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Trading Stamps

William H. Jackson, Jr.

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tives of value" is a misdemeanor³⁰ and that such a device may be destroyed by the sheriff after appropriate procedure has been complied with by the officers of the court.³¹ It seems entirely possible that the Wyoming courts could hold that a pinball machine is such a device, and that free games are representative of value. The legislature has not specifically declared the gaming statutes of Wyoming to be either remedial or penal. The gaming laws are in Wyoming Compiled Statutes, 1945, Chapter 9—entitled "Criminal Offenses."³² However, the legislature did point out that gaming devices were considered to be a nuisance.³³ The fact that the gaming statutes are found in the criminal section of the statute book does not necessarily mean that the courts must strictly construe them and it is entirely possible that they could be construed as remedial in nature. But until this question is presented to the Wyoming Supreme Court the answer will remain unknown.

If the legislature deems that pinball machines are by their nature things which are undesirable, it would appear that it would be advisable to amend our gambling statutes to specifically prohibit them. An expression of a state policy on these devices would eliminate the doubt that may arise. The State of New York has been foremost in legislation which has sought to completely outlaw these devices, which encourage the gambling instinct in people.³⁴ Legislation such as that found in New York, if adopted in Wyoming, would make future court decisions on this point unnecessary.

ROBERT J. HAND

TRADING STAMPS

Regardless of legal concepts connected with the trading stamp, it is a conclusive presumption that it appeals to consumers like the apple in the Garden of Eden appealed to Eve.¹

Generally, consumers receive trading stamps contemporaneously with the cash purchase² of an item from a retailer who has adopted the stamp

30. Wyo. Comp. Stat. § 9-818 (1945).

31. Wyo. Comp. Stat. § 9-825 (1945).

32. Wyo. Comp. Stat. ch. 9 (1945).

33. Wyo. Comp. Stat. § 9-825 (1945), "Any gambling table, gambling device, or paraphernalia adopted (adapted), devised or designed for the purpose of playing, conducting, or carrying on, any game of chance, prohibited by the laws of this state, is hereby declared to be a nuisance. . . ."

34. New York Penal Code § 982. For a good discussion of the New York gambling situation see 43 J.Crim.L. 114.

1. Life Magazine, Mar. 4, 1957, pp. 114-126. These facts brought out in the article demonstrate the popularity of trading stamps: More than 400 stamp companies in 1956 printed nearly \$600 million worth of stamps, which were sold to 170,000 businesses in this country.

Time Magazine Nov. 19, 1956, p. 97: "Trading stamp tax, passed by North Dakota Legislature to discourage stamp giveaways, was thrown out by state's stamp-hungry voters in first popular referendum on issue."

2. Colgate-Palmolive Co., and Sperry & Hutchison Co., Intervenor v. Max Dischter & Sons, Inc., 142 F.Supp. 545 (1956).

plan, but they have been issued on payment of a charge account that is paid promptly at the end of the month.³ The stamps are ordinarily redeemable in prizes.⁴ Retailers employing the scheme may acquire stamps in one of three ways: (1) Under a purchasing agreement from an independent stamp manufacturer,⁵ or (2) the retailer may print his own stamps for exclusive use in his store or chain of stores,⁶ or (3) independent merchants may band together in a particular locality, and under a reciprocal agreement, undertake such a plan jointly.⁷

Gleeful merchants who issue stamps have sung these praises to the courts: (1) Giving stamps to customers at the cash register has induced a larger number of them to pay cash for their purchases, thus, lessening the risks of receiving bad checks tendered in payment of accounts and decreasing their worry over collectability of slow accounts;⁸ (2) where stamps are issued to customers who pay their bills by a certain date, those accounts are paid more promptly than if no stamps were given;⁹ (3) trading stamps are a more effective means of increasing volume of sales than is an ordinary cash discount for cash;¹⁰ (4) an over-all trade advantage results in that more customers are enticed into the store;¹¹ (5) employing this means of advertising has decreased the expenses of that item, and at the same time, has done more good than other types of advertising formerly used;¹² (6) the consumer is given something of value in addition to his purchase, which heretofore he did not receive.¹³

On the other hand, proponents of the abolition of trading stamps have voiced these criticisms through the courts: (1) The net effect of

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3. *Sperry & Hutchison Co. v. Hudson*, 190 Ore. 458, 226 P.2d 501 (1951).
 4. *Wecco Products Co. v. Mid-City Cut Rate Drug Stores*, 55 Cal.App.2d 684, 131 P.2d 856 (1942). This court considered that there was no distinction between trading stamps redeemable in cash or merchandise; but see, *Ed Schuster & Co. v. Steffes*, 237 Wis. 41, 295, N.W. 737 (1941), where it was stated in the dissenting opinion that the objections to stamps redeemable in merchandise were not applicable to redemptions in cash.
 5. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 883 (1904). For analysis of the nature of the agreement between the retailer and the issuing company, see *Sperry & Hutchison Co. v. Hudson*, note 3 supra.
 6. *Bristol-Myers Co. v. Picker*, 302 N.Y. 61, 96 N.E.2d 177 (1950).
 7. *Id.* Involved cash register receipts which the court treated as trading stamps.
 8. *Trade Commission v. Bush*, 259 P.2d 304 (Utah 1953).
 9. *Sperry & Hutchinson Co. v. Margetts*, 15 N.J. 203, 104 A.2d 310 (1954). The trading stamp may be considered a financial inducement to customers to pay their bills on or before the date specified in sales invoices. The court quoted with approval a statement contained in *Montgomery, Auditing Theory and Practice*, pp. 499, 500, that a cash discount was a reward for prompt payment and was a practice long established and authoritatively recognized as being not a reduction from the purchase price. See note 27 infra.
 10. *Colgate-Palmolive Co. v. Max Dischter & Sons, Inc.*, note 2, supra, testimony of an expert witness.
 11. *Wecco Products Co. v. Mid-City Cut Rate Drug Stores*, note 4, supra; *Sperry & Hutchinson v. Mechanics' Clothing Co.*, note 5, supra.
 12. *Sperry & Hutchinson v. Mechanics' Clothing Co.*, note 5, supra.
 13. *Bristol-Myers Co. v. Lit Bros., Inc.*, 336 Pa. 81, 6 A.2d 843 (1939). Contained in Justice Drew's dissent is the language that appeared upon the stamp in question: "Refusing to take Yellow Trading Stamps from the storekeeper is like forgetting your change. Yellow Stamps are not something for nothing, but something instead of nothing—a discount for the money you spend with the storekeeper."

giving the buyer something extra, is that he is not paying the price asked, but the price less the value of the discount, and therefore, less than the fair trade price, and this is price cutting in violation of the Fair Trade Act;¹⁴ (2) their use and condonation opens the door to carefully devised schemes to affect indirect price cutting;¹⁵ (3) such a scheme tempts by a promise of a value greater than the article offered, and hence may be thought of as a lure to improvidence,¹⁶ in that it encourages profligate and wasteful buying;¹⁷ (4) a middle man is introduced who receives a profit and therefore adds to the cost of the article;¹⁸ (5) the plan affords an opportunity to defraud the public in regard to values and prices, in that it detracts attention from the quality and price of the article purchased and from the fact that the discount stamp is added to the cost;¹⁹ (6) it presents an opportunity for coercion in that merchants may be compelled to buy stamps against their wishes in order to meet competition, thus, competition is stifled unless they adopt a similar plan.²⁰

Cases arising under the Fair Trade Act generally conform to this fact situation: A manufacturer has supplied a merchant with a trade-marked article for resale to the public. To assure that a price war will not develop which would destroy the market value of the article, the manufacturer wishes to standardize the retail price of the article so that the merchant cannot cut the price below a certain minimum. Under the Fair Trade Act of the state where the merchant is located,²¹ the manufacturer is allowed to contract with retailers in that state and establish a minimum fair trade price.²²

If the manufacturer has executed a fair trade price agreement with retailers in that state, he is empowered to enjoin sales below that minimum.²³ The question then is this: If a retailer is selling an article at the

14. *Colgate-Palmolive Co. v. Max Dischter & Sons, Inc.*, note 2, *supra*. District Judge Aldrich stated: "I believe the difference (between trading stamps and ordinary cash discounts) is substantial, and that roughly that difference is the measure that they exceed a true discount for cash. Accordingly, even if I accept S. & H.'s proposition that a reasonable discount for cash is not inconsistent with the maintenance of the minimum price, it does not go far enough." *Bristol-Myers Co. v. Picker*, note 6, *supra*. Redeeming cash register receipts is price cutting in violation of fair trade legislation.
15. *Bristol-Myers v. Lit Bros., Inc.*, note 13, *supra* (dissenting opinion).
16. *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679 (1916).
17. *Lawton v. Stewart Dry Goods Co.*, 197 Ky 394, 247 SW. 14 (1923).
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. Note, 41 *Iowa L. Rev.* 715, 716, note 5. Fair trade contracts are authorized by statute in all states except Texas, Vermont and Missouri, but held unconstitutional in Colorado and Florida.
22. *Wyo. Comp. Stat.* § 39-302 (1945). Also see note 24, *infra*.
23. Under various forms of the Act, the manufacturer may have gained privity with the merchant by virtue of the contract between the two, or if the merchant was not a party to the agreement, the manufacturer may acquire privity with him by virtue of a non-signer clause in the Act. *Wyo. Comp. Stat.* § 39-306 (1945), contains a non-signer clause. The states, through the exercise of their police power, have enacted legislation on intrastate commerce; the Act under consideration being such a product. However, there is a growing tendency toward holding non-signer clauses unconstitutional, and in turn, this attack may weaken the entire foundation of fair trade legislation. For a discussion of constitutional aspects of non-signer clauses, see note, 41 *Iowa L. Rev.* 715 (Summer 1956).

fair trade price established by contract, and the retailer gives away trading stamps with customer purchases of the article, is he selling that article below the minimum set out in the fair trade agreement?

The determination of the question rests on whether there has been a price-cut, and these circumstances must be studied: (1) The intent or purpose behind the adoption of the plan; (2) whether the stamps are given across the board on all items, or in just certain items; (3) do all customers have equal opportunity to receive them; (4) the relative value of the stamp as compared with the cost of the item purchased; (5) whether the trading stamp scheme adopted vests stamp holders with an immediate property right or merely gives them a chance to convert it into something of value

Under the Wyoming Fair Trade Act,²⁴ if the retailer wilfully intends to affect a price-cut below the fair trade agreement, or has knowledge that his selling price is below the fair trade standard, he has violated the Act and his operation may be enjoined. However, under another section²⁵ of the same Act, the element of intent is not required in order to perpetrate a violation.

Whether the retailer is guilty of selling below the fair trade minimum presents the problem of the net effect of the stamp on the price of the commodity on which it was issued. The courts are unified on two points: (1) For a retailer to come within liability of the Act, he must have directly cut the price of a commodity within the Act's protection, or (2) he must have accomplished the same result in respect to the commodity by a device which was palpable subterfuge resorted to for the purpose of circumventing the law.²⁶

Travel beyond this ground must be over one of three routes: (1) The ordinary trading stamp is a cash discount and not a discount on the price of the commodity purchased;²⁷ (2) conceding that the trading stamp is a cash discount, it is also a trade or quantity discount and therefore a price

24. Wyo. Comp. Stat. § 39-306 (1945): "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

25. Wyo. Comp. Stat. § 39-303 (1945) which sets out three acts which may constitute a violation of the Act, without reference to intent, they are: (1) The offering or giving of any article of value in connection with sale of such commodity; (2) the offering or making of any concessions of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or (3) the sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction.

26. Bristol-Meyers Co. v. Lit Bros., Inc., note 13 supra.

27. Weco Products Co. v. Mid-City Cut Rate Drug Stores, note 4, supra. Held, that the giving of discounts for cash did not violate fair trade legislation, since a cash discount was but a reward for prompt payment and not a price cut, and that the use of the trading stamp did not effect a reduction in price of the articles sold so as to violate the Act.

cutting device;²⁸ (3) conceding that it is a price cutting device, its effect is insignificant and therefore the maxim "de minimis non curat lex" applies.²⁹

The element of the retailer's intent under the Unfair Practice Act³⁰ is clearly spelled out. Acts committed with intent to (1) injure competitors, and (2) destroy competition, are condemned.³¹ The problem is not simplified by this definition of intent, for in regard to the issuance of trading stamps, the proof of this intent becomes difficult. Fewer trading stamp cases have been decided under this Act than have been adjudicated under the Fair Trade Act. However, of those reported in connection with

28. This type of discount, which favors only certain customers or is limited to a particular item, should be distinguished from a volume-purchase discount in which all customers are treated equally. See notes 30 (5), 33 and 35, *infra*, but see, note 34, *infra*.
29. *Bristol-Myers Co. v. Lit Bros., Inc.*, note 13, *supra*. Held, that the doctrine of *de minimis non curat lex* should apply, if the deviation were a mere trifle, which if continued in practice, would weight little or nothing on public interest, it might properly be overlooked. But see, *Bristol-Myers Co. v. Picker*, note 6, *supra*: "The Act applies to any discount, regardless of the amount, that cuts the price of an article. By allowing a breach, no matter how small, we invite the flood, and unless the legislature decrees the exception, we are powerless to allow it."
30. This area of fair trade legislation is concerned with discriminatory or monopolistic practices which result in unfair competition and is sometimes referred to as the unfair competition act. One or all of the following six provisions may be contained in a particular state's act: (1) A prohibition against combinations between producers, manufacturers or distributors, for the purpose of preventing or destroying competition, controlling or influencing production of prices, gaining unjust and unreasonable profits, or discriminating unfairly in prices of commodities between markets. This language is contained in *Wyo. Comp. Stat. § 39-401 (1945)*. (2) Forbidding any person or firm to prevent competition among other persons or firms by intentionally seeking such result by the use of locality discrimination in prices, or any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is accomplished. See, *Wyo. Comp. Stat. § 39-406 (1945)*; also see, *State v. Langley*, note 31, *infra*. (3) It shall be unlawful for any business establishment to sell or offer for sale any article at less than the cost thereof to such vendor, or give, offer to give or advertise to give away any article or product for the purpose of injuring competitors and destroying competition. See, *Wyo. Comp. Stat. § 39-407 (1945)*; also see, *Trade Comm. v. Bush*, note 8, *supra*. It was held that trading stamps used in the customary manner did not violate this provision. (4) Prohibition against giving premiums with retail purchases of gasoline or bakery goods, for the purpose of injuring or destroying competition. *Sperry & Hutchinson Co. v. Kent County*, 287 Mich. 555, 283 N.W. 686 (1939). (5) It is deemed a misdemeanor where any person or firm shall allow certain purchasers' secret payment, allowance of rebates, refunds, commissions, or special services which are not extended to all purchasers, where such device tends to destroy competition and is an unfair trade practice. See *Wyo. Comp. Stat. § 39-411 (1945)*. (6) Prohibition against unfair price discrimination of petroleum products among market areas within the state. See, *Wyo. Comp. Stat. § 39-417 (1945)*.
31. *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938). In upholding the constitutionality of unfair competition legislation adopted in 1937, Blume, C. J., speaking for the majority of the Court said: "The Act in question only provides against use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, or on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of price or abandon their business, yet, if his conduct is not for the purpose and with intention prohibited by statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense."

the former, the ordinary and customary use of trading stamps is not unfair competition.³²

When stamps are given only on particular articles, the transaction would appear more like a quantity discount device³³ than where stamps are issued on all articles sold, but even the latter may be susceptible of invalidation under fair trade legislation.³⁴ In a like manner, where all customers do not have equal opportunity to receive stamps, there is strong indication that a discount from the purchase price or a trade discount was intended.³⁵ The relation of the value of the stamp to the purchase price of the item on which it was given, may be a decisive factor in invalidating the plan,³⁶ for the courts seem to take judicial notice of the fact that the customary cash discount of 2%,³⁷ and a valuation over the amount is viewed as a lure for purposes other than inducement to pay cash.³⁸

Legislative attacks on trading stamps have been waged on two major fronts: (1) Statutes aimed at total or partial prohibition of their use, and (2) those which have sought to exact a license or tax fee on those who issue them. Where constitutionality of these statutes has been challenged, it is claimed that they violate due process or equal protection clauses of federal and state constitutions in that, (1) the statute is an improper exercise of a state's police power,³⁹ or (2) the classification of persons falling

32. Trade Comm. v. Bush, note 8, supra.

33. Weeco Products Co. v. Mid-City Cut Rate Drug Stores, note 4, supra. "Respondent's fair trade minimum-priced articles are not singled out by appellant as objects to which alone the trading stamp privileges attach. No discrimination is made for or against them."

34. Colgate-Palmolive Co. v. Max Dischter & Sons, Inc., note 2, supra. "It is not important that stamps are given on all merchandise across the board, whether fair-traded or not. A quantity discount on fair-traded products is no less a quantity discount by reason of the fact that it is given on other articles as well."

35. Weeco Products Co. v. Mid-City Cut Rate Drug Stores, note 4, supra. Appellant's stamp plan was not discriminatory as to commodities or purchasers: "The policy may be said to be of uniform application both as to goods sold and as to purchasers of the same, and logically falls into the classification of 'cash discount' rather than 'price cut'."

36. Palmer v. Angert, 275 App.Div. 965, 90 N.Y.S.2d 745 (1949). The practice of redeeming cash register receipts for 10% of their amounts, in merchandise, was considered a price-cutting device in violation of the minimum prices established by fair trade contracts.

37. Colgate-Palmolive Co. v. Max Dischter & Sons, Inc., note 2, supra. Judge Aldrich stated that fair trade legislation was not intended to interfere with normal credit arrangements such as 2% off if bills are paid in 10 days.

38. Trade Comm. v. Bush, note 8, supra. Concurring opinion by Wolf, J., indicating that if the stamps had possessed a value substantially in excess of 2%, their use may have run afoul with fair trade legislation.

39. Annot., 26 A.L.R. 707, 717 (1923). Such statutes may be held invalid because they impair the obligations of contracts, or constitute a deprivation of property without due process, or operate as a restraint of trade, or as an interference with interstate commerce, or as an infringement of the constitutional liberties of citizens. State v. Dalton, 22 R.I. 77, 46 Atl. 234 (1900). Trading stamp legislation does not look to public health, safety, nor morals. Compare, State v. Lutey Bros., 55 Mont. 545, 179 Pac. 457 (1919). Held, that a statute aimed against the use of goods as premiums, was not intended to prohibit trading stamps which were used as a cash discount. Contra: State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); Sperry & Hutchinson Co. v. Weigle, 166 Wis. 613, 166 N.W. 54 (1918); Ed. Schuster & Co. v. Steffes, note 4, supra; Sperry & Hutchinson Co. v. Margetts, note 9, supra. The dissenting opinion stated that a state's police power was not limited to public health, safety or morals, but may be extended to any matters touching upon the welfare, prosperity, comfort and convenience of the public.

within the operation of the statute is discriminatory or arbitrary.⁴⁰

In a series of cases decided by the U.S. Supreme Court in 1916,⁴¹ it was conclusively decided that states may legislate on trading stamps without violating the due process clause of the 14th amendment. Several state courts have followed the federal view in upholding the validity of such statutes,⁴² but the overwhelming majority of states have repeatedly held these statutes unconstitutional.⁴³

It is interesting to note that the Wyoming legislature twice considered bills that involved trading stamps. Both involved a partial restraint on the use of stamps. The first bill⁴⁴ was presented as an Act to amend and reenact a statute relating to unfair competition,⁴⁵ which in general prohibited wilful destruction of competition by unjust discrimination in cost, quantity or quality of an item offered for sale between various sections of the state.

The last sentence of the statute sought to be amended read as follows: "The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance of fact, effected in violation of the spirit and intent of this Act." The only change proposed was to delete the words "against locality discrimination," and insert after "collateral contracts" the words "trading stamps." The bill was defeated.

Had this bill been enacted into law, what would have been the status of the trading stamp in Wyoming? Their use would not have been prohibited, for the proposal merely attached a restraint or condition on their use, i.e., they could not be employed with intent to destroy competition by unfair discrimination. The present Act includes the words "any device of any nature whereby such discrimination is . . . effected," and the burden is upon the complainant to prove that such a device was employed with intent to destroy competition.

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40. *State v. Holtgreve*, 58 Utah 563, 200 Pac. 894 (1921). A statute that imposed a tax upon the use of trading stamps purchased from others, while permitting a merchant to issue them without tax when he furnished them himself, was held void as denying equal protection of the laws. *State v. Lothrop-Farnham Co.*, 84 N.H. 322, 150 Atl. 551 (1930). Held, that a license tax statute was unconstitutional as being prohibitive, and an unreasonable interference with one's right to acquire and possess property. *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 65 N.W.2d 410 (1954). Held, a statute aimed at eliminating redemption directly from the manufacturer, was unconstitutional because it amounted to an unreasonable exercise of police power in that its classification of stamp dealers was arbitrary.
41. *Rast v. Van Deman & Lewis Co.*, note 16, *supra*; *Tanner v. Little*, 240 U.S. 369, 36 S.Ct. 379, 60 L.E. 691 (1916); *Pitney v. Washington*, 240 U.S. 387, 36 S.Ct. 385, 60 L.Ed. 703 (1916).
42. Collection of cases and annotations, 26 A.L.R. 707, 708 (1923), and 133 A.L.R. 1071 (1941); *Life Magazine*, note 1, *supra*. Stamps are outlawed in Washington, D.C., and their use is partially restricted in Washington, Wisconsin and Kansas, according to this article.
43. *Sperry & Hutchinson v. Hoegh*, note 40, *supra*. This case contains elaborate citations of cases comprising the majority view and the federal or minority view. See Annot., 26 A.L.R., note 42, *supra*, and Annot., 22 A.L.R.2d 1214 (1952).
44. Senate Bill No. 55, introduced January 19, 1955.
45. See note 30 (2), *supra*.

It is therefore submitted that the proposed amendment, if it had been enacted, would have had no effect on the status of the trading stamp in Wyoming; for whether specifically enumerated or not, if the proof were sufficient, the trading stamp could be brought under the Act's classification of "any device." Neither should it be inferred that failure to specifically include the words "trading stamp" in the Act is indicative of legislative sanction toward the stamp.⁴⁶

The second bill,⁴⁷ which also failed to pass, prohibited customer-inducing devices or trading stamps to be used in an exclusive manner. Had this bill been passed, it may have affected the use of trading stamps in one respect, that is, a commercial stamp concern could not induce one merchant to purchase its stamp plan by telling him that the plan would not be offered to his competitors. Otherwise, the bill would have had no effect, for if a merchant should inaugurate a plan of his own, any other merchant would be at liberty to model his own stamp scheme on any other plan that an individual merchant may be using.

A recent case in the U.S. District Court of Massachusetts,⁴⁸ may trigger another flood of cases involving the stamp and fair trade legislation, at least in federal courts. Colgate-Palmolive Co. sought to enjoin a non-signer from selling trade-marked articles of the plaintiff, below the fair trade standard. The defendant asserted that an injunction should not issue since the plaintiff was allowing its retailers to violate the Act by their practice of giving trading stamps with purchase of fair trade merchandise.

The court stated that the injunction would not be granted while the plaintiff tolerated this practice. Colgate-Palmolive Co. then notified its retailers to disist from such practice, and threatened suit against those who refused to comply. The plaintiff then returned to court and was granted an injunction against the non-signer.

After the injunction was granted, Sperry & Hutchinson Co., intervenor, filed its motion for entry of declaratory judgment to determine the status of the trading stamp in regard to price-cutting. Their motion was dismissed because the court said that no controversy existed and the issue was moot. Judge Aldrich concluded that no controversy existed since the plaintiff took steps to rectify the special defense set up by the defendant, if it ever was a defense, and the issue no longer existed.

In Judge Adrich's original opinion, where the injunction was denied, he discussed at length the effect of the trading stamp on the price of the article with which it was issued, and concluded that such a device was a price-cut, whether considered a cash discount or a trade discount, regardless

46. *Lawton v. Stewart Dry Goods Co.*, note 17, *supra*. Merely because the legislature enacts a prohibition against the use of trading stamps, does not raise a presumption that the trading stamp is bad.

47. Senate Bill No. 281, introduced January 25, 1957.

48. *Colgate-Palmolive Co. v. Max Dischter & Sons, Inc.*, note 2, *supra*.

of what expert accountants called it.⁴⁹ He stated that the amount of the reduction was immaterial, for either the price was cut or it was not cut. The Act made no provision for a reasonable reduction of the purchase price, he said.

Free competition is a major concept of free economy. It is therefore submitted that legislative or court controls should not be imposed on a business practice unless that practice presents a clear and present threat to the well-being of our internal trade system. The legitimate use of trading stamps is but one of many forms of trade inducements that have long been customary and of wide-spread business usage. Restraints on the form of the trade inducement is unjust in that it disregards the substance of such a scheme, and labels it unfair because of its name.

Under the veil of fair trade legislation, the ordinary and customary usage of trading stamps should find protection. Since they were in use long before the adoption of such legislation, it should not be inferred that the founders of fair trade legislation intended to strike down a practice that had such wide-spread usage and acceptance in the business world.⁵⁰ In like manner, statutes seeking to place uncustomary restraints on this business practice, should be held violate of those constitutional guarantees of freedom to live and work where one wishes, to earn one's livelihood in any lawful calling, and to pursue any lawful trade or occupation.⁵¹

WILLIAM H. JACKSON, JR.

THE BONA FIDES OF CONSCIENTIOUS OBJECTOR CLAIMS

So long as there is a draft of military manpower in this country under the present statutes,¹ there will be cases which require the courts to rule on the various aspects of the claims of conscientious objectors to military service. The last three to five years have seen an increasing number of such cases, due perhaps to greater awareness of the privileges granted to conscientious objectors.

Historically, the conscientious objector has been handled in various

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49. The expert witness was a C.P.A., and he testified that a cash discount was an agreement separate from a sale and constituted an unilateral offer by the vendor to pay something if the buyer would pay in cash, and there was no effect on the selling price.
50. *Bristol-Myers Co. v. Picker*, note 6, *supra*. The Act contained no implied exception (applicable to trading stamps or cash register receipts), merely because the practice prevailed before adoption of the Act, for price-cutting likewise prevailed, and the Act stopped that practice.
51. *State v. Langley*, note 31, *supra*. Blume, C.J., stated in connection with unfair competition legislation, that "The ordinary business is not conducted for the purpose of loss. The legislature has not undertaken to compel merchants to do anything out of the ordinary, but only what is usual and customary. It has merely attempted to have each merchant give a fair chance to the other and do business without evil intent."

1. Act of June 24, 1948, c. 625, 62 Stat. 604, as amended 50 U.S.C. § 450 (1952 ed.).