

terest took subject to the lien. The *Home Public Market* case should not have been decided upon the principle of either case.

An option holder clearly has no legal interest in the realty. Furthermore, there is substantial authority holding that an option does not give the optionee any equitable interest in the land.¹⁷ Pomeroy states that until a contract is changed from a conditional to an absolute form there can be no interest in the property in the optionee.¹⁸ This position is consistent with the doctrine of equitable conversion wherein the right of a vendee to specific performance of a contract for the sale of land gives rise to an equitable interest in the vendee in the subject realty.¹⁹ Since an option is a continuing offer, which until seasonably accepted creates no contractual right in the optionee to the transfer of the property,²⁰ the doctrine of equitable conversion is inapplicable. With neither a legal nor an equitable interest in the land an optionee can not subject the land to a mechanics' lien under the statute.²¹

Because of the lack of ownership required by the lien statute, it is suggested that *Home Public Market v. Fallis* is in error and should have been overruled. The legislature carefully defined the conditions under which a lien would attach. Such a statute, being in derogation of the common law, should not be construed liberally in respect to these conditions.²² While the interest of the mechanic is favored by the law because of the inferior position he holds after the accession of the materials to the land, the judiciary can not extend the unambiguous language of the statute to include situations which do not fall within its provisions.²³

EDGAR J. BELLEFONTAINE

Robinson-Patman Act—Brokerage—Reduction of Brokerage by Seller's Agent Followed by Price Reduction to Buyer as Violation of § 2(c) by Broker.—*Federal Trade Commission v. Henry Broch & Co.*¹—Respondent, an independent seller's-broker, agreed with one of his principals to reduce his commission from the contract rate of 5% to 3% to enable the seller to make a sale at a reduced price proposed by a buyer. The 2% reduction represented 50% of the saving passed on to the buyer, the other 50% coming directly from the seller. The buyer was unaware that a reduction in brokerage was partially responsible for the lower selling price.

¹⁷ *Durepo v. May*, 73 R.I. 71, 54 A.2d 15 (1947); *Mendenhall v. Klinch*, 51 N.Y. 246 (1872); *Kern v. Robertson*, 92 Mont. 283, 12 P.2d 565 (1932); See, Annot., 52 A.L.R. 693 (1927); American Law of Property § 11.17 (1952).

¹⁸ Pomeroy, Specific Performance of Contracts § 319 (3rd ed. 1926).

¹⁹ Pomeroy, Equity Jurisprudence § 161 (5th ed. 1941); Walsh, Equity 415 (1930).

²⁰ *Helvering v. Bartlett*, 71 F.2d 598 (4th Cir. 1934); *Rampton v. Dolson*, 156 Iowa 315, 136 N.W. 682 (1912).

²¹ Colo. Rev. Stat. Ann. § 86-3-3 (1953).

²² *Friedman v. Stein*, 4 N.J. 34, 71 A.2d 346 (1950).

²³ *Turner v. Furliegh*, 124 Wash. 45, 213 Pac. 454 (1923).

¹ 363 U.S. 166 (1960).

CASE NOTES

The Federal Trade Commission charged respondent with violating § 2(c) of the Robinson-Patman Act² by granting to the buyer a portion of the normal and customary brokerage fee, and a cease and desist order was entered against him. The Court of Appeals for the Seventh Circuit reversed,³ holding that § 2(c) does not apply to a seller's broker.

In a 5-4 decision the Supreme Court reversed the Court of Appeals. **HELD:** The "statute clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer or indirectly through the seller. . . ." ⁴ "A price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers."⁵

This is the first decision involving the problem of a broker accepting less than his contract fee from his seller-principal in order that the latter can offer his goods at a more attractive price to a particular buyer. The Court cited several cases which it evidently considers analogous, but none treats of this specific issue. Most of the cited cases concern the payment of brokerage by the seller to the buyer's broker with the knowledge that the payment would eventually reach the buyer.⁶ The courts have consistently held such to be a violation of § 2(c), on the ground that "the intermediary is entitled to nothing more than 'appropriate compensation by the one in (whose) interest he so serves,' and one who acts in such capacity may not receive fees from the seller when he is under contract and does in fact turn over such fees to the buyer."⁷

In another of the cited cases,⁸ the buyer dealt directly with the seller, with no broker being utilized; however, the seller credited the buyer's account with an amount equal to the brokerage fees ordinarily incurred when a broker's services were utilized. An attempt was made to justify these

² 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1958): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

³ *Broch v. Federal Trade Commission*, 271 F.2d 725 (7th Cir. 1958).

⁴ 363 U.S. 166, 175.

⁵ *Id.* at 176.

⁶ *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F.2d 687 (2d Cir. 1938). See also *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F.2d 970 (7th Cir. 1945); *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393 (1st Cir. 1940); *Webb-Crawford v. Federal Trade Commission*, 109 F.2d 268 (5th Cir. 1940).

⁷ *Biddle Purchasing Co. v. Federal Trade Commission*, *supra* note 6, at 691.

⁸ *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F.2d 607 (4th Cir. 1945). See also *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939).

payments on the basis that the buyer rendered the same services as a broker and was, therefore, entitled to be reimbursed by the seller. It was also claimed that there was no discrimination in price since the seller was merely passing on his savings. However, as the Court stated, "For sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work and is a mere gratuity,"⁹ and "... if the statute forbids the payment of brokerage to such agents because they represent buyers, a fortiori, it forbids the payment to the buyers themselves."¹⁰

These cases seem plainly covered by the language of the statute as well as by the following expression of congressional intent: "... this subsection [§ 2(c)] permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."¹¹

In these cases, the defense was raised that the buyer or his broker had performed some services for the seller for which he deserved compensation. However, this contention was rejected on the ground that the services were purely incidental for which he may not be compensated.

It seems clear that the payments or price reductions in the preceding cases were made as "allowance(s) in lieu of brokerage" which were attempted to be justified as payments due for services performed. In the instant case, however, there is no such claim. The FTC pleads only its unsupported conclusion that the price reduction was a discount in lieu of brokerage. It does not allege that the parties so described it, or that it was designed to reimburse the buyer for some brokerage or servicing obligation ostensibly incurred.¹²

The fact that there is price discrimination between customers does not mean that the favored one has received brokerage. Section 2(c) deals with unearned brokerage, per se, not discrimination. The facts of the instant case seem to indicate price discrimination by the seller among his customers rather than allowance of brokerage by the respondent to the buyer, and a proceeding under § 2(a) against the seller would seem more in tune with the realities of the transaction.¹³

⁹ Southgate Brokerage Co. v. Federal Trade Commission, *supra* note 8, at 611.

¹⁰ *Id.* at 610.

¹¹ H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

¹² Robinson v. Stanley Home Products, Inc., 272 F.2d 601 (1st Cir. 1959).

¹³ 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially

Of course, it must be recognized that a decision in favor of the respondent broker in this case might well have constituted an open invitation to others to rearrange their organizational setup to skirt the provisions of § 2(c). It must also be realized that the § 2(a) requirement of a showing, for a prima facie violation, that the illicit practice has had an injurious or destructive effect on competition, together with the built-in defense of cost justification, might seriously complicate the enforcement of the Act. However, these complications should be remedied by statutory revision, not by strained constructions of existing statutes. Prior cases have held § 2(a) and § 2(c) to be independent, emphasizing that the defenses provided in the former are not applicable to § 2(c).¹⁴ Yet throughout the majority opinion reference is made to discrimination among buyers, the Court stating in its conclusion, "... the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory."¹⁵

In view of the difficulties presented in a proceeding under § 2(a), the decision would seem more readily justifiable if it provided a clear and settled precedent or defined the permissible scope of corporate activity. However, as was stated at page 175, "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case."

ANNE P. JONES

Sales—Effectiveness and Scope of Manufacturer's Disclaimer of Warranties.—*Hall v. Everett Motors, Inc.*¹—An action was brought by the purchaser of a new automobile against a retail dealer to recover for fire damage caused by defective wiring. At the time of the sale the purchaser received and accepted a bill of sale together with the manufacturer's "service policy owner manual" containing the manufacturer's warranty which provided, inter alia, that there were no other warranties, express or implied, made by either the dealer or the manufacturer except the manufacturer's warranty against defective materials and workmanship, which warranty was limited to "making good" at its factory, within a prescribed period, parts which its examination disclosed to be defective.

to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing contained in . . . this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

¹⁴ *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Oliver Bros., Inc., Biddle Purchasing Co., and Quality Bakers of America v. Federal Trade Commission*, supra note 6.

¹⁵ 363 U.S. 166, 176.

¹ 1960 Mass. Adv. Sh. 279, 165 N.E.2d 107.