

# The Louisiana Fair Trade Act and Interstate Transactions: The Krauss Company Case

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of property lies in the fact that the donor's heirs can revoke the donation for non-performance of the charge and thus defeat the rights of the beneficiary altogether.<sup>114</sup> This danger can be avoided. The donor can deprive his representatives of the power to revoke the legacy, leaving them only the power to require specific performance.<sup>115</sup>

#### CONCLUSION

French lawyers and their clients can create, and in many instances have created, property interests which in complexity rival those established in common law jurisdictions. Such devices as the "permitted" substitutions, the *donation avec charge*, the *stipulation pour autrui*, the alternative conditional legacy, the usufruct, the *fiducia* and the *fondation* lend themselves to almost infinite complication, and evidence that not only the common law property system, but the civilian system as well, is sadly in need of drastic reform.<sup>116</sup> Complex "future interests" and their civilian equivalents, which today prop up the privileged few just as the substitution *fidéicommissaire* once did the feudal aristocracy of France, might well be relegated to history and remembered only for their resistance to necessary reform.

F. HODGE O'NEAL \*

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### THE LOUISIANA FAIR TRADE ACT AND INTERSTATE TRANSACTIONS

#### *The Krauss Company Case*

Plaintiff, a manufacturer, instituted an action in the federal district court seeking to enjoin defendant, a retailer, from selling the plaintiff's trade-marked goods at less than the minimum price fixed by fair trade agreements which plaintiff had made with more than a hundred retail dealers in Louisiana under Act 13 of 1936,<sup>1</sup> popularly known as the Louisiana Fair Trade Act.

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114. A contract containing a *stipulation pour autrui* can be used to accomplish many of the results obtained by the *donation avec charge*; but the *stipulation pour autrui* can be used only *inter vivos*.

115. Le Paulle, *op. cit. supra* note 6, at 1137.

116. Louisiana's property system is far simpler than either those of common law origin or that of France. Even in Louisiana, however, there is need for considerable reform.

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1. Dart's Stats. (1939) §§ 9809.1-9809.6.

Although the defendant was not a party to any of the above contracts, he was nevertheless subject to suit for having "wilfully and knowingly" sold the article for less than the price stipulated.<sup>2</sup> *Held*, relief denied. The Fair Trade Act, as interpreted in the instant case, authorizes only contracts which provide that the product shall not be resold "except at the price stipulated by the vendor,"<sup>3</sup> and the contracts in question exceeded this authority by providing that the goods should not be resold at a price less than the minimum price prescribed by the plaintiff. Since the contracts exceeded the protection of the Fair Trade Act, they are invalid under the state statutory provisions forbidding contracts in restraint of trade.<sup>4</sup> *Mennen Company v. Krauss Company, Limited*, 37 F. Supp. 161 (S.D. La. 1941).

The effect of Judge Borah's decision in the instant case is to sound the death knell of resale price maintenance contracts in Louisiana for many practical purposes. Most of the commodities affected by these agreements have moved in interstate commerce; hence the agreements must conform to the terms of the Miller-Tydings amendment in order to avoid being regarded as illegal under the Sherman Anti-Trust Act.<sup>5</sup> This amendment excepts from the ban of the Sherman Act agreements prescribing minimum prices for the resale of a commodity.<sup>6</sup> Manufacturers selling into Louisiana have sought to safeguard themselves from federal attack by employing in their contracts terms which conform meticulously to the language of the amendment. They now find themselves in the unhappy predicament of being unable to steer a safe course between Scylla and Charybdis: If their contracts conform to the federal requirements they will overstep the protection afforded by the state Fair Trade Act as interpreted by Judge Borah, and hence will run afoul of the Louisiana prohibitions against contracts in restraint of trade. On the other hand

2. La. Act 13 of 1936, § 2 [Dart's Stats. (1939) § 9809.2].

3. *Id.* at § 1(1) [Dart's Stats. (1939) § 9809.1(1)].

4. La. Const. of 1921, Art XIX, § 14; La. Act 90 of 1892 [Dart's Stats. (1939) §§ 4924-4931]; La. Act 11 of 1915 [Dart's Stats. (1939) §§ 4905-4923].

5. 26 Stat. 209 (1890), as interpreted in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). *Dunn, Resale Price Maintenance* (1923) 32 Yale L. J. 676.

6. 26 Stat. 209 (1890), as amended by 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (Supp. 1940): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: *Provided, That nothing herein contained shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity . . .*" (Italics supplied.)

if they draft their agreements in conformity with the state Fair Trade Act and stipulate the exact price at which the commodity shall be resold, they will lose the protection of the Miller-Tydings Amendment and be subject to prosecution under the Sherman Anti-Trust Act as interpreted by the Supreme Court in the case of *Dr. Miles Medical Company v. John D. Park & Sons Company*.<sup>7</sup>

The rationale advanced in the instant case is that the Fair Trade Act is in derogation of common right<sup>8</sup> and must be strictly construed. Since this act permits only contracts which provide that the buyer will not resell the commodity "except at the price stipulated by the vendor," no authority is granted to enter into agreements whereby the resale may be made at any price desired by the retailer so long as a minimum price or "floor" is maintained. The court felt that in some way the principles of fair competition as expressed in the Louisiana statutes would be outraged unless every retailer were compelled to sell the commodity at exactly the same price. In answer to the above, it may be said that a contract which allows the free interplay of competition above a prescribed minimum price should be less onerous to free competition than a stipulation by which the manufacturer is enabled to saddle the market with a single retail price of his own choosing. An instructive analogy is found in those cases which have upheld the power of the state to prohibit the sale of a commodity at a price below cost.<sup>9</sup> The ground most frequently advanced in defense of such statutes is that they do not effect a regimentation of prices, but merely fix a level above which competition is permitted to function freely.<sup>10</sup> This latter is generally regarded as a less drastic restraint upon free competi-

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7. 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911).

8. Cf. Hamilton, Common Right, Due Process and Antitrust (1940) 7 Law and Contemp. Prob. 24.

9. See, for example, Louisiana Unfair Sales Act, La. Act 338 of 1940 [Dart's Stats. (Supp. 1940) §§ 4931.1-4931.8]. These statutes are sometimes known as Unfair Practice Acts [i.e., *California*, Cal. Gen. Laws (Deering, 1937) Act 8781].

10. "The present statute ... in its true sense ... is not a price fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. In all other respects price is the result of untrammelled discretion." Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 11 Cal. (2d) 634, 655, 82 P.(2d) 3, 15 (1938).

"[The Montana Unfair Practice Act] fixes a minimum price only, leaving in the seller the discretion to sell at whatever price above that he chooses. The minimum price is fixed not as an end in itself, but to prevent ruinous price-cutting injuring or destroying competitors." Associated Merchants of Montana v. Ormesher, 107 Mont. 530, 543, 86 P.(2d) 1031, 1033 (1939).

tion than rigid price fixing. The same idea is applicable in resale price maintenance by a manufacturer or distributor.<sup>11</sup>

Furthermore, it is hardly realistic to assume that the Louisiana legislature intended to permit price-fixing only upon the condition that every retailer be compelled to sell at exactly the same price. This assumption ignores the circumstances attendant upon the nation-wide enactment of Fair Trade Laws. For a number of years such acts had been urged upon the legislatures of the various states, but without success, because of a fear that statutes authorizing the fixing of prices through contract would be held unconstitutional under the due process clause of the Fourteenth Amendment.<sup>12</sup> When the pioneer Illinois act<sup>13</sup> was upheld by the United States Supreme Court in the case of *Old Dearborn Distributing Company v. Seagram-Distillers Corporation*<sup>14</sup> in 1936, that act was immediately copied slavishly by a dozen or more states and enacted into law. Louisiana was one of those states. It is reasonable to believe that the idea uppermost in the minds of the legislators was the enactment of a statute which would meet the pressing demand for resale price maintenance, and whose constitutionality was assured. The Illinois act, which was effective, and which also had run the gauntlet of the Supreme Court, appeared to meet both specifications. It validated contracts which provided "that the buyer will not resell such a commodity except at the price stipulated by the vendor." This same provision appeared verbatim in the Fair Trade Acts of

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11. "Such statutes [Fair Trade Acts] permit the owner of trade-marked articles to fix the resale price of such articles. The basic purpose of such a statute and the one here involved [the California Unfair Practice Act] is the same. Both are aimed primarily at cut price retailing and the ruinous use of loss leaders. The Fair Trade Act aims to correct the evil from above by legalizing resale price maintenance, by penalizing all who sell trade-marked articles in disregard of the owner's contract even though not parties to it. The present statute operates from below and is broader in scope." *Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 655, 82 P.(2d) 3, 15 (1938).

12. It was generally believed that the right of the owner of property to fix the price at which he will sell it was an inherent attribute of the property itself, and as such was within the protection of the Fifth and Fourteenth Amendments. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280 (1923); *Tyson and Brother—United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236 (1927); *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327 (1928); *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596 (1929); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932). See *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 192-193, 57 S.Ct. 139, 143-144, 81 L.Ed. 109, 118 (1936).

13. Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 121 1/2, § 188.

14. 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 130 (1936).

fifteen states.<sup>15</sup> Until the present decision no one had contended that this type of provision precluded the making of agreements which fixed merely a minimum resale price.<sup>16</sup> It is interesting to note, however, that seven states<sup>17</sup> which have adopted the Illinois act have pretermitted the problem by substituting the phrase "at less than the minimum price stipulated by the vendor" in place of the phrase "except at the price stipulated." Furthermore, in the more recent model law recommended by the National Association of Retail Druggists, which has been adopted in nineteen states,<sup>18</sup> this altered phraseology is incorporated.<sup>19</sup>

Within the Louisiana act itself there is substantial evidence that the legislature was not of the opinion that price-fixing would be permissible only "if every retailer should be compelled to sell

15. *Arizona*, Ariz. Code Ann. (1939) § 74-201-74-206; *California*, Cal. Gen. Laws (Deering, 1937) Act 8782; *Illinois*, Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 121 ½; *Iowa*, Iowa Code (1935) §§ 9884-g1-9884-g7; *Kentucky*, Laws 1936-37, c. 24; *Louisiana*, La. Act 13 of 1936 [Dart's Stats. (1939) § 9809]; *Massachusetts*, Mass. Ann. Laws (Supp. 1938) c. 93, § 14a et seq.; *Michigan*, Mich. Stat. Ann. (Henderson, Supp. 1938) § 19,321 et seq.; *Mississippi*, Miss. Gen. Laws (1938) c. 348; *New Mexico*, N. M. Stat. Ann. (Courtright, Supp. 1938) § 145-107 et seq.; *New York*, Unconsol. Laws (Thompson's 1939) § 2201 et seq.; *North Dakota*, N. D. Laws (1937) c. 126; *Tennessee*, Tenn. Code Ann. (Michie, 1938) § 6770-1 et seq.; *Washington*, Wash. Code Ann. (Pierce, Supp. 1937) § 7109-51 et seq.; *Wisconsin*, Wis. Stat. (1937) § 133.25 et seq.

16. It is clear that the Miller-Tydings Amendment was drafted with the Illinois type statute in mind. It was the prototype of the Fair Trade Acts in effect in 1937, and the purpose of the Amendment was to implement the provisions of these acts by removing the barrier to their application to interstate transactions. 81 Cong. Rec. 9699-9700 (1937).

17. *Colorado*, Colo. Stat. Ann. (Michie, Supp. 1938) c. 165; *Maine*, Me. Laws (1937) c. 204; *Michigan*, Mich. Stat. Ann. (Henderson, Supp. 1938) § 19,321 et seq.; *New Hampshire*, N. H. Pub. Laws (1937) c. 184; *Ohio*, Ohio Code Ann. (Baldwin, 1936) § 6402-2 et seq.; *Oklahoma*, Okla. Stat. Ann. (1938) tit. 78, § 41 et seq.; *South Carolina*, S. C. Laws (1937) no. 206.

18. *Alabama*, Ala. Laws (1939) H.B. 102; *Arkansas*, Ark. Dig. Stat. (Pope, 1937) § 5606 et seq.; *Connecticut*, Conn. Gen. Stat. (Supp. 1937) c. 138a; *Florida*, Fla. Laws (1937) c. 18-395; *Georgia*, Ga. Laws (1937) 800; *Idaho*, Idaho Laws (1937) c. 240; *Indiana*, Ind. Stat. Ann. (Burns, Supp. 1940) c. 66, § 301 et seq.; *Kansas*, Kan. Laws (1937) c. 165; *Maryland*, Md. Ann. Code (Flack, 1939) Art. 83, §§ 103-110; *Minnesota*, Minn. Stat. Ann. (Mason, Supp. 1938) § 3976.51 et seq.; *Montana*, Mont. Laws (1937) c. 42; *Nebraska*, Neb. Comp. Stat. (Kyle, Supp. 1937) § 59-1101 et seq.; *North Carolina*, N. C. Laws (1937) c. 350; *Oregon*, Ore. Comp. Laws Ann. (1940) § 43-401 et seq.; *South Dakota*, S. D. Code Ann. (1939) c. 54:0401 et seq.; *Utah*, Utah Rev. Stat. (Supp. 1939) tit. 95, c. 3, §§1-10; *Virginia*, Va. Code Ann. (Michie, Supp. 1938) § 1463(j); *West Virginia*, W. Va. Code Ann. (Michie & Sublett, 1937) § 4678(1) et seq.; *Wyoming*, Wyo. Rev. Stat. (Supp. 1940) c. 117, art. 6, §§ 601-612.

19. The language of the Model Act is as follows:

"Sec. 2. No contract ... shall be construed to violate any provision of the general statutes by reason of any of the following provisions which may be contained in such contract:"

"B. That the buyer will require from any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller."

the commodity at exactly the same price." Section 2 of the act, under which this suit was brought, provides that "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 . . ." <sup>20</sup> No mention is made here or elsewhere in the act of sanctions imposed for reselling the commodity at more than the price stipulated. The conclusion appears inescapable that the legislature had in mind only minimum prices. It is most unlikely that the lawmakers would authorize a price-fixing agreement without providing protection for that agreement in all areas of its operation.

The soundness of resale price maintenance from an economic viewpoint is by no means established. However, if an abandonment of the practice is desirable, such a movement should emanate from the legislature. The decision in the instant case, because of its drastic effect upon resale price maintenance in interstate transactions, deserves a careful reconsideration. An interpretation of the Louisiana act more consonant with the legislative history of fair trade statutes and more in keeping with the interstate aspects of resale price maintenance is greatly to be desired.

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### THE LOUISIANA BLUE SKY LAW

"It is better to close the barn door before the horse is stolen." This homely proverb epitomizes the purpose of regulatory Blue Sky Laws which have been enacted in almost every state. Such statutes purport to prevent promotional frauds by providing for a close scrutiny of new stock or bond issues prior to their being offered to the public. Then too, the Federal Securities Act<sup>1</sup> regulates securities which are offered or delivered through the mails or interstate communications. These statutes afford the buying public much needed protection, and when properly administered do not impose an undue burden on the sale of securities.

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20. La. Act 13 of 1936, § 2 [Dart's Stats. (1939) § 9809, 2].

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1. 48 Stat. 74 (1933), 15 U.S.C.A. § 77 (Supp. 1940).