

H. C. OF A. 1914. GAVAN DUFFY J. I agree that this is not a case for special leave. So far as the matter has been argued I am disposed to think that the decision of the Full Court is right.

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POWERS J. concurred.

RICH J. concurred.

Special leave to appeal refused.

Solicitors, for the plaintiff, *Plante & Henty* for *J. R. Town*,
Swan Hill.

B. L.

[HIGH COURT OF AUSTRALIA.]

MORAN & CATO PROPRIETARY LIMITED . APPELLANTS ;
DEFENDANTS,

AND

CANTLON RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. 1914. *Trading Stamps*—"Issue" on sale of goods—Coupons entitling purchaser to obtain other goods free—Promise by manufacturer or original vendor—Distribution by retailer—*Trading Stamps Act 1901 (Vict.) (No. 1750), secs. 2, 3.**

MELBOURNE,

Oct. 19, 20.

Griffith C.J.,
Isaacs and
Powers JJ.

* The *Trading Stamps Act 1901* by sec. 2 provides that "'Trader' means any person firm or company carrying on any business who issues trading stamps to customers. 'Trading stamp' includes any stamp coupon cover package document means or device supplied by any trading stamp company or issued by any trader which entitles the holder thereof to demand and receive from any trading stamp company or from any person firm or company other than the said trader any money or

goods. 'Trading stamp company' means and includes any person firm or company who supplies any trading stamps to any trader and undertakes to redeem the same or that the same will be redeemed by giving or delivering to the holder thereof any money or goods."

Sec. 3 provides that "(1) No person shall on the sale of any goods issue any trading stamps," and imposes a penalty on a person doing so.

A retail dealer who, on sales by him of goods, passes on to the purchasers coupons whereby the manufacturer or wholesale merchant from whom the retail dealer purchased the goods and received the coupons promises that upon presentation by a user of the goods to the agent of the manufacturer or wholesale merchant of a certain number of the coupons such agent will give in exchange certain other goods, does not "issue trading stamps" within the meaning of sec. 3 of the *Trading Stamps Act* 1901.

So held by Griffith C.J. and Powers J., Isaacs J. dissenting.

Decision of the Supreme Court of Victoria (*Hodges J.*): *Cantlon v. Moran & Cato Proprietary Ltd.*, (1914) V.L.R., 141; 35 A.L.T., 132, reversed.

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APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Melbourne on 24th December 1913 an information was heard whereby Joseph Adam Cantlon charged that Moran & Cato Proprietary Ltd. did on the sale of certain goods, that is to say, 28 one pound packets of "Burford's No. 1 Starch" issue trading stamps to the informant contrary to the Statute in that case made and provided.

The evidence disclosed the following facts:—W. H. Burford & Sons Ltd., of Adelaide, South Australia, were manufacturers in South Australia of starch which for the purposes of sale they put up in packets. In each of the packets they placed a coupon which, in addition to the picture of a wringer, contained substantially the following statement:—"This wringer value 18/6 free to users of Burford's No. 1 Starch. The world's best. One coupon for free wringer. In order to thoroughly establish Burford's No. 1 starch on the market we are giving every user during the next twelve months the opportunity of securing one of the well known 'Horse-Shoe' brand wringers free. All that is necessary is to use Burford's No. 1 Starch only. In every one pound packet there is one of these coupons. In every half pound packet a half coupon. The wringer will be delivered to you, free, if 28 coupons are sent to us before 31st December 1913, if 56 coupons are sent to us before 31st March 1914, if 112 coupons are sent to us before 30th June 1914, if 200 coupons are sent to us at any time after 30th June 1914. It is not necessary for you to keep the coupons until the dates given. As soon as you have the requisite number send them in and you will get the wringer. If you have not the number at the end of any period

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save them to make up the number in the next period. Pin the coupons together and attach them to a sheet of paper on which the number of coupons is clearly indicated with your name and address and send to our agents, the Trading & Agency Co., 378 Flinders Street, Melbourne, who will then give you the wringer.” One Sydney Herbert Dickens carried on business at the address mentioned in the coupon under the name of the Trading & Agency Co. as agents to whom goods were consigned for sale on commission, and as agent for W. H. Burford & Sons Ltd. sold a number of such packets of starch to the defendants, who carried on business as grocers at a shop in Toorak Road, South Yarra. The informant on 16th December 1913 went to the shop and bought 28 of the one pound packets of starch, took the coupons which were in them to the Trading & Agency Co. and received in exchange for them a wringer, having first signed a declaration that it was his intention to use the wringer in his own household and not to sell it immediately, and that the coupons had been in packets of starch “purchased for my use from the grocer in the ordinary way.”

The Court of Petty Sessions having dismissed the information, an order *nisi* to review their decision was obtained by the informant on the ground, shortly, that the evidence conclusively established that the defendants committed the offence charged.

The order *nisi* was heard by *Hodges J.*, who made it absolute and remitted the case to the Court of Petty Sessions for rehearing: *Cantlon v. Moran & Cato Proprietary Ltd.* (1).

From that decision the defendants now, by special leave, appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments hereunder.

Starke, for the appellants.

Bryant and *Hayes*, for the respondent, referred to *Brady v. Maddern* (2).

GRIFFITH C.J. The *Trading Stamps Act* 1901 first defines the expressions “trader,” “trading stamp,” and “trading stamp

(1) (1914) V.L.R., 141 ; 35 A.L.T., 132. (2) 27 N.Z.L.R., 657.

company." I take first the definition of "trading stamp," because that is involved in the definitions of the two other expressions: "'Trading stamp' includes any stamp coupon cover package document means or device supplied by any trading stamp company or issued by any trader which entitles the holder thereof to demand and receive from any trading stamp company or from any person firm or company other than the said trader any money or goods." The word used in the case of a trading stamp company is "supplied" and in the case of a trader is "issued." That distinction is important and proper. "'Trading stamp company' means and includes any person firm or company who supplies any trading stamps to any trader and undertakes to redeem the same or that the same will be redeemed by giving or delivering to the holder thereof any money or goods." "'Trader' means any person firm or company carrying on any business who issues trading stamps to customers."

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In the present case W. H. Burford & Sons Ltd. in South Australia sell starch in packets, with each of which they issue a "coupon" which entitles the holder of a sufficient number to demand from their agents in Melbourne certain goods. If the coupon authorizes the holder to demand goods from any person other than W. H. Burford & Sons it falls within the definition of a trading stamp. But does it? It is not an uncommon thing for persons who act as agents for several manufacturers to call themselves "manufacturers' agents." Such persons, who deliver goods for their principals, are described by the firm as "our agents in" such a place. In my opinion principal and agent are for the purposes of the Act the same person. Otherwise the privilege given to persons who issue coupons redeemable by themselves would be confined to those who could not act by agents. That would be a strange construction to give to the Act. It appears, therefore, that these documents when issued by W. H. Burford & Sons were not trading stamps within the meaning of the Act. W. H. Burford & Sons sold some of the packages of starch containing the coupons to the appellants. At the time when the coupons came into the possession of the appellants they were not trading stamps. When did their character change? When did the lawful issue of these coupons

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cease to be lawful? A wholesale merchant can only dispose of his goods through retail dealers. It is lawful for the merchant to issue the coupons on a sale to a retailer. Is it unlawful for the rest of the distribution to be carried out? It seems to me that the reservation of the privilege to a certain class of traders includes a reservation of all the necessary means for giving effect to the privilege.

Then it is said that the appellants were "traders" and issued the coupons to their customers. That depends on what is the meaning of "issue." The real effect of the coupon is a contract entered into by W. H. Burford & Sons with the person who may be the ultimate holder of the document that on presentation of a sufficient number of the coupons that person will be entitled to receive a certain article. It is at all times a promise made by W. H. Burford & Sons, which is passed on through the hands of the first purchaser and the hands of any subsequent purchasers until it gets to the ultimate consumer or customer. There is no more a promise by the appellants than there is a promise by a person who pays his debt by a bank-note to pay the note. In my opinion the word "issued" in the definition of "trader" refers to the person who makes a promise of that kind on his own behalf, and not to a person who as a mere medium of distribution hands it to another. I think, therefore, that the appellants were not traders who issued trading stamps to their customers within the meaning of the Act. The word "issue" is not synonymous with "on any occasion whatever deliver." It refers to a delivery by a person whose business it is to deliver trading stamps as to which he himself is a contractor. Otherwise the reservation of liberty which is carefully made by the Act to manufacturers and wholesale vendors would be entirely taken away. On the one hand a privilege would be carefully reserved to them to *issue* such documents, and on the other hand any effect that such an issue might have would be denied. Such inconsistent results cannot have been intended by the legislature.

I think, therefore, that the appeal should succeed.

ISAACS J. I take a different view. Mr. *Starke's* argument to a large extent rests upon a consideration of the evil the legisla-

ture intended to remedy. There is a very important canon of construction connected with that consideration in interpreting an Act of Parliament. In *Equitable Life Assurance Society of the United States v. Reed* (1) Lord *Dunedin*, for the Privy Council, said :—" In all cases where something not *ipsâ naturâ* unlawful is prohibited by Statute, the words of prohibition must be taken as they stand ; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom. In other words, the evil that was to be checked can only be considered so far as necessary for the interpretation of the words, but must not be used for an independent determination of the scope of the remedy." Now, the evil that was to be dealt with as apparent from the language of the Act itself, which is all we are at liberty to look at, is the device of a trader selling his goods to a customer over the counter and at the same time giving to the customer a promise that somebody else will give him money or goods on the presentation of what is called a " trading stamp." In this case Moran & Cato are grocers. They are what are ordinarily known as " traders." Their business includes selling to " customers " who come into their shop starch in packets. Along with the starch—it matters not whether in the packets or not—they hand over to the customer a document by which W. H. Burford & Sons promise to give goods on the presentation of a number of the documents. (I assume for this purpose that the Trading & Agency Co. are the agents of W. H. Burford & Sons.) That seems to me to come directly within the language of the Statute. The particular document—the promise—was prepared by W. H. Burford & Sons and was handed to Moran & Cato for the very purpose of being delivered to a customer for the first time that it could have any efficacy, namely, when Moran & Cato sold goods over the counter. In accordance with that arrangement Moran & Cato handed out the document, and thereby issued it. The intention of W. H. Burford & Sons was, according to the evidence of their own agents, not that the grocer himself if he presented the document to the Trading & Agency Co. should get goods in return for it, but that the document should only be for the benefit of

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(1) (1914) A.C., 587, at pp. 595-596.

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the user of the starch. It is plain, therefore, that the issue of the document, using the word "issue" in a common-sense way as equivalent to giving out only, took place when Moran & Cato handed it over with a packet of starch when they sold the packet.

It is said that the promise is by W. H. Burford & Sons, and that if W. H. Burford & Sons had sold to a customer and given him one of the documents it would not have been an offence. That is true, because it is a promise by W. H. Burford & Sons, and not by another person; but, for the very reason that it is a promise by them and *not* by Moran & Cato, the "trader," it becomes an offence for Moran & Cato to do it. This is not a prosecution against W. H. Burford & Sons, but against Moran & Cato. Had W. H. Burford & Sons done the act complained of, the document would not have been a trading stamp within the meaning of the Act. Nor would it have been a trading stamp within the meaning of the Act if a trading stamp company also sold goods and issued with the goods a coupon redeemable by themselves. But that is not to say that if someone else had issued the trading stamp company's stamp it would not have been a trading stamp.

It has been urged that it was intended by the Act to protect manufacturers. There is not a word about manufacturers in the Act, and to assume a reservation in their favour is to offend against the canon of construction already adverted to. The only thing that can be said is that they are not referred to, and applying the words of the Judicial Committee in the case I have mentioned, all we have to look at is: What does the Act prohibit? It prohibits any trader from giving a trading stamp to any person on the sale of goods.

Reliance is also placed upon sec. 4 of the Act which compels trading stamp companies to pay up upon their trading stamps issued prior to the passing of the Act. That provision was necessary in view of sec. 3 (2), which says that "No person shall give or deliver any money or goods on presentation of any trading stamp issued after the commencement of this Act." So it was necessary, in order to do justice as between traders and trading stamp companies, to insist that trading stamp companies should not keep the money paid them for any books of stamps supplied and yet never have to redeem them.

The case is really in a very small compass. A trading stamp company need not, on the view taken by the Chief Justice, issue trading stamps at all. It may arrange with a trader that he shall have stamps printed containing the promise of the company to pay. Then, inasmuch as according to the definition of the word "issue" given by the Chief Justice it only refers to the promise by the trader himself that a third person shall give money or goods in exchange for the stamp, a document not supplied by a trading stamp company but given out by the trader and containing no promise by him, but only the promise of a trading stamp company, would not be "issued" by the trader, and would not be within the Act. The whole Act is thus set at nought.

I think the decision of *Hodges J.* was correct, and that the appeal should be dismissed.

POWERS J. In this case I think that the evil which the Act was intended to prevent is clearly shown, especially by sec. 4, namely, to prevent trading stamp companies from issuing trading stamps in the way that had been done before the Act; and I think that the Act has effectually done it. It is also true that manufacturers are not mentioned in the Act. But I take it that every manufacturer who sells his goods is a trader within the meaning of the Act; and, although the Act was intended to prevent the issue of trading stamps by trading stamp companies, I take it that, by the words "other than the said trader" in the definition of "trading stamp" in sec. 2, it was intended expressly to allow traders and manufacturers *bond fide* to issue coupons payable by themselves. I agree with the judgment of the Chief Justice, and with the reasons given by him for it.

Appeal allowed. Judgment appealed from discharged. Order nisi discharged with costs. Respondent to pay costs of appeal.

Solicitor, for appellants, *W. R. Rylah.*

Solicitors, for respondent, *Sugden & Cornwall.*

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