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Constitutional Law - Interstate Commerce - Municipal Corporations - Milk Ordinances - Validity

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It is submitted that social policy would be served better if the second discharge had been given effect. Under the spirit of the Bankruptcy Act some definite end to litigation must arrive. To hold otherwise may cause undue hardship on former bankrupts who have begun business anew, believing that their old debts had been discharged years before.

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MUNICIPAL CORPORATIONS—MILK ORDINANCES—VALIDITY. An ordinance of Madison, Wisconsin, prohibited the sale of milk (a) collected from farms located more than 25 miles, or (b) pasteurized at plants located more than 5 miles, from the central square of the city. Plaintiff Dean Milk Company, an Illinois corporation, applied for but was denied a license to sell its milk in Madison, solely because its sources and pasteurization plants were located in northern Illinois beyond the limits prescribed by the ordinance. Pointing out that its milk is inspected and rated "Grade A" by both Chicago and United States Public Health inspectors, the Dean Milk Company contended that both sections of the Madison ordinance violate the Commerce Clause and the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the United States, three justices dissenting, *held* that the challenged sections impose an undue burden upon interstate commerce and are therefore unconstitutional. *Dean Milk Co. v. City of Madison,* 71 Sup. Ct. 295 (1951). "In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce."[1]

The Court objected not to the purppse of the ordinance—to obviate health dangers created by sale of milk from remote areas—but rather to the means by which the city hoped to achieve its purpose. Both the Madison Health Commissioner and the sanitarian of the Wisconsin State Board of Health agreed that there were other workable alternatives, and the Court, in dictum, declared these preferable to the Madison ordinance. First, the city could accomplish satisfactory inspection of milk from outlying pasteurization plants by having its own officials conduct inspections and by charging "the actual and reasonable cost of such inspection to the importing producers and processors."[2] Second, the city could adopt a milk regulatory program based on section 11 of the Model Milk Ordinance recommended by the United States Public Health Service, which in effect permits sale of milk from other localities whose inspection standards are equivalent.[3]

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[1] *Id.* at 298.

[2] *Id.* at 298.

[3] Section 11 of the Model Milk Ordinance recommended by the United States Public Health Service reads, in part, as follows: "Milk and milk products from points beyond the limits of routine inspection of the city of . . . . may not be sold in the city of . . . . or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

A municipal corporation exercises its authority, generally, through powers derived from and granted to it by the state. It has unquestioned authority within the scope of its police power to pass ordinances affecting and regulating public health and safety, especially as regards the milk industry,[4] but in so doing, its ordinances must not be a direct or undue burden on interstate commerce.[5] The exercise of this authority must be reasonable and appropriate,[6] not arbitrary, capricious, or discriminatory.[7] It cannot be used to prevent a person from engaging in a lawful business.[8] The milk company involved in the instant case has successfully challenged similar ordinances promulgated by Illinois cities.[9] It should be noted, however, that the ordinances invalidated in these Illinois decisions violated an Illinois statute[10] limiting municipal jurisdiction to places within one-half mile of the corporate limits, while the decision in the instant case is bottomed solely upon an unwarranted interference with interstate commerce. Obviously the decision under discussion is not authority for a situation where milk sources and pasteurization plants are within the same state as the challenged municipal ordinance.

The Supreme Court of Minnesota has declared unconstitutional an ordinance of the City of Minneapolis, requiring that all milk sold

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[4] Numerous cases sustain regulation of the milk industry in the interests of public health and safety. See, *e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (labelling the milk industry as "one clothed with a public interest"); Carpenter v. City of Little Rock, 101 Ark. 238, 142 S.W. 162 (1911); City of Chicago v. Chicago & N.W. Ry., 275 Ill. 30, 113 N.E. 849 (1916) (regulated temperature of milk cans); State v. Nelson, 66 Minn. 166, 68 N.W. 1066 (1896); City of St. Louis v. Liessing, 190 Mo. 464, 89 S.W. 611 (1905); Cofman v. Ousterhaus, 40 N.D. 390, 168 N.W. 826 (1918) (holding that North Dakota's creamery business is "affected with a public interest"); New York *ex rel.* Lieberman v. Van de Carr 175 N.Y. 440, 67 N.E. 913, *aff'd*, VTT U.S. 552 (1905); Korth v. Portland, 123 Ore, 180, 261 Pac. 895 (1927). *But cf.* Sheffield Farms Co. v. Seaman, 114 N.J.L. 455, 177 Atl. 372 (1935).

[5] Miller v. Williams, 12 F. Supp. 236, 242 (D. Md. 1935).

[6] Natural Milk Producers Ass'n v. San Francisco, 20 Cal. 2d 101, 124 P.2d 25, 29 (1942), *vacated as moot and cause remanded*, 317 U.S. 423 (1942); Koy v. Chicago, 263 Ill. 122, 104 N.E. 1104 (1914); People *ex rel.* Lodes v. Dep't of Health, 189 N.Y. 187, 82 N.E. 187 (1907); Stephens v. Oklahoma City, 150 Okla. 199, 1 P.2d 367 (1931).

[7] Grant v. Leavell, 259 Ky. 267, 82 S.W.2d 283, 286 (1935); State *ex rel.* Larson v. Minneapolis, 190 Minn. 138, 251 N.W. 121 (1933); City of Abilene v. Tennessee Dairies, 225 S.W.2d 429 (Tex. Civ. App. 1949).

[8] Meridian, Ltd. v. Sippy, 54 Cal. App. 2d 214, 128 P.2d 884, 889 (1942). *But cf.* Duffcon Concrete Products v. Borough of Cresskill, 1. N.J. 509, 64 A.2d 347 (1949).

[9] Dean Milk Co. v. City of Elgin, 405 Ill. 204, 90 N.E.2d 112, 114 (1950); Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827, 830 (1949); Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E.2d 751 (1949).

[10] Ill. Rev. Stat. c. 24, §§ 23-40-63 (1947). For discussions of the extraterritorial effect of city ordinances, see Note, 14 A.L.R.2d. 103 (1949); and see Anderson, *The Extraterritorial Powers of Cities*, 10 Minn. L. Rev. 475 and 564 (1926), at 572, where it is stated, "The principal purpose of setting municipal boundaries is to set a territorial limit to the city's governmental powers. Municipal regulations are, therefore, felt primarily by the local inhabitants. Both indirectly and directly, however, a great many city ordinances have an appreciable extraterritorial effect."

within the city be pasteurized within the city limits.[11] A study of the cases indicates that most ordinances are unsuccessful which attempt to designate territorial limits, from outside of which the importation of milk is prohibited: *e. g.*, a 25 mile routine inspection zone,[12] 10 miles from the city limits,[13] and the boundaries of the immediate county.[14] Other efforts at regulation, nearly all of them successful, include inspection of the pasteurization plant,[15] inspection of all milk sold within city limits,[16] inspection of herds,[17] tuberculin testing of herds,[18] and limitation of sale to pasteurized milk only.[19]

It is not unlikely that many cities in North Dakota have ordinances resembling the ordinance of Madison, Wisconsin, which the instant case has declared invalid as an undue burden on interstate commerce. The City of Grand Forks, North Dakota, for example, in section 14-0203, Chapter 14 of the Revised Ordinances of 1948, establishes a 15 mile limit for maximum location of a pasteurization plant offering milk for sale within the city, but there is an additional provision stating that pasteurization plants located beyond the 15 mile limit ". . . . shall be required to pay the actual cost of the inspection service to such producers, which said cost is hereby fixed and determined at the sum of five dollars ($5.00) per inspection, plus five cents (5c) per mile for transportation beyond the corporate limits of the City of Grand Forks." The weight of the cases would appear to sustain this ordinance.

The decision of the instant case will have a determining influence on the interpretation and revision of many existing milk ordinances. It modifies the general rule that ordinances and statutes enacted under the police power are presumptively constitutional if reasonably related to the protection of the public health, safety, and welfare.[20] Henceforth, where such legislation burdens interstate commerce, it will be struck down if reasonable alternatives are available which do not so interfere with interstate commerce.

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[11] State *ex rel.* Larson v. City of Minneapolis, 190 Minn. 138, 251 N.W. 121 (1933), Note, 18 Minn. L. Rev. 841 (1934); *accord*, Van Gammeren v. City of Fresno, 51 Cal. App. 2d 235, 124 P.2d 621 (1942); La Franchi v. City of Santa Rosa, 8 Cal. 2d 331, 65 P.2d 1301 (1937). *Contra*: Witt v. Klimm, 97 Cal. App. 131, 274 Pac. 1039 (1929). *Cf.* Lang's Creamery v. City of Niagara Falls, 251 N.Y. 343, 167 N.E. 464 (1929).

[12] Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827 (1949) (invalid).

[13] Higgins v. City of Galesburg, 401 Ill. 87, 81 N.E.2d 520 (1948). *Contra*: Dyer v. City of Beloit, 250 Wis. 613, 27 N.W.2d 733 (1947), *judgment vacated and remanded as moot*, 333 U.S. 825 (1948).

[14] Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E.2d 751 (1949) (invalid); Moultrie Milk Shed v. City of Cairo, 206 Ga. 348, 57 S.E.2d 199 (1950) (unconstitutional as discriminatory against plants located outside of the county.)

[15] Korth v. Portland, 123 Ore. 180, 261 Pac. 895 (1927) (valid).

[16] Deems v. Mayor of Baltimore, 80 Md. 164, 30 Atl. 648 (1894) (valid); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903) (valid).

[17] State v. Nelson, 66 Minn. 166, 68 N.W. 1066 (1896).

[18] Adams v. City of Milwaukee, 228 U.S. 572 (1913); Dorssom v. City of Atchison, 155 Kan. 225, 124 P.2d 475 (1942).

[19] City of Phoenix v. Breuninger, 50 Ariz. 372, 72 P.2d 580 (1937).

[20] 6 McQuillin, Municipal Corporations § 20.06 (3d ed. 1949).