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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

COURTS—FEDERAL REMOVAL STATUTE—"SEPARATE AND INDEPENDENT CLAIM OR CAUSE OF ACTION" TEST.—*P*, a citizen of West Virginia sued *D* railway, a Virginia corporation, and *X* and *Y*, citizens of West Virginia who were employees of *D*, jointly, for damages in a grade crossing collision. The action was brought in the circuit court of Logan County, West Virginia. The declaration charged *D* with negligently maintaining the crossing and *X* and *Y* with negligently operating *D*'s train. *D* filed a petition for removal to the federal court on the ground that there was a separate and independent cause of action between *P*, a West Virginia citizen, and *D*, a Virginia corporation. *P* filed a motion to remand. The removal statute provides: "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action" the defendant has the right to remove the entire case to a federal court. 62 STAT. 937 (1948), 28 U.S.C. § 1441(c) (1952). *Held,* case remanded, the declaration contains but a single cause of action. The court by looking to the West Virginia substantive law found that *P* suffered only one actionable wrong for which he was entitled to but one recovery even though there were separate acts of negligence. "The mere multiplication of grounds of negligence does not result in multiple causes of action unless, under the facts, there has been a violation of multiple legal rights." *Brinkley v. Chesapeake & O. Ry.*, 139 F. Supp. 480 (S.D. W. Va. 1956).

The principal case is another enunciation by the courts that the congressional purpose in enacting the present removal statute was to restrict removal from the state courts further than the "separable controversy" test. Annot., 19 A.L.R.2d 748 (1951).

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FIXTURES—SALE OF LEASED PREMISES TO STATE—HOUSES AND GARAGE FOUND TO BE FIXTURES.—Proceeding for declaratory judgement brought by *P*, a coal mining lessee, to determine the respective rights of *P* and *D*, lessor, to a certain sum of money deposited to the joint account of *P* and *D* in a bank. The money resulted from the sale of certain leased premises to the West Virginia Turnpike Commission. *D*'s predecessor leased the property to *X* for the purposes of mining coal. The lease provided that at its termination all the buildings and improvements attached to the freehold shall

revert to the lessor. *X* assigned the lease to *Y*, and *Y* assigned it to *P*, the deed of assignment conveying "all the improvements and structures of every kind." The garage and four of the houses sold to the Turnpike Commission were built by *P*, the other thirteen houses sold having been constructed by *Y*. *D* wrote to *P* that the sum of $5,458.95 was agreed upon as the price of the land to be sold to the Turnpike Commission and that to this amount was to be added the value of the buildings upon the land, which value *P* was to set. $72,400.00 was established as the value of the improvements and *P* and *D* agreed to sell to the Turnpike Commission the property for $77,858.95, the proceeds to be deposited in a bank. This agreement provided that all the rights and interests in the proceeds should be determined under the provisions of the lease from *D* to *X*, as amended as if the property had been taken by condemnation proceedings. The trial court found that D was entitled to the sum of $5,458.95 and that *P* should recover the sum of $72,400.00. *D* appealed. *Held*, affirming the decision of the trial court, that although the general rule states that whatever is annexed to the soil becomes a part of it, and can only be removed by the person who owns the freehold, there is an exception to the effect that fixtures erected for the purposes of trade or business are personalty and are removable by the tenant during his term. The form or size of the improvement is of no significance. The sole question is one of fact as to the intention of the lessee in attacking the property, *i.e.*, as to whether it was designed for the purposes of trade, or whether it was for the purpose of increasing the value of the land. The court, by looking to all of the letters and agreements, determined that the purpose was for trade and therefore temporary. *Milburn By-Products Co. v. Eagle Land Co.*, 93 S.E.2d 231 (W. Va. 1956).

There are three general tests to determine whether an improvement is a fixture or not: "First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold." Annot., 77 A.L.R. 1400 (1932). The factual situation often determines how these tests will be applied; but the intention of the party making the annexation is usually the controlling consideration. The court in the principal case found that the intention of the party making the annexation was the deciding factor and looked to the facts and circumstances to find out what such intention was.

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INSURANCE—INSURER'S ATTEMPTED CANCELLATION OF AUTO LIABILITY POLICY BY MAIL INEFFECTIVE.—*D* insurance company issued an auto liability policy to *X*, a member of the United States Air Force, for a period commencing on December 28, 1954, and ending on December 28, 1955. *X*'s address on the date of issuance was Hill Air Force Base, Utah. This address was inscribed on the face of the policy and was never changed. The policy was in the usual form and contained a provision that the "policy may be cancelled by the company by mailing to the named insured at the address shown in this policy, written notice stating when, not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice." On January 11, 1955, *X* received orders transferring him to Langley Air Force Base, Virginia, and he departed on or about that date. He was to report to his new base on February 18, 1955. On January 21, 1955, *D*'s agent in Utah was informed by personnel at Hill Air Force Base that *X* was transferred to Langley Air Force Base, effective as of that date. On January 25, 1955, *D* mailed a registered letter, addressed to *X* at Langley Air Force Base, containing a notice of cancellation to be effective on February 4, 1955. This letter reached Langley Air Force Base on January 28, 1955, but was returned undelivered on February 11, 1955. On February 4, 1955, *X* while driving in the state of West Virginia was killed in an auto accident, as a result of which *A* and *B* were injured. Due to his untimely death, *X* never received the letter of cancellation. In this action *A* and *B* are suing *D*, the insurer. The issue here is whether *D* effectively cancelled the policy before the accident occurred. *Held*, that *D* failed to strictly follow the cancellation provision of the policy, and since *X* did not receive notice of the attempted cancellation, the policy was still in force. "In the absence of a stipulation to the contrary, the act of cancelling a contract which provides for cancellation on notice necessarily includes the element of delivery of the notice." Although the parties to an insurance policy can "provide that mailing shall be sufficient proof of delivery, the party seeking to take advantage of such a provision must show a strict compliance with the terms of the contract, or display some valid reason for non-compliance." *D* claimed since they received knowledge of *X*'s change of address, notice to the address prescribed in the policy would have been a fruitless act. The court found, however, that *X* never notified *D* of any change of address. Even if there were no accident *X* would not have received the notice until February 18, 1955, the day he was to report. While if *D* had inquired at Hill Air Force Base, it is probable that it would

have been informed of the address at which *X* could have been reached while on leave. In the event that notice were sent to the address in the policy, it likely would have been forwarded to *X* at his home address. Therefore, since it was not mailed to *X*'s address as shown in the policy the notice of cancellation was ineffective. *Wright v. Columbia Casualty Co.*, 137 F. Supp. 775 (S.D. W. Va. 1956).

On appeal, decision for the plaintiffs was affirmed, the court stating that strict compliance with the contract was necessary to cancel the policy. If the notice was mailed to the address shown in the policy, the defendant having no knowledge of any change of address, the actual receipt of the notice by the insured would not be essential for cancellation. In the principal case because the notice was mailed to an address not provided for in the policy, actual receipt on the part of *X* was mandatory. If however, the defendant received notice from the insured of a change in his address, the cancellation would have to be mailed to the new address to be effective. *Columbia Casualty Co. v. Wright*, 235 F.2d 462 (4th Cir. 1956).

The question of cancellation of insurance policies by mail has been frequently litigated. There are many divergent decisions due to variations in the facts, provisions in the policies and the effect of statutes. Annot., 123 A.L.R. 1008 (1939); 29 AM. JUR., *Insurance* § 285 (1940).

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TRADE-MARKS AND TRADE-NAMES — UNFAIR COMPETITION — SWITCH SELLING METHOD — D ENJOINED AND HELD LIABLE FOR ITS PROFITS. — *P*, Admiral Corporation, brought an action for an injunction and damages against *D* corporation and three of its officers, *A*, *B*, and *C*. The complaint charged infringement of *P*'s registered trade-mark "Admiral" and unfair competition, by selling electric vacuum cleaners and sewing machines under the name "Admiral". *P* manufactures and sells, under the name "Admiral", a number of household appliances. "Admiral" is a registered trade-mark for its appliances, but not for vacuum cleaners or sewing machines, which it does not handle. By expending millions of dollars, *P* has publicized this name so that it is known to the public favorably. *D* used the "switch" selling method. It would advertise used vacuum cleaners and sewing machines of well known makes, at low prices, to get in touch with possible buyers. *D*'s salesmen would then show the

prospect "beat up" appliances and then try to sell him a new machine bearing the name "Admiral", often deliberately creating the impression that *P* was the manufacturer of these goods. In short *D* was palming off these appliances as products of *P*. The pertinent statute provides that when a defendant infringes upon a registered trademark, the plaintiff shall be entitled to recover: "(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 60 STAT. 439 (1946), 15 U.S.C. § 1117 (1952). *Held,* injunction granted and *D,* and *A,* the president of *D,* are liable for profits. *A* made the decision to use the name "Admiral", while *B* and *C* had no active part in the management of the corporation and therefore are not liable. *P,* even though it did not manufacture vacuum cleaners and sewing machines, recovered the profits of *D*. *A* was liable for the share of his income that could be fairly attributed to the sales of "Admiral" products. He, being the directing head, was as much at fault as *D*. *Admiral Corp. v. Price Vacuum Stores,* 141 F. Supp. 796 (E.D. Pa. 1956).

The principal decision takes the profit out of palming-off goods as those of another by the use of the "switch" selling method, thereby protecting the complainant, and also protecting the public. It follows the modern trend in finding that competition is no longer the essential test. The emphasis is now placed upon the injury suffered by the plaintiff and the public from the confusion resulting from the defendant's acts. Annot., 148 A.L.R. 12 (1944).

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