

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calender years

1961 - 1962

in certain instances your wardens may be able to take a violator to a closer court than is now possible. We would like to emphasize, however, that the violator must still be taken to the district court for the district in which the violation occurs even though that court may not be the nearest court.

THOMAS W. TAVENNER

Assistant Attorney General

December 1, 1961

To: Governor John H. Reed

Re: Election Date of Primary Election and Voting on Educational Television Bond Issue

In answer to your questions:

"1. Can the Legislature legally establish the date of the Primary Election as the date for voting on the Educational Television Bond Issue?"

Answer: Yes. However, the wordage of the referendum section of the bill should conform to Section 14, Article IX of the Constitution, that is ". . . at a special election to be held on the 3rd Monday of June, 1962 . . ."

in place of

". . . at the state-wide election to be held on the 3rd Monday of June . . ."

"2. If the answer to the first question is in the affirmative, should notification of the referendum question be contained in the warrant for the Primary Election, or should a separate warrant issue?"

Answer: A separate warrant should issue.

FRANK E. HANCOCK

Attorney General

December 6, 1961

To: Walter B. Steele, Jr., Executive Secretary, Maine Milk Commission

Re: Trading Stamps

We have your request of September 27, 1961, for an opinion with regard to the legality of the issuance of trading stamps on purchases including fluid milk. As we understand this problem, certain grocery stores doing business in Maine in areas designated by the Maine Milk Commission as natural marketing areas are offering coupons in the form of trading stamps with either the direct sale of fluid milk or cream or for a total purchase which purchase includes some milk or cream. We understand that you are requesting an opinion with regard only to sales for which the minimum legal price is the price set by the retailer. If the net price of the product after the discount has been deducted is still in excess of the legal minimum price, then the discount is, of course, perfectly legal. For this reason, we will limit our opinion to instances in which the net cost of the milk and cream to the purchaser is below the scheduled minimum retail price established by the Maine Milk Commission.

We have been unable to discover any cases dealing directly with this question and will, therefore, make an analogy between the problem here under discussion and alleged violations of various "fair trade" acts.

Section 4, chapter 33, Revised Statutes of 1954, as amended, reads in part:

"It shall be unlawful for any person to engage in any practice destructive of the scheduled minimum prices for milk established under the provisions of this chapter for any market, including but not limited to any discount, rebate, gratuity, advertising allowance or combination price for milk with any other commodity. . . "

This section prohibits any discount which is destructive of the scheduled minimum price for milk established under the provisions of this chapter. It is our opinion that any discount, rebate, gratuity, advertising allowance or combination price would be illegal if it resulted in the sale of milk below the minimum price. This would be the case even though the practice did not totally destroy said minimum price. It is our opinion that the Legislature in using the words which it did intended to protect the minimum price from even the slightest reduction though that reduction did not destroy the control program entirely.

We now turn to the question of whether or not the issuance of trading stamps on purchases of milk constitutes an illegal practice under the Milk Control Law. The claim has been made that this practice is not illegal as it is a discount for cash rather than a trade discount. It should be noted at the inception that the statute does not differentiate between a trade and a cash discount.

The various states which have considered the question of whether trading stamps are actually discounts have reached no uniform conclusion. The states of Pennsylvania and California have determined that trading stamps are a discount for cash and are thus not destructive of the established minimum prices.

Bristol-Myers v. Lit Bros. Inc., 336 Pa. 81, 6 A. 2d 843 (1939); *Food and Grocery Bureau of Southern California v. Garfield*, 20 Cal. 2d 228, 125 P. 2d 3 (1942). The states of Massachusetts and New York on the other hand have held that the giving of stamps constitutes a discount and it makes no difference what form this discount takes or what name it is given.

Bristol-Myers Company v. Picker, 302 N. Y. 61, 96 N. E. 2d 177, 22 A. L. R. 1203 (1950); *Colgate-Palmolive Co. v. Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (D. Mass. 1956); *Colgate-Palmolive Company v. Elm Farm Foods Co.*, 148 N. E. 2d 861 (Mass. 1958). Of particular interest is the *Elm Farm* Case which was handed down by the Massachusetts Supreme Judicial Court. The question raised in that case was whether or not trading stamp plans violated the minimum price set for certain articles under the Massachusetts Fair Trade Law. (G. L. Mass. c. 93, §§ 14A to 14D) Justice Spaulding speaking for a unanimous court quoted the decision in *Bristol-Myers Co. v. Picker*, supra, and made the following statement:

"We lay to one side the difficulty we have in seeing how stores which sell almost exclusively for cash can give the customer a cash discount for doing what he has to do anyway. We think there is a more fundamental answer. As Judge Froessel said, speaking for the majority of the court, in *Bristol-Myers Co. v. Picker*, 302 N. Y. 61, at page 68, 96 N. E. 2d 177, at page 160, 'No matter how one puts it, the consumer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is none the less true because

the return is by way of merchandise rather than coin which may purchase merchandise. When defendants sold plaintiff's products at fair trade prices, and as part of the same transaction gave their customers cash register receipts having a redemption value of 2 1/2% of such fair trade prices, they, in effect, sold plaintiff's products at 2 1/2% less than the prices fixed. I can see no distinction between returning to the customer a credit memorandum of 2 1/2% and giving him a cash register receipt. And whether the discount is small or large makes no difference—the statute forbids both.' The force and logic of this reasoning impress us as unanswerable. We recognize that other courts have come to a different conclusion, but the reasoning on which their decisions are based does not persuade us. There is no magic in the words 'cash discount.' When subjected to analysis they are merely a euphemism for what is in reality a price cut."

We have considered cases both pro and con and have determined that the issuance of trading stamps does constitute a discount which is unlawful under the Maine State Milk Control Law.

THOMAS W. TAVENNER

Assistant Attorney General

December 7, 1961

To: Lawrence Stuart, Director of Park Commission

Re: Passenger Tramway Safety Board re Inspections of Ski Tows, etc.

We have your request for an opinion with regard to the effective date of the various provisions contained in the Act creating a Passenger Tramway Safety Board, Chapter 325, Public Laws 1961. As we understand the problem, the Board wishes an opinion as to when they must begin the performance of the various functions delegated to them under the terms of the above Act.

The declared policy of this Act is to protect the citizens and visitors of the State of Maine from unnecessary mechanical hazards in the operation of ski tows, etc., and to insure that reasonable design and construction are used. Because of this primary function there can be no lapse of diligent inspection. The problem is, of course, that the Board is empowered to make rules and regulations under section 7 of the Act and these rules and regulations can be made only after due consideration and then 14 days notice.

Quite clearly, these regulations will not be ready for use during the early part of the 1961-62 skiing season. It is the duty of the Board, nevertheless, to conduct inspections under section 9 in order to determine whether or not the construction and methods used by the various aerial tramway operators are sufficient to insure the safety of the public. This is a continuing duty and cannot be suspended. The Board must act immediately to set up some inspection system. As soon as reasonably possible thereafter, the Board should promulgate regulations and should create the forms necessary to enable the various operators to register under the provisions of sections 13 and 14.

THOMAS W. TAVENNER

Assistant Attorney General