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TRADE RESTRAINTS-FAIR TRADE ACTS - USE OF TRADING STAMPS

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TRADE RESTRAINTS — FAIR TRADE ACTS — USE OF TRADING STAMPS —
The plaintiff filed a bill in equity to restrain by injunction an alleged violation of the Pennsylvania Fair Trade Act. The violation charged was the issuance by the defendant retailer of yellow trading stamps, when requested, on all purchases of merchandise, including trade-marked articles manufactured by the plaintiff in relation to which, as the defendant well knew, the plaintiff had made contracts fixing the resale price. The chancellor dismissed the bill. *Held*, judgment affirmed. The issuance of the trading stamps was not a violation of the Fair Trade Act. Even assuming that it was a violation, the invasion was

not substantial enough to warrant an injunction. Two justices dissented. *Bristol-Myers Co. v. Litt Bros., Inc.*, 336 Pa. 81, 6 A. (2d) 843 (1939).

The legality of resale-price maintenance agreements,¹ although formerly contested, has now become established by the enactment of Fair Trade Acts in most of the states.² The constitutionality of such statutes has been upheld by the Supreme Court of the United States,³ and congressional sanction to the policy promulgated by such acts was recently given through the enactment of the Miller-Tydings Amendment of 1937.⁴ These statutes authorizing retail-price maintenance agreements may, in general, be conveniently divided into two categories: (1) those following the form of the original California statute of 1931;⁵ (2) those following the form of model statute proposed by the National Association of Retail Druggists in 1937.⁶ Both types of statutes expressly forbid direct price-cutting by the retailer. In addition, under the latter form of statute, certain kinds of indirect price-cutting are expressly forbidden.⁷ The use of trading stamps by the retailer would seem to constitute a clear violation of this type of statute, unless authorized by the resale price agreement. However, where the older type of statute is in force, which is true in Pennsylvania, the only express condemnation is of "advertising, offering for sale or selling" at less than

¹ "Resale-price maintenance is a technical term of recent origin. It designates a system whereby the manufacturer endeavors to keep at a level prescribed by him the price of his product charged by retailers and other distributors." SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE I (1932).

² McLaughlin, "Fair Trade Acts," 86 UNIV. PA. L. REV. 803 (1938); 52 HARV. L. REV. 284 (1938); 22 WASH. UNIV. L. Q. 549 (1937).

³ *Old Dearborn Distributing Corp. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936), upholding the Illinois Fair Trade Act, Ill. Stat. Ann. (Smith-Hurd, Supp. 1939), c. 121½, § 189; *Pep Boys, Manny, Moe & Jack v. Pyroil Sales Co.*, 299 U. S. 198, 57 S. Ct. 147 (1936), upholding the California Fair Trade Act, 2 Cal. Gen. Laws (Deering, 1937), Act 8782; 35 MICH. L. REV. 659 (1937).

⁴ The Miller-Tydings Enabling Act exempted from the prohibition of the Sherman Act resale-price maintenance contracts which were lawful in the state in which the resale was to be made. 50 Stat. L. 693 (1937), 15 U. S. C. (Supp. 1938), § 1.

⁵ 2 Cal. Gen. Laws (Deering, 1937), Act 8782.

⁶ For a compilation of the states and the statute-type which they have adopted, see 52 HARV. L. REV. 284 at 285 (1938), and Wolf, "The Establishment of Resale Price Control under Fair Trade Acts," 1 TRADE REG. REV., No. 4, 5-17 (1937).

⁷ 11 Ind. Stat. Ann. (Burns, Supp. 1939), § 66-303: "For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by said contract):

"(a) The offering or giving of any article of value in connection with the sale of such commodity;

"(b) The offering or making of any concession of any kind whatsoever (whether by giving coupons or otherwise) in connection with any such sale; or

"(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restrictions, for which the remedies prescribed by section six of this act shall be available."

See also Ark. Stat. Dig. (Pope, 1937), § 5608; Utah Rev. Stat. (Supp. 1939), § 95-3-3; Conn. Gen. Stat. (Supp. 1937), c. 138a, § 593 d.

the price stipulated in the resale-price agreement,⁸ and the statute remains silent as to indirect price cutting. Under this type of statute, the question whether the use of trading stamps constitutes a violation of the act resolves itself largely into a question of statutory interpretation. The New Jersey court, under the older type of statute, recently held that allowing employees a discount on price-maintained articles did constitute unfair competition within the meaning of the act.⁹ This would appear to be direct price-cutting and accordingly distinguishable from the instant case. In another recent case, the Pennsylvania Court of Common Pleas held that the issuance of profit-sharing coupons with sales of merchandise was prohibited by their Fair Trade Act.¹⁰ It seems difficult to distinguish such a case from the case at bar. Until the legislature has declared its policy as to indirect price-cutting, the results will, in large part, depend upon the willingness of the court to extend the operation of the statute beyond its express language.¹¹ The use of trading stamps may be logically characterized either as a mere advertising scheme or as a palpable invasion of the Fair Trade Acts. Consequently, the decision of the court in the instant case may be justified upon the theory that the Fair Trade Acts are so sweeping in their scope and effect¹² that they should be strictly construed.

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⁸ 73 Pa. Ann. Stat. (Purdon, 1939), § 8: "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 section one 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 party damaged thereby." See also 4 Ohio Gen. Code (Page, 1938), § 6402-4.

⁹ *Bristol Myers Co. v. L. Bamberger & Co.*, 133 N. J. Eq. 559, 195 A. 625 (1937).

¹⁰ *Bristol Myers Co. v. Soble*, (Phila. 1938) 106 C. C. H., TRADE REG. SERV., ¶ 25,114.

¹¹ For the economic aspects of price maintenance, see SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE 246 et seq. (1932).

¹² The Fair Trade Acts extend their protective provisions to encompass persons who are not parties to the resale-price maintenance agreement. For example, see 73 Pa. Ann. Stat. (Purdon, 1939), § 8. In the instant case, although the defendant did have notice of the contract, he was not a party thereto.