characteristics of these other types of sellers. A manufacturer may be held liable because he created the defect. The seller here also created the defect by an overt act. On this basis he could be liable. An habitual seller has considerable knowledge concerning the product he sells. The seller here, who was engaged in the business of renting cars, probably had the same degree of knowledge as an habitual seller.¹⁵ He did not, however, have the same volume of sales as the habitual seller. The seller here bears a closer resemblance to a building contractor in that his sales are less frequent. It has been suggested that the main reason for holding the manufacturer liable is that his volume of sales is great enough to allow him to distribute the loss to a large segment of the public by a slight price increase.¹⁶ This reason also applies to liability of habitual sellers. If the significant fact in determining the liability of a seller is his volume of sales, then the decision of the court in the principal case is correct in view of the small number of sales made by this defendant. If, however, the loss distribution motivation is not controlling, the decision is erroneous in light of the extension of the liability of sellers of defective products to provide increased consumer protection.

TORTS—TRADE SECRETS—NECESSITY OF CONFIDENTIAL
RELATIONSHIP

Smith v. Dravo Corporation, 203 F.2d 369 (7th Cir. 1953).

Smith designed and manufactured a novel freight container. After his death, Dravo Corporation became a prospective buyer of his business and during negotiations received detailed information from his executor concerning the construction of the container. Dravo decided against the purchase, but, shortly thereafter, marketed a freight container which was almost identical to that which had been designed and produced by Smith. Smith's executor brought an action to enjoin Dravo Corporation from

15. The UNIFORM COMMERCIAL CODE §§ 2-104, 2-314 (1952), provides for greater liability on implied warranty grounds for those having special knowledge of the product sold than for those not having such knowledge.

16. *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 461-468, 150 P.2d 436, 440-444 (1944) (concurring opinion). See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382-384 (1951).

manufacturing this type of freight container, claiming defendant had wrongfully obtained and used Smith's trade secret. The district court found for the defendant. On appeal, the court of appeals reversed the judgment of the district court and held that a trade secret which defendant learned by means of a confidential relationship will be protected even though the defendant could have learned the secret by legitimate means.¹

It has long been settled in both English and American law that an action exists for misappropriation and use of a trade secret. The first case granting injunctive relief was *Yovatt v. Winyard*,² decided in England in 1820. Mr. Justice Story declared as early as 1853 that Equity would restrain a party from disclosing trade secrets communicated to him in the course of a confidential employment.³ However, it was not until 1868 in the leading case of *Peabody v. Norfolk*,⁴ that an American court granted an injunction in a trade secrets case. In that case, the Massachusetts court introduced both the necessity of a "breach of trust" for actionable misappropriation of trade secrets, and the troublesome and somewhat discredited⁵ concept of the trade secret as property. The latter concept was further developed in 1889 by the New York Court of Appeals⁶ and reached its zenith in *International News Service v. Associated Press*.⁷ By calling a trade secret "property," the courts were able to grant injunctive relief against misappropriation on the ground that equity protects property. This use of the property concept is an example of *circulus in probando*: Equity will protect trade secrets because they are property, and, conversely, trade secrets are property because equity protects them. Mr. Justice Holmes, in the case of *DuPont de Nemours Powder Co. v. Masland*,⁸ recognized this fallacy and

1. *Smith v. Dravo Corporation*, 203 F.2d 369 (7th Cir. 1953). The district court also found for the defendant on a second ground, patent infringement. This holding was affirmed on the appeal.

2. 1 Jac. & W. 394, 37 Eng. Rep. 425 (1820).

3. STORY, EQUITY JURISPRUDENCE 932 (1853).

4. 98 Mass. 452 (1868).

5. See *E. I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917).

6. *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889). For an excellent discussion of the history of the action, see Barton, *A Study in the Law of Trade Secrets*, 13 U. OF CINN. L. REV. 507 (1939).

7. 248 U.S. 215 (1918).

8. 244 U.S. 100 (1917). "The word 'property' as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." *Id.* at 102.

concluded that the emphasis in a trade secret case should be placed on the existence and breach of a confidential relationship, rather than on the legalistic nomenclature of the interest to be protected.

In the principal case the court does not consider the question of whether or not a trade secret is property. By completely eliminating this legal surplusage, the court has taken a progressive step. The court set forth the requirements for a cause of action for misappropriation of trade secrets:⁹ 1) Existence of a trade secret, 2) communicated to the defendant, 3) while he was in a position of trust or confidence, and 4) use by the defendant to the injury of the plaintiff. Although the court claims to have taken a different view than Holmes, there is a marked similarity between the two approaches in that the court in the principal case also stresses the breach of a confidential relationship. The court, however, primarily emphasizes the existence of a trade secret saying, "This is the very basis of plaintiff's claim."¹⁰ In accordance with the view of the Restatement of Torts,¹¹ the court declares that almost any knowledge or information used by the plaintiff in its business may be the subject matter of a trade secret so long as it was acquired by the independent effort of the plaintiff,¹² and that the second aspect of a trade secret is the relative secrecy of the subject matter.¹³ The court points out that, although the information might have been derived from plaintiff's products which had been marketed, it is still sufficiently secret to be classified as a trade secret between these parties if the defendant obtained the information surreptitiously.¹⁴ This proposition substantially modifies the secrecy requirement.

9. *Smith v. Dravo Corporation*, 203 F.2d 369, 373 (7th Cir. 1953). The federal court, sitting in Pennsylvania, used *MacBeth-Evans Glass Co. v. Scheibach*, 239 Pa. 76, 86 Atl. 688 (1912), as declaratory of the local law.

10. *Smith v. Dravo Corporation*, *supra* note 9.

11. RESTATEMENT, TORTS § 757, comment *b* (1939).

12. *Smith v. Dravo Corporation*, 203 F.2d 369, 373 (7th Cir. 1953). The court's position is sustained by the weight of authority. *Victor Chemical Works v. Iliff*, 299 Ill. 532, 132 N.E. 806 (1921); *National Tube Co. v. Eastern Tube Co.*, 3 Ohio Cir. Ct. R.N.S. 459 (1902). See *Barton*, *supra* note 6, at 521-529.

13. *Smith v. Dravo Corporation*, *supra* note 12. See RESTATEMENT, TORTS § 757, comment *b* (1939): "A substantial element of secrecy must exist, so that . . . there would be difficulty in acquiring the information."

14. *Smith v. Dravo Corporation*, *supra* note 12. The court's position is sustained by the weight of authority. *Herold v. Herold China & Pottery Co.*, 257 Fed. 911 (6th Cir. 1919); *Radium Remedies Co. v. Weiss*, 173 Minn.

Unless a confidential relationship exists there can not be a trade secret, although the information is the proper subject matter upon which to base injunctive relief.¹⁵ Thus, if the information were obtained by legitimate methods, such as an examination of the plaintiff's marketed products, no protection would be given the trade secret.

It is clear that the information misused by the defendant in the principal case was obtained through a confidential relationship. Therefore, the four step approach used by this court is adequate to arrive at the correct result;¹⁶ but it is a more indirect route than that advocated by Holmes, which penetrates immediately to the question of whether there has been a breach of a confidential relationship.

It is submitted that a better approach would be: 1) Did the defendant occupy a position of trust or confidence to the plaintiff, 2) which was breached by the defendant, 3) to obtain information of a business or commercial nature, 4) which was used by the defendant to the detriment of the plaintiff? This approach would emphasize the breach of the confidential relationship, rather than the "existence of a trade secret."

WILLS—DEPENDENT RELATIVE REVOCATION

La Croix v. Senecal, 99 A.2d 115 (Conn. 1953).

Testatrix died leaving a will and codicil. Although the codicil expressly revoked the residuary clause of the will, and substituted a new residuary clause, the only change made by the codicil was to eliminate the possibility of any uncertainty as to the identity

342, 217 N.W. 339 (1928); *Vulcan Detinning Co. v. American Can Co.*, 72 N.J. Eq. 387, 67 Atl. 339 (Ct. Err. & App. 1907); *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889); *Witkop & Holmes Co. v. Great Atlantic & Pacific Co.*, 69 Misc. 90, 124 N.Y. Supp. 956 (Sup. Ct. 1910); *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 Atl. 4 (1904); *RESTATEMENT, TORTS* § 757, comment *b* (1939). *But cf.* *Bristol v. Equitable Life Ins. Co.*, 132 N.Y. 264, 30 N.E. 506 (1892).

15. *Stewart v. Hock*, 118 Ga. 445, 45 S.E. 369 (1903); *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068 (1890); *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889); *See Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150 (1949).

16. The second and fourth steps used in the approach to the problem by the court in the principal case, that the subject matter was communicated to the defendant and that such information was used by the defendant to the detriment of the plaintiff, do not provide any difficult questions of law in this case.