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# Trade Regulation

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rightness or wrongness about these views. They simply represent a dispute which has existed for many years before and ever since the classic *Palsgraf Case*.<sup>15</sup>

Finally, a take-your-choice result was reached by the Supreme Court in *Clinger v. Duncan*.<sup>16</sup> The defendant driver had stepped out of the driver's seat of a two door automobile to allow passengers to enter. She left the motor running and the hand brake released. The plaintiff was preparing to enter the back seat on the right side. The remaining passenger in the front seat moved to her left to facilitate plaintiff's entry, and in the process she hit the transmission lever into reverse. The car moved suddenly backward striking both plaintiff and defendant to the ground. The startled passenger compounded her confusion and moved the lever to the forward position so that plaintiff was struck again. The majority held that the guest statute did not apply because plaintiff was not "in or upon such vehicle" at the time of the accident. Accordingly defendant was found liable for negligence. The dissent felt that plaintiff's partial entry should be enough to bring her within the guest statute, or at least that the jury should be allowed to resolve that particular dispute.

WALTER PROBERT

## TRADE REGULATION

Two Ohio decisions, one in the field of resale price fixing, and the other in the field of unfair competition, deserve comment.

In the Survey of Ohio Law for 1955<sup>1</sup> the first Ohio decision applying the nonsigner provisions of the Ohio Fair Trade Act,<sup>2</sup> received comment. This trial court<sup>3</sup> granted an injunction against the nonsigner defendant's selling a fair traded commodity at less than the minimum resale price fixed in a contract with an Ohio retailer. The court of appeals, following an appeal on questions of law, granted a permanent injunction almost identical with that previously granted in the Court of Common Pleas of Lake County. On appeal on the merits, the Supreme Court in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*<sup>4</sup> reversed the judgment below with instructions to dissolve the injunction.

This decision held the nonsigner provision of the Ohio Fair Trade Act<sup>5</sup> to be unconstitutional. The court did not pass upon the validity of any other provisions of the Ohio law.

<sup>14</sup> 101 Ohio App. 442, 140 N.E.2d 322 (1955).

<sup>15</sup> *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>16</sup> 166 Ohio St. 216, 141 N.E.2d 156 (1957).

The majority opinion states that section 1333.07, Revised Code, is invalid for three reasons:

1. As applied to nonsigners, the prohibition of the statute constitutes an unauthorized exercise of the police power because there is no substantial relation to the public safety, morals or general welfare;
2. The statute violates the due process clause of the Ohio Bill of Rights by its arbitrary and monopolistic denial to a nonsigning seller of his privilege of disposing of his own property on terms of his own choice;
3. The statute delegates legislative power and discretion to private persons.<sup>6</sup>

Ohio now joins the growing number of state courts which have either held their entire fair trade acts unconstitutional or at least have refused to apply them to nonsigners. During 1956 and 1957 the Supreme Courts of the following states rendered similar decisions: Arizona, Colorado, Indiana, Louisiana, New Mexico, Oregon, South Carolina, and Utah.<sup>7</sup>

*United Electric Fixture and Supply Co. v. United Electric Supply Co.*<sup>8</sup> involved alleged unfair competition by a defendant through the use of a similar corporate name. The case emphasizes the importance of the burden of proof upon the complainant to show confusion or the probability of confusion resulting in the sustaining of damage, or the probability of substantial damage from the continued use of a similar name. An incorporated wholesaler and retailer of electrical supplies brought an action to enjoin a wholesaler of electrical supplies operating in Cuyahoga County from doing business under a similar name. The defendant was doing business on Euclid Avenue at least two miles from the plaintiff's place of business in the downtown Cleveland area. The trial court found that

<sup>1</sup> 7 WEST. RES. L. REV. 343 (1956).

<sup>2</sup> OHIO REV. CODE §§ 1333.05-10.

<sup>3</sup> *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 130 N.E.2d 255 (Ohio C. P. 1955).

<sup>4</sup> 167 Ohio St. 182, 147 N.E.2d 481 (1958). While this case was decided in January, 1958, an exception to the normal rule of reporting only cases appearing in the Northeastern Reporter during the calendar year 1957 has been made because of the timeliness of this decision which deserves immediate comment without postponement until 1959.

<sup>5</sup> OHIO REV. CODE § 1333.07.

<sup>6</sup> In *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958), Taft, J., in a concurring opinion expressed the view that there was in fact in this case no evidence of a binding contract with an Ohio retailer within the meaning of OHIO REV. CODE §§ 1333.06-07, and that there was obviously no basis for the injunction authorized by OHIO REV. CODE § 1333.08.

<sup>7</sup> The decisions from other jurisdictions are collected in 1 CCH TRADE REG. REP. § 3258, pp. 4666, 4945, 4966 (1957).

<sup>8</sup> *United Electric Fixture and Supply Co. v. United Electric Supply Company*, 140 N.E.2d 340 (Ohio C.P. 1956).