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Thomas F. Kelsch

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THE CONSTITUTIONALITY OF ANTI-TRADING STAMP LEGISLATION

Trading stamp companies have been in operation since the turn of the century, emerging from the use of premiums by department stores in the 1880's and 1890's.¹ Their growth parallels the country's business cycles with the exception of the two world wars when merchandise was in short supply and stores had no desire to increase volume.² The industry has developed several types of stamp programs, so that today a retailer may either purchase from independent stamp companies, store-owned plans, or in conjunction with a co-operative stamp system.³

The typical plan is principally an advertising device which allows retailers to buy stamps for approximately three-tenths of a cent each,⁴ and the consumer to receive one for each ten cents worth of purchases.⁵ If the stamps induce a fifteen per cent increase in volume they will pay their way,⁶ and in areas where the stamps are new, stores have gained from thirty to fifty per cent in volume in less than six months.⁷ Although stamp saturation tends to prevent desired volume increases, it often requires non-users in the area to introduce them as a defensive device merely to prevent a loss of volume.⁸

A recent survey reported that seventy-five per cent of American families saved trading stamps, receiving 275 billion stamps from thirty-two billion dollars of purchases, which is fifteen per cent of all the sales in retail stores.⁹ Half of the families in this country save more than one kind of stamp, and in 1962 stamps cost over a quarter of a million retailers between 671 and 800 million dollars.¹⁰

1. Hammer, *Will Trading Stamps Stick*, Fortune, Aug. 1960, p. 16.

2. In 1914, stamps were given in six per cent of the retail stores, but after World War I, in 1921, only 0.5 per cent of the stores used them. Hammer, *Will Trading Stamps Stick*, Fortune, Aug. 1960, p. 213. In 1957, the median age for 108 stamp companies was three to four years, only nine companies had been in operation more than twenty-five years. 295 U.S. DEPT. OF AGRICULTURE REPORT at N. (1958).

3. 295 U.S. DEPT. OF AGRICULTURE REPORT 8 (1958).

4. *Id.* at 17.

5. *Supra* note 1, at 117.

6. *Supra* note 1, at 118.

7. *Supra* note 3, at 29. Cost of stamps to retailers exclusive of handling costs, average \$2.25 per 1000 stamps.

8. *Supra* note 1, at 118. The company will then go to the small merchants in the area, in an attempt to build up a family of stamp givers.

9. Hammer, *Will Trading Stamps Stick*, Fortune, Aug. 1960, p. 16.

10. Dun's Review and Modern Industry p. 49 (July 1963).

There were approximately 250 stamp companies in 1960, distributing merchandise with a retail value of 675 million dollars through 1600 redemption centers.¹¹ The ten largest companies accounted for seventy per cent of the business.¹² Sperry and Hutchinson of New York, accounted for forty per cent of the 700 million dollar volume that year, and today more than half of the trading stamps saved are S. & H.¹³

Stamp companies have been able to acquire net profits after taxes of approximately six per cent as compared to three per cent for a normal well-run department store. The reason for the high rate of profit is attributed to the companies' ability to make profits in several ways.¹⁴

ANTI-STAMP LEGISLATION

Constitutional History

The courts are in conflict as to the validity of legislation which prohibits or attempts to regulate trading stamps. Much of the confusion can be attributed to the varying weight that the courts have assigned to the individual factors of evidence involved in attempting to determine whether there has been a proper exercise of the police power. Some jurisdictions have examined the nature of each stamp plan, and often their viewpoint with respect to its desirability has been controlling.¹⁵ In other jurisdictions the wording or application of each particular statute or ordinance has been the determining factor.¹⁶

The history of anti-stamp legislation can be divided into four chronological periods which are inter-related with the industry's inception, growth and expansion. The most stamp litigation arose in the first period, between the turn of the century and 1916. With few exceptions the legislation involved in these early cases was

11. Hammer, *Will Trading Stamps Stick*, Fortune, Aug. 1960, p. 117.

12. *Supra* note 3, at 5.

13. *Supra* note 11, at 117, 208. S. & H. was incorporated by the State of New Jersey in 1900, and was licensed in forty-four states in 1956. Other major plans are Top Value Enterprises of Dayton, Ohio; Gold Bond Stamp Company of Minneapolis, Minnesota; and Blue Chip Company in California.

14. First, in 1960, S. & H. bought 160 million dollars worth of merchandise which it redeemed to the consumer for stamp books costing the consumer 300 million dollars. This tremendous difference is due to the large volume and narrow variety of items the company handles. S. & H. is one of the largest distributors of appliance and "home goods." They have sixty-five million dollars worth of premiums in 705 redemption centers and ten warehouses. They carry only 1500 items without advertising costs; while R. H. Macy and Company, one of the few larger distributors, displays over 400,000 items and must pay for advertising and promotional services. Second, not all stamps are redeemed. Estimates vary from sixty per cent by some competitors to ninety-five by the S. & H. Company. The Bureau of Internal Revenue allows S. & H. ninety-five per cent for tax purposes. In 1960, the Company's reserve for stamps outstanding was almost 100 million dollars. Third the high reserves allow the Company to go into outside investments. In 1959, over eighty million dollars was invested in cash, securities and real estate. *Supra* note 11, at 119, 208.

15. *Lansburgh v. District of Columbia*, 11 App. D.C. 512 (1897); *Sperry & Hutchinson Co. v. Owensboro*, 151 Ky. 389, 151 S.W. 932 (1912); *State v. Haukins*, 95 Md. 133, 51 Atl. 850 (1902).

16. *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919); *State v. Walker*, 105 La. 492, 29 So. 973 (1901).

held unconstitutional.¹⁷ The second period began in 1916, with three decisions from the Supreme Court,¹⁸ and lasted for three years during which a limited number of courts followed the high court's rationale.¹⁹

For the next forty-two years not a single prohibitive statute was upheld, although the general power of the legislature to act was recognized in some instances,²⁰ and a regulatory statute was upheld.²¹ The last quarter of this period, beginning in the early 1950's, witnessed a great boom in the stamp industry²² so the legislatures were again flooded with anti-stamp proposals. Few of these proposals were enacted, and only two of those that were survived litigation in the courts.²³ Attempts to enlist federal aid were also unsuccessful.²⁴ In 1961, the Montana court struck down an anti-stamp act,²⁵ but an act was finally upheld in Wyoming²⁶ and Kansas followed Wyoming's lead in 1963.²⁷ Also, in 1961 an act which regulated stamps through a licensing and bonding scheme was upheld by a United States District Court in California.²⁸

The first attempts to prohibit trading stamps began before the first stamp company had been formed.²⁹ They were based on the existing general statutes which prohibited other specific prac-

17. Between 1888 and 1915 the validity of anti-trading stamp legislation was tested in seventeen states and the District of Columbia. Only Alabama, *Gamble v. City Council of Montgomery*, 147 Ala. 682, 39 So. 353 (1905); the District of Columbia, *Matter of Gregory*, 219 U.S. 210 (1911); Washington, *State v. Pitney*, 79 Wash. 608, 140 Pac. 918 (1914); and West Virginia, *Sperry & Hutchinson Co. v. Melton*, 69 W. Va. 124, 71 S.E. 19 (1911); held such legislation valid.

18. *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).

19. *State v. Crosby Bros. Merchantile Co.*, 103 Kan. 733, 176 Pac. 321 (1918); *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917); *State v. Underwood*, 139 La. 288, 71 So. 513 (1916); *State v. J. M. Seney Co.*, 134 Md. 437, 107 Atl. 189 (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). *Cf. Olson v. Ross*, 39 N.D. 372, 167 N.W. 385 (1918) (held a proper object of police power, but the statute did not include stamps redeemable in cash).

20. *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919); *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939); *People v. Sperry & Hutchinson Co.*, 179 Mich. 532, 164 N.W. 503 (1917). *Cf. United Cigar Stores v. Stewart*, 144 Ga. 724, 87 S.E. 1034 (1916).

21. *Ed Schuster & Co. v. Steffes*, 237 Wis. 41, 295 N.W. 737 (1941).

22. 295 U.S. DEPT. OF AGRICULTURE REPORT 2 (1958). From 1948, to 1955, the industry expanded from 150 to an estimated 370 companies.

23. *Ibid.* During 1957, approximately 100 bills were proposed in thirty-five of the forty-three state legislatures in session that year. Only four were enacted and of these only Kansas prohibited the use of trading stamps.

24. *Supra* note 22.

25. *Garden Spot Market, Inc. v. Byrne*, 141 Mont. 382, 378 P.2d 220 (1963). The court held that an imposition of a license which was prohibitive in nature (100 dollars tax plus two per cent of the total gross receipts) on a private purpose, while exempting wholesalers was unreasonable and arbitrary discrimination violating the due process and equal protection clauses of the state constitution.

26. *Steffey v. City of Casper*, 358 P.2d 951 (Wyo. 1961). The court accepted the anti-stamp argument that merchant after merchant was practically coerced into buying the stamps in order to compete. Since Wyoming was a fair trade state, the court held stamp legislation was a logical extension of the state's economic legislation, and within the scope of the police power, it had no choice but to apply a presumption of constitutionality to the statute.

27. *Cushenbery v. Shanahan*, 190 Kan. 720, 378 P.2d 69 (1963). The court upheld the 1957 statute, making it a misdemeanor to issue stamps redeemable in either merchandise or cash; while exempting packers and manufacturers.

28. *Blue & Gold Stamps—U-Save Premium Co. v. Sobleski*, 190 F. Supp. 133 (S.D. Cal. 1961)

29. *Hammer, Will Trading Stamps Stick*, *Fortune*, Aug. 1962, p. 119. *Sperry & Hutchinson Co.*, founded in 1896, is the oldest trading stamp company.

tices such as lotteries or gift enterprises.³⁰ Almost without exception, the courts held that these acts were intended to prohibit only schemes involving gambling, chance or lotteries and not trading stamps.³¹ If the statute specifically listed trading stamps, that provision was an unreasonable and arbitrary classification which violated the equality provisions of the state constitutions.³²

Specific legislation designed to prohibit trading stamps was then enacted, but nearly all of these statutes were struck down on the ground that their unreasonable classification exceeded the power of the state, violated the due process and equal protection clauses of the federal constitution and similar clauses of the state constitutions.³³ States also passed excessive tax or license fees applicable to trading stamp companies and the retail stores issuing them, but the courts almost unanimously held that these classifications were arbitrary, unreasonable and discriminatory.³⁴

The validity of anti-stamp legislation was finally tested in 1916 before the United States Supreme Court in *Rast v. Van Deman & Lewis Co.*³⁵ and two companion cases, *Tanner v. Little*,³⁶ and *Pitney v. Washington*.³⁷ In these cases the Court held that a Florida statute imposing a prohibitive tax upon merchants issuing trading stamps and a Washington statute imposing a 6,000 dollar annual license fee did not violate the due process, equal protection or the contract clauses of the United States Constitution, and was within the police power of the State. The Court, in the *Rast* decision, noted that the power to regulate conduct and contracts, upon the basis of the public welfare, is not subject to judicial review unless the legislation is "unreasonable or purely arbitrary,"³⁸ and concluded that:

[W]hether the use of such coupons and stamps can or cannot be called a lottery, it is still within the power of

30. *City of Winston v. Beeson*, 135 N.C. 271, 47 S.E. 457 (1904); *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888); *International Trading-Stamp Co. v. City of Memphis*, 101 Tenn. 181, 47 S.W. 136 (1898). *Contra*, *Lansburgh v. District of Columbia*, 11 App. D.C. 512 (1897).

31. *District of Columbia v. Kraft*, 35 App. D.C. 253 (1910); *Lansburg v. District of Columbia*, 11 App. D.C. 512 (1897). *Matter of Gregory*, 219 U.S. 210 (1911), held that the District of Columbia's Act was not too vague to be enforceable. This statute encompassed much more than most of the laws of this nature, and prohibited an article or thing in consideration for a purchase.

32. *Supra* note 30. These cases were decided on one of two issues. (1) Did the legislation intend to prohibit trading stamps, and if so (2) was such inclusion beyond the police power of the state?

33. *Territory v. M. A. Gunst & Co.*, 18 Hawaii 196 (1907); *In re Opinion of Justices*, 226 Mass. 613, 115 N.E. 978, (1917) (Advisory opinion given by Mass. Supreme Judicial Court); *People v. Sperry & Hutchinson Co.*, 197 Mich. 532, 164 N.W. 503 (1917); *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 144 N.W. 795 (1913); *State v. Ramseyer*, 73 N.H. 31, 50 Atl. 958 (1904).

34. *City Council of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67 (1905); *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916 (1899); *Hewin v. City of Atlanta*, 121 Ga. 723, 38 So. 67 (1905); *Sperry & Hutchinson Co. v. City of Owensboro*, 151 Ky. 389, 151 S.W. 932 (1912); *O'Keefe v. City of Somerville*, 190 Mass. 110, 76 N.E. 457 (1906).

35. 240 U.S. 342 (1916).

36. 240 U.S. 369 (1916).

37. 240 U.S. 387 (1916).

38. *Supra* note 35, at 342. The court pointed out that it is the legislatures duty to "discern and correct evils, not only of definite injury, but also such as are obstacles to greater public welfare if within legislative authority; as is the use of such coupons and stamps."

the legislature to consider it as having similar evils; and the regulation thereof by the legislature is not to be impeached and overruled by the courts on the account of difference of opinion in regard to the conclusion reached.³⁹

Noting its position was contrary to the large majority of state court decisions, the Court commented that, in many instances, the legislature should be the conclusive judge as to prohibitive legislation.⁴⁰

When a state constitution embodies clauses substantially similar to those of the federal constitution, such as the due process or equal protection clauses, the Supreme Court's interpretation should be "highly persuasive" but it is not controlling on the state court's interpretation of its constitution.⁴¹ The impact of these decisions on state courts was not wide-spread, and by 1919 there were only seven decisions in five states which adopted the Supreme Court's rationale.⁴²

Other areas which produced a large amount of litigation were the fair trade acts, resale price maintenance and below cost statutes which became popular in the 1930's. Most of these statutes were designed to eliminate other competitive practices and did not explicitly cover the use of trading stamps.⁴³ The issue here was whether the use of stamps constituted an illegal price reduction or whether it was a part of the cost of doing business included in the statutory markup; and if it was the former, did the legislature intend the act to apply to stamps, and if so, was it a constitutional use of the police power?⁴⁴ The majority of cases have held that

39. *Supra* note 35, at 343, 365. The court rejected the contention that stamp giving was but a means of advertising, and a method of allowing a cash discount. In rejecting the argument that the stamp plans could carry no inherent evil, the court noted, "Advertising . . . is merely identification and description . . . appraising of quality and space The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by promise of value, greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence."

40. *Rast v. Van Denam & Lewis Co.*, 240 U.S. 342, 364-366 (1916). "In such differences between judicial and legislative opinion where should the choice be? . . . 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. The foundation of all of them is that the schemes detailed are based on inviolable right, that they are but the exercise of a personal liberty . . . that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone and does not give enough force to their . . . insidious potentialities. As to all of which not courts but legislatures may be the best judges and, it may be, the conclusive judges. . . . Certainly . . . [their] judgment is not impeached by urging against it a difference of opinion. . . . And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation."

41. *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 180, 122 N.E. 584 (1919); *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 925, 65 N.W.2d 410, 423 (1954) (dissenting opinion); *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939).

42. *State v. Crosby Bros. Mercantile Co.*, 103 Kan. 733, 176 Pac. 231 (1918); *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917); *State v. Underwood*, 139 La. 288, 71 So. 513 (1916); *State v. J. M. Seney Co.*, 134 Md. 437, 107 Atl. 189 (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). *Cf. Olson v. Ross*, 39 N.D. 372, 167 N.W. 385 (1918) (held a proper object of police power, but the statute did not include stamps redeemable in cash). This line of cases proceeds on the concept that the police power is no longer limited by the simple purposes of public safety, health and morals, but extends to the entire field of "common welfare, convenience or prosperity."

43. See *Food & Grocery Bureau v. Garfield*, 20 Cal. 2d 228, 125 P.2d 3 (1942); *Bristol-Myers Co. v. Lit Bros. Inc.*, 336 Pa. 81, 6 A.2d 843 (1939).

44. *Ibid.*

stamps do not violate these acts because stamps are a discount for cash and not a price reduction; or the acts or their application to stamps are unconstitutional; or because the intent to injure competition had not been established.⁴⁵ Two states have even attempted, without success, to base stamp prohibition on securities ("Blue Sky") acts and antimonopoly acts.⁴⁶

Regulatory legislation in this area has met with more favorable results as the stamp industry has expanded.

Wisconsin and Washington require that stamps be redeemable in cash only. Since 1958, laws have been enacted in California, Connecticut, Florida, Maryland, Massachusetts, New Hampshire, New Mexico and Vermont, which require registration of trading stamp companies, disclosures of basic information about their operation and financial condition, a bond to insure redemption and that stamps show a cash value and be optionally redeemable at that value. With the exception of the bond, these regulations also apply in Maine. Indiana, Nebraska, New Jersey, North Dakota and Ohio require an optional redemption and . . . Utah requires a bond. These regulatory schemes, which have been tested, have been held constitutional.⁴⁷

Probably the most novel attempt to regulate trading stamps to the extent of practical prohibition is an effort to claim the unredeemed stamps for the state under escheat laws. To date the theory has been tested in only one state, and the New Jersey court rejected it.⁴⁸

Trading Stamps and the State Police Power

Although in an overwhelming majority of cases courts struck down legislation prohibiting trading stamps, the validity of such legislation under the state police power is still open to question. In a substantial number of the cases litigated, the courts have either generally recognized or not answered the question of whether the legislature has the right to enact such legislation even though the particular statute was struck down.⁴⁹ Many of the decisions specifically holding that such legislation is beyond the scope of the police power were decided prior to 1916 and prior to the Supreme

45. *Ibid. Contra*, Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958).

46. *Merchant's Legal Stamp Co. v. Murphy*, 220 Mass. 281, 107 N.E. 968 (1915); *Sperry & Hutchinson Co. v. Hudson*, 190 Ore. 458, 266 P.2d 501 (1951).

47. 10 KAN. L. REV. 456, 457 (1962).

48. *State v. Sperry & Hutchinson Co.*, 59 N.J. 154, 157 A.2d 505 (1960). The court held that the evidence was insufficient to specifically identify the property and without this the property could not be subject to escheate.

49. *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919); *Sperry & Hutchinson Co. v. Hoehn*, 246 Iowa 925, 65 N.W.2d 410 (1954); *People v. Sperry & Hutchinson Co.*, 197 Mich. 532, 164 N.W. 503 (1917); *State v. Holtgreve*, 58 Utah 563, 200 Pac. 894 (1921). *Cf. Opinion of Justices*, 226 Mass. 613, 115 N.E. 978 (1917).

Court decisions.⁵⁰ Also, decisions subsequently voiding this type of legislation did so on the basis of precedents set prior to the Supreme Court decisions.⁵¹ The bulk of these statutes were held void due to exemptions which were held to be discriminatory classifications.⁵² Finally, these cases were determined under a concept of a strictly limited police power. Since then the judicial philosophies concerning the review of economic and social legislation have been considerably liberalized with a greater legislative freedom in classification, which should gradually be reflected in state court decisions.⁵³

CONCLUSION

Due to its phenomenal growth in the past ten years, the trading stamp industry has become a major, if not a paramount, factor in directing consumer patronage.⁵⁴ As the market becomes saturated the paradox arises, that as the consumer seems to become more enchanted with stamps the retailer grows more disenchanted.

Although stamps are merely a business device to retailers, their effect on consumers is much more complex, and the knowledge that prices are raised to cover their cost does not seem to disillusion the average stamp consumer.⁵⁵ To many it is an easy way to save, and some motivational researchers feel their appeal lies in that they allow the housewife to get small appliances, housewares and luxuries that she would not buy if she had to pay cash.⁵⁶

On the other hand most plans cost the average supermarket two per cent of its annual volume and close to three per cent of that of smaller businesses, such as dry cleaners, drug stores and gasoline stations, due to their lower volume.⁵⁷ When the stamp

50. *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 925, 65 N.W.2d 410, 422 (1954) (dissenting opinion).

51. *City & County of Denver v. United Cigar Stores Co.*, 68 Colo. 363, 189 Pac. 848 (1920); *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939).

52. *People v. Zimmerman*, 102 App. Div. 103, 92 N.Y.S. 497 (1905); *State v. Dalton*, 22 R.I. 77, 46 Atl. 234 (1900); *State v. Dodge*, 76 Vt. 197, 56 Atl. 983 (1904).

53. *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Nebbla v. New York*, 291 U.S. 502 (1934).

54. In 1962, seventy-seven per cent of all supermarkets offered stamps and they accounted for seventy-five per cent of the nation's food bill. See *The Great Supermarket Profit Squeeze: Relief In 1964?*, *Forbes*, Feb. 1964, p. 22. Food stores, drugstores and gasoline stations comprise seventy per cent of the stamp business. Forty per cent of the grocery stores handle stamps. This includes the ten largest chain stores. See *Hammer, Will Trading Stamps Stick*, *Fortune*, Aug. 1960, p. 116.

55. A survey in 1962, by *Progressive Grocers Magazine* in co-operation with Colonial Stores (eleventh largest food chain) revealed the following: stamp savers could be placed in three categories, (1) eager, ten per cent; (2) interested, thirty-five per cent; (3) indifferent, fifty-five per cent. Fifty-five per cent saved two types of stamps, twelve per cent three types, sixty-eight per cent did not exactly know what premiums they were saving for, but the same per cent preferred merchandise redemption instead of cash. Fifty-one per cent preferred fifty extra stamps to a reduction of five cents less per item. The helpful friendly store personnel was the main reason seventy-three per cent of the consumers shopped at a particular market. Fifty-two per cent, because of wide selection, fifty per cent wanted stamps, forty-four per cent, the meats; thirty-six per cent the produce and in eighteen per cent of the cases the price was the reason. See *Advertising Age*, Oct. 1963, p. 10.

56. To illustrate: A wife wants a new electric appliance, but it costs \$28.98. If she is on a budget she finds it difficult to purchase the item. But a slight increase in the food bill, to take advantage of the stamps will not be questioned and she will have provided herself with a means to procure the item. See *The Great Supermarket Profit Squeeze: Relief In 1964?*, *Forbes*, Feb. 1964, p. 22.

57. 295 U.S. DEPT. OF AGRICULTURE REPORT at iv. (1958). Cost of stamps to retailers exclusive of handling costs, average two dollars and twenty-five cents per 1000 stamps.

plan is no longer able to increase a retailer's volume by fifteen per cent, which is the minimum increase necessary for the plan to pay for itself, he must simply tack the two per cent on to his operating costs. Since this is roughly the percentage of his profit, normally the consumer will have to share the burden through an increase in prices.⁵⁸ Stamps are now the second largest expense item of most supermarkets' operating cost⁵⁹ (fourteen per cent).

In the past, attempts to prohibit the use of stamps have not survived legal tests except in Kansas, Wyoming and the District of Columbia, yet all but six of the fifty states have attempted to place some type of restriction on them.⁶⁰ Attempts to restrict the use of stamps have been more successful, but have been mainly minor in character and not of sufficient severity to seriously hamper the industry.⁶¹

Efforts to control the use of stamps have increased with the industry's growth and it can be safely said that they will continue to intensify. In light of the wide-spread effect the industry now has on so many people in almost every state, it is submitted that state courts will eventually recognize the right of the legislatures under the police power to more effectively regulate if not prohibit stamps. Initially strictly prohibitive criminal statutes would seem to have the best chance to survive constitutional attacks before state courts, and would be upheld upon federal appeal.⁶² But this process would indeed be a slow one, and it seems more likely that prior to that time, the economics of competition rather than legal control will decide the future role of trading stamps.⁶³

In the last analysis the consumer will be the deciding factor. This seems to be true in North Dakota as elsewhere. In Olson

58. 295 U.S. DEPT. OF AGRICULTURE REPORT 28 (1958). This study indicated that the average prices paid by consumers in stamp stores was 0.6 per cent higher than non-stamp stores, which equaled only about thirty per cent of the average merchandise value of the stamps. As the market is more highly saturated the cost of prices in stamp stores should go up, due to the less probable volume increase necessary to offset the cost. Hammer, *Will Trading Stamps Stick*, *Fortune*, Aug. 1960, p. 116. In 1960, retailers paid over 600 million dollars for stamps, and R. M. Loverty, Sr., Chairman of Thriftmart, and the guiding hand behind Blue Chip stamps stated, "Don't kid yourself, the customer has to pay for the stamps." In 1964, with the retail cost near 800 million dollars, with seventy-seven per cent of all supermarkets offering them, Sidney R. Robb, Chairman of the Stop and Shop food chain, remarked, "They don't really bring in any more business, they simply force you to boost prices." A & P, the largest food chain in the country, was forced to raise prices by three per cent to four per cent in 1963. *The Great Supermarket Profit Squeeze: Relief In 1964?*, *Forbes*, Feb. 1964, p. 22.

59. *Ibid.*

60. Only Alaska, Arizona, Mississippi, Missouri, South Carolina and Texas have not passed some type of anti-stamp legislation.

61. In the great majority of jurisdictions the only restrictions which have survived judicial review are: (1) a cash value must be stated on the face of each stamp; (2) stamps must be redeemed in cash (explicitly or at the option of the owner); (3) reasonable tax or licenses can be levied.

62. Under this approach there would be less possibility of having a statute voided due to wording or application. The only issue before the court would be whether it was a proper exercise of police power.

63. A recent survey of supermarkets indicated a drop from seventy-seven per cent to seventy per cent of members giving stamps in the past year. See Brown, *Sperry & Hutchinson's Very Successful Stagnation*, *Fortune*, Nov. 1964, p. 256. In North Dakota, some communities have banned trading stamps and others have initiated their own stamp plans. See *Grand Forks Herald*, Feb. 16, 1964, p. 1, col. 2.

v. Ross,⁶⁴ the court held that the state's Trading Stamp Act did not prohibit or regulate the sale of trading stamps redeemable only in cash.⁶⁵ Since such a plan was being contested, the action was dismissed without deciding the constitutionality of the Act.⁶⁶ In dictum the court did seem to approve the Supreme court's rationale in *Rast v Van Deman*.⁶⁷ In 1955, the legislature passed an act which also prohibited stamps redeemable in cash, but before it could be tested in the courts, it was defeated in a referendum by almost a two to one vote.⁶⁸

If the retailers in this state are unable to find a solution among themselves and are unable to induce the consumers to change their minds or offer them a comparative substitute, restrictive if not prohibitive legislation is likely to be initiated again. If the consumer again rejects the statute, federal intervention may be the only avenue of control remaining.⁶⁹

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64. 39 N.D. 372, 167 N.W. 385 (1918).

65. *Id.* at 387.

66. *Ibid.*

67. *Id.* at 386.

68. The statute authorized each county in the state to levy a 6000 dollar license fee upon any stamp company operating within county lines. N.D. Sess. Laws 1955, ch. 302, § 2. The statute was submitted to a referendum on November 6, 1956, and was defeated by a vote of 160,344 to 83,159. N.D. Sess. Laws 1957, ch. 394.

69. Between 1917 and 1954, the trading stamp issue was brought before the Federal Trade Commission six times and during 1956 and 1957, it conducted investigations to determine whether certain stamp companies were operating in violation of the Federal Trade Act or Clayton Act. The Commission left the door open to proof of specific violations as to unfair methods of competition, but at this time did not hold trading stamps themselves unlawful. See 295 U.S. DEP'T. OF AGRICULTURE REPORT 12 (1958).