

Advanced Torts

Cases and Materials

FOURTH EDITION

Peter B Kutner

HUGH ROFF PROFESSOR OF LAW
THE UNIVERSITY OF OKLAHOMA

Osborne M. Reynolds, Jr.

MAURICE H. MERRILL DISTINGUISHED SCHOLAR
AND PROFESSOR OF LAW EMERITUS
THE UNIVERSITY OF OKLAHOMA



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 1989, 1997, 2007, 2013
Peter B Kutner
All Rights Reserved

ISBN 978-1-61163-301-6
LCCN 2012950117

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Summary of Contents

Table of Contents	vii
Table of Cases	xiii
Preface	liii
INTRODUCTION	3
CHAPTER 1. FAMILY RELATIONS	9
Section 1. Injuries to Family Members	9
Section 2. Fatal Injuries to Family Members	50
Section 3. Interference with Family Relationships	77
Section 4. Wrongful Birth	112
CHAPTER 2. ECONOMIC RELATIONS	123
Section 1. Interference with Contractual Relations	123
Section 2. Interference with Prospective Advantage	164
Section 3. Unintentional Interference	210
CHAPTER 3. MARKETPLACE FALSEHOODS	239
Section 1. Injurious Falsehood	239
Section 2. Passing Off (Unfair Competition)	263
Section 3. False Advertising	304
CHAPTER 4. INTANGIBLE ASSETS	309
Section 1. Trade Secrets and Confidential Information	309
Section 2. Literary, Artistic and Commercial Creations	336
CHAPTER 5. PUBLICITY AND PRIVACY	387
Section 1. Appropriation of Name, Likeness or Identity	387
Section 2. Intrusion	427
Section 3. Disclosure of Private Facts	440
Section 4. False Light	473
Section 5. Review	484
CHAPTER 6. DEFAMATION	491
Section 1. Defamatory Communications	491
Section 2. Common Law Defenses	562
Section 3. Constitutional Law	626

CHAPTER 7. JUDICIAL PROCESS AND CIVIL RIGHTS	685
Section 1. Malicious Prosecution	685
Section 2. Wrongful Civil Proceedings	702
Section 3. Abuse of Process	718
Section 4. Interference with Civil Rights	725
Index	743

Table of Contents

Table of Cases	xiii
Preface	liii
INTRODUCTION	3
Leon Green, Basic Concepts: Persons, Property, Relations	3
CHAPTER 1. FAMILY RELATIONS	9
Section 1. Injuries to Family Members	9
A. Spouse	9
Guy v. Livesey	9
Guevin v. Manchester Street Railway	9
Neuberg v. Bobowicz	13
Rodriguez v. Bethlehem Steel Corporation	16
B. Child or Parent	22
Hall v. Hollander	22
Borer v. American Airlines, Inc.	25
Baxter v. Superior Court of Los Angeles County	30
Hibpshman v. Prudhoe Bay Supply, Inc.	31
C. Other Relationships	34
Hendrix v. General Motors Corporation	34
D. Defenses	38
Brennan v. Biber	38
Wright v. Standard Oil Company, Inc.	40
Scott v. Marshall	44
Handeland v. Brown	46
Section 2. Fatal Injuries to Family Members	50
Huggins v. Butcher	50
Baker v. Bolton	51
Woolworths Ltd. v. Crotty	51
Gaydos v. Domabyl	56
Selders v. Armentrout	60
Dubil v. Labate	64
Todd v. Sandidge Construction Company	66
Kelliher v. New York Central & Hudson River Railroad Company	70
Johnson v. Ottomeier	73
Section 3. Interference with Family Relationships	77
Rose v. Kavanagh	77
Carrieri v. Bush	80
Oakman v. Belden	82

McMillan v. Felsenthal	85
Armstrong v. McDonald	88
Plante v. Engel	90
Politte v. Politte	91
Pyle v. Waechter	94
Magierowski v. Buckley	96
Bearbower v. Merry	101
Taylor v. Keefe	106
Burnette v. Wahl	109
Section 4. Wrongful Birth	112
Speck v. Finegold	112
CHAPTER 2. ECONOMIC RELATIONS	123
Section 1. Interference with Contractual Relations	123
A. Inducing Breach of Contract	123
Lumley v. Gye	123
Glamorgan Coal Company, Ltd. v. South Wales Miners' Federation	127
Camden Nominees, Ltd. v. Forcey	128
Sweeney v. Smith	134
Wilkinson v. Powe	135
United Truck Leasing Corporation v. Geltman	139
B. Inducing Termination of Contract	143
Terry v. Dairymen's League Co-Operative Association, Inc.	143
Kemp v. Division No. 241, Amalgamated Association of Street & Electric Railway Employés of America	146
Adler, Barish, Daniels, Levin and Creskoff v. Epstein	152
C. Interference with Performance of Contract	155
National Phonograph Company, Ltd. v. Edison-Bell Consolidated Phonograph Company, Ltd.	155
Piedmont Cotton Mills, Inc. v. H.W. Ivey Construction Company, Inc.	157
D.C. Thomson & Company Ltd. v. Deakin	160
Section 2. Interference with Prospective Advantage	164
A. Interference with Business	164
Walker v. Cronin	164
Mogul Steamship Company, Ltd. v. McGregor, Gow, & Company	167
J.F. Parkinson Company v. Building Trades Council of Santa Clara County	173
Dunshee v. Standard Oil Company	180
Clark v. Crown Drug Company	183
K & K Management, Inc. v. Lee	186
Top Service Body Shop, Inc. v. Allstate Insurance Company	190
Pleas v. City of Seattle	192
Speakers of Sport, Inc. v. ProServ, Inc.	197
B. Interference with Other Expectations	201
Harmon v. Harmon	201
Goff v. Harold Ives Trucking Company, Inc.	204
Trautwein v. Harbourt	208

Section 3. Unintentional Interference	210
Connecticut Mutual Life Insurance Company v. New York and New Haven Railroad Company	210
Morton v. Merrillville Toyota, Inc.	212
Berg v. General Motors Corporation	215
Dunlop Tire and Rubber Corporation v. FMC Corporation	220
Beck v. FMC Corporation	222
J'Aire Corporation v. Gregory	223
Pelham v. Griesheimer	230
Stinson v. Physicians Immediate Care, Limited	234
CHAPTER 3. MARKETPLACE FALSEHOODS	239
Section 1. Injurious Falsehood	239
Fen v. Dixe	239
Hatchard v. Mège	239
Young v. Macrae	242
White v. Mellin	243
De Beers Abrasive Products Ltd. v. International General Electric Company of New York Ltd.	245
National Refining Company v. Benzo Gas Motor Fuel Company	250
Annbar Associates v. American Express Company	255
Granada Biosciences, Inc. v. Forbes, Inc.	257
Teilhafer Manufacturing Company v. Unarco Materials Storage	260
Section 2. Passing Off (Unfair Competition)	263
A. Products	264
Fischer v. Blank	264
Havana Cigar and Tobacco Factories, Ltd. v. Oddenino	268
Kellogg Company v. National Biscuit Company	272
B. Business Names	278
Zimmerman v. B. & C. Motel Corporation	278
Saskatoon Star Phoenix Group Inc. v. Noton	281
Zimmerman v. Holiday Inns of America, Inc.	284
Oklahoma District Council of the Assemblies of God of the State of Oklahoma, Inc. v. New Hope Assembly of God Church of Norman, Oklahoma, Inc.	287
C. Non-Competitors	290
Philadelphia Storage Battery Company v. Mindlin	290
Cue Publishing Company, Inc. v. Colgate-Palmolive Company	294
Wyatt Earp Enterprises, Inc. v. Sackman, Inc.	299
Section 3. False Advertising	304
Mosler Safe Company v. Ely-Norris Safe Company	304
CHAPTER 4. INTANGIBLE ASSETS	309
Section 1. Trade Secrets and Confidential Information	309
Wilson Certified Foods, Inc. v. Fairbury Food Products, Inc.	309
Aetna Building Maintenance Company, Inc. v. West	314
Bayer Corporation v. Roche Molecular Systems, Inc.	319
Forest Laboratories, Inc. v. Formulations, Inc.	321
Djowharzadeh v. City National Bank and Trust Company of Norman	328
E.I. duPont deNemours & Company, Inc. v. Christopher	331

Section 2. Literary, Artistic and Commercial Creations	336
A. Common Law Copyright	336
Palmer v. De Witt	336
National Institute, Inc., for the Improvement of Memory v. Nutt	339
B. Misappropriation	343
International News Service v. Associated Press	343
Cheney Brothers v. Doris Silk Corporation	352
Intermountain Broadcasting & Television Corporation v. Idaho Microwave, Inc.	356
C. Characters and Characterizations	361
Booth v. Colgate-Palmolive Company	361
Columbia Broadcasting System, Inc. v. DeCosta	365
Lone Ranger, Inc. v. Cox	369
D. Ideas	373
Educational Sales Programs, Inc. v. Dreyfus Corporation	373
Hamilton National Bank v. Belt	376
Richter v. Westab, Inc.	380
 CHAPTER 5. PUBLICITY AND PRIVACY	 387
Section 1. Appropriation of Name, Likeness or Identity	387
Hinich v. Meier & Frank Company, Inc.	387
Minnifield v. Ashcraft	393
Uhlaender v. Henricksen	398
Carson v. Here's Johnny Portable Toilets, Inc.	403
Landham v. Lewis Galoob Toys, Inc.	404
Memphis Development Foundation v. Factors Etc., Inc.	409
Hicks v. Casablanca Records	413
Groucho Marx Productions, Inc. v. Day and Night Company, Inc.	419
C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.	423
Section 2. Intrusion	427
Froelich v. Werbin	427
Creel v. I.C.E. & Associates, Inc.	432
Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.	434
Section 3. Disclosure of Private Facts	440
A. Publication of Private Facts	440
Meetze v. Associated Press	440
Gilbert v. Medical Economics Company	443
The Florida Star v. B.J.F.	449
Diaz v. Oakland Tribune, Inc.	456
Norris v. King	459
B. Disclosure Without Publicity	463
Swinton Creek Nursery v. Edisto Farm Credit, ACA	463
McCormick v. England	467
Section 4. False Light	473
Leverton v. Curtis Publishing Company	473
Uhl v. Columbia Broadcasting Systems, Inc.	476
Cain v. Hearst Corporation	480

Section 5. Review	484
Anderson v. Fisher Broadcasting Companies, Inc.	484
CHAPTER 6. DEFAMATION	491
Section 1. Defamatory Communications	491
A. Defamatory Meanings	491
Denny v. Mertz	491
Hepburn v. TCN Channel Nine Pty. Ltd.	497
Burton v. Crowell Publishing Company	501
Derbyshire County Council v. Times Newspapers Ltd.	504
Cassidy v. Daily Mirror Newspapers, Ltd.	512
B. Reference to Plaintiff	519
Gaiimo v. Literary Guild	519
Helmicks v. Stevlingson	520
Bindrim v. Mitchell	523
Arcand v. Evening Call Publishing Company	529
C. Libel and Slander	533
Matherson v. Marchello	533
Gunsberg v. Roseland Corporation	539
D. Publication	542
Hedgpeth v. Coleman	542
Vermaak v. Van der Merwe	547
Vizetelly v. Mudie's Select Library, Ltd.	549
Lunney v. Prodigy Services Company	552
Traditional Cat Association, Inc. v. Gilbreath	557
Section 2. Common Law Defenses	562
A. Truth	562
Shihab v. Express-News Corporation	562
Crane v. New York World Telegram Corporation	568
B. Absolute Privileges	573
Mills v. Denny	573
Adams v. Peck	577
Stukuls v. State	582
Luttrell v. United Telephone System, Inc.	586
C. Qualified Privileges	589
Flanagan v. McLane	589
Sindorf v. Jacron Sales Company, Inc.	593
Shenkman v. O'Malley	602
Benassi v. Georgia-Pacific	607
Green Acres Trust v. London	613
London Artists Ltd. v. Littler	618
Section 3. Constitutional Law	626
Gertz v. Robert Welch, Inc.	626
Stone v. Essex County Newspapers, Inc.	637
Wolston v. Reader's Digest Association, Inc.	646
Clyburn v. New World Communications, Inc.	650
Kahn v. Bower	657
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.	662
Philadelphia Newspapers, Inc. v. Hepps	670

Barry v. Time, Inc.	674
Milkovich v. Lorain Journal Company	678
CHAPTER 7. JUDICIAL PROCESS AND CIVIL RIGHTS	685
Section 1. Malicious Prosecution	685
Halberstadt v. New York Life Insurance Company	685
Fusario v. Cavallaro	689
Gustafson v. Payless Drug Stores Northwest, Inc.	692
Royal Oil Company, Inc. v. Wells	698
Section 2. Wrongful Civil Proceedings	702
Myhre v. Hessey	702
Melvin v. Pence	707
Berlin v. Nathan	710
Section 3. Abuse of Process	718
Ellis v. Wellons	718
Hauser v. Bartow	721
Section 4. Interference with Civil Rights	725
Ashby v. White	725
Nevin v. Pullman Palace Car Company	730
Bhadoria v. Board of Governors of Seneca College of Applied Arts and Technology	732
Davis v. Passman	736
Index	743

Preface

The first-year Torts course is a fixture of American legal education. This course is primarily concerned with tort remedies for personal injury and property damage. Most of the torts concerned with intangible harm are never examined. They cannot be, in the hours allotted to the first-year course. Thus, students are never exposed to such major subjects as defamation, the rights of privacy and publicity, harm to family relationships, malicious prosecution, interference with common law civil rights, injurious falsehood, liability for economic loss, interference with contract, misappropriation of trade secrets, unfair competition and other business torts. For these subjects—now the principal “growth areas” of tort liability—one or more courses for upperclass students must be offered.

This book is designed primarily for an Advanced Torts course addressing the subjects mentioned above. It is also appropriate for courses and seminars on economic torts (or business torts), using Chapters 2, 3, 4 and the first section of Chapter 5; defamation and privacy, using Chapters 5 and 6; and the family and tort law, using Chapter 1. None of the casebooks published for the first-year course is suitable for these purposes—hence the need for an Advanced Torts casebook.

The influence of Dean Leon Green, who introduced a casebook on “injuries to relations” in 1940, must be acknowledged. His concept of injuries to relations, which encompasses all the subjects covered in our book, is outlined in the introductory chapter. Some theories of tort liability for economic harm, such as misrepresentation, tortious breach of contract and wrongful discharge from employment, do not involve interference with a “relational interest” and are not addressed in this book. Practical reasons for their exclusion are the impossibility of covering both these torts and a good variety of other “advanced torts” in a single course and the likelihood that they will be addressed in other courses, such as Remedies.

The format of the book is the familiar one of principal cases followed by textual notes. The materials emphasize the facts and decisions of reported cases rather than secondary sources, such as law review commentaries. The principal cases have been substantially edited. Deletions of text, other than citations and footnotes, are indicated by ellipses. Editors’ footnotes are followed by “[Ed.]”

Apart from subject-matter, the main respect in which this book differs from other casebooks is the inclusion of cases from outside the United States. They are included for the same reasons as American cases: their roles as legal precedents and value for instructional purposes. In addition, use of non-American cases and treatises makes the point that for many subjects, including Torts, the law is “common,” not “American,” and cases and literature from other countries with common law legal systems are sources of law and legal analysis for the United States.

This involves more than noting that American law and the law of other places once within the British Empire have foundations in the common law of England, or making

references to old, familiar English cases. It means that it is necessary for Americans to undertake research of modern law and literature from common law jurisdictions outside the United States and utilize the results of this research in writing, teaching and practice. It strikes us as strange that practitioners and academics will spare no effort to find some precedent in the lower courts of distant American states but ignore the possibility that there are relevant decisions by such eminent courts as the (English) Court of Appeal, Supreme Court of Canada and High Court of Australia.

We wish to express our appreciation to all of the many persons who assisted and encouraged us in the production of the present edition and previous editions of this book. For the present edition we particularly acknowledge the efforts of the Faculty Support Staff of the University of Oklahoma College of Law; the librarians and personnel of the University of Oklahoma Law Library, the library of the Max Planck Institute for Comparative and International Private Law, and other libraries at which research for the book was conducted; and Keith Sipe, Linda Lacy and staff of Carolina Academic Press.

We thank the Richard-Wagner-Museum, Photofest, the Berkshire Record Office, the Special Collections/Archives of the University Library of the University of Louisiana at Monroe, Professor William M. Roberts of the University of Memphis School of Law, Peppi Marchello of The Good Rats, Theodore G. Gertz, Esq., Carl Ketner, Director of Technology of the University of Oklahoma College of Law, and Professor Darin Fox, Director of the University of Oklahoma Law Library, for providing photographs and images used as illustrations in the book. Specific credits appear with each photograph. Excerpts from the Restatement of Torts are Copyright 1934, 1938, 1939 by The American Law Institute. Excerpts from the Restatement (Second) of Torts are Copyright 1965, 1977, 1979 by The American Law Institute. Excerpts from the Restatement of Unfair Competition are Copyright 1995 by The American Law Institute. Excerpts from the Restatement of the Law Governing Lawyers are Copyright 2000 by The American Law Institute. Reprinted with the permission of The American Law Institute. All rights reserved. Basic Concepts: Persons, Property, Relations, by Leon Green, is Copyright 1938 by the American Bar Association. Reprinted with permission from ABA Journal, The Lawyer's Magazine.

P.B.K.
O.M.R.

Advanced Torts

Introduction

Leon Green, *Basic Concepts: Persons, Property, Relations*

24 American Bar Association Journal 65 (1938)*

The common law has developed to a very large degree around the interests of person and property. The early common law actions, for example, were devoted primarily to the protection of these interests against physical harms and appropriation. As they have expanded and as the harms to which they may be subjected have become more subtle, the common law too has expanded and grown more subtle. In the meanwhile, through the action on the case and its successor, the code action on the facts, with the assistance of equitable principles, an entirely new group of interests, namely, the interests a person may have in his *relations with other persons*, has been recognized and given protection. But in a society so active and complex it has been difficult to keep distinct these basic concepts of *personality, property and relations*.

The confusion of interests of personality, property and relations is due in part at least to the conflict between law and equity. In the familiar case of *Gee v. Pritchard* (1818) [2 Swans. 403] the court restrained the publication of certain personal letters written by plaintiff to defendant; in *Abernethy v. Hutchinson* (1825) [3 L.J. Ch. 209, Hall & T. W. 28] the court restrained the publication of certain notes taken of plaintiff's oral lectures. In both of these cases the subject matter involved in one sense could be viewed as nothing more than the emotional or intellectual sparks given off by the personalities of the respective plaintiffs. In another sense the conduct of the defendants could be viewed as an interference with plaintiff's relations with other persons. In no legitimate sense could the interests of the plaintiff be viewed as property. The plaintiffs had done nothing to set aside their creations as property. The casual letters and spoken words found their value in their close connection with the personalities of the respective plaintiffs and in their effect upon the relations existing between plaintiffs and other persons. But the chancellors having limited their jurisdiction to property, found it convenient to so characterize these interests in order to give the plaintiffs the protection they deserved. The holdings have been followed in later and analogous cases, but most courts have been sensible enough to recognize that they were not dealing with property interests...

On a parity with both the interests of personality and property are those of relations with other persons — relational interests. When, for example, Jones and Smith by agreement combine their efforts in an enterprise, there is something here identified as a relation brought into existence in addition to the two personalities. That relation incidentally gives each personality power and range beyond that of either. If in their enterprise they

* Copyright 1938, American Bar Association. Reprinted with permission from ABA Journal, The Lawyer's Magazine. [Ed.]

combine the resources of lands, chattels and money, they too are bound by the newly created relation. It is as distinct from their persons and property as the latter are distinct from each other. So is the protection that is required for it.

Relational interests are not new to the law. They have long been a very important element in the legal order. But they have never been clearly identified, and the value of the concept and its ramifications have never been appreciated. Relational interests are not infrequently called property interests, and much of the protection which has been extended them by law has been under the guise of protecting property. This, in addition to the long standing conflict between courts of law and equity, has also doubtless been due to the desire to bring them within the peculiar sanctity extended to property under the due process clause and other clauses of our national and state constitutions. But it should not be necessary to invoke the protection of property for these interests. They are entitled to protection for their own sake, for the relational interests of present day society in their aggregate are perhaps as valuable as the aggregate of physical property. Some of them are modern society's substitute for property. They give to property much of its value, and add immeasurably to the power which personalities possess. They demand for their control and protection the projection of law far beyond that required for either person or property.

There are several groups of these relations which are easily recognized. First is the broad group of *family relations*; second, *trade relations*, made up of employment relations on the one hand and general commercial relations on the other; third, *political and professional relations*, yet largely in their formative state; and fourth, *general social relations*.

What are the characteristics of these relations that set them off from the interests of personality and property? Generally, they do not have the attributes of physical things. Their value lies in the fact that one person has an interest in the welfare and conduct of some other person. Normally, hurts to such an interest do not involve physical hurt to the person who has the interest, or to his property, and when they do so result little protection is extended against them. For example, a person may be defamed. The charges against him may react on his physical health, but few courts have allowed any protection for this hurt to the personality. The defamatory hurt is to his standing in the eyes of his business associates, his neighbors, or people generally. His social, family, professional, business, or political relations, or perhaps all of them, may be hurt by such defamatory charges, and it is against such hurts that protection is given. As another example, the title to a person's property is slandered. The loss of its sale may seriously impair his fortune. His property itself is not hurt, but he may have recovery for the hurt done his relation with a particular buyer or to his relation with buyers in general. As a further example, plaintiff may have a contract as the representative of an industry to market its products in a certain locality. A third person induces the industry to breach the contract. Plaintiff suffers no hurt to person or property for which he is given any protection against the third person but for the hurt done his relation which has been destroyed or appropriated he may have recovery against such person. . . .

But it is not the concept of the relational interest *as between the parties to the relation* with which we are concerned in this discussion. It is the relation as it may interfere with or in turn be interfered with by third parties. It is in this particular that relations differ so widely from person and property. *What protection is there to such interests as against the hurts done by third parties? What immunities have those who have such relations against the hurts which they incidentally cause third persons?* These inquiries do not involve the simple two-party situations found in the protection of person and property. They are always three-party situations; a relation which necessarily implies two persons, and a third party

who interferes with that relation. It is thus that relational interests demand such different treatment in the protection given under the law.

Let us briefly consider the more important relations. In the group of *family relations*, actions for alienation of affections, criminal conversation, seduction and abduction, physical injury to children, parents and spouses, the wrongful death of some member of a family, failure to deliver death messages and other conduct interfering with the relations between living members of a family and a deceased member, interference with the relations enjoyed by beneficiaries under wills and insurance policies, defamation of one of the spouses, and other like cases, are all the product of the recognition given by law to the interest of one member of the family. Except in rare instances, these interests have not been identified as property interests. They transcend any notion of property. The actions for their protection are relatively new actions and are still little better understood by lawyers than by laymen. Some of them are treated as anomalies, and no one of them has reached a maturity of development.

General social relations have recognition of long standing. These relations have none of the earmarks of either personality or property. They give substance to the thing we call *reputation*. They have not infrequently been thought of as interests of personality, but a person's standing in the eyes of his neighbors, his friends and other people generally is very definitely a relational interest. Their value in some instances has been so great that very able lawyers have been tempted to call them property. But courts of equity in this country have withstood all attempts to invoke their protection in behalf of such relations. Social relations, as is true of other relations, are protected by a very distinctive type of common law known as libel and slander. Practically speaking, they have no other protection. Protection to them, like the protection given the relations of the family group, is relatively new and immature. For several centuries both groups of relations were protected, if at all, by the ecclesiastical courts.

Of growing importance are *political and professional relations*. With the development of democratic society and numerous professional groups, the relational interests created thereby have demanded recognition and protection. The right to vote is one of the earliest political relations to be recognized. It is still relatively young, and the protection afforded it is still inadequate. The protection extended to this group of relations is through the recognition given the common interests of the members of a group. The members of groups of all types—political, professional and otherwise—require freedom of action and communication within the group in order to make the group effective. The recognition of these privileges has given rise to important immunities for the hurts done both outsiders and other members of the group. The recognition of a common interest in the political group, for example, gives a wide immunity to public officials in the performance of their official functions. In the case of judges, legislators, and high executives, immunity for all practical purposes is complete, while in the case of lesser officials it may be quite limited. With respect to non-official groups the immunity is always limited. As an antidote, however, to these privileges and immunities, corresponding privileges and immunities are given critics, who also represent the interests of the public. The idea involved is strikingly similar to the adage that fleas are good for dogs. Public officials, teachers, lawyers, medical men, dramatic and other artists, and in fact all those who touch the public's interests, are legitimate prey of the critic—reporter, columnist, and publisher. Here is involved the difficult subject of freedom of speech and press—the public forum, the newspaper, periodical, radio, and other forms of publication. The protection given relations and interests subject to hurts inflicted through such activities is as yet poorly defined. The interests involved have none of the attributes of property except that they are valuable. They call for peculiar treatment by courts as well as other agencies of government.

But of transcendent importance among relational interests are the *relations of trade* around which is built the structure of our modern order. Trade relations for the most part are based upon express contract, but not entirely so. For example, the relational interests of a business may rest largely in contract, but they may also rest in its good will which is found in the potentialities of future dealings. Likewise, labor relations may rest upon contract, but the great bulk of such relations rests fundamentally upon the needs and customs of industry rather than upon formal contract. . . .

. . . Society has advanced beyond the state of single personalities and physical property forms; group activities call for something more than barter and sale and even symbolic exchange of property. The answer has been found in the development of relations, and they have given a range to business activities far beyond the range that property could have ever given. They have the advantage of property in their capacity for multiplication and adaptability, as witness the corporate form of organization. They are a distinct form of wealth, and to call them property is to confuse them with other forms of wealth. They require treatment different from that required by property on the part of the people who are dependent upon them, and on the part of the courts and other agencies of government. They are a new type of interest. They tie together modern society and make it possible to utilize the natural resources of property and invention to the end that there may be more activities and a better balanced existence for a constantly growing population. It is the press of these almost infinite relations which is making so many new problems for government and for the legal profession. They can not be subjected to the principles, rules and formulas which have been developed for person and property. They demand treatment peculiar to themselves.

There are many difficult problems in the field of trade relations. Among them are those that arise out of the relations between the owners and managers of industry and those who operate its physical processes. Enormously complex industrial relations are over-simplified by the terms capital and labor, or employer and employee. Having so simplified them, we expect the property law of land and chattels and the tort law of master and servant to work the legal adjustments of their conflicts. When they fail, we think that government has failed. And it has, because the law invoked was not designed for any such usage. . . .

. . . [The courts'] power to adjust labor disputes is always incidental to something else—incidental to the keeping of the peace, protection of person and property against violence and fraud, or protection against interference with other trade relations. After a century of struggle the limitations upon the means either group can employ to further its ends are by no means definitely outlined. In this mass struggle for economic freedom, we still suffer from ill-timed intrusions of both police and courts. . . .

We have made a beginning too long delayed in the Norris-LaGuardia Act, the Railway Labor Act and the Wagner Act. Although it may take years of painstaking efforts to mold new processes into workable law, when that is done there should be no place left for strikes, pickets, boycotts, sit-downs, lockouts, company unions, detectives, bribery, bombs, rackets, machine guns or the other weapons which have been utilized in the industrial struggle. Government has a definite place in providing adequate protection for the relations of both the capital and labor groups. Instead of constituting the explosion points of the social order, as at present, they should become its most conservative and stabilizing influences.

What is true of industrial relations is true in part of the relations of other classes of traders. The protection and control of those intricate institutions of finance—banks, holding companies, investment and personal trusts, insurance companies—their relations inter

ese, as well as their relations with their customers, investors, borrowers, beneficiaries, require law far different from that which concerns chattels and lands. The protection and control of those who produce wealth from agriculture, mines and natural resources of other types with respect to their relations with each other and their relations with their processors and dealers, also demand many new legal forms. The same is true as to those general traders who market, or supply the facilities for marketing the products of industry, invention, agriculture, and mines. . . .

Consider also the matter of fair competition among traders, the protection of consumers against inferior qualities and excessive prices, the regulation of the issuance and sale of securities, the security of unemployed and aged persons, the control of public service companies and other such group interests. The protection the interests here involved require is equally as difficult to provide as is their control. Trade relations present exacting problems for government. Given free reign traders take over government; given unintelligent government, the trade upon which all of us are so dependent may be greatly impaired if not destroyed.

Beginning about half a century ago, government began to do the only thing within its power to meet the demands made upon it by the relations growing out of trade. It fell back upon the administrative agency, the first line defense of Anglo-American government. The list of important national agencies roughly represents the relational interests of trade which I have enumerated: The Federal Reserve Bank, The Interstate Commerce Commission, The Federal Trade Commission, The Securities and Exchange Commission, The National Labor Relations Board, The Boards provided by the Railway Labor Act, The Federal Communications Commission, The Board of Tax Appeals, The Social Security Board, and the more important bureaus of the departments of agriculture and commerce. Many of their counterparts are found in the states. . . .

. . . As long as human beings are inventive enough to create new forms of wealth and develop new activities, there will be constant necessity for adjusting them to the current order. There are always those who will refuse to recognize intruding legal principles, much as the older members of a club accept its new members with ill grace, or as the established wealthy resent the newly rich, or as classical intellectuals lift an eyebrow at recent pretenders. As the new club member must assume meekness, as the newly rich must go in for culture, and as the recent intellectual must bow down to learning, if recognition is to be readily won, so any new legal interest or new legal principle must disguise itself in an old form before the legal profession will give it recognition. That may be why those who have sought protection for relational interests have done so in the name of property. . . . But why should the law and lawyers continue to ignore what has become so great a part of everyday life?