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Milk Price Fixing in South Carolina

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NOTES

MILK PRICE FIXING IN SOUTH CAROLINA

I. *Introduction*

The following quotations from the neighboring states of Mississippi and Georgia point to the underlying arguments for and against fixing the price of milk—whether it is a necessary and constitutional objective or whether it is in violation of due process of law.

> Contrast:
>
> The police powers of the State may be exercised in the proper control and regulation of an industry affecting the public interest, even to the extent of fixing prices for the milk in all stages and forms, and the legislature of the State has solemnly invoked those powers for the control and regulation of the milk industry, even to the fixing of such prices.[1]
>
> With:
>
> If this court, in deference to the economic advantages which some may derive from this legislation, should shrink from the performance of its duty and fail to declare this assault upon individual liberty unconstitutional because the legislature has recited that milk is an important and essential food, a precedent would thereby be set requiring this court to sustain legislation fixing the price of all products vital to human life and health. . . . By such conduct the legislature, aided and abetted by the judiciary of this State, could ultimately convert Georgia into a socialistic state despite the plain provisions of the Constitution which forbid such.[2]

The question has been laid to rest on the national level, by having been held a valid federal constitutional action,[3] but it is still very much alive in South Carolina. In the very recent case

1. Mississippi Milk Comm'n v. Vance, 240 Miss. 814, 860, 129 So. 2d. 642, 662 (1961).
2. Harris v. Duncan, 208 Ga. 561, 570, 67 S.E.2d 692, 697 (1951) (concurring opinion).
3. Nebbia v. New York, 291 U.S. 502 (1934).

of *Richbourg's Shoppers Fair, Inc. v. Stone*[4] the South Carolina Supreme Court followed its prior decisions[5] and held a 1965 price fixing statute unconstitutional. This act,[6] though more of an anti-discrimination law, was also vulnerable to the due process argument for it, like its predecessors, placed restrictions on the use of property. However, milk price fixing still continues as established under the 1966 price control statute.[7] (This act, called the "Emergency Milk Control Law of 1966," was to last only 380 days but has been extended until June 1, 1968, by recent legislation.[8]) But as a consequence of the *Shoppers Fair* decision, the constitutionality of the present act is dubious.

II. *Gwynette v. Myers*

On April 27, 1953, the legislature created the State Dairy Commission for the purpose of regulating the quality of milk brought into South Carolina.[9] Section 32-1610.26 of the 1952 Code made it clear that the commission was not to fix prices. But in 1955 this section was repealed by act number 496,[10] which gave the commission power to declare a state of emergency and fix minimum prices at the producer, distributor and retail levels.

The constitutionality of the 1955 act, insofar as it applied to retail grocers, was challenged in the 1960 case of *Gwynette v. Myers*.[11] There the Dairy Commission had prevented a retail grocer from using milk as a "loss-leader." (The practice is to sell one product at a loss in order to attract customers.) Justice Legge for the three-to-two majority said that there was no emergency, and, even if there had been, the law was still a violation of the due process clause of the South Carolina Constitution.[12] The argument is that one may not be deprived of ownership in his property without due process of law. Since the right to ownership consists of the right to use his property, price fixing is depriving him of this ownership.

4. 153 S.E.2d 895 (S.C. 1967).
5. Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964); Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960).
6. LIV S.C. Stats. at Large 528 (No. 297, 1965).
7. LIV S.C. Stats. at Large 2847 (No. 1165, 1966).
8. Ratification No. 59, signed into law Feb. 20, 1967.
9. XLVIII S.C. Stats. at Large 279 (No. 230, 1953).
10. S.C. CODE ANN. §§ 32-1634 to -1634.68 (1962).
11. 237 S.C. 17, 115 S.E.2d 673 (1960).
12. S.C. CONST. art. 1, § 5.

A state through its police power may deprive a person of property rights, but in order to do so the property must be *affected with a public interest.* This has been the test since the 1877 United States Supreme Court decision of *Munn v. Illinois.*[13] The South Carolina court in attempting to apply this test noted that the test is not susceptible to precise definition. It agreed with a 1929 United States Supreme Court opinion[14] which held that the phrase means devoted to a public use, or in other words its use is granted to the public, and that simply because the public is warranted in having a feeling of concern over its maintenance is not enough. In dictum the South Carolina court in *Gwynette* made two observations: (1) That although milk is essential and perishable, similar characteristics are present in other industries of great importance to this state, *e.g.*, the marketing of meat and fruit, or the sale of fish. The court seemed to be asking what made milk unique. And, (2) the court found no suggestion that any producer or distributor has yet been forced to reduce his price as a result of the defendant's loss-leader practice.

III. *The Due Process Argument in Other Jurisdictions*

The vast majority of state courts that have considered milk price control acts have found them constitutional.[15] They have so decided following the 1934 landmark federal case of *Nebbia v. New York.*[16] There the Supreme Court upheld a New York statute that fixed the retail price of milk. The court found the milk industry to be affected with a public interest and that the

13. 94 U.S. 113 (1877).

14. Williams v. Standard Oil Co., 278 U.S. 235 (1929).

15. Franklin v. State, 232 Ala. 637, 169 So. 295 (1936); Jersey Maid Milk Prods. Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577 (1939); Shriver v. Lee, 81 Fla. 805, 89 So. 2d 318 (1956); Milk Control Bd. v. Crescent Creamery, 214 Ind. 240, 14 N.E.2d 588 (1938); Milk Control Bd. v. Gosselin's Dairy, 310 Mass. 174, 16 N.E.2d 641 (1938); Mississippi Milk Comm'n v. Vance, 240 Miss. 814, 129 So. 2d 642 (1961); Borden Co. v. Thomason, 353 S.W.2d 735 (Mo. 1962); Montana Milk Control Bd. v. Rehberg, 141 Mont. 149, 376 P.2d 508 (1962); Cloutier v. State Milk Control Bd., 92 N.H. 199, 28 A.2d 554 (1942); Abbott's Dairies v. Armstrong, 14 N.J. 319, 102 A.2d 372 (1954); Noyes v. Erie & Wyo. Farmer's Co-op., 281 N.Y. 187, 22 N.E.2d 334 (1939); State *ex rel* Van Winkle v. Farmer's Union Co-op. Creamery, 160 Ore. 205, 84 P.2d 471 (1938); Rohrer v. Milk Control Bd., 322 Pa. 257, 186 Atl. 336 (1936); State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939); Board of Supervisors v. Milk Comm'n, 191 Va. 1, 60 S.E.2d 35 (1950); State *ex rel* Finnegan v. Lincoln Dairy, 221 Wis. 1, 265 N.W. 197 (1936).

16. 291 U.S. 502 (1934).

phrase meant only that the industry, for adequate reason, is subject to control for the public good. The decision, though of course not binding on state court interpretation of state constitutions, carried vehement persuasive force.

In Mississippi, as though expecting a court fight, the legislature put many of the favorite arguments for milk price fixing in the preamble of their act.[17] When the litigation came in *Mississippi Milk Commission v. Vance*[18] the court unanimously followed a separation of powers approach and gave much weight to the legislature's findings. The opinion is extensive but its basic rationale is that the legislature primarily should be the judge of the necessity for such an enactment.[19]

Just two years after *Nebbia* the Alabama court decided that their law[20]—a virtual copy of the New York Act—was constitutional and that there could be no serious doubt that the business of producing and selling milk was affected with the public interest.[21] In this they followed *Nebbia* to the letter.[22] There was one dissenter who also objected to the idea of emergency legislation designed to permanently control milk collection.[23]

In *Reynolds v. Milk Commission*[24] a six-judge Virginia court on November 15, 1934, held unconstitutional a law[25] fixing a minimum price at which producers could sell milk. The due process clause of the Virginia constitution[26] was adopted in 1902. The court, noting that it was taken from the Federal Constitution, applied the construction placed on the Federal Constitution by the Supreme Court up until that time.[27] It discussed, but refused to follow the then seven months old *Nebbia* decision.[28] Two justices, in dissenting, felt that the milk industry was affected with a public interest.[29] But on March 29, 1935, a

17. Miss. Laws 1960, ch. 155.
18. 240 Miss. 814, 129 So. 2d 642 (1961).
19. *Id.* at 858, 129 So. 2d at 663.
20. Ala. Gen. Acts (1935) No. 204.
21. Franklin v. State, 169 So. 295 (Ala. 1936).
22. *Id.* at 299.
23. *Id.* at 303.
24. 163 Va. 957, 177 S.E. 44 (1934).
25. Va. Acts (1934) No. 357.
26. VA. CONST. art. 1, § 11.
27. Reynolds v. Milk Comm'n, 177 S.E. 44, 49 (Va. 1934).
28. *Id.* at 50.
29. *Id.* at 58.

full bench reheard the November decision and overruled it.[30] The dissenting opinion became the majority opinion, and milk price fixing was held constitutional at the producer level. In a 1959 case[31] the Virginia court found it unnecessary to comment on the due process argument but simply made reference to *Reynolds* and to the United States Supreme Court decision of *Highland Farms Dairy v. Agnew*[32] in which the same Virginia statute was considered. In *Highland Farms*, Justice Cardozo stated that the act did not violate the Federal Constitution[33] by fixing minimum prices at producer, distributor and retailer levels, and whether it violated the Virginia constitution was up to the Virginia courts.[34]

In 1936 the Florida Supreme Court held an emergency milk price control statute[35] constitutional as it applied to a distributor.[36] The court notably refused to comment on the validity of permanent legislation. The court accepted the *Nebbia* definition of "affected with a public interest" as being subject to regulation in the public interest.[37] The court stated that if the legislature found that there was such an economic emergency in which the dairy industry was threatened, then, in the absence of proof by the appellant to the contrary, these findings of fact would be conclusive.[38] Twenty years later the Florida legislature still found the emergency to exist.[39] This "continuing emergency" theory was contested by a retailer in *Shiver v. Lee*.[40] But the court found no difficulty in reaffirming the legislature's power to fix wholesale and retail prices. Considering the stated purpose of the legislation, the court said: "We have never found a stronger finding of fact and statement of policy as the basis of regulating and administering a great in-

30. Reynolds v. Milk Comm'n, 163 Va. 957, 179 S.E. 507 (1935).
31. Board of Supervisors v. State Milk Comm'n, 191 Va. 1, 60 S.E.2d 35 (1950).
32. 300 U.S. 608 (1937).
33. *Id.* at 612.
34. *Id.* at 613.
35. Fla. Laws 1935, ch. 17103.
36. Miami Home Milk Producer's Ass'n v. Milk Control Bd., 169 So. 541 (Fla. 1936).
37. *Id.* at 547.
38. *Id.* at 542.
39. Fla. Laws 1953, ch. 501.
40. 89 So. 2d 318 (Fla. 1956).

dustry. . . ."[41] They followed *Nebbia's* more liberal test of what is affected with a public interest and said:

> [T]here is certainly nothing in this case to indicate that the police power was invoked for private purposes or for other than a proper legislative purpose. . . . [T]he power to reasonably regulate the price of a commodity does not necessarily depend on the existence of an economic emergency but may in a proper case be exercised because of the peculiar nature of the problems incident to marketing the commodity.[42]

There was one dissenter without opinion.

Besides South Carolina, in only one state, Georgia, has a terminal court held milk price fixing unconstitutional. The decisions of the Georgia court show a reversal of trends; the price law was held constitutional in two earlier decisions[43] but was later emphatically denounced as a violation of due process.[44] The first decision was *Bohannon v. Duncan*[45] in 1938. The case came up on a demurrer; therefore the court accepted the uncontested legislative declaration that an emergency existed.[46] The opinion, though brief, contains a synopsis of the gainweights most frequently used in determining such an act constitutional: the separation of powers approach in presuming the act constitutional, the acceptance of the legislature's uncontradicted determination of facts and the acceptance of the *Nebbia* definition of "affected with a public interest" as meaning subject to the police power. One justice dissented and one was disqualified.[47]

The constitutionality of the Georgia act[48] was again affirmed about a year later in *Holcombe v. Georgia Milk Producers.*[49] The court pointed out that the act does not become effective in a marketing area until a majority of the producers and distrib-

41. *Id.* at 321.
42. *Id.* at 322.
43. These were Bohannon v. Duncan, 185 Ga. 840, 196 S.E. 897 (1938) and Holcombe v. Georgia Milk Producer's Confederation, 188 Ga. 358, 3 S.E.2d 705 (1939).
44. Harris v. Duncan, 208 Ga. 561, 67 S.E.2d 692 (1951).
45. 185 Ga. 840, 196 S.E. 897 (1938).
46. *Id.* at 841, 196 S.E.2d at 898.
47. *Id.*
48. Ga. Laws (1937) No. 247.
49. 188 Ga. 358, 3 S.E.2d 705 (1939).

utors of that area vote affirmatively to have the law apply there.[50] In other words, there was some choice available. The extended emergency parody gave the court little trouble. They said:

> It is true that they have predicated it on a so-called emergency, and have determined that it may be of at least five years' duration. We cannot say, from anything of which we may take judicial notice, that conditions appropriate for such public regulations did not or do not exist; nor may we assume if these conditions said by the General Assembly to exist should be cured or cease to exist, that the Assembly will not itself so determine and appeal this remedy chosen by it.[51]

Two justices dissented relying on the due process clause.[52] Although price fixing at producer-distributor levels is still in force in Georgia,[53] the constitutionality of the present act is of considerable doubt,[54] because of the 1951 case of *Harris v. Duncan*.[55] There a unanimous court held the milk industry not to be affected with a public interest.[56] It said that since *Bohannon* and *Holcombe* were not full-bench decisions, they were not binding on them.[57] The court, though faced with every decision in the United States against it plus two in its own jurisdiction, tenaciously held with the *Nebbia* dissent that the milk industry is essentially private in nature.[58]

Milk price regulations of some type or another are almost uniform. Only Alaska and Hawaii have none. Sixteen states fix exact prices at either producer, distributor or retail levels and twelve others prevent either their wholesalers or retailers, or both, from selling at prices below cost. In twenty others the farmer alone gets a guaranteed price. These twenty are governed only by federal marketing orders.[59]

50. *Id.* at 360, 3 S.E.2d at 707.
51. *Id.* at 372, 3 S.E.2d at 713.
52. GA. CONST. art. 1, § 1.
53. GA. CODE ANN. § 42-554 (1957).
54. See editorial note following GA. CODE ANN. § 42-554 (Supp. 1966).
55. 208 Ga. 561, 67 S.E.2d 692 (1951).
56. *Id.* at 563, 67 S.E.2d at 694.
57. *Id.* at 563, 67 S.E.2d at 693.
58. Nebbia v. New York, 291 U.S. 502 (1934) (dissenting opinion at 554).
59. Bowles, *Price Regulations on Milk are Wide Spread,* News and Courier, (Charleston, S. C.) Feb. 15, 1967, p. 1.

IV. *Federal Regulation*

A federal marketing order is a price fixing regulation issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, as amended.[60] The dissenting opinion of Justice Black in a case construing the complex act is helpful:

> [T]he 1935 Act gave the Secretary specific power to set up regional marketing areas within which he could, for the government, fix minimum prices handlers [dairies or distributors] would have to pay farmers for the various uses of milk and require that those minimum prices be paid to a pool for the area. . . . The 1937 reenactment went beyond even this . . . to insure that dairy farmers would receive a high enough price for their products.[61]

In other words, the act dictates a minimum price that dairies in a certain area must pay their producers. Application of the act is predicated upon a condition precedent. Two-thirds of the producers supplying milk to an area must vote that their distributors be controlled by the order.[62]

The procedure for developing a federal order is as follows: (1) petition by the dairymen to the Secretary of Agriculture; (2) investigation by the Secretary to determine if an order might effectuate the purpose of the act; (3) notification of a public hearing effectuated by publishing in the Federal Register a press release summary issued by the Department of Agriculture, and by direct mail to the Governor of the State affected and to any other persons known to be interested; (4) issuance of a temporary order recommended as a result of the hearing; and (5) publication of the final order in the Federal Register thirty days later. This order becomes binding on the dairies after an affirmative vote by the producers.[63] Since the authority for the act is the commerce clause,[64] for a market to qualify there must

60. 7 U.S.C. § 608-c (1964).

61. Lehigh Valley Co-op. Farmers v. United States, 370 U.S. 76 (1962) (dissenting opinion at 101).

62. 7 U.S.C. § 608-c (8)A (1964).

63. Economic and Statistical Analysis Div., Economic Research Service, USDA, Fluid Milk in the United States. (Reprinted from Dairy Situation at 35, May 1965).

64. *Id.* at 37.

be interstate implications of the pricing action.[65] But it was held in *United States v. Wrightwood Dairy Co.*[66] that the act also applies to milk moving in intrastate commerce when these activities affect interstate commerce. The Court said the act includes "authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the congressional regulation."[67] The federal orders were given even more importance with the 1965 decision of *Pearce v. Freeman*[68] in which a Louisiana district court held that federal regulations issued for an area preempted the field and subordinated similar state controls.

V. *The Milk Price War*

In April of 1963 Piggly-Wiggly Food Stores in Charleston cut the price of a half gallon of milk from fifty-five cents to thirty-nine cents.[69] The mere skirmishing was ended and a full scale war began. Within a week milk prices had plummeted all over South Carolina. The loss-leader competition did not end for three years and then only through a price fixing law.[70]

Three hundred and eighty-four dairy farmers have gone out of business since 1963.[71] It is a safe inference that many of these producers were forced out of business as a direct result of the war.[72]

In August of 1964 the South Carolina Supreme Court handed down *Stone v. Salley.*[73] Again a milk price fixing statute[74] was held unconstitutional as it affected retailers. The split-court opinion, though relying heavily on the *Gwynette* case,[75] had a more pragmatic ring to it. Justice Moss said:

65. United States v. Rock Royal Co-op., 307 U.S. 533 (1939).
66. 315 U.S. 110 (1942).
67. *Id.* at 121.
68. 238 F. Supp. 947 (E.D. La. 1965).
69. Bowles, *Milk Price War Effects May Help, Hurt Consumer,* News and Courier (Charleston, S. C.) Feb. 18, 1967, p. 1.
70. *Id.*
71. Interview with South Carolina Dairy Commissioner, in Columbia, S. C., Feb. 21, 1967.
72. *Id.*
73. 244 S.C. 531, 137 S.E.2d 788 (1964).
74. LII S.C. Stats. at Large 512 (No. 319, 1961).
75. Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960).

> When the retail dealer purchases milk from the distributor at the price established by the Commission, and the producer receives from the distributor the price fixed and required by the milk control act, it is difficult to see how the interest of either, or of the public at large, can be prejudiced or threatened by the retail dealer selling at such a price as he sees fit. The sale of milk by the retail dealer below the price established by the Commission, where he has purchased such milk at the price established by the Commission, cannot adversely affect the producer and distributor. It seems to us that the sale of milk at a reduced price by a retailer, such retailer absorbing the loss, would increase the sale of milk and therefore be beneficial to the producer and distributor.[76]

Although this statement is purely dictum it is of utmost importance. Its logic was used as a gainweight and should be criticized, for unless retail prices are fixed to curtail loss-leader practices, it would seem that producers and dairies *do* take a loss, as will be explained in part VI.

The court held that the statute failed the *Munn* test because the milk industry was not affected with a public interest.[77] Two justices dissented; they observed the undisputed facts found by the circuit court as to the effects of loss-leader competition and said:

> The sharp difference in the facts which were before the court in *Gwynette* and those now presented was assigned by the circuit judge as one of his reasons for concluding that *Gwynette* is not controlling here. The opinion counters by stating that the well pleaded facts stated in the complaint in the *Gwynette* case were "not at material variance with the evidence submitted in the instant case." But the facts as deducted by the court in *Gwynette* unquestionably were different from those now appearing materially different.[78]

In essence, they said there was no price war then, there is one now, and the private status of the industry has changed into one in which the public has such an interest as to justify its

76. Stone v. Salley, 244 S.C. 531, 541, 137 S.E.2d 788, 792 (1964).
77. *Id.*
78. Stone v. Salley, 244 S.C. 531, 549, 137 S.E.2d 788, 796 (1964).

regulation.[79] There have been drastic economic changes in the milk industry since the *Gwynette* ruling when Justice Legge wrote that there was no suggestion that producers or distributors had been forced to reduce their price a penny. Perhaps had *Gwynette* not been decided before the price war the results in *Salley* would have been different. The legislature in its caution to avoid the war may have "cried wolf" prematurely, so that when the emergency did arise the weight of stare decisis was already set against them.

VI. *The Property Argument*

The constitutionality of the extended Emergency Milk Control Law of 1966[80] empowering the Dairy Commission to fix retail prices is of considerable doubt.[81] The *Shoppers Fair* decision[82] certainly reflects this. The circuit court opinion and the briefs[83] presented a new and interesting argument. The constitutional objection to the act[84] in this case was the same—that the statute denied due process by unduly restricting the retailer's right to sell his property. However the new argument was that the milk is not the property of the retailer, that the retailer is only a consignee, and therefore, since the retailer has no ownership in the milk, his property rights are not violated.[85] Since the word consignment implies an agency instead of a sale, the title would remain in the consignor. A consignment creates only a bailment with authority in the bailee as the consignor's agent to sell the property to a third person. The court's decision in *Shoppers Fair* was that a consignment existed.[86] The judge said:

> How can it be said that a producer can deliver to a retailer a . . . product which a retailer can cause to become stale and unwholesome, yet shift the entire loss to the producer who is powerless to prevent that loss?

79. Determination of whether an industry had so changed in nature was held in *Gwynette* to be a matter for judicial inquiry.

80. Ratification No. 59, signed into law Feb. 20, 1967.

81. *See* Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964); Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960).

82. Richbourg's Shoppers Fair v. Stone, 153 S.E.2d 895 (S.C. 1967).

83. Brief of Appellant, Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895 (S.C. 1967).

84. LIV S.C. Stats. at Large 528 (No. 297, 1965).

85. Brief of Respondents, Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895 (S.C. 1967).

86. Record, Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895 (S.C. 1967).

> If the retailer owned all of the milk in his shelves, he wouldn't price one item in such a manner as to make the remainder unsaleable. This isn't the policy he follows on other merchandise in his store which he owns.[87]

But the South Carolina Supreme Court reversed this decision. Acting Associate Justice Legge agreed with appellant's argument that the transaction between the distributor and the retailer was a "contract for sale or return" and not a consignment. The distinction is often a difficult one.[88] Both sides argued that milk marketing practices supported their contentions.

Milk marketing practices are uniform throughout the United States.[89] The producer who has built up his herd to supply a somewhat constant volume of milk must continue extracting this amount from the cows whether it is sold or not. He cannot effectively control his supply to meet the highly fluctuating demand that follows loss-leader retailing. When the cows are milked, the milk is put up for the distributor, whose trucks move it to the dairy for processing. At this time the producer is paid nothing.[90] The distributor then stocks the retail store and receives payment from the retailer. However, every three to four days the distributor must replace any milk not sold within this period, at his and the producer's expense. To keep this removed milk from becoming a total loss, it is converted by the dairy into milk by-products such as ice cream or powdered milk which may be stored. The producer receives only approximately one-half the amount for these dairy products as he receives on fresh fluid milk sales.

The dairy industry's marketing practices have evolved in order to insure a supply of wholesome milk. And because of these established practices, discriminatory trade gimicks such as loss-leader retailing have a definite detrimental effect.

Normally the producers become very closely interwoven with the dairy to which they sell, and therefore they have only this one market. If their dairies' brand of milk is not bought, *they*

87. *Id.*

88. 46 AM. JUR. *Sales* § 483 (1943).

89. Interview with South Carolina Dairy Commissioner, in Columbia, S. C., Feb. 21, 1967.

90. The producer is later paid by the dairy according to his "basis" which is roughly a volume amount determined by the sale of his milk during the prior month.

directly absorb the loss. Although it is theoretically possible for these producers to contract with another dairy, in reality, this is not done, partly because of sundry local inspection laws which would have to be complied with if they changed distributors. In this context consider again Justice Moss' statement in *Salley* that if wholesale prices are set, reduced retail prices might be beneficial to the producers through increased volume of sale. This may be true in some other areas but not in the milk industry; milk consumption will remain about the same regardless of prices. If the retailer cuts the price of brand X, the sales of brand Y will plummet. The distributor of brand Y will have to remove more and more of its milk after the four-day period and convert it into by-products. The producers of this dairy subsequently take the loss. If the retailers would, without discriminating, uniformly cut the prices of all brands, perhaps this practice would not be damaging.

VII. *Conclusion*

Presently, under recent emergency legislation, South Carolina has milk price fixing at all three levels. This legislation will remain in force until challenged, and whether or not it will be challenged may have been determined by the decision in the *Shoppers Fair* case. There the South Carolina Supreme Court followed its prior decisions of *Gwynette* and *Salley*, and again held milk price fixing unconstitutional. The court has considered the arguments from other jurisdictions concerning the same issues and it has cited the same precedent cases used by the other courts. Although the court's decisions have been contrary to the weight of authority, it has not been oblivious to the pertinent issues. It should also be pointed out that if state legislation is not permitted in this area, there lurks the possibility that federal controls may preempt the field. The fate of milk price fixing in South Carolina in undecided, but the guidelines for coming decisions are set.

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