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TRADE RESTRAINTS - FEDERAL TRADE COMMISSION - FALSE REPRESENTATION AS UNFAIR METHOD OF COMPETITION

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TRADE RESTRAINTS — FEDERAL TRADE COMMISSION — FALSE REPRESENTATION AS UNFAIR METHOD OF COMPETITION — An order of the Federal Trade Commission issued against the defendant publisher requiring it to cease and desist from representing to prospective purchasers, contrary to fact, (1) that the purchaser was a selected person in the community to whom special offers were being made, and (2) that an encyclopedia was being given to him free, a charge being made only for an annual supplement. The Circuit Court of Appeals for the Second Circuit affirmed the first clause but dismissed the second.[1] *Held*, that the second clause should be reinstated. *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 58 S. Ct. 113 (1937).

In a case falling in other respects within the jurisdiction of the Federal Trade Commission,[2] the question of what, if not all, false representations are "unfair" has in the past been a difficult one to answer.[3] Just as the scope of "unfair methods of competition" has been somewhat limited by reference to common-law principles,[4] so has the quantitative standard of unfairness. The most common method of competition litigated has been the deception of prospective purchasers.[5] Here the common-law standards of deceit would require

[1] 86 F. (2d) 692 (1936), noted 35 MICH. L. REV. 1035 (1937).

[2] See generally on jurisdictional prerequisites, Handler, "The Jurisdiction of the Federal Trade Commission over False Advertising," 31 COL. L. REV. 527 (1931); and 40 YALE L. J. 617 (1931). Some of the jurisdictional limitations have been swept away by the recently adopted amendment to the Federal Trade Commission Act. See 5 U. S. LAW WEEK (March 22, 1938), Statute Supplement; Pub. Acts No. 447, 75th Cong., 3d sess. (1938).

[3] A collection of cases classified according to the nature of the representation involved is printed as an appendix to Handler, "The Jurisdiction of the Federal Trade Commission over False Advertising," 31 COL. L. REV. 527 at 553-560 and supplemented at 1190 (1931). The criticism of the lower court decision in the principal case in 35 MICH. L. REV. 1035 (1937) deals with the nature of the representation made.

[4] The necessity of showing the effect of the practice upon competition is beyond the scope of this note. An amendment to the Federal Trade Commission Act evidently abolishes the requirement of competition. 5 U. S. LAW WEEK (March 22, 1938), Statute Supplement; Pub. Acts No. 447, 75th Cong., 3d sess. (1938).

[5] 31 MICH. L. REV. 804 at 812, 814 (1933).

false representations fraudulently made under circumstances entitling the plaintiff to rely thereon.[6] A few cases have required that the plaintiff's reliance conform to the standards of reasonable care.[7] The better view, however, would not in this way introduce the defense of contributory negligence into the field of intended harms.[8] Where, instead of damages at common law, the remedy sought is the preventative suppression by a public tribunal, the stricter requirements of the deceit action seem peculiarly out of place.[9] There may still be room to show that the representations were not false in the sense that they honestly embodied words the intended meaning of which was generally understood. Among these cases fall the secondary meaning cases, in which words must be interpreted as they are understood by people generally rather than according to a more restricted standard.[10] But when, as in the principal case, no other explanation or purpose of the words exists than as a plan to deceive, justification of them should fail. The cases in which the lower courts have overruled the findings of the commission,[11] on the theory that no reasonable purchaser should have been deceived by the representations, have for some time been criticized as "unfortunate and erroneous." [12] The principal case, although without any reference to the precedents, has evidently disposed of this narrow tendency. There still exists the situation in which the lower courts have denied that representations were unfair, not because they were too obviously false, but because they were too petty.[13] The importation of the "puffing" defense [14] in this field seems an

[6] HARPER, TORTS, § 217 (1933).

[7] Jesse v. Tinkham, 207 Wis. 49, 239 N. W. 455 (1932).

[8] HARPER, TORTS, § 224 (1933); 5 WILLISTON, CONTRACTS, rev. ed., § 1516 (1936).

[9] 31 MICH. L. REV. 804 at 816-817 (1933). See also 32 MICH. L. REV. 1142 at 1147-1148 (1934) on the failure to require fraud in Federal Trade Commission v. Keppel, 291 U. S. 304, 54 S. Ct. 423 (1934).

Per contra: Freedom of speech and press have been suggested as prohibiting suppression as in Federal Trade Commission v. Raladam, (C. C. A. 6th, 1930) 42 F. (2d) 430 at 435. See injunction cases collected in 32 L. R. A. 829 (1896).

[10] Examples in which opposite results were reached upon varying facts are: Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 54 S. Ct. 315 (1934); Berkey & Gay Furniture Co. v. Federal Trade Commission, (C. C. A. 6th, 1930) 42 F. (2d) 427.

[11] On the conclusiveness of the commission's findings, see 32 MICH. L. REV. 1142 at 1150-1151 (1934); 38 HARV. L. REV. 103 (1924).

[12] Winston Co. v. Federal Trade Commission, (C. C. A. 3d, 1925) 3 F. (2d) 961, relied on by the lower court in the principal case [criticized in 31 MICH. L. REV. 804 at 815-816 (1931)]. Contra: Consolidated Book Publishers, Inc. v. Federal Trade Commission, (C. C. A. 7th, 1931) 53 F. (2d) 942. See also Chicago Portrait Co. v. Federal Trade Commission, (C. C. A. 7th, 1924) 4 F. (2d) 759, discussed in HENDERSON, THE FEDERAL TRADE COMMISSION 198-200 (1924).

[13] Ostermoor & Co. v. Federal Trade Commission, (C. C. A. 2d, 1927) 16 F. (2d) 962, criticized in 31 MICH. L. REV. 804 at 815 (1931); 36 YALE L. J. 1151 at 1162 (1927); and Handler, "False and Misleading Advertising," 38 YALE L. J. 22 at 44 (1929). But see NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES, rev. ed., 128-129 (1929).

[14] Liability may be avoided if the representations are either immaterial or a matter

analogous limitation on the "unfairness" of false representations. The broad language of the Supreme Court suggests a tendency against limitations and in favor of increased conclusiveness for the commission's findings.

Frank B. Stone

of opinion, variously known as "puffing." Alexander v. Stone, 29 Cal. App. 488, 156 P. 998 (1916). Cases collected in 28 A. L. R. 991 at 999 (1924). See 5 WILLISTON, CONTRACTS, § 1490 (1936), paraphrasing the rule, "Any misrepresentations which were intended to bring about a particular result and which do bring about that result are sufficiently material."