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Legislature's Authority to Fix the Minimum Price at Which the Retailer Must Sell to the Consumer

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CONSTITUTIONAL LAW—SOUTH CAROLINA MILK CONTROL LAW—LEGISLATURE'S AUTHORITY TO FIX THE MINIMUM PRICE AT WHICH THE RETAILER MUST SELL TO THE CONSUMER

Stone v. Salley (South Carolina 1964)

On April 29, 1963, the South Carolina State Dairy Commission promulgated an order pursuant to the 1961 Dairy Commission Act fixing[1] the minimum price of milk and prohibiting producers, distributors and retailers from selling milk below the cost of production. Following the order eighteen separate suits were brought in various counties asserting that sections 32-1635, 32-1640.3 and 32-1640.5 of the aforesaid code violate article I, section 5 and article I, section 8 of the SOUTH CAROLINA CONSTITUTION OF 1895 in that the Commission was taking property without due process of law and denying the equal protection of the law by preventing sales of milk below cost of production. In order to determine the constitutionality of the above sections of the code the Dairy Commission instituted this action under the Uniform Declaratory Judgments Act naming as defendants a producer, a distributor and a retailer grocer. Each defendant represented others similarly situated. The producer and the distributor answered the complaint admitting the constitutionality of the act. The retailer denied the constitutionality of the act in answer. The circuit court ruled that the order was valid and constitutional. The retailer appealed the decision of the circuit court. HELD: reversed as to the constitutionality of section 32-1640.5 of the code allowing the Dairy Commission to fix the minimum price at which the retailer must sell milk to the consumer. *Stone v. Salley*, __ S.C. __, 137 S.E.2d 788 (1964).[2]

New York was the first state to enact a milk control statute[3] and consequently the milk control laws of New York have been thoroughly litigated. The first test was in *People v. Nebbia*.[4] In the opinion the court stated that the legislation was the result of an extensive legislative investigation which discovered distinctive and demoralizing competitive conditions and unfair trade practices in the milk industry. These conditions caused the income of the farmer to be dangerously unstable and threatened

1. S.C. CODE, §§ 32-1635 to 1640.8 (1962).
2. __ S.C. __, 137 S.E.2d 788 (1964).
3. N.Y. AGRICULTURE AND MARKETS LAW § 312 (e), as added by LAWS 1933, ch. 158.
4. 262 N.Y. 259, 186 N.E. 694 (1933).

the destruction of this vital industry. The court held that the legislature had the authority under the police power of the state to regulate the price at which the retailer must sell to the consumer because the industry was affected with a public interest. The case was appealed to the United States Supreme Court.[5] The decision, which is now the leading case on milk control acts, approved the decision of the New York court and sanctioned the power of any state to regulate the milk industry through enforcement of reasonable legislation. The court in affirming the decision said:

> Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or, demonstrably irrelevant to the policy the Legilsature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty.[6]

Today in the milk industry there is a definite trend toward price regulation. Presently, twenty-two states have passed and now have milk control acts which determine the price. The acts of sixteen states have been held valid and constitutional by the highest court of the state.[7]

5. Nebbia v. New York, 291 U.S. 502 (1934).

6. *Id.* at 539.

7. Alabama: *Ex parte* Homewood Dairy Prods. Co., 241 Ala. 270, 3 So.2d 58 (1941); Franklin v. State, 232 Ala. 637, 169 So. 295 (1936); California: Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665 (1940); Jersey Main Milk Prods. Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577 (1939); Florida: Shiver v. Lee, 81 Fla. 805, 89 So.2d 318 (1956); Miami Home Milk Producers Ass'n. v. Milk Control Bd., 124 Fla. 797, 169 So. 541 (1936); Indiana: Milk Control Bd. v. Crescent Creamery, 214 Ind. 240, 14 N.E.2d 588, *appeal dismissed,* 305 U.S. 559 (1938); Massachusetts: Milk Control Bd. v. Gosselin's Dairy, 310 Mass. 174, 16 N.E.2d 641 (1938); Mississippi: Mississippi Milk Comm'n. v. Vance, 240 Miss. 814, 129 So.2d 642 (1961); Missouri: Borden Co. v. Thomason, (Mo. 1962), 353 S.W.2d 735 (1962); Montana: Montana Milk Control Bd. v. Rehberg, 141 Mont. 149, 376 P.2d 508 (1962); New Hampshire: Cloutier v. State Milk Control Bd., 92 N.H. 199, 28 A.2d 554 (1942); New Jersey: Abbott's Dairies v. Armstrong, 14 N.J. 319, 102 A.2d 372 (1954); Como Farms v. Foran, 6 N.J. 306, 71 A.2d 201 (1950); State v. Newark Milk Co., 118 N.J. Eq. 504, 179 Atl. 116 (1935); New York: Noyes v. Erie & Wyoming Farmers Co-op. Corp., 281 N.Y. 187, 22 N.E.2d 334 (1939); Oregon: Savage v. Martin, 161 Ore. 660, 91 P.2d 273 (1939); State *ex rel* Van Winkle v. Farmers Union Co-op. Creamery, 160 Ore. 205, 84 P.2d 471 (1938); Pennsylvania: Rieck-McJunkin Dairy Co. v. Milk Control Comm'n., 341 Pa. 153, 18 A.2d 868 (1941); Colteryahn Sanitary Dairy Co. v. Milk Control Comm'n., 332 Pa. 15, 1 A.2d 775, 122 A.L.R. 1049 (1938); Rohier v. Milk Control Bd., 322 Pa. 257, 186 Atl. 336 (1936); Vermont: State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939); Virginia: Board of Sup'rs of Elizabeth City v. Milk Comm'n., 191 Va. 1, 60 S.E.2d 35 (1950); *appeal dismissed,* 340 U.S. 881 (1950); Reynolds v. Milk Comm'n., 163 Va. 957, 177 S.E. 44 (1934), 179 S.E. 507 (1935); Wisconsin: State v. Marriott, 237 Wis. 607, 296 N.W. 622 (1941), *appeal dismissed,* 314 U.S. 571 (1941); State v. Lincoln Dairy, 221 Wis. 1, 265 N.W. 197 (1936).

In three states the acts have not been contested.[8] South Carolina[9] and Georgia[10] are the only two states in which the acts have been declared invalid and unconstitutional.

The question of the constitutionality of the legislature's power to fix milk prices is not one of novel impression. The constitutionality of price fixing at the retail level was decided by the South Carolina Supreme Court in *Gwynette v. Myers*.[11] Essentially the same issue was decided as in the present case, *i.e.*, "May the State fix the price at which a retail grocer may sell milk?". The court held in a three to two decision that selling milk at the retail level was not affected with a public interest; that regulation of milk prices is beyond the state's police power; and that the statute which purported to give the Dairy Commission power to regulate milk prices at the retail level was to that extent unconstitutional. The opinion stated that the question did not involve public health, safety, or morals; therefore the state had no power to regulate and control the price that one in private business may charge for goods or services where such business is not affected with a public interest. Police power is concerned with public, not private, welfare and governmental intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise.

The court went on to say that whether or not a business has changed into one in which the public has such an interest as to justify its regulation by the state is always a matter for judicial inquiry and that the mere declaration by the legislature that the industry is affected with a public interest is not conclusive. The court cited the following passage by Justice Reynolds who wrote the minority opinion in *Nebbia v. New York*[12] which accurately describes our court's attitude:

> Regulation to prevent recognized evils in business has long been upheld as permissible legislature action. But fixation of the price at which 'A', engaged in an ordinary

8. Louisiana: LA. REV. STAT. ch. 4, §§ 40:898—899 (1950); Maine: REV. STAT. ch. 33, § 4 (1954); North Carolina: *Gen. Stat.* § 106—266.8(10) (1958).
9. Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960).
10. Harris v. Ducan, 208 Ga. 561, 67 S.E.2d 692 (1951). The court in a unanimous decision held that the milk industry was not affected with a public interest; therefore, the legislature was without authority to abridge the right protected by due process clause of the state constitution. Price fixing at all levels was declared invalid and unconstitutional under the statute. However, in 1952 the Georgia legislature enacted a new price control statute which has not been contested.
11. *Supra* note 7.
12. 291 U.S. 502, at 554 (1934).

> business, may sell, in order to enable 'B', a producer, to improve his condition, has not been regarded as within the legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs .... The argument advanced (for price control of the milk industry) .... would support general prescription of prices for .... all the necessities of modern civilization as well as labor, when some legislature finds and declares such action advisable and for the public good. This court has declared that a state may not by legislative fiat convert a private business into a public utility. To adopt such a view, of course, would put an end to liberty under the constitution.

The dissenting opinion in *Gwynette v. Myers*[13] said that the court should only be concerned with the question of whether or not the legislature had the authority to exercise such control over the milk industry and not whether such power should be exercised. Justice Oxner said that the legislature had the authority provided that the act laid down a well-defined and reasonable method for accomplishing its purpose and that the court could only declare the act unconstitutional when it was clearly shown beyond any reasonable doubt that the statute violated some provision of the constitution.

The opinion stated that the presumption of the constitutionality of the legislative enactment had not been refuted.[14]

In a three to two decision, the court in the instant case followed without variation the case of *Gwynette v. Myers*[15] in holding that price fixing at the retail level was unconstitutional under the authority of the police power of the state because the milk industry at the retail level was not affected with a public interest. The court restated its concept of an industry affected with a public interest which is narrowly confined to an industry *directly* affecting the public interest. It appears that the court feels that once the milk is produced and distributed according to State regulations the health requirements which directly concern the public welfare are fulfilled and the duty of the legislature to the people ceases. The court has not ruled on the constitutionality of the power of the Dairy Commission

13. *Supra* note 7.
14. See Sinkler, *Constitutional Law, 1962 Survey of S.C. Law,* 14 S.C.L.Q. 153 (1962).
15. *Supra* note 7.

to fix the price the retailer must pay to the distributor, and the distributor to the producer; consequently the Dairy Commission apparently still has this power until the court rules otherwise.[16]

The dissenting opinion agrees with the majority of states[17] in that price regulations by the state of the milk industry at all levels is constitutional because the milk industry is affected with a public interest.

The economic problems of the dairy industry were discussed in relation to the probable effects of no price control at the retail level. The dissenting opinion accepted the legislative findings which concluded that the milk industry needs regulation from the producer to the consumer in order to insure the public an adequate supply of fresh fluid milk at all times. The dissenting opinion stated that if the State cannot control the retail price, the producers will be susceptible to unfair competitive practices, for example using milk as a "loss leader" product. Such practices will force the producer to meet the competition either by reducing his price[18] or by not selling his milk at all. The latter is impractical because milk has to be sold as soon as it is taken from the cow. Milk cannot be stored until market conditions are favorable. The dissenting opinion is in accord with the following statement from the recent case in Mississippi upholding the milk control act:

> We are unable to say that the legislature is lacking in power, not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the price to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction.[19]

The view taken by all states with the exception of South Carolina and possibly Georgia is the better approach to the problem. The legislature should have the power to control the milk industry and the court should only be in a position to decide whether or not the legislative pronouncement of that power is reasonable and relevant to the policy the legislature is free to

16. S.C. CODE §§ 32-1635, 32-1640.3 (1962).
17. Cases cited note 5, *supra*.
18. See S.C. CODE § 32-1640.3(2) (1962), allowing the distributor or subdistributor to meet in good faith a lawful competitive price, condition or practice.
19. Mississippi Milk Comm'n. v. Vance, 240 Miss. 814, 129 So.2d 642, at 653 (1961).

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adopt. The legislature, through its ability to make a careful study of all the available information, is the most qualified branch of the government to decide what is and is not affected with a public interest.

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