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Administrative Action—Federal Trade Commission—Public Interest Essential to Proceedings

Comment on Recent Decisions

ACCESSION—AUTOMOBILES—PRIORITY OF CONDITIONAL VENDOR OVER CHATTEL MORTGAGEE.—The case of *Franklin Service Station, Inc. v. Sterling Motor Truck Co.* (R. I. 1929) 197 Atl. 754, holds that where a conditional seller of new tires for a truck removed the old ones (retaining them) and replaced them by new ones, a chattel mortgagee of the automobile was not entitled to claim title to the new tires upon the theory of accession, since the tires were not an integral and permanent part of the truck.

Although the law of accession is of early origin, the complex nature of this right to acquire the property of another by its joinder with the owner's own property has made it very difficult of reduction to generalizations and precise rules. As between mortgagors and mortgagees repairs made by the former become a part of the property, enhance the security, and pass upon foreclosure of the mortgage or upon the vendor reclaiming the property under a conditional sale. *Southworth v. Isham* (N. Y. 1850) 3 Sandf. 448; *Holly v. Brown* (1841) 14 Conn. 252. It has been so held even when the value of the repairs greatly exceeds the value of the original article. *Gregory v. Stryker* (N. Y. 1846) 2 Denio 628. In *Blackwood Tire & Vulcanizing Co. v. Auto Storage Co.* (1916) 133 Tenn. 15, 182 S. W. 576, it was held that tire casings fitted to an automobile the title to which was retained in the vendor passed to him when he reclaimed the automobile for non-payment of the purchase price as against the unpaid vendor of the tires, who, however, had not retained title to them. And it has been held that pneumatic tires and wheels sold on credit without retention of title became part of a truck conditionally sold by the same seller. *Purnell v. Fooks* (Del. 1923) 122 Atl. 901.

The doctrine of accession has not been held to apply against anyone who has retained title to his repairs. It has been held that where the articles attached consist of parts which can be identified and severed without injury to the principal article, title thereto may be reserved in the person selling them until they are paid for. *Clark v. Wells* (1872) 45 Vt. 3; *Netzrog v. National Supply Co.* (1905) 28 Ohio C. C. 112; *Alley v. Adams* (1870) 44 Ala. 609.

The automobile is often assembled with parts purchased from different dealers which are separable, readily identified, and replaceable. The decision in the principal case to the effect that the new tires did not become a part of the mortgage security is well adapted to the prevailing conditions in the automobile trade. E. S., '31.

ADMINISTRATIVE ACTION—FEDERAL TRADE COMMISSION—PUBLIC INTEREST ESSENTIAL TO PROCEEDINGS.—Sec. 5 of the Federal Trade Commission Act (1914) 38 Stat. 719, c. 311, 15 U. S. C. 45, provides that a complaint may be filed by the Commission only if it should appear that the proceedings by it would be in the interest of the public. One Sammons had done business in Washington, D. C. for many years as a maker of window shades under the name of "The Shade Shop." Defendants, who were interior decorators, began to sell window shades under the name "Shade Shop." The Federal Trade Commission entered an order that defendant cease and desist, which the Supreme Court of the District of Columbia was requsted to enforce. On appeal it was held that sec. 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs, and that the Commission had no power to proceed. *Federal Trade Commission v. Klesner* (1929) 50 S. Ct. 1.

The interpretation of the requirement in the Federal Trade Commission Act that the Commission issue a complaint when "it shall appear to the Commission that a proceeding by it would be to the interest of the public" has been controverted. Text writers have maintained that a view such as that taken in the principal case is hard to reconcile with the language of sec. 5 of the Act, and that the intention appears to be to characterize the procedure rather than the type of competition. Henderson, THE FEDERAL TRADE COMMISSION (1924) 52, 54. The section contains, first, an unqualified declaration that "unfair methods of competition in commerce are hereby declared unlawful," and the next paragraph empowers the Commission to prevent "the use of unfair methods of competition in commerce." The third paragraph contains the provision in regard to "interest of the public." It has been asserted that the statute leaves the Commission with discretion to prosecute only those violations of the Act which it feels are serious. "It would seem that the determination of public interest is an administrative function only, not open to judicial review, except, perhaps where such determination is so arbitrary as to be beyond the powers of the Commission. . ." Mechem, *Procedural Practice Before the Federal Trade Commission* (1922) 21 MICH. L. REV. 139.

But judicial decisions are inclined to a different view. In *Federal Trade Commission v. Gratz* (C. C. A. 3, 1919) 258 F. 314, it was held that this provision does not contemplate the prohibition of unfair methods between individuals, there being no authority given to individuals to present grievances. The *Gratz* case was appealed to the Supreme Court but the decision there does not touch on the question. *Federal Trade Commission v. Gratz* (1920) 253 U. S. 421. See also *Gulf Refining Co. v. Federal Trade Commission* (C. C. A. 3, 1922) 282 F. 81, which raised but did not decide the question, and *New Jersey Asbestos Co. v. Federal Trade Commission* (C. C. A. 2, 1920) 264 F. 509.

Public interest may be affected injuriously, although the business practices suppressed on account of unfair competition may not infringe any right of private traders. See *Federal Trade Commission v. Winsted Hosiery Co.* (1922) 258 U. S. 483, involving misbranding of goods; also *Federal Trade Commission v. Beech-Nut Packing Co.* (1922) 257 U. S. 441, involving a plan of merchandising for the purpose of fixing retail prices. The Commission exercises a wide discretion in determining whether a proceeding will be in the public interest, but to justify it in filing a complaint the public interest must be specific and substantial. The Federal Trade Commission has power to order suppressed a plan of merchandising in interstate trade which has a tendency to unduly hinder competition or to create a monopoly. Sometimes public interest is involved because the unfair methods being used mean oppression of the weak by the strong. *Federal Trade Commission v. Beech-Nut Packing Co.* (1922) 257 U. S. 444; *Federal Trade Commission v. Oppenheim, Obendorf, & Co., Inc.* (C. C. A. 4, 1925) 5 F. (2d) 574; *Kobi Co. v. Federal Trade Commission* (C. C. A. 2, 1927) 23 F. (2d) 41. The principal case places emphasis on the fact that the practice complained of arose out of hatred and malice. It was not claimed that the article supplied by the defendant was inferior to that of the complainant or that the public suffered financially. Therefore an order of the Commission prohibiting a practice which does not affect the public may be set aside by the reviewing court. E. S., '31.

AGENCY—LIABILITY FOR INFRINGEMENT OF COPYRIGHT BY INDEPENDENT CONTRACTOR.—Appellants owned and operated for profit a dance and amusement hall to which the public was invited for entertainment and for which charge was made. Appellants entered into a contract with an orchestra leader to furnish music on certain nights, but they had no voice in the selection of musicians, had no control over the players, and had no right to determine the musical selections to be rendered during an evening's engagement. The orchestra infringed appellee's copyrights on certain musical numbers. *Held,* that appellants are liable in damages for the infringement. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.* (C. C. A. 7, 1929) 36 F. (2d) 354.

It is an elementary rule of agency that if an employer uses due care in the selection of one with whom he enters into a contract by which the other party undertakes to accomplish a certain result with means of his own choice the employer is not liable for the negligence of the contractor. Mechem, AGENCY (2d ed. 1914) sec. 1917. Stated briefly, the master is not responsible for the torts of the independent contractor unless the latter was hired to do some act in its nature illegal. However, despite this well settled rule, the copyright infringement cases disregard it and hold the employer liable. This holding, moreover, is uniform throughout England and the United States. In *Monaghan v. Taylor* (1885) 2 T. L. R. 685, defendant employed a singer and took no pains to ascertain what songs he proposed to sing. He was present at the performance at which the singer infringed plaintiff's copyright. Defendant was held liable on the ground that he had caused the singer to sing the songs, including the one which was copyrighted by plaintiff. The same doctrine is upheld in *March v. Conquest* (1864) 17 C. B. (N. S.) 418, 10 L. T. 717, and *Performing Rights Society v. Thompson* (1918) 34 T. L. R. 351. Some American cases hold that the mere fact that defendant operates a place for profit establishes his liability for permitting the unlicensed use of musical compositions on the premises. *Irving Berlin, Inc. v. Daigle* (D. C. E. D. La. 1928) 26 F. (2d) 149; *Trow v. Boyd* (C. C. S. D. N. Y. 1899) 97 F. 586.

One case, which is typical, reasons thus: "He who employs a musician to