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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5136

In the Supreme Court of Appeals of Virginia at Richmond

STANDARD DRUG COMPANY, INCORPORATED

v.

GENERAL ELECTRIC COMPANY

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5136

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 15th day of January, 1960.

STANDARD DRUG COMPANY, INCORPORATED,
Plaintiff in Error,

against

GENERAL ELECTRIC COMPANY, Defendant in Error.

From the Law and Equity Court of the City of Richmond

Upon the petition of Standard Drug Company, Incorporated, a writ of error is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 27th day of August, 1959, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and General Electric Company was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 18 }

* * * * *

ORDER.

This day came the parties, by counsel, and the plaintiff tendered and asked leave to file an Amended Motion for Declaratory Judgment, and the defendant having agreed to the filing thereof, it is ORDERED that said Amended Motion be filed; and, thereupon, the defendant filed its grounds of defense to such amended motion.

Enter Dec. 17, 1958.

T. C. F.

* * * * *

page 19 }

* * * * *

Filed December 17, 1958.

Teste:

LUTHER LIBBY, JR., Clerk
By EDWARD G. KIDD, D. C.

AMENDED MOTION FOR DECLARATORY JUDGMENT.

To the Honorable Judges of said Court:

Plaintiff, Standard Drug Company, Incorporated, moves the Court for a declaratory judgment under and pursuant to the provisions of Section 8-578, Code of Virginia (1950) to determine a matter of actual controversy existing between the parties hereto by virtue of the following facts:

1. Plaintiff is a corporation organized and existing under the laws of the State of Virginia, with its principal office at

3301 Rosedale Avenue, Richmond, Virginia, engaged in the sale at retail of prescription drugs and other drug products, sundries and general merchandise at various locations in the City of Richmond and other cities in Virginia.

2. Defendant, General Electric Company, is a corporation organized and existing under the laws of the State of New York, with its principal office at 1 River Road, Schenectady 5, New York, engaged in the manufacture, distribution and sale at wholesale of, among other things, electric appliances and supplies of various kinds. Defendant has duly qualified to do business in the State of Virginia and in accordance with law has filed with the State Corporation Commission of Virginia a formal designation of Ralph H. Ferrell, Jr. as its registered agent and 1003 Electric Building, Richmond, Virginia, as its registered office in Virginia.

page 20 } 3. Plaintiff is now and has for some time been purchasing photo flashbulbs from the defendant for resale at retail, and has purchased a quantity of said flashbulbs from the defendant since June 27, 1958. Since April 23, 1956, the date of the decision of the Supreme Court of Appeals of Virginia in the case of *Benrus Watch Company, Inc.* v. *Jack Kirsch, Trading as Smith-Williams Jewelers,* 198 Va. 94, in which the then "Fair Trade Act" of Virginia was held invalid, plaintiff has offered for sale and sold photo flashbulbs, purchased from defendant both before and after June 27, 1958, at retail at prices determined solely by plaintiff and for less than the minimum retail prices prescribed by defendant.

4. On March 8, 1958 the General Assembly of Virginia enacted into law an Act designated as the "Fair Trade Act," Section 1, Chapter 259, Acts of Assembly of 1958, which Act became effective on June 27, 1958. A true copy of this Act is attached hereto, marked Exhibit A, and made a part hereof.

5. By letter dated June 9, 1958, a true copy of which, including a schedule of prices received with same, is attached hereto, marked Exhibit B, and made a part hereof, the defendant advised the plaintiff that effective June 27, 1958 it is "Fair Trading its flashbulbs in the Commonwealth of Virginia." Said letter requests the plaintiff to observe "our Retail Fair Trade prices" and refers to the enclosed "* * * list of Fair Trade prices on flashbulbs * * *," a copy of which list forms a part of Exhibit B as aforesaid. The letter concludes, in part:

"No policy is worthwhile unless it is vigorously carried out. For our part, we will make every effort."

6. Plaintiff alleges and charges that receipt by it of the aforesaid letter from the defendant dated June 9, 1958, with the "list of Fair Trade Minimum Retail Prices" attached thereto, together with the purchase by plaintiff since that date of photo flashbulbs from the defendant for resale, is within the statutory definition of a contract as set forth in the aforesaid "Fair Trade Act," purporting to require plaintiff to resell said photo flashbulbs for prices not less than those specified by defendant. For the purposes of this proceeding plaintiff concedes that the defendant, in connection with the sale to plaintiff of the quantity of flashbulbs here involved, has taken all necessary action to comply with the requirements of the "Fair Trade Act" and to entitle it to en-
page 21 } force such contract if the "Fair Trade Act" and such contracts as are made thereunder be valid. However, plaintiff has not entered into any contract or agreement and knows of no contract or agreement to maintain defendant's resale prices unless the operation of the "Fair Trade Act" imposes such contract or agreement upon plaintiff by reason of the notice aforesaid. These facts constitute an actual antagonistic assertion of right by the defendant under and pursuant to the said "Fair Trade Act" to fix the minimum retail prices which may be charged by plaintiff upon the resale of photo flashbulbs purchased by it from the defendant.

7. Plaintiff denies that the defendant has the right to fix the minimum prices to be charged by it upon the resale of photo flashbulbs purchased from the defendant as aforesaid for the reason that the said "Fair Trade Act" violates the Constitution of the State of Virginia in the following respects, among others, and is therefore illegal, unconstitutional, void and without the force of law:

a. It prohibits and restrains this defendant and others similarly situated in the prosecution of a lawful business and thereby violates Article I, Sections 1 and 11, of the Virginia Constitution.

b. It confers upon private citizens the authority to determine price to be charged for their product by retail merchants throughout the state, but establishes no standards to govern its exercise and makes no provisions for procedural due process, and, therefore, constitutes a delegation of legislative power which is violative of the Virginia Constitution.

c. It authorizes practices constituting monopolies inimical to the public welfare in violation of Section 165 of the Virginia Constitution.

d. It creates arbitrary and unreasonable classifications and grants special rights, privileges and immunities to the defendant and others similarly situated, and thereby violates Sections 1 and 63 of the Virginia Constitution.

8. The plaintiff further alleges and charges that the aforesaid "Fair Trade Act" is in direct conflict with
page 22 } the Virginia Anti-Monopoly Act, Sections 59-20 through 59-40, Code of Virginia (1950), as amended, which was enacted pursuant to the mandate of Section 165 of the Constitution of the State of Virginia, in that it purports to authorize acts which are plainly prohibited by the said Anti-Monopoly Act, and the "Fair Trade Act" is therefore illegal, void and without the force of law.

9. The plaintiff alleges that it has the sole and exclusive right to determine the retail prices at which flashbulbs purchased by plaintiff from the defendant will be sold and that the defendant may not lawfully require the plaintiff to maintain retail prices specified by it.

10. By virtue of the foregoing there exists an actual controversy between the plaintiff and the defendant.

WHEREFORE, plaintiff prays for a declaratory judgment under Section 8-578, Code of Virginia (1950) declaring that the aforesaid "Fair Trade Act," Section 1, Chapter 259, Acts of Assembly of 1958, is unconstitutional, void and without the force of law, and that the defendant may not fix the retail prices to be charged for flashbulbs purchased from it by the defendant.

STANDARD DRUG COMPANY,
INCORPORATED
By LEROY R. COHEN, JR.
Of Counsel.

• • • • •

page 24 } EXHIBIT A.

Acting Chairman, House Committee

CHAPTER 259

An Act to permit any producer or distributor to prescribe minimum resale prices of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and

which is in free and open competition with commodities of the same general class produced or distributed by others with certain exceptions; to define terms; to provide for the giving of notice of such minimum resale prices; to declare that wilful and knowing violation by a party who has received notice of such minimum resale prices is unfair competition, and a wrongful interference with property rights; to provide for the relief thereof, and thereby to foster the preservation of small business, to protect the goodwill of trade-marks and trade names, to further competition, to prevent monopoly and to promote the public welfare.

[H 323]

Acting Chairman, Senate Committee

Approved Mar 8 1958

Be it enacted by the General Assembly of Virginia:

1. § 1. This act may be known and cited as the "Fair Trade Act."

§ 2. The following terms, as used in this act, are hereby defined as follows:

(1) "Commodity" means any subject of commerce, except meat and meat products, meal, flour, bakery products, fresh and canned fish, sea food, fresh and canned fruits and vegetables, coffee, tea, ice, sugar and wearing apparel.

(2) "Wearing apparel" means the finished product or article and does not include any material, ingredient, or component out of which wearing apparel is made, altered, or repaired.

(3) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.

(4) "Distributor" means any person who identifies a commodity distributed by him by the use of his trade-mark or trade name.

(5) "Wholesaler" means any person who buys a commodity for the purpose of resale.

(6) "Retailer" means any person selling a commodity to a consumer for use.

(7) "Trade-mark" means any word, name, symbol or device, or any combination thereof used by a producer or dis-

tributor to identify his commodity and distinguish it from that produced or distributed by others.

(8) "Trade name" means personal names, and any word, words, symbol, or symbols used by producers or distributors to identify their companies, firms or corporations.

(9) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization.

(10) "Contract' 'means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof.

The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be *prima facie* evidence of actual notice of the terms of the "contract." Acceptance for resale with actual notice shall be deemed to be assent to the terms of the "contract."

page 25 } § 3. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark or trade name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;

(b) That the buyer will require of any dealer to whom he may resell such commodity a contract that he will not, in turn, resell at less than the minimum price stipulated by the seller;

Provided, however, that no such contract shall be permitted unless it further contains the provisions that the seller will not sell such commodity in this State:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

§ 4. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract, except to the extent authorized by the contract, the following instances shall be deemed a violation of such resale price restriction, for which the remedies prescribed by § 7 shall be available:

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

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

(c) The sale or offering for sale of such commodity in combination with any other commodity.

Nothing contained in this section shall be construed as prohibiting the giving of "premium stamps," the furnishing, supplying or use of which may be taxed under Article 10.1, Chapter 7, Title 58, of the Code of Virginia, as amended.

§ 5. No minimum resale price shall be established for any commodity by any person other than the owner of the trade-mark or trade name used in connection with such commodity or a wholesaler specifically authorized to establish such price by the owner of such trade-mark or trade name.

§ 6. No contract containing any of the provisions enumerated in § 3 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the *bona fide* purpose of discontinuing dealing in such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer, distributor, or wholesaler, as the case may be, of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, second-hand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court.

page 26 } § 7. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract is unfair competition and is actionable at the suit of any person damaged thereby.

§ 8. This act shall not apply to any contract, agreement, or understanding between or among producers or distributors or, exempt as provided in subdivision (b) (1) of § 3, between or among wholesalers, or between or among retailers, as to sale or resale prices. Nor shall this act apply to any sale of a commodity to the Commonwealth of Virginia, or an agency thereof, a political subdivision, a county, city or town, or a religious, charitable or educational institution.

§. This act is enacted in the exercise of the police powers of the Commonwealth, and its purposes are generally to protect and preserve small business, to safeguard the goodwill of trade-marks and trade names, to further wholesome competition, to prevent monopoly, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the Commonwealth.

§ 10. If any one or more sections, paragraphs, sentences, clauses, phrases or parts of this act, or the application thereof to any person or circumstance, shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remaining applications or provisions thereof, but shall be confined in its operation to the specific provision or application held invalid, and the inapplicability or invalidity of any section, paragraph, sentence, clause, phrase or provision of this act in one or more instances or circumstances shall not be

taken to affect or prejudice in any way its applicability or validity in any other instance.

A True Copy—Teste:

May 5, 1958.

/S/ E. GRIFFITH DODSON
Clerk of the House of Delegates and Keeper of the Rolls of the State.

.....
President of the Senate.

.....
Speaker of the House of Delegates.

Approved:

.....
Governor.

page 27 } EXHIBIT B.

GENERAL ELECTRIC
Company

PHOTO LAMP DEPARTMENT

Nela Park Cleveland 12 Ohio Telephone Glenville 1-6600

June 9, 1958

TO: ALL VIRGINIA RETAILERS

Dear Mr. Retailer:

The Photo Lamp Department of the General Electric Company is announcing that effective June 27, 1958 it is Fair Trading its flashbulbs in the Commonwealth of Virginia.

We believe that the flashbulbs we manufacture are of high quality, carefully and attractively packaged and properly priced. We have felt that every retailer could sell these flash-

bulbs at our recommended list prices with full confidence that the customer would receive equal or greater value for his money than is offered by any of our competitors.

We also believe that a retailer who sells our products at less than our minimum Fair Trade prices needlessly sacrifices the profit which he could easily make and which he needs in order to stay in business. We can only conclude that those retailers who have cut prices have done so for purposes which are contrary to the best interests of the vast majority of other retailers and, of course, harmful to us too.

The reasons, therefore, behind our decision to Fair Trade are fundamentally the reasons which led to the enactment of the Fair Trade Laws. As a manufacturer, we are vitally interested in protecting the value of our trademarks and brand name. The value of our trademarks on General Electric flashbulbs can be seriously damaged or even destroyed by those who would cheapen the value of our good will through such pricing tactics as utilizing this product as a loss leader. The great majority of retailers obviously may also suffer as a result of such practices.

Since your cooperation is important in the administration of a Fair Trade program, we are asking you to help us by observing our retail Fair Trade prices. Our list of Fair Trade prices on flashbulbs is enclosed.

No policy is worthwhile unless it is vigorously carried out. For our part, we will make every effort. However, you, too, have a responsibility. You can become a mighty force to help us make Fair Trade on General Electric flashbulbs work. Please report to us any instance where General Electric flashbulb Fair Trade prices are not being observed or where they are offered through advertisements at less than Fair Trade prices.

With best wishes, I am,

Very truly yours,

O. H. YOUNG
Manager—Marketing.

OHY;sjt

Enclosure:
Schedule of Fair Trade Minimum Prices.

page 28 } Form 2204X 3-58

PHOTO LAMP DEPARTMENT
GENERAL ELECTRIC
COMPANY

GENERAL ELECTRIC FLASHBULBS
LIST OF FAIR TRADE MINIMUM RETAIL PRICES
Revised—Effective March 14, 1958

G. E. Lamp Ordering Number	Each	Per Pack of 4	Per Pack of 12	Per Case of 120	Per Case of 144
PowerMite M2	$0.11	$0.44	$1.29	$9.00	$10.75
PowerMite M2 Roto-Load Pack* . .	—	—	1.39	—	11.50
PowerMite M2B . . .	.13	.52	1.49	10.75	13.00
PowerMite M5	.14	.56	1.59	11.75	14.00
PowerMite M5B . . .	.17	.68	1.98	14.25	17.25
PowerMite 25B	.17	.68	1.98	14.25	17.25
PH/SM . . .	.16	.64	1.89	13.50	16.25
PH/5 . . .	.14	.56	1.59	11.75	14.00
PH/5B . . .	.17	.68	1.98	14.25	17.25
PH/6 . . .	.16	.64	1.89	13.50	16.25
PH/6B . . .	.20	.80	2.39	17.00	20.50
PH/8 . . .	.13	.52	1.49	10.75	13.00

G. E. Flashbulbs in the above sizes are now packed 144 to the case. However, 120 lamp cases will also be sold in some instances for a few more months.

*Power Mite M2 Root-Load flashbulbs also come in 6-lamp discs at a Fair Trade minimum retail price of $0.70 for each 6-lamp disc.

G. E. Lamp Ordering Number	Each	Quantity Per Pack	Price per Pack	Quantity Per Case	Price per Case
PH/11 . . .	$0.19	8	$1.49	120	$15.25
PH/11B . . .	.23	8	1.79	120	19.00
PH/22 . . .	.21	6	1.19	120	17.00
PH/22B . . .	.27	6	1.59	120	22.50
PH/31 . . .	.28	6	1.59	60	11.75
PH/31B . . .	.34	6	1.98	60	14.25
PH/50 . . .	.26	6	1.49	60	10.75
PH/50B . . .	.32	6	1.89	60	13.50

The prices shown in this schedule are only minimum prices. Retailers are free to charge higher prices. Case prices apply to sales of full cases only.

PHOTO LAMP DEPARTMENT
GENERAL ELECTRIC COMPANY
NELA PARK
CLEVELAND 12, OHIO

page 29 }

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Filed December 17, 1958.

Teste:

LUTHER LIBBY JR., Clerk
By EDWARD G. KIDD

GROUNDS OF DEFENSE TO AMENDED MOTION.

The defendant, General Electric Company, states the following grounds of defense to the amended motion for declaratory judgment filed against it:

1. The defendant admits the allegations of paragraph 1 of the motion.
2. The defendant admits the allegations of paragraph 2 of the motion.
3. The defendant admits the allegations of paragraph 3 of the motion.
4. The defendant admits the allegations of paragraph 4 of the motion.
5. The defendant admits the allegations of paragraph 5 of the motion.
6. The defendant admits the allegations of paragraph 6 of the motion.
7. The defendant denies that the said "Fair Trade Act" violates the Constitution of the State of Virginia in the respects set forth in paragraph 7 of the motion, or
page 30 } otherwise.
8. The defendant denies that the said "Fair Trade Act" is in conflict with the Virginia Anti-Monopoly Act, as set forth in paragraph 8 of the motion.
9. The defendant denies the allegations of paragraph 9 of the motion, and alleges that, on the contrary, the plaintiff

having received the notice set forth in paragraph 5 of the motion, and having accepted goods from the defendant after receipt of said notice, has by the acceptance of said goods agreed to sell at not less than the minimum retail sales price specified by the defendant in said notice.

10. The defendants admits the allegations of paragraph 10 of the motion.

WHEREFORE, the defendant prays for a declaratory judgment under Section 8-578, Code of Virginia, 1950, declaring that the Fair Trade Act of Virginia (Sections 59-8.1 to 59-8.9, Code of Virginia, 1950, as amended) is constitutional valid, and with the force of law, and that the defendant may require the plaintiff to sell products purchased from the defendant at minimum retail sales prices, according to the terms of the said "Fair Trade Act."

GENERAL ELECTRIC COMPANY
By WALTER E. ROGERS
Of Counsel.

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STIPULATION OF FACT.

It is hereby stipulated and agreed between Standard Drug Company, Incorporated and General Electric Company, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipution does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy:

1. The matters of fact stated in Paragraphs 1, 2, 3, 4, 5 and 6 of plaintiff's "Amended Motion for Declaratory Judgment" are true and correct.

2. Pursuant to Invoice No. 81888 dated August 29, 1958 defendant, General Electric Company, shipped and charged to plaintiff, Standard Drug Company, 3301 Rosedale Avenue, Richmond 20, Virginia, a quantity of flashbulbs manufactured by it, including 600 standard packages bearing the General Electric trade mark (a total of 86,400) of PH 5 flashbulbs.

3. That the said quantity of PH 5 flashbulbs was duly delivered to the plaintiff.

page 32 } 4. That at the time of the purchase and of the delivery of said flashbulbs the plaintiff had in its possession a "List of Fair Trade Minimum Retail Prices" for General Electric flashbulbs specifying that the said General Electric PH 5 flashbulbs should be sold for $0.14 each, or $1.59 "per pack of 12."

5. That by advertisement inserted in the Richmond News Leader, a newspaper of general circulation in the City of Richmond, Virginia, for October 23, 1958 the plaintiff offered for sale said PH 5 flashbulbs at a price of $0.12 each, or $1.39 per pack of 12. A copy of said advertisement is hereto attached, marked Exhibit A.

6. That pursuant to said advertisement plaintiff sold said flashbulbs at $0.12 each and also at $1.39 per pack of 12 to various customers of plaintiff on October 23, 1958, October 24, 1958 and October 25, 1958.

LEROY R. COHEN, JR.
Attorney for Standard Drug Company, Incorporated.

WALTER E. ROGERS
Attorney for General Electric Company.

Stipulation Aug. 27, 1959.

T. C. F.

page 34 } LAW AND EQUITY COURT
of the
CITY OF RICHMOND
RICHMOND, VIRGINIA

Judges
Thomas C. Fletcher
Robert Lewis Young
John Hicks Rives, Jr.

Clerk
Luther Libby, Jr.

June 19, 1959.

Messrs. Haw and Haw,
Witt & Cohen,
Williams, Mullen, Pollard & Rogers,
Morton L. Wallerstein,
Henry T. Wickham,
Attorneys at Law,
Richmond, Virginia.

Re: Standard Drug Company, Incorporated, *v.* General Electric Company;

Gentlemen:

The plaintiff filed its motion for a declaratory judgment that the "Fair Trade Act," Section 1, Chap. 259, Acts of 1958, is unconstitutional and void and that the defendant "may not fix the retail prices to be charged for flashbulbs purchased from it by the defendant." The case has been submitted upon a written stipulation of fact, from which it appears that the defendant is a manufacturer of flashbulbs, and the plaintiff a retailer and regular customer. The issues of the case have been so ably presented and argued that I feel no useful purpose would be served by a detailed discussion here of the precedents cited.

The Act in question became effective on June 27, 1958. It provides that " 'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof. It provides that:

"The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be *prima facie* evidence of actual notice of the terms of the 'contract.' Acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract'—No contract * * * shall be deemed in violation of any

law of the State by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller * * *"

By letter of June 9, 1958, receipt of which is conceded, the defendant notified the plaintiff that, effective June 27, 1958, it was "Fair trading its flashbulbs in Virginia," page 35 } and enclosed a list of minimum retail prices. In August, 1958, the defendant shipped to the plaintiff, on its order, the flashbulbs here involved. No suggestion was offered by the latter that the contract of sale expressly free it from restriction as to resale.

A former "Fair Trade" act was before this court in the case of *Benrus Watch Co.* v. *Kirsch.* Judge Young was of opinion that it was in conflict with the Virginia anti-monopoly statute passed at the same session (1950) and that the latter must prevail under the rule that the earlier must yield to the later expression of the legislative will where there is a repugnancy between two acts," but that in the event this was a misinterpretation of the statutes the non-signer provisions of the "Fair Trade" act were in conflict with sections 40 and 52 and also the liberty and due process clauses of the Constitution of Virginia. This decision was affirmed by our Supreme Court of Appeals, (198 Va. 94) for the reason that the statutes conflicted. That case involved a non-signer provision. It throws little light on the present case which has to do with a "vertical" rather than a "horizontal" agreement, another "Fair Trade" statute having been since enacted with a more comprehensive title. (Acts 1958, Chap. 259, p. 311). Judge Young said in his opinion: "The validity of voluntary price maintenance contracts, as between the parties thereto, is not before me and I express no opinion with reference thereto." Our Court of Appeals, in affirming his decree, said at p. 99, "* * * we do not reach the very serious questions raised as to the constitutionality of the Fair Trade Act * * *"

The question presented by the case, therefore, is whether there was an agreement between the parties as to the minimum resale price of the flashbulbs and, if so, did it contravene the laws or public policy of the Commonwealth.

According to 12 Am. Jur. 769, (Contracts, section 240). "It is commonly said that the existing statutes and the settled law of the land at the time a contract is made became a part of it and must be read into it just as if an express provision to

that effect were inserted therein, except where the contract discloses a contrary intention."

The language of the statute is clear and when the plaintiff bought the flashbulbs it did so with notice and knowledge that the minimum resale price provision would become a part of contract of purchase. It is in the same position as if this condition had been expressly contained in the offer page 36 } to sell and accepted. It had its freedom of choice to buy or not to buy.

There is nothing novel or new about statutes which provide that the doing of certain things shall raise certain presumptions as to the intentions, rights and liabilities of the parties. To cite a few instances:

Abbreviated forms of covenants of warranty are almost universally used in deeds and the statutes fix their exact meaning;

One who conveys land to secure a debt by deed of trust which is silent as to methods of enforcement finds that by virtue of the statute he has made numerous covenants as to payment of taxes, maintenance, waste, etc., and provided in considerable detail for sale by the trustee in the event of default;

Insurance policies are required by statute to contain certain provisions favorable to policy holders, and are construed as if such provisions were expressly contained, notwithstanding they may have been omitted.

There are many others. I think we may take it that the parties hereto, by virtue of the statute, mutually agreed upon a minimum resale price of the flashbulbs.

I am further of opinion that the question whether this agreement violates our laws or public policy must be answered in the negative.

In the view above expressed that the minimum resale price results from a contract of the parties, and that is the basis of this decision, then the liberty and due process provisions of the State and Federal Constitutions have no application. That public policy which once regarded the fixing of resale prices as repugnant to ownership and in restraint of trade has been altered by the Fair Trade Act. It is a proper function of the General Assembly, within constitutional limitations, to determine such questions of public policy.

It is argued that the Fair Trade Act is in conflict with our Anti Monopoly statute. It is, but the Fair Trade Act must prevail under the rule mentioned by Judge Young that the earlier must yield to the later expression of the legislative will where there is a repugnancy between two acts. The re-

quirement of section 165 of the Virginia Constitution that "The General Assembly shall enact laws preventing all trusts, combinations and monopolies, inimical to the public welfare," is not self executing. The General Assembly has broad discretion in determining what is "'inimical to the public welfare." What we have here is merely another exception to the Anti Monopoly statute. I do not feel that it goes beyond a legitimate exercise of this discretion.

page 37 } It is also urged that the Fair Trade Act is in conflict with the Sherman Anti-Trust Act, as amended. As pointed out by Judge Young, "Section 1 of the Sherman Anti-Trust Act merely makes these practices which were illegal at common law illegal under that Act if they affect interstate commerce." There is nothing in the pleadings or stipulation of fact to suggest, except perhaps by implication that the sale here under consideration was an interstate transaction. If it were, the amendments of that Act except fair trade agreement and non-signer clauses, if valid under state law.

I am of opinion that no constitutional right of the petitioner has been violated.

A draft of order may be presented dismissing the petition.

Very sincerely yours,

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ORDER.

Upon consideration of the Plaintiffs' amended motion for a declaratory judgment; the Defendant's grounds of defense to the amended motion; the stipulation of facts filed herein and the oral arguments and briefs of Counsel, the Court is of the opinion that the "Fair Trade Act" Chapter 259, Acts of Assembly of Virginia, 1958, is valid and constitutional for the reasons set forth in its written opinion in letter form, dated June 19, 1959, to be read and considered as a part hereof, it is

ADJUDGED, ORDERED and DECREED that the "Fair Trade Act" of Virginia, Chapter 259 of the Acts of Assembly of Virginia of 1958, is valid and constitutional, and the Court does so declare, and it is

Further ADJUDGED, ORDERED and DECREED that the Defendant may in the manner provided by the Virginia Fair

Trade Act fix the minimum retail prices to be charged for flashbulbs sold by it.

It is further ADJUDGED, ORDERED and DECREED that the Defendant do recover its costs of the Plaintiff.

To all of which the Plaintiff by Counsel excepts:

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page 39 } We ask this:

WALTER E. ROGERS
Counsel for General Electric Company

We have seen and object to the entry of the foregoing order:

ROBERT A. COX, JR.
GEO. E. HAW of Haw and Haw
Counsel for Standard Drug Company, Incorporated.

Enter Aug. 27, 1959.

T. C. F.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To Luther Libby, Jr., Clerk:

The plaintiff, Standard Drug Company, Incorporated, hereby gives notice of appeal from the final order entered in this cause on August 27, 1959, holding that the Fair Trade Act of Virginia, Chapter 259 of the Acts of Assembly of Virginia of 1958, is valid and constitutional and that the defendant may in the manner provided by the Virginia Fair Trade Act fix the minimum retail prices to be charged for flashbulbs sold by it, and assigns the following errors:

1. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, does not violate the Constitution of Virginia.

2. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of

Virginia of 1958, does not violate the Constitution of the United States.

3. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958 does not violate the liberty and due process clauses of the Virginia Constitution, namely, Sections 1 and 11 thereof.

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4. The Court erred in failing to hold that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958 effects an unconstitutional delegation of legislative power contrary to Section 40 of the Virginia Constitution.

5. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, does not violate the monopoly provision of the Virginia Constitution, namely, Section 165, and is a valid exception to the Virginia Anti-Monopoly statutes, Sections 59-20 through 59-40, Code of Virginia (1950).

6. The Court erred in failing to hold that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, does not express the object of the Act as required by Section 53 of the Virginia Constitution.

7. The Court erred in failing to hold that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, violates the equality provisions of the Virginia Constitution, namely, Sections 1 and 63, and creates arbitrary and unreasonable classifications.

8. The Court erred in failing to hold that subsection (10) of §1 of the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, is an attempt by the General Assembly to create a conclusive presumption of the existence of a contract, contrary to the provisions of the Constitution of the State of Virginia and the Constitution of the United States.

9. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, is not in conflict with the Sherman Anti-Trust Act, as amended.

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10. The Court erred in failing to hold that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, violates the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution.

11. The Court erred in holding that by virtue of the Fair Trade Act, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, the plaintiff, upon purchasing flashbulbs from the defendant entered into a contract with the defend-

ant agreeing upon a minimum resale price of the flashbulbs.

12. The Court erred in holding that the defendant may in the manner provided by the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, fix the minimum retail prices to be charged for flashbulbs sold by it.

STANDARD DRUG COMPANY,
INCORPORATED
By LEROY R. COHEN, JR.
Of Counsel.

HAW & HAW
Of Counsel.

Received and filed Oct. 13, 1959.

Teste:

LUTHER LIBBY, JR., Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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