question, then, turns upon the point, when does the beneficial interest of the executor accrue? Because the will confers no pecuniary benefit upon him, he cannot have an interest at the time of attestation. Here is one difference between him and the executor who took the *residuum* at common law. So, too, at the probate of the will the executor has no interest. For what if he renounce the trust, or be not able to give the named security? Until the grant of the letters testamentary there is no interest. Both the attestation and the probate precede this. The right to commissions, so far from taking effect through relation to the time of attestation, has not accrued until the services have been performed, and the allowance is not made until there has been a final settlement of the estate, or the close of the administration. See *Merrill v. Moore's Heirs, 7 How.*, Miss. 293. If in point of fact, the executor does not administer the estate, he is entitled to no compensation, for commissions are allowed upon the whole estate administered. Does it not follow that, that "certain, immediate legal interest" in the witness, at the time of attestation, which is necessary to render him incompetent, is not present?" *See II. Greene, Ev.* 455.

The Illinois court in *Jones v. Grieser, supra,* the case under discussion, is of the opinion that an executor has "such a direct financial interest in the probate of the will that he is disqualified by reason of such interest as a witness to the execution of the will," and "that he has an interest in the probate of the will to the extent of his commissions as executor," and "that the true test of interest of such witness is whether he will gain or lose financially as the direct result of the proceeding," and since commissions are a direct gain the executor is an incompetent witness. However, in the present case, statutes of the state of Illinois removed the objection to the witnesses to the will in question, because these witnesses fell within the purview of the state statutes made to regulate just such conditions. The Illinois court, in view of the previous decisions of that political authority, could not have decided differently than they did, and at the same time carried out the doctrine of *stare decisis* as laid down by former courts of that state. That the view of the Illinois court in holding that "the interest which he (the executor) has, however, like that of a devisee or legatee grows out of and by virtue of the execution of the will," and that "an executor is not a competent witness to the execution of a will which names him executor," is plainly the holding of the minority of the states of this country, and is against the interpretation of the majority, and also the interpretation given to the same proposition by the English courts, cannot be controverted. For in these jurisdictions, the executor has not an office of emolument, but, as Lord Ellenborough has aptly put it, "The executor takes no interest under the will, but only a burthensome trust." *Betteson et al., v. Bromley,* 12 *East.* 250; *Low v. Joliff,* 1 *W. Bl.* 365.

UNFAIR COMPETITION AS APPLIED TO UNPATENTED ARTICLES.

It is well settled that after the expiration of a patent, a person's right to monopolize the manufacture and sale of the patented article ceases.

Robinson, Patents, Vol. III, Sect. 908. And necessarily one has no right to the monopoly of an article which is not patented.

A delicate point, and the crucial one in the question of unfair competition, arises as to how far the right to copy such an article exists. The rule is well stated in the case of *Mueller Mfg. Co. v. McDonald & Morrison Mfg. Co.,* 164 Fed. 1001, decided in October, 1908, in the eighth circuit. where the court says: "Irrespective, however, of any question of trade mark, rival dealers have no right to dress their goods in simulation of those of their competitors, or by simulative devices mislead the purchasing public into buying their goods in the belief that they are those of their rivals in trade."

The doctrine of unfair competition as applied to unpatented articles is to be distinguished from the trade mark cases. In the case of trade marks the encroachment lies in the misrepresentation as to the origin of the article. Here it lies in copying the form and appearance of an article in non-essential details for the purpose of taking advantage of another's reputation. Due to the fact that the federal courts are continually called upon to consider patent and trade mark cases and allied subjects, it is not perhaps to be wondered at that this subject has been developed rather more fully in their decisions than elsewhere.

One of the earlier cases in which this question came before the courts was *Fairbanks v. Jacobs,* 14 Blatchf. 337, decided in 1877. The plaintiff was the manufacturer of the well known Fairbanks scales. Some time after the expiration of the patent on them, the defendant put upon the market exact copies of the plaintiff's product. In fact it was proved that parts of the plaintiff's scales had been used as patterns from which the castings for the defendant's scales were taken. The court said: "Anyone may make anything in any form and may copy with exactness that which another has produced without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person." An injunction was refused, however, because there was no proof of actual deception. So when an article is unpatented the public may copy it exactly as long as they do not deceive purchasers as to its origin.

Another early case was *Coates v. Merrick Thread Co.,* 149 U. S. 562 (1893). The plaintiff had patented certain devices for stamping the periphery of spools. After the expiration of the patent the defendant used this device for the same purpose and in the same manner in which the plaintiff had used it. However, the defendant *did not* copy the *arbitrary* and *non-essential* details of the embossing of the plaintiff. The court held that the defendants had acted well within their rights, but said that no one had a right "by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals." p. 566.

One of the most important recent cases in which this doctrine was before the court, important for the reason that the complainant's case rested solely on the doctrine, was *Enterprise Mfg. Co. v. Landers, Frary*

and Clark, 131 Fed. 240 (June, 1904), decided by the Circuit Court of Appeals for the Second Circuit. Here the complainant was the maker of the well known coffee mills which are seen to-day in almost every grocery store. These mills had been made for thirty years in the same shape and with the same color and ornamentation, and had thereby become well known to the public in general. The defendant, wishing to put a coffee mill on the market, made "Chinese copies" of the complainant's mill. The court held in granting the complainant an injunction that where there is "a Chinese copy, such as the defendants offer the public" proof of intent to deceive and actual deception is unnecessary. "A Court of Equity will not allow a man to palm off his goods as those of another, whether his representations are made by word of mouth, or, more subtly, by simulating the collocations of details of appearance by which the consuming public has come to recognize the product of his competitor." The part of this decision which holds that proof of actual deception is not necessary extends the doctrine beyond the limit of *Fairbanks v. Jacobs, supra.* In accord with *Enterprise v. Landers, supra,* is the case of *Yale and Towne Mfg. Co. v. Alder,* 154 Fed. 37 (1907), decided also in the Second Circuit by the same judges who sat on the case of *Enterprise v. Landers, supra.* After stating that many of the features of the plaintiff's padlock could with all propriety be adopted separately by anyone, the court held that since the plaintiff was the first one to assemble those features together and that in such a shape they had become well known to the public, it was unfair competition for anyone to so combine the features and to so dress his lock as to deceive the purchasing public as to its origin.

A decision by the same court in the Second Circuit nearly contemporaneous with the decision of *Enterprise v. Landers, supra,* brings out clearly how much one may or may not copy. It was held not to be unfair competition to copy the details of construction and form of an unpatented article when those details were essential to the construction of any device which was to be used for the same purpose. *Marvel v. Pearl,* 133 Fed. 161 (Oct., 1904). Thus one has the absolute right to copy all essential details of an unpatented article, but the non-essential, distinctive characteristics, those things which are valueless in the mechanical construction or usefulness of the article, cannot be copied in such a way as to defraud the public, and proof of such deception will be implied where exact duplicates are produced.

Between the realms of mechanical and design patents there is a middle ground occupied by a class of devices not susceptible of patenting, and yet, which exhibit some degree of artistic taste and ingenuity in their conception. This doctrine affords some protection to this class of devices, for when a man has adopted an arbitrary non-essential form and when the public has come to differentiate between his product and that of others by the peculiar form, he has a property right in it, analogous to a "good will," which should be and is protected. Unless a person intends to defraud and to get the benefit of another's reputation he cannot be prejudiced by being compelled to adopt some other form, since the form which is pro-

tected is entirely non-essential to the utility or mechanical value of the product. As has been very well said: "The power of courts of equity to restrain unfair competition is a very beneficent one, and is founded upon a basis of sound business morality." *Ludlow Valve Co. v. Pittsburg Mfg. Co.*, 166 Fed. 26.

C. E. H., JR.