Trade Regulation -- State Fair Trade Acts -- Trading Stamps

Richard R. Lee

on the ground that unavoidable accident or sudden emergency had not been shown, but that the damage had resulted from negligence. However, the words of the court in the earlier case were, "There was no evidence to show that the tree was felled by design or carelessness." In fact, the trial court had charged that intent or carelessness in felling the tree would have to be shown; and for this error in the charge, the defendant's judgment below was reversed. The conclusion seems inescapable that both cases involved unintentional and non-negligent entry, yet different results were reached.[5]

However, the present position of the court, taken in *Smith v. Pate*, brings North Carolina in accord with what purports to be the weight of authority on this point.[6]

WILTON RANKIN

Trade Regulation—State Fair Trade Acts—Trading Stamps

Fair trade laws, enacted in all states except Missouri, Texas, and Vermont,[1] permit vertical price fixing[2] contracts between a manufacturer and a wholesaler or a retailer which establish a fixed resale price of the manufacturer's product. The acts provide that as soon as one such contract is entered into with a distributor within a state, all other distributors on the same level of competition who receive notice of the contract are bound by it, even though they are non-signers.[3]

For the purpose of preventing evasion of the resale price maintenance contracts, twenty states and territories[4] have specifically prohibited

[5] For an example of another state recently changing from the early common law to the modern trend, *compare* Louisville Ry. v. Sweeney, 157 Ky. 620, 163 S.W. 739 (1914); Consolidated Fuel Co. v. Stevens, 223 Ky. 192, 3 S.W.2d 203 (1927) *with* Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955); Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956).

[6] RESTATEMENT, TORTS § 166 (1934). "Except where the actor is engaged in an extrahazardous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the third person has a legally protected interest."

This Note is not concerned with trespass to person, but it should be pointed out that unavoidable accident is also a defense to trespass to person. RESTATEMENT, TORTS §§ 18, 21, 35 (1934).

[1] A complete compilation of fair trade laws may be found in 2 CCH TRADE REG. REP. (10th ed.) ¶ 10000-15585 (1956).

[2] Both horizontal and vertical price fixing were originally prohibited by the Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (Supp. IV 1957), but vertical price fixing was later exempted from the Sherman Act by the Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (Supp. IV 1957) and the McGuire Act, 66 STAT. 632, 15 U.S.C. § 45 (1952).

[3] However, some parts of the acts, and generally the non-signer provisions, have been held unconstitutional in Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Michigan, Nebraska, New Mexico, Oregon, South Carolina, and Utah. See Note, 31 N.C.L. REV. 509 (1953).

[4] Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho,

certain practices by adding "anti-concession" provisions to their fair trade acts.[5]

A perplexing problem under state fair trade laws is whether or not the issuance of trading stamps by retailers who sell fair trade items at the minimum resale price results in a reduction in price and a consequent violation of the act. The problem arises in those states having the "anti-concession statutes" as well as in those that do not.

In the states that do not have the "anti-concession" provisions, the weight of authority in the cases decided thus far seems to be that the giving of trading stamps does not violate the fair trade acts.[6] There are two reasons generally given for this view: (1) trading stamps, having a redemption value appropriate to a normal discount for the payment of cash, are in all respects a cash discount and not a reduction in price;[7] (2) the stamps are merely a trade promotional scheme and are similar to other advertising devices or the extension of credit.[8]

Indiana, Kansas, Maryland, Minnesota, Montana, North Carolina, Oregon, South Dakota, Utah, Virginia, West Virginia, and Wyoming. In addition, Nevada has part of the anti-concession statute prohibiting combination sales, and Wisconsin has the anti-concession wordage in a statute separate from its Fair Trade Act. See 1 CCH TRADE REG. REP. (10th ed.) ¶ 3008 (1950).

[5] These provisions generally read as follows: "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 article (except to the extent authorized by the said contract):

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

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

"(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale prices restriction . . . ." N.C. GEN. STAT. § 66-53 (1950) (Emphasis added).

The issue may be raised in two ways: (1) the manufacturer or retailer may sue the user of the stamps claiming that their use results in a sale below the minimum price. See Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950); or (2) the manufacturer may sue an obvious price cutter who asserts as a defense that the manufacturer's right to an injunction is waived because he has permitted others to violate his resale price maintenance contracts by giving the stamps to their customers. See Colgate-Palmolive Co. v. Max Dichter & Sons, Inc., 142 F. Supp. 545 (D. Mass. 1956).

[6] Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942); Food and Grocery Bureau v. Garfield, 20 Cal. App. 2d 228, 125 P.2d 3 (1942); Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269 (1940); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956); Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954); Benjamin v. Palan Drug Co., 144 Misc. 879, 88 N.Y.S.2d 291 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 1036, 92 N.Y.S.2d 413 (1st Dept. 1949); Nechamkin v. Picker, 67 N.Y.S.2d 60 (Sup. Ct. 1946).

[7] This is the so-called "cash discount" theory. The stamps are said to be a cash discount, measured by the economic worth to the merchant of the prompt use of his money and the corresponding reduction in working capital requirements and the avoidance of the expense of maintaining credit and the inevitable losses from bad debts. These courts also argue that it is a term of payment, not a price adjustment. It is a mode of financing, and the "cooperative" feature permits the accumulation and redemption of stamps issued by any or all of the merchants in a given area. In a word, the cash discount thus provided measures the value of

Bristol-Myers Co. v. Lit Bros., Inc.,[9] is an illustrative case of both of the above propositions. The plaintiff sought an injunction to restrain the defendant from violating his fair trade contract. Defendant, who sold his fair-trade products at the minimum prices, gave one trading stamp for each ten cents of purchases. Each book of 990 stamps represented $99 in purchases and could be redeemed in merchandise worth $1.75. The court held that there was no violation of the act, reasoning that the stamps amounted to a 1.76% cash discount. The defendant, said the court, could have provided his customers with a nursery service to care for children while the mother shopped, with free bus service to and from his store, or he could have extended credit for 30 or 60 days, and none of these practices would have violated the act, even though all would benefit the customer. The court emphasized that the fair trade laws were not designed to prevent all forms of business competition, but only "cut-throat" competition."[10]

On the other hand, a contrary view has been taken in other jurisdictions with similar statutory provisions on the grounds that: (1) even though it may be an advertising scheme, the benefit to the customer is directly, proportionately and inseparably related to the article purchased and its price, and amounts to a reduction in price;[11] (2) the stamps are actually a quantity discount because they have no value until a book is filled, and quantity discounts are generally considered as a reduction in price.[12]

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the use of money to the merchant, and makes for economic equality between the merchant selling for cash and the merchant selling on credit. It does not in any real sense work an inequality of price within the intendment of the act. Weco-Products Co. v. Mid-City Cut Rate Drug Stores, *supra* note 6; Sperry & Hutchinson Co. v. Margetts, *supra* note 6.

[8] Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956).

[9] 336 Pa. 81, 6 A.2d 843 (1939).

[10] The court also concluded that this practice antedated the fair trade laws by many years, and that nothing in the act indicates that its provisions were intended to prevent the practice. Even if the issuance of trading stamps did constitute a violation of the act, no injunction should be issued, said the court, because the injury to the plaintiff is very slight, if any, whereas the damage to the defendant caused by a restraining order might well be substantial and irreparable. Therefore the maxim *"de minimis non curat lex"* should apply.

[11] Bristol-Myers v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950). Actually the case involved cash register receipts instead of trading stamps, but the court said there was no distinction between the two and held that they violated the act because they have a value in themselves and are directly related to price and thus amount to a price cut regardless of how small. The court did distinguish the cash receipts and trading stamps from other types of advertising and promotional "service" plans by saying that the latter have no direct relation to price and are completely separated and too remote from the pricing element to come within the statutory prohibition. For a criticism of this point, see Note, 45 CALIF. L. REV. 378 (1957).

[12] Colgate-Palmolive Co. v. Max Dichter & Sons, Inc., 142 F. Supp. 545 (D. Mass. 1956). This case has been criticized on the grounds that it is contrary to prior Massachusetts decisions and is contrary to the general view that quantity discounts usually relate to volume sales of one item between one buyer and one seller and not a voluminous variety of items and more than one buyer and seller. See Notes, 30 TEMP. L.Q. 205 (1957); 21 ALBANY L. REV. 272 (1957).

In jurisdictions having "anti-concession" provisions in their acts, the fate of the trading stamp is almost certain.[13] The "anti-concession" statutes were designed to prevent evasion of the fair trade contracts. They expressly forbid the giving of *coupons* as a concession to the customer. Accordingly, the courts of Connecticut and Oregon have held that the terms of the statute forbid the giving of trading stamps and preclude a judicial distinction between a legal cash discount and an illegal price cut.[14]

These decisions obviate almost any argument that the trading stamp proponents could make in states having the express prohibitions. It would seem that the only defense available in a suit by a manufacturer for an injunction would be a showing that the manufacturer had not been diligent in his efforts to enforce his contracts.[15] But in a jurisdiction where the question has never been raised, the court should be hesitant in holding that a manufacturer has waived his rights to an injunction because of the conflicting opinions in other jurisdictions.

Since the North Carolina "anti-concession" statute[16] is substantially identical to those of Connecticut and Oregon, it is believed that if the question arises in North Carolina, the court will reach a result similar to that in those states.

RICHARD R. LEE

Trusts—Statute of Uses—Trusts for Separate Use of Married Women

Does the fact that a passive trust is for the sole and separate use of a married woman prevent it from being executed by the Statute of Uses? This question was raised in *Pilkington v. West*[1] and answered by the North Carolina Supreme Court in the negative. The plaintiff wife had conveyed land to a trustee to be held in trust during her lifetime. By the terms of the trust instrument the property was to be held for her "sole

[13] See note 5 *supra.*

[14] Mennen Co. v. Katz, CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62,734 (Conn. Ct. Com. Pl. 1950); Lambert Pharmacal Co. v. Roberts Bros., CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62,669 (Ore. Cir. Ct. 1950), *rev'd on other grounds,* 192 Ore. 23, 233 P.2d 258 (1951). If the court were allowed to make a distinction, it might possibly say that the trading stamp is a transaction independent and separable from the sale of the protected articles, and therefore could not be a cut in price. This would open the way for the court to make an analogy between the trading stamps and the cash discount, and possibly decide that they are the same thing, as the majority of the courts have done in the jurisdictions not having the "anti-concession" statutes.

[15] It is generally held to be a defense to the manufacturer's action if it is shown that he has not been reasonably diligent in enforcing his fair trade contracts. See Colgate-Palmolive Co. v. Max Dichter & Sons, Inc., 142 F. Supp. 545 (D. Mass. 1956).

[16] N.C. GEN. STAT. § 66-53 (1950).

[1] 246 N.C. 575, 99 S.E.2d 798 (1957).