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Constitutional Law -- Police Power -- Price Control of Milk

Thomas H. Leath

loci as controlling, it may accept only the terminology of the foreign law and look to its own decisions for substantive definitions.[20]

Among the American decisions,[21] the results reached and the language employed seem to support the "'vested rights" theory, but on closer examination, particularly of contract cases, it is evident that rulings have been shaped with a view to the result desired and without any real basic theory common to all the cases.[22] It is submitted that the hypothesis of the "vested rights" theory of conflict of laws does not accurately describe the legal phenomena with which it treats and that it involves limitations on the power of the forum which make it impractical and undesirable as a binding rule for the guidance of the courts.[23]

R. MAYNE ALBRIGHT.

Constitutional Law—Police Power—Price Control of Milk.

The New York Milk Control Act prohibited the sale within the state of milk purchased from producers in other states at a price less than the minimum payable to producers within the state.[1] Plaintiff dealer in New York City purchased milk from producers in Vermont at prices below the minimum fixed by the Act, and sold it in New York both in the original containers and in bottles. Plaintiff was denied a dealer's license because he refused to comply with the provisions of the Act and the regulations thereunder. After being threatened with prosecution for trading without a license, plaintiff sued to enjoin enforcement of the Act. A District Court of three judges granted an injunction against the enforcement of the Act as to sales in the original cans but denied relief as to sales in bottles after removal from the cans.[2] On

[20] Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933) (N. C. accepted the Virginia common law rule of "gross negligence" but applied its own definitions to the terms). See a criticism in (1934) 12 N. C. L. REV. 247. For a criticism of the N. C. rule of ordinary negligence, see Brogden, J., dissenting in Norfleet v. Hall, 204 N .C. 573, 169 S. E. 143 (1933). For a proposed statute for N. C., see (1930) 9 N. C. L. REV. 47.

[21] England does not recognize the "vested rights" theory in tort cases but requires the foreign wrong to be such as would have been actionable if committed in England. Phillips v. Eyre, L. R. 6 Q. B. 1 (Ex. 1870).

[22] Stumberg, *supra* note 10, at 184, 186.

[23] Lorenzen, *supra* note 14, at 751.

[1] New York Agriculture and Markets Law, Laws 1934, c. 126, 258m (4), article 21-A; formerly Laws 1933, c. 158, 312 (g), article 25 ("It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.")

[2] Seelig v. Baldwin, 7 F. Supp. 776 (S. D. N. Y. 1934).

appeal, the Supreme Court held an injunction should issue as to all the milk brought in, whether sold in the original packages or in bottles, because the Act had the "aim and effect of establishing an economic barrier against competition with the products of another state" and was "an unreasonable clog upon the mobility of commerce."[3]

It was established in *Nebbia v. New York*[4] that a state could fix milk prices to be paid the producer, the wholesaler, and the retailer. The Supreme Court did not base its decision on the existence of an emergency in the industry, and neither did it resort to the old doctrine that the business "was affected with a public interest;" it held that price control, like any other regulation, "is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." Thus the prospect of saving the dairy industry from bankruptcy and of assuring New York an ample supply of wholesome milk necessary to its public health appeared very bright until the principal case was decided. In this latter case the court was of the opinion that the purpose of the legislation was to restrict competition from outside the state. Though it may not appear on the face of the Act, the real concern and the underlying purpose of the legislation was to assure the people of New York a sufficient quantity of milk, whether it be produced within or without the state. To accomplish this purpose the Act simply attempted to give the producers outside of New York the same protection accorded the local producers. The system of price control approval in the *Nebbia Case* is bound to fail now that the Commerce Clause has been invoked to deny protection to the producers outside the regulating state. Forthwith the dealers will begin purchasing outside the state at lower prices in order to increase their profits. The New York producers will have to cut prices in an effort to regain lost business; this will result in an orgy of unbridled competition the con-

[3] Seelig v. Baldwin, 55 Sup. Ct. 497 (1935).

[4] 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934). This decision was concerned with an intrastate situation and did not touch on the problem involved in the principal case. In approving the New York Milk Control plan the court declared, at page 538, that if the legislature "concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threatened ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other." And again, at page 537, the court stated, "So far as requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that legislation adopted to its purpose."

sequences of which will be a bankrupt industry, a failure of the milk supply from without as well as from within the state, and injury to public health.[5]

It is imperative that some means be devised to preserve a constant supply of milk and this depends upon saving the producers from economic ruin. It is possible that New York might accomplish this end by imposing a sales tax upon the milk dealers equal to the differential between the price actually paid the producer, whether he be in Vermont or New York, and the minimum price fixed by law. Such a tax would apply to all milk whether sold in the original package or not.[6] There would be no discrimination against the out of state producer since the dealer selling imported milk would pay the same tax required of the dealer in domestic milk who failed to pay the minimum price.[7] Some

[5] At the time the principal case was tried New York received thirty percent of its milk from outside the state. The statute controlling prices will fall short of its goal when even this percentage of the producers have no protection. It is only natural that the dealers should buy outside the state to increase their profits. The result of this is that the producers outside the state who supply New York will greatly increase in number and will compete with each other to force the price down. The New York producers will not find a market for their milk when the imported milk may be sold for less than the minimum fixed price. New York will be forced to abandon her present price control system and this will result in ruinous competition between the increased number of producers supplying New York from outside the state and the local producers. The producer received only two cents per quart for milk before the legislature determined to fix minimum prices in order to prevent destruction of the industry and to safeguard the consumers. Unless some control measure is sustained, prices will drop below the old figure and the producers without as well as within New York will be bankrupt.

[6] Sonneborn Brothers v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643, 67 L. ed. 1095 (1923). The original package doctrine was first applied in Brown v. Maryland, 25 U. S. 419, 6 L. ed. 679 (1827) and it was held that the foreign imports could not be taxed by the states so long as they remained in the hands of the importer and in the original package. It was implied in that early case that domestic imports could not be taxed so long as they remained in the original package but this *obiter* has been overruled by later cases. *Infra* note 7.

[7] Woodruff v. Parham, 75 U. S. 123, 19 L. ed. 382 (1868) (The defendant auctioneer was engaged in selling goods brought in from another state in the original package, as well as local goods. The court held that a tax which did not discriminate against sales of goods from other states, and which was imposed upon sales of all merchandise, whether the origin of the goods was in the local state or in another state, was not "an attempt to fetter commerce among the States," and that it was applicable to the goods sold in the original package).

Hinson v. Lott, 75 U. S. 148, 19 L. ed. 387 (1868) (Alabama law imposed a levy of fifty cents per gallon before it should be lawful for a dealer to introduce liquor *into* the state for sale. This was held not an attempt to burden interstate commerce because by another section of the same law every distiller in the state was bound to pay fifty cents per gallon. The two sections were complementary in order to "make the tax equal on all liquors sold in the State.")

The possible objection that such a tax would burden interstate commerce seems to be discredited in Sonneborn Brothers v. Cureton, 262 U. S. 506, 43 Sup. Ct. 643, 67 L. ed. 1095 (1923). A tax on the sale of oil in the original package was sustained. In considering the rule followed in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 31 L. ed. 128 (1890) as to the necessity of sale to complete importation to sustain the view that the sale was a part of interstate commerce, the court pointed out the radical difference between state legislation preventing any

practical objections to such a plan suggest themselves at once: there would be difficulty in establishing the differential between the price actually paid the producer and the fixed minimum price for the purpose of measuring the tax on the individual transaction, also purchasers in the original container could easily avoid the tax by making the purchase outside the state and having the milk shipped direct to them instead of purchasing from the local dealer who has brought it into the state.[8] Thus it seems that the state acting alone cannot effectively legislate to assure itself of an ample supply of milk.

If the holding in *Hammer v. Daggenhart*[9] is followed, it is doubtful that Congress could control the price of milk by excluding it from interstate commerce when the producer was not paid the minimum price. Perhaps there can be no effective control unless Congress can be prevailed upon to divest milk of its interstate character as it has done in the cases of intoxicating liquors,[10] oleomargarine,[11] and convict-made goods,[12] so that the laws of the state may apply when the milk is shipped into the state for sale and use therein.

THOMAS H. LEATH.

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sale at all accompanied by forfeiture of the merchandise, and a provision for an occupational tax applicable to all sales of such merchandise whether domestic or brought in from another state. It was determined that the first clearly interferes with or destroys the commerce, while the second merely puts the merchandise on an equality with all the other and is no hindrance to introducing the merchandise into the state for sale upon the basis of equal competition.

[8] In such a situation the sale would take place in the producing state and the receiving state would have no sale to tax.

[9] 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101 (1918). This case held unconstitutional the effort of Congress to regulate the hours of labor of children by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities which they helped to produce. This was held to be an attempt to regulate an intrastate matter which was outside the power of Congress. An attempt on the part of Congress to fix the price of milk by refusing to allow it to be shipped in interstate commerce on the ground that the producer did not receive the minimum price seems closely analogous and would likely be held unconstitutional.

The federal courts are divided over the validity of the federal control over milk prices established under the Agricultural Adjustment Act, 48 STAT. 31-41 (1933), 7 U. S. C. A. §§601-19 (1934 Supp.). The statute was approved in the following cases: Economy Dairy Co. v. Wallace, (Leading Decisions, IX-N. R. A.) (Sup. D. C. 1933) (This case held that the statute was applicable even though the milk did not cross a state line); Capital City Milk Producers' Assn. v. Wallace, (Leading Decisions, IX-N. R. A.) (Sup. D. C. 1933); United States v. Shissler, 7 F. Supp. 123 (N. D. Ill. 1934); United States v. Dwyer, (Leading Decisions IX-N. R. A.) (D. C. Mass. 1934). The statute was held invalid in Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N. D. Ill. 1934). It was held in the following cases that the statute did not apply where the milk was not in interstate commerce, Mellwood Dairy Co. v. Sparks, (Leading Decisions IX-N. R. A.) (W. D. Ky. 1934); Royal Farms Dairy, Inc. v. Wallace, 8 F. Supp. 975 (D. C. D. Md. 1934).

[10] The Wilson Act, 26 STAT. 313 (1890), 27 U. S. C. A. §121 (1928); The Webb-Kenyon Act, 37 STAT. 699 (1913), 27 U. S. C. A. §122 (1928).

[11] 32 STAT. 193 (1902), 21 U. S. C. A. §25 (1927).

[12] The Hawes-Cooper Act, 45 STAT. 1084 (1929), 49 U. S. C. A. §65 (1934