Vanderbilt Law Review

Volume 11
Issue 2 *Issue 2 - A Symposium on Trade Regulation and Practices*

Article 11

3-1958

Trading Stamps

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TRADING STAMPS

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INTRODUCTION

It is as hard to define the trading stamp as it is to count the points on the circumference of a circle, for a trading stamp is what it appears to be and that, of course, depends upon point of view. To the housewife, it is a coupon—in some instances free, in others expensive—for which a redemption value may be claimed. To the stamp-issuing merchant, it is a method of advertising taking the form of a promotional device or operating as a discount to cash customers. To the nonissuing merchant, it is an instrumentality of unfair competition. To the trading stamp company, it is the heart of a legitimate business entitled to all of the constitutional protections. But in law—it is just what the courts view it to be, neither more nor less. And the courts are not always in agreement.

This judicial disagreement is cogently illustrated by contrasting two definitions delivered by two distinguished courts, the Massachusetts Court, in 1915:

> While we do not go so far as to say that trading stamps are an absolute public necessity, yet they enter into the merchant's business, and are an essential element of a form of bargain and sale which a very appreciable portion of the public demands.[1]

and the Supreme Court of the United States, in 1916:

> This may not be called in an exact sense a "lottery", may not be called "gaming"; it may, however, be considered as having the seduction and evil of such. . . .[2]

Thus, it is not surprising to find a diversity of judicial views of the trading stamp arising from the several states.[3] And this is true though the mechanical structure of the trading stamp plans is, for the most part, the same throughout.

Fundamentally, these stamp plans operate to combine selected noncompeting merchants in a given geographical location. The trading stamp company sells membership in the plan through a franchise agreement and furnishes stamps at an assigned cash value to the

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1. Merchants' Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N.E. 968, 969 (1915).
2. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 365 (1916).
3. See 52 AM. JUR., *Trading Stamps* § 6 (1944); 29 HARV. L. REV. 779 (1916).

contracting merchant. Each merchant issues stamps as sales are made to his customers, and each customer receives stamps with purchases from a member of the plan. The customer, after collecting the required number of stamps, as advertised in the premium catalog, presents the stamps to a redemption center, provided for and maintained by the trading-stamp company, and in return receives the selected premium.[4]

The economics of the trading stamp business and its impact upon retail establishments is complex.[5] The trading stamp plan can be considered basically as a three-party relationship between the trading stamp company, the issuing merchant and the stamp collecting customer. But it has its effect upon others. The nonissuing merchant, who is placed at a competitive disadvantage, must offer his customer other inducements or join a competing stamp plan. The retailer who merchandises the same items as those which are offered as premiums is certain to feel the effect of the decreased demand in his market area.[6] Newspapers and other advertising media are in competition with an extremely successful promotional device. And the manufacturers of the premiums have found in the trading stamp company a large wholesale purchaser with a vast network for distribution. These are but a few of the factors which have moved legislators to action and have given rise to extreme measures. The motive most frequently professed by those supporting anti-trading-stamp legislation is the protection of an unwary public.

The trading stamp company, being a business enterprise, must make a profit to exist. Whether this profit is realized from the price spread between the wholesale cost of the premium and its cash equivalent upon redemption; or from the benefits accruing from unredeemed stamps, there must be a profit.[7] The merchant may, during the initial stages of his participation in a stamp plan, so increase his volume of trade that the additional profits realized from increased volume will

4. See Trial Brief for Complainants, Logans Supermarket, Inc. v. Atkins, Rule No. 78942, Chancery Court, Part Two, Nashville, Tennessee, (June, 1957), *aff'd*, 304 S.W.2d 628 (Tenn. 1957).

5. Two excellent articles which treat the economic aspects in detail are Notes, *The Trading Stamp*, 24 TENN. L. REV. 557 (1956); *Regulation of the Trading Stamp Industry*, 6 DUKE B. J. 72 (1957).

6. Sperry & Hutchinson Company is one of the largest purchasers of small appliances in the country, a large purchaser of silver items, a large purchaser of textiles, of certain types of luggage, of glass, of certain kinds of tables, of small furniture, and so forth. See the Transcript of Record, cross-examination of William S. Bienecke, Logans Supermarket, Inc. v. Atkins, Rule No. 78942, Chancery Court, Part Two, Nashville, Tennessee (June 7, 1957), *aff'd*, 304 S.W.2d 628 (Tenn. 1957).

7. There are reports that trading stamp companies annually transfer part of the reserves set up for unredeemed stamps to current income, see Note, *The Trading Stamp*, 24 TENN. L. REV. 556 (1956). But see testimony to the effect that S & H operates on a basis of redemption of 95% of their stamps. Transcript of Record, cross-examination of Bienecke, Logans Supermarket, Inc. v. Atkins, *supra* note 6.

offset the cost of the stamps he issues. But when his competitors adopt a competing trading stamp, or otherwise lure their lost customers back, there will result a re-equalization of trade in the area. Then the merchant must either absorb the cost of the stamps or pass the expense on to his customers. More frequently than not, it appears, he elects the latter, and the customer pays for his premiums. Thus, it is made to appear that there is some justification for legislative action in this area of commerce.

THE TRADING STAMP IN THE UNITED STATES SUPREME COURT

Almost without exception the trading stamp has been channeled into the courts through enforcement of, and attacks upon, anti-trading-stamp legislation. Such was the case in 1916 when the trading stamp, though no stranger to the state courts, made its first appearance in the Supreme Court of the United States. There, in three companion cases,[8] the rulings in which were considered revolutionary,[9] the Court adopted the view that the trading stamp created problems the solution to which were best left in the hands of the state legislatures, and held that prohibitive taxes upon the trading stamp business were not violative of the Federal Constitution. Prior to this pronouncement the great weight of authority had held such legislation unconstitutional.[10] Since 1916, however, several state courts have adopted the federal view in ruling upon like legislation attacked as violative of the state constitution.[11] A consideration of these three companion cases will disclose many of the problems arising in this area of the law.

Rast v. Van Deman & Lewis Co.[12]

The complainants in *Rast v. Van Deman & Lewis Co.*, were Florida merchants seeking to enjoin the state taxing authorities from proceeding under a statute which imposed upon them prohibitive taxes. They sought to invalidate the statute on the grounds that it violated the commerce and contract clauses of the Constitution and the due process

8. Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916); Tanner v. Little, 240 U.S. 369 (1916); Pitney v. Washington, 240 U.S. 387 (1916).

9. "In 1916 The Supreme Court of the United States, in a series of decisions which, in view the then-existing conceptions of the law, were of fairly revolutionary tenor, announced the doctrine that the trading stamp business . . . fell within the police power of the state and was outside the protection of the Fourteenth Amendment." 52 AM. JUR., *Trading Stamps* § 7 (1944).

10. "Prior to 1916 the almost uniform current of authority was to the effect that the dispensing of trading stamps, and the business of trading stamp companies dependent upon it, were, when free from any element of chance, both harmless and lawful, and did not fall within the scope of the police power." *Ibid.*

11. See notes 27, 28 *infra* and text thereto.

12. 240 U.S. 342 (1916).

and equal protection clauses of the fourteenth amendment.[13] They were not successful.

A treatment of all the ramifications of the interestate commerce aspects of the trading stamp business is beyond the scope of this article. Suffice it here to confine the treatment to those redemption plans presented in the instant case where (1) the local merchant issued and redeemed his own coupons within one state; (2) the foreign manufacturer shipped both goods and coupons packaged together into the merchant's state for delivery there by him to the consumer who redeemed from the foreign manufacturer; and (3) the foreign manufacturer shipped coupons and goods packaged together to the local merchant for delivery to consumer who redeemed from a third source outside the state. The Court determined that the common characteristic of all these plans was the giving of something of value more than the immediate object of the purchase, a characteristic so designed that it was executed not through a sale of the original package of importation but through the retail sale to the consumer. The transaction, thus fixed within the state of retail sale, was removed from interstate commerce.

The contract clause of the Constitution afforded the complainants no shield against the operation of the statute. The Court held the statute to have prospective operation only, not affecting those sales through which the right of redemption had previously accrued to the purchaser. The Court viewed the purchaser's expectation that future sales would be accompanied by additional coupons as being neither obligatory nor contractual. Thus the statute in no way operated as an unconstitutional impairment of the obligation of contracts.

Nor was the equal protection clause helpful to the complainants. The Court viewed the use of trading stamps, even if regarded as a means of advertising, as distinguishing by a pronounced difference the businesses which used them from the businesses which did not. The classification was held not to be arbitrary since the distinction be-

13. With regard to the fourteenth amendment the bill alleged specifically that "(1) The statute discriminates between merchants in similar lines of business; (2) between merchants who advertise in a certain manner and those who advertise in another manner. (3) The taxes are not upon the business or occupation of complainants but upon the mere incidents of the business . . . . (4) The taxes are unreasonable arbitrary oppressive discriminatory and prohibitory for the reason already detailed . . . and are far in excess of the taxes or licenses fixed or imposed when other methods of advertising or inducing custom are used, and will prevent complainants from carrying on their legitimate business. (5) They are not productive of revenue, are in excess of the profits of the business, and are in fact prohibitory. (6) That the methods employed by complainants in no wise affect the public health, morals, or welfare, and the imposition of the taxes is in no way a legitimate or lawful exercise of the police power of the State. (7) That the fines are so onerous, drastic, excessive, and enormous as to deter complainants in going on and doing business as they have heretofore done, and testing the validity of the statute in a court of law." 240 U.S. at 350.

tween the classes was valid and could support class legislation.[14]

It was upon the consideration of questions arising under the due process clause that the Court saw an evil foundation underlying the trading stamp businesses. It was the position of the complainants that the stamp plans were but alluring methods of advertising in the form of discounts, and as such were merely incidental to their businesses. They contended that, as the trading stamps were neither detrimental to the public morals nor obstructive to the public welfare, the legislation against them was an "illegal meddling with a lawful calling and a deprivation of freedom." However, the Court felt otherwise.

The Court acknowledged that the great weight of authority did support the complainants' position that the trading stamp business, as an exercise of personal liberty, was entitled to constitutional protection. But the Court urged that the opinions constituting that weight of authority looked only to the mechanics of the problem involved. The Court suggested that because of the "insidious potentialities" of the stamp schemes, "the legislature, rather than the courts may be the best, and perhaps the conclusive judges." In distinguishing trading stamps as lacking the "directness and effect" of other methods of advertising and yielding to the state legislatures the determination of the advisability of permitting the operation of trading stamp businesses, the Court made the statement since often quoted, that trading stamp plans "by an appeal to cupidity lure to improvidence."[15]

The Court, after reinforcing its views with a discussion of cases[16] supporting the validity of apparently equally extensive measures designed for the protection of the public welfare held that "the business schemes . . . are not protected from regulation or prohibition by the Constitution of the United States."[17]

Tanner v. Little[18]

Tanner v. Little, the second of the companion cases, was appealed

14. The Court supported this holding with dicta to the effect that (1) if any conceivable state of facts would sustain a distinction in legislation the existence of that set of facts at the time the law was enacted must be assumed [citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)]; and (2) that it matters not that those facts may be disputed as to existence or effect [citing Chicago B & Q Ry. v. McGuire, 219 U.S. 549 (1911); German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 413, 414 (1914); Price v. Illinois, 238 U.S. 446, 452 (1915)] so long as the discriminations made are based upon distinctions that are not unreasonable or purely arbitrary [citing Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912)].

15. 240 U.S. at 365.

16. In the order of their discussion by the Court: Otis v. Parker, 187 U.S. 606 (1903); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912); Keokee Consol. Co. v. Taylor, 234 U.S. 224 (1914); Erie Ry. v. Williams 233 U.S. 685 (1914).

17. 240 U.S. at 368.

18. 240 U.S. 369 (1916).

by the state of Washington from a decision of the federal district court enjoining enforcement of a statute which imposed a prohibitive license tax upon the privilege of using trading stamps. The statute, which levied a fee of $6,000 for each store using stamps, was held by the lower court to be unconstitutional on the grounds of discrimination.[19]

On appeal the Supreme Court in reversing the lower court devoted a thorough discussion to the pivotal question of discriminatory classification. Classification was there described as "the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those particulars'."[20] Certain items may logically be grouped into one class and distinguished from others grouped into another. Such classification may or may not be appropriate depending upon the objective in view. Thus, the objective becomes an integral part of the classification when the classification is searched for unconstitutional discriminatory defects. For example:

> Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-headed men and black-headed men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation.[21]

It is apparent that not only must one class be logically distinguished from the other but also that the objective of the classification must justify the distinction. Looking to the objective of the classification, the statute may well stand or fall upon the authority of the legislature to deal with that object toward which statute is directed.[22] The Court, after inviting attention to this reasoning, avoids a decisive answer based upon it by invoking the reasoning of *Rast v. Van Deman & Lewis Co.*, "that the 'premium system' is not one of advertising merely," that "it has other, and, it may be, deleterious consequences," and that "the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength."[23]

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19. The lower court indicated that the mere fact that the fee was prohibitive in the absence of the unconstitutional discrimination possibly would not invalidate the statute. Little v. Tanner, 208 Fed. 605 (E.D. Wash. 1913).
20. 240 U.S. at 382, quoting from Billings v. Illinois, 188 U.S. 97, 102 (1903).
21. 240 U.S. at 382.
22. "If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature." 240 U.S. at 383.
23. 240 U.S. at 384-85.

Pitney v. Washington[24]

The third of the companion cases was a criminal case on appeal from the conviction and fine of the defendant under the same statute attacked in *Tanner v. Little*. This opinion adds little to our consideration here. Though it is a criminal case, the same standards are applied, the same reasoning employed and the same conclusions reached as in the two preceeding cases each of which arose as a civil action upon applications for injunction against the operation of the statutes. In this connection, however, it is noteworthy that the misdemeanor of which defendant Pitney was convicted was that of failing to pay the tax imposed, there being here no absolute prohibition of the use of stamps.

In summary, it is apparent that the United States Supreme Court saw in trading stamp plans a hidden evil, and that Court was willing, even insistent, that each state solve its own problem through its own legislature. Further, it appears that should the legislation be couched purely in terms of a criminal statute, an absolute prohibition of the trading stamp business, the Court would find no constitutional fault with it. The problem, if it is a problem, is in the state, and it devolves upon the state legislature to find the solution, if the need be felt. However, it is fundamental that the task rests with the courts of the state to then measure that solution against the yardstick of the state's constitution. The United States Supreme Court has found that there is no violation of the Federal Constitution; it remains to the state court to determine the validity under the state's constitution.

THE STATE COURTS—A VARIETY OF LAWS

Before and After

Before the 1916 doctrine of the Supreme Court, the weight of authority protected the trading stamp business by invalidating anti-trading-stamp legislation.[25] The Federal Supreme Court made patent recognition of this in *Rast v. Van Deman & Lewis Co.*[26]

After 1916 several states, following the view that there should be uniformity of interpretation of a similar provision in the several state constitutions held that the interpretations of the Federal Constitution by the United States Supreme Court, while not binding upon the state court in interpreting its own constitution were, nevertheless, strongly

24. 240 U.S. 387 (1916).
25. See Annot., 26 A.L.R. 707, 710 (1923).
26. "These contentions [that the anti-trading stamp legislation under consideration violates the due process clause of the 14th amendment] have the support of a number of cases. They are opposed by others, not nearly so numerous . . . . Regarding the number of cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion." 240 U.S. at 363-64.

persuasive and adopted the doctrine of the 1916 cases.[27] This they subscribed to though in some instances it necessitated the overruling of a previous holding in the state.[28]

On the other hand some states, relying upon the fundamental doctrine that the supreme court of a state is the final authority in rendering an interpretation of the constitution of that state, have refused to conform to the Supreme Court's views.[29] Other state courts have avoided conforming by drawing distinctions between the case under consideration and the Supreme Court cases of 1916.[30]

It becomes apparent that in the development of trading stamp law 1916 is a critical period, and state court opinions delivered prior to that time may have subsequently been expressly or impliedly overruled.

Direct Legislative Attack

Most trading stamp legislation has been aimed toward effecting the prohibition of the trading stamp business either directly through the police power or indirectly through the tax power. Upon contest of such a statute the pivotal determination appears to be whether or not the court views the trading stamp business as a lawful enterprise free of hidden evils and inoffensive to the public morals. Viewed as such the business cannot be subjected to the imposition of other than normal regulation applicable to all businesses, and *special* police powers are inapplicable.

In *Sperry & Hutchinson Co. v. Owensboro*,[31] the court held that the trading stamp business, being a lawful business, was subject to a reasonable tax but not to an unreasonable and prohibitive tax.[32] This reasoning was followed in the two companion cases of *Lawton v. Stewart Dry Goods Co.*[33] and *Ware v. Sperry and Hutchinson Co.*[34] where the court voided a statute which attempted, under the police power, to prohibit the issuance of trading stamps.

And in the case of *State v. Lothrops-Farnham Co.*,[35] the court held anti-trading-stamp legislation imposing prohibitive fees and taxes to

27. See *e.g.* Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919); State v. Crosby Bros. Mercantile Co., 103 Kan. 733, 176 Pac. 321 (1918); State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); Sperry & Hutchinson Co. v. Weigle, 169 Wis. 562, 173 N.W. 315 (1919); Sperry & Hutchinson Co. v. Weigle, 166 Wis. 613, 166 N.W. 54 (1918).

28. See *e.g.* State v. J. M. Seney Co., 134 Md. 437, 107 Atl. 189 (1919) overruling, State v. Cospare, 115 Md. 7, 80 Atl. 606 (1911).

29. See *e.g.* Opinion of the Justices, 226 Mass. 613, 115 N.E. 978 (1917).

30. See *e.g.* State v. Holtgreve, 58 Utah 563, 200 Pac. 894 (1921).

31. 151 Ky. 389, 151 S.W. 932 (1912).

32. See *Ex Parte* Hutchinson, 137 Fed. 950 (C.C.D. Ore. 1905); Montgomery v. Kelley, 142 Ala. 552, 38 So. 67 (1905).

33. 197 Ky. 394, 247 S.W. 14 (1923).

34. *Ibid.*

35. 84 N.H. 322, 150 Atl. 551 (1930).

be unconstitutional interference with the right to acquire and possess property.

Other cases[36] illustrating additional successful attacks made on various anti-trading-stamp statutes since 1916 include: *Opinion of the Justices,*[37] where a bill forbidding the issuance of stamps redeemable by a party other than the issuer was said to be discriminatory and unconstitutional; *Denver v. United Cigar Stores,*[38] where the court in a per curiam opinion voided an ordinance prohibiting trading stamps; *Sperry & Hutchinson Co. v. Prosecuting Attorney*[39] in which an act prohibiting a dealer in particular goods from issuing trading stamps was declared unconstitutional; *Sperry & Hutchinson Co. v. McBride*[40] where a statute forbidding the issuance of trading stamps, whether redeemed by the issuer or a third party, was held unconstitutional as an arbitrary interference with a lawful business; *Alabama Independent Service Stations Ass'n. v. McDowell*[41] where a section of the act which intended to suppress the practice of advertising by giving away premiums was held unconstitutional as being beyond the scope of the police power; *Sperry & Hutchinson Co. v. Hoegh,*[42] where a gift enterprise statute attempting to prohibit only those trading stamp plans where the stamps were furnished and redeemed by a third party was held discriminatory and unconstitutional; *Sperry & Hutchinson Co. v. Margetts*[43] where trading stamps were deemed not to be a rebate within the reason and spirit of a statute prohibiting rebates with the sale of motor fuel; and *Tennessee v. White,*[44] where the court held that a statute prohibiting the giving of trading stamps with the sale of motor fuel was unconstitutional because beyond the scope of the police power of the state.[45]

On the other hand, should a state court see evils lurking in the shadows of the trading stamp, support for a decision upholding the constitutionality of anti-trading-stamp legislation can be found in the Federal Supreme Court cases of 1916[46] where it is indicated that once the evil is recognized it matters not whether prohibition is effected directly through the police power or indirectly through the imposition

36. For the collection of these cases the author is indebted to the trial brief filed by Messrs. Larry Creason, Edwin Hunt and Cecil Sims in behalf of the complainants in Logans Supermarkets, Inc. v. Atkins, Rule No. 78942, Chancery Court, Part Two, Nashville, Tennessee (June 7, 1957).
37. 226 Mass. 613, 115 N.E. 978 (1917).
38. 68 Colo. 363, 189 Pac. 848 (1920).
39. 287 Mich. 555, 283 N.W. 686 (1939).
40. 307 Mass. 408, 30 N.E.2d 269 (1940).
41. 242 Ala. 424, 6 So. 2d 502 (1942).
42. 246 Iowa 9, 65 N.W.2d 410 (1954).
43. 25 N.J. Super. 568 (1953), 96 A.2d 706 (1953); *aff'd,* 15 N.J. 203, 104 A. 2d 310 (1954).
44. 199 Tenn. 544, 288 S.W.2d 428 (1956).
45. See discussion of *Tennessee v. White, infra* page 578.
46. See note 8 *supra.*

of prohibitory taxes.[47] Further support can be found in the views adopted by the courts of the states of Kansas, Wisconsin and Maryland. In *State v. Wilson*[48] the Kansas court adopted the "modern view . . . that the state may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adopted to promoting the common welfare, convenience or prosperity,"[49] and held that the legislature had the power to place a special burden upon a business using trading stamps.

The Wisconsin court upheld a statute prohibiting the issuance of stamps as a proper exercise of the police power because the schemes affected the public generally.[50] And in *State v. J. M. Seney Co.*,[51] the Maryland court upheld anti-trading-stamp legislation as a proper exercise of a police power which has been extended beyond its original scope to meet new and varied conditions of society.

It appears that should the court see such an evil lurking in the trading stamp business to permit the invocation of the police power then that police power should be applicable indiscriminately to all of the various forms of trading stamp plans in the state. As stated by the Utah Supreme Court in the leading case of *Utah v. Holtgreve*,[52] where the court held unconstitutional a statute imposing a tax upon the use of trading stamps purchased from another while permitting the merchant to issue, without tax, stamps furnished by himself:

> If the supposed business of each be considered from the standpoint of the effect on the public morals and the general welfare of society, can it be said for any conceivable reason or under any supposable state of facts that the business conducted by the former is more deleterious in its effects on society than that conducted by the latter?[53]

It is possible that the court could view one form of the trading stamp business as "deleterious in its effects on society" justifying its prohibition under the police power; and at the same time remove other forms of the same business from the operation of the police power. However, it seems that such action would require a constitu-

47. "It is not certain from the allegations of the bill that the tax is of the asserted [prohibitory] character, but granting it to be so we have shown that the business schemes described in the bill are not protected from regulation or *prohibition* by the Constitution of the United States." Rast v. Van Deman & Lewis Co., 240 U.S. 342, 368 (1916). (Emphasis added.)

48. 101 Kan. 789, 168 Pac. 679 (1917). See also State v. Crosby Bros. Mercantile Co., 103 Kan. 733, 176 Pac. 321 (1918).

49. 168 Pac. at 681.

50. Sperry & Hutchinson Co. v. Weigle, 166 Wis. 613, 166 N.W. 54 (1918). See also Sperry & Hutchinson Co. v. Weigle, 169 Wis. 562, 173 N.W. 315 (1919).

51. 134 Md. 437, 107 Atl. 189 (1919).

52. 58 Utah 563, 200 Pac. 894 (1921).

53. 200 Pac. at 898, quoting from Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919).

tionally sound distinction between the two forms of the business to justify the classification.

The Sidewise Swipes

Not infrequently trading stamp plans have become the subject of litigation under legislation which, though not aimed directly at trading stamps, encompass trading stamps within the scope of their effect. Some of these include; statutes prohibiting lotteries as a scheme for stimulating legitimate business,[54] statutes relating to gifts or gift enterprises[55] and statutes pertaining to the giving of premiums in general.[56]

Trading stamp plans have often been found within the focal area of price regulating statutes and fair trade laws. The position so taken being that if a regulated price is charged, trading stamps operate as a discount when given or as a rebate when redeemed; and, as such, constitute a violation of the regulated price. In some statutes an express prohibition against giving premiums is conjoined with the definition of fair trade practices or with the regulation of prices.[56a]

In *People v. Victor*,[57] the defendant was convicted by the trial court for violation of a statute viewed by the court below as a fair trade law rather than a price-fixing measure. The statute prohibited the giving of premiums for the purpose of promoting sales. On appeal, the Michigan Supreme Court finding no evils in the giving of premiums viewed the practice as a legitimate trade practice and the statute as applied thereto was held unconstitutional.

On the other hand, in *Schuster & Co. v. Steffes*,[58] the contested statute prohibited the issuance of trading stamps in connection with the retail sale of merchandise where the retailer had knowledge of and was charging the retail price fixed by the producer or distributor. The court pointed out that in view of the prior Wisconsin holdings that the police power could regulate or prohibit entirely the use of trading stamps, the police power could be used in this way to fortify the policy of a fair trade law.

In *Alabama Independent Service Station Ass'n. v. McDowell*,[59] the Alabama statute under attack provided for the sale of gasoline and

54. See generally, Annots., 124 A.L.R. 341 (1940); 113 A.L.R. 1121 (1938); 109 A.L.R. 709 (1937); 103 A.L.R. 866 (1936); 57 A.L.R. 424 (1928); 48 A.L.R. 1115 (1927).
55. See generally Annots., 39 A.L.R. 1035 (1925); 26 A.L.R. 707 (1923).
56. See generally Annot., 133 A.L.R. 1087 (1941).
56a. See generally Note, 43 CORNELL L.Q. 140 (1957).
57. 287 Mich. 506, 283 N.W. 666 (1939).
58. 237 Wis. 41, 295 N.W. 737 (1941).
59. 242 Ala. 424, 6 So. 2d 502 (1942); ALA. CODE ANN. tit. 2, § 425 (1940). This case was followed in Alabama Independent Service Stations Ass'n. v. Hunter, 249 Ala. 403, 31 So. 2d 571 (1947). See also Tennessee v. White, 199 Tenn. 544, 288 S.W.2d 428 (1956).

petroleum products at the exact prices advertised and prohibited discounts, refunds, premiums, etc. The court viewed the premium system as an inoffensive method of advertising and held the statute unconstitutional insofar as it prohibited the giving of premiums.

The recent New Jersey case of *State v. Sperry & Hutchinson Co.*,[60] held that unredeemed stamps as cash obligations were within the meaning and sweep of the state's Custodial Escheat Act. Consequently, the unclaimed moneys payable by way of the right of redemption would be escheatable under an act which, it appears, was aimed primarily at unclaimed dividends, interest and wages.

TENNESSEE LAW

The first reported Tennessee case dealing with trading stamps, *Trading Stamp Co. v. Memphis*,[61] appeared in 1898. The complainant sought to enjoin the passage of a city ordinance imposing a privilege tax on trading stamp companies. The court determined that, since the legislature had not empowered the city to create and tax privileges, the ordinance was *ultra vires*, and the injunction was granted.

Police Power

A much later (1956) case, *Tennessee v. White*[62] involves a statutory prohibition of the giving of premiums or gratuities. In this case the defendant was prosecuted for the violation of a statute[63] which directed that the prices of motor fuels be posted, prohibited sales at less than the posted price, and specifically prohibited the giving of premiums or gratuities which would accomplish the effect of a sale at less than that price. The court pointed out that there was no decision on the subject in Tennessee, but following a foreign case[64] in which an identical statute had been attacked held the Tennessee law unconstitutional as applied. The requirement for the posting of prices, it was said, was a valid exercise of the police power, but where the statute went further and prohibited the giving of a trade stimulant it was held to be beyond the scope of the police power.

The Court stated that:

> *So long as the operator's business does not offend the public morals and work an injustiee on the public,* its constitutional right to pursue on equal terms to that allowed to others in like business is beyond question, even though his methods may have a tendency to draw trade to him to the

60. 23 N. J. 38, 127 A.2d 169 (1956).
61. 101 Tenn. 181, 47 S.W. 136 (1898).
62. 199 Tenn. 544, 288 S.W.2d 428 (1956).
63. Now TENN. CODE ANN. § 59-1502 (1956).
64. Alabama Independent Service Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502 (1942).

detriment of competitors.[65] (Emphasis added.)

Thus, it appears, the court with characteristic foresight preserved great latitude to itself for the determination of the applicability of the police power to future stamp plans. Now, should the court view a different premium system as being offensive to the public morals the court could, without inconsistence, permit a prohibition under the police power.

Tax Power

The most recent Tennessee case dealing with trading stamps is *Logans Supermarket, Inc., v. Atkins.*[66] This action was brought by several merchants and trading companies pursuant to the provisions of the Tennessee Declaratory Judgment Statute[67] for a determination of the constitutionality of the Tennessee Trading Stamp Act,[68] as amended. (Actually, the attack was made upon the 1957 amendment to the act.[69]) The act, as amended, imposed a privilege license tax of $600 for each county in which a trading stamp company transacted business and also levied a two per cent gross receipts tax on merchants issuing stamps redeemable from any person other than the issuing merchant.[70]

The chancery court, Chancellor William J. Wade presiding, held that the $600 license tax was constitutional but found the gross receipts tax to be unconstitutional because of the discriminatory classification in its application to those merchants who issued stamps to be redeemed by "any other person" and its non-application to those merchants who issued stamps redeemable by the issuing merchant.[71]

The License Tax

The constitution of the state permits great latitude in the creating and taxing of privileges by empowering the legislature to "tax Merchants, Peddlers, and privileges in such manner as they may from time to time direct."[72] The supreme court in *Jenkins v. Ewin,*[73] gave emphasis to this grant of power in noting that the language was in

65. 288 S.W.2d at 430.
66. Rule No. 78942, Chancery Court, Part Two, Nashville, Tennessee (June 7, 1957), *aff'd*, 304 S.W.2d 628 (Tenn. 1957).
67. TENN. CODE ANN. § 23-1101 (1956).
68. TENN. CODE ANN. § 67-4203, item 106 (1956).
69. Tenn. Pub. Acts 1957, c. 97, now TENN. CODE ANN. § 67-4203, item 106-B (Supp. 1957).
70. TENN. CODE ANN. § 67-4203, item 106 (Supp. 1957).
71. It was also held that the doctrine of elision was applicable and the license tax was thereby permitted to stand, the court relying on State v. Wilson, 80 Tenn. 246 (1883); Scott v. Nashville Bridge Co., 143 Tenn. 86, 223 S.W. 844 (1920), and Jones v. City of Jackson, 195 Tenn. 329, 259 S.W.2d 649 (1953).
72. TENN. CONST. art. 2, § 28.
73. 55 Tenn. 456 (1871).

contradistinction to the constitutional provision immediately preceding which limited the taxation of property, and the court there held that:

> the power of the Legislature to tax merchants, peddlers and privileges was unlimited and unrestricted, and might be exercised in any manner and mode in their discretion.[74]

The later case of *Knoxville & O. Ry. v. Harris*[75] added that:

> If the Legislature has the legal right to impose a privilege tax, the amount of the imposition is a matter within its discretion. "Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."[76]

And more breadth appears to have been given in *H. G. Hill Co. v. Whitice*[77] where the court in answer to averments that a tax was unreasonable, oppressive and confiscatory held that:

> The power of the legislature to declare and tax privileges is unlimited. Its discretion in this regard cannot be restrained or controlled by the courts.[78]

With this broad taxing power resting in the legislature and with a finding of fact that the proof did not show the tax to be confiscatory, the chancellor upheld the constitutionality of the license tax applied to the trading stamp companies.

The Gross Receipts Tax

The two percent gross receipts tax levied upon merchants who issued stamps redeemable by any other person was held unconstitutional. The application of the tax, as directed by the statute, created a classification which was considered to be arbitrary, capricious and unreasonable in violation of article XI, section 8 of the Tennessee Constitution.[79]

A study of this section of the statute[80] reveals ambiguity as to the extent of the scope of the tax levy. Does immunity from the tax

74. *Id.* at 479.
75. 99 Tenn. 684, 43 S.W. 115 (1897).
76. *Id.* at 709, 43 S.W. at 121.
77. 149 Tenn. 168, 258 S.W. 407 (1924).
78. *Id.* at 175, 258 S.W. at 409.
79. "The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law extended to any member of the community who may be able to bring himself within the provisions of such law." TENN. CONST. art. 11, § 8.
80. See note 70 *supra*.

extend to all merchants who redeem their own stamps since the applicability clause applies to the tax only on those businesses issuing stamps redeemable from *"any other person?"* Or is the only immunity found in the exemption clause which exempts those merchants who redeem *from their own general stock?* The chancellor gave consideration to an entry in the *Legislative Journal* which disclosed that the word "other" was placed between the words "any" and "person" after deliberation during passage of the act. And following the doctrine of *H. D. Watts Co. v. Hauk*,[81] that doubt as to the extent of a tax statute should be resolved in favor of lesser rather than greater extent, interpreted the statute to have the narrow scope, *i.e.*, that the immunity from the tax extended to all merchants who redeemed their own stamps.

After resolving this ambiguity, the court inspected the classification established. *Corn v. Fort*[82] directs that:

> While the Legislature has a wide range of discretion in the matter of imposing privilege taxes, it cannot arbitrarily exclude one set of individuals from the operation of a privilege tax and include another set.[83]

And the more recent case of *Wilson v. Beeler*[84] adds that though the reason for the discrimination need not affirmatively appear on the face of the statute, that reason must exist and indicates that the court should search for such a validating reason.

Under the authorities, the chancellor held the tax to be unconstitutional, stating that:

> This Court has given much thought and time in trying to find a reason which would justify the classification . . . this reason has not been forthcoming as the Court does not believe there is any real and substantial difference between a merchant who uses stamps and redeems his own stamps and a merchant who uses stamps and for a consideration has someone else to redeem them for him. In one instance he is taxed, and in the other instance he is not.[85]

On appeal, the chancellor was affirmed on every point.[86] The court followed the language and rationale of *Sperry & Hutchinson Co. v. Hoegh*[87] to the effect that even if it were assumed, which it was not, that anti-trading-stamp legislation could be sustained under the police powers, there was no reasonable basis for distinguishing between the

81. 144 Tenn. 215, 231 S.W. 903 (1921). See also Neuhoff Packing Co. v. Chattanooga, 191 Tenn. 395, 234 S.W.2d 824 (1950).
82. 170 Tenn. 377, 95 S.W.2d 620 (1936).
83. *Id.* at 387, 95 S.W.2d at 623.
84. 193 Tenn. 213, 245 S.W.2d 620 (1951).
85. Logans Supermarkets, Inc. v. Atkins, Rule No. 78942, Chancery Court, Part Two, at Nashville, Tennessee (June 7, 1957).
86. Logans Supermarkets, Inc. v. Atkins, 304 S.W.2d 628 (Tenn. 1957).
87. 246 Iowa 9, 65 N.W.2d 410 (1954).

merchant who redeemed his own stamps and the merchant who arranged for another to redeem his stamps. Then viewing the act as an exercise of the tax power the court stated that:

> It is well settled . . . that the legislature may not arbitrarily exclude one class of individuals from the operation of a privilege tax and include another.[88]

CONCLUSION

In summary, it appears that anti-trading-stamp legislation either in the form of a prohibitive tax or possibly in the form of an absolute prohibition encounters no restraints in the provisions of the Federal Constitution. However, similar provisions of state constitutions may, or may not, offer more formidable obstacles depending upon the nature and effect of the trading stamp business as seen by the courts. Viewed as an evil it may be prohibited; viewed as a legitimate business it is entitled to the same constitutional protections afforded all businesses. But independent of the extent to which the legislature is permitted to restrict the trading stamp business, it appears that laws applicable to one class of trading stamp schemes should be applicable to all, unless a constitutionally sound distinction will support the classification.

88. Logans Supermarkets, Inc. v. Atkins, 304 S.W.2d 628, 631 (Tenn. 1957), citing Wilson v. Beeler, 193 Tenn. 213, 245 S.W.2d 620 (1951); Corn v. Fort, 170 Tenn. 377, 95 S.W.2d 620 (1936).