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MILK CONTROL LAWS IN THE UNITED STATES

BY CHARLES S. MANGUM, JR.*

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INTRODUCTION

The first substantial impetus for state economic control of milk and its derivative products came about as the result of the Great Depression of the fourth decade of the present century. Out of the vicissitudes of this period came a demand for greater state control of industry and a desire to stabilize the economy. Politicians sought ways of preventing great fluctuations in the business cycle. The farmers had been badly hurt and legislators and economists alike were desperately trying to find some way of alleviating their distressing plight. Many tenants found it impossible to make a living on the farms and started the great migration to the urban centers, thereby creating an excessive labor supply and increasing the overloaded bread lines. Prices of farm commodities, including milk and its derivatives, sank below the cost of production in many regions, and there was cutthroat competition with respect to those markets that had not vanished. There was real suffering among certain segments of the population. In an effort to bring some order out of the economic chaos the New Deal was born. The National Recovery Administration and its state counterparts represented an effort to establish a degree of government control over most of the nation's economy. It was only natural that conservative elements in the population should object to such drastic changes in the doctrines concerning the relations of business and government. Typical of this conservatism was the attitude of a majority of the Justices of the United States Supreme Court and some of the state courts as well. The philosophy of the past century was very much in evidence in the judicial utterances of many federal and state judges in the early days of the New Deal. Much of the conflict of this period came about as the result of the reluctance of judges to deviate from time-honored concepts of constitutional relationships.

Against this background of economic disaster and conflict, public sentiment arose for a controlled economy and a degree of government supervision which would have been impossible a few years earlier. The cutthroat competition in the dairy industry was perhaps worse than in industries whose products were less perishable. Even before the Depression there had been some effort on the part of states and municipalities to set up varied forms of regulations by statute or ordinance. Thus Maine legislators enacted an early statute requiring milk dealers to pay for purchases semi-monthly and providing for punishment by fine in case of default. This statute was ruled unconstitutional as class legislation violative of the equal protection clause of the fourteenth amendment.¹ It was said that classifications of businesses and occupations, to be valid, must be based upon a real and not an arbitrary

¹ *State v. Latham*, 115 Me. 176, 98 Atl. 578 (1916).

difference. On the other hand, it was held that a Baltimore ordinance regulating the production and distribution of milk and milk products in the interests of cleanliness and health was valid under the city charter and not unconstitutional as depriving milk dealers of their property without due process of law.² The court ruled that there was no improper delegation of authority and no lack of proper hearing or notice. It made the additional point that the ordinance was not invalid because it would confer upon the Commissioner of Health too much discretion in granting, refusing, or revoking dealers' permits. These cases illustrate types of issues which have continually arisen since milk control became a problem of increasing importance in the fast changing economy of the nation.

The typical milk control law, whether it sets up an independent agency like a milk commission or establishes a division in an existing agency such as a state Department of Agriculture, has its inception in a time of economic instability. For this reason legislators may enact statutes which are not fully protective of the interests and rights of all groups concerned. Thus the producer, consumer, or even the distributor may be neglected in some manner by a statute primarily enacted to alleviate the plight of just one group. Since the consumers lack organization and have no lobby to guard their interests, their effective participation in the preparation of control legislation is practically nil, although the control agencies usually have members who, nominally at least, are appointed to protect their rights. With this situation definitely in mind a group of Georgia milk consumers filed a petition asking that the Milk Control Board be enjoined from acting under a statute which was alleged not to be fair in this respect. The petition averred that the board was composed of two producer-distributors, one ordinary distributor, one state licensee, and only one consumer. It was claimed that consumer representation was inadequate and that the board was therefore not impartial. The prices set by the board were claimed to be excessive and unlawful. It was alleged that the concept of due process of law had been violated. However, the state Supreme Court would listen to no such argument and affirmed the lower tribunal's decision dismissing the petition.³ A very real and disturbing disregard for democratic principles is evident here. Justice would seem to demand that the regulations governing an industry's relations with consumers should not be made and enforced by the industry's representatives.⁴ A sounder view was taken in a case involving a Michigan statute setting up an administrative board consisting of the Commissioner of Agricul-

² Creaghan v. Mayor of Baltimore, 132 Md. 442, 104 Atl. 180 (1918).

³ Fleisher v. Duncan, 195 Ga. 309, 24 S.E.2d 15 (1943).

⁴ See Carter, *State Regulation of Milk in the Southeast*, XXIV So. ECON. JOUR. 63 (1957).

ture and four other members to be appointed by the Governor, the state Senate being given the right to confirm or disapprove the appointees. The act provided that two of the board members were to be milk producers not connected with the distributive aspects of the industry except as representatives of bona fide producer co-operative associations. Both of these producers were required to earn their principal livelihood from dairies. One of the remaining members was to be a distributor and the other a consumer not connected in any way with the production or distribution of milk. This portion of the statute was declared to be fatally defective in that it failed to provide for an impartial board.⁵ Here consumers were not the only group discriminated against, and this fact might very well be significant.

While certain affected persons may not have proper representation on the controlling agencies, they do not lack the protection of procedural safeguards. A person coming before an administrative body in charge of a milk control program has a right to a full, fair, and orderly hearing, and the proceedings must follow prescribed rules.⁶ There must be a degree of formality and a detailed record should be kept of anything relevant to the controversy.⁷ The opportunity to present evidence and to sustain a challenge through argument is essential, and the action taken cannot be based upon undisclosed evidence or information which the parties have had no chance to explain, rebut, or test for trustworthiness.⁸ However, the technical rules surrounding the admissibility of evidence in courts of law are not to be rigidly enforced.⁹ There must be a true attempt to disclose the facts and the findings can be supported only if they have a substantial and reasonable basis in the evidence.¹⁰

Where there is evidence to support administrative findings no court should interfere, but there would be a different situation where no such testimony existed.¹¹ There is nothing in the usual milk control statute to indicate any intention to make administrative findings final. It would appear to be beyond question that any attempt to make such findings final would be invalid. A Michigan statute stating their finality and yet providing for a review of questions of law by the state Supreme

⁵ Milk Marketing Bd. v. Johnson, 295 Mich. 644, 295 N.W. 346 (1940).

⁶ Buhler v. Department of Agriculture and Mkts., 229 Wis. 133, 280 N.W. 367 (1938).

⁷ Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 1 A.2d 775 (1938).

⁸ National Dairy Prods. Co. v. Milk Control Bd., 133 N.J.L. 491, 44 A.2d 796 (1945).

⁹ Milk Control Comm'n v. United Retail Grocers' Ass'n, 361 Pa. 221, 64 A.2d 818 (1949); Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 1 A.2d 775 (1938).

¹⁰ National Dairy Prods. Co. v. Milk Control Bd., 133 N.J.L. 491, 44 A.2d 796 (1945).

¹¹ White Way Pure Milk Co. v. Alabama State Milk Control Bd., 265 Ala. 660, 93 So. 2d 509 (1957).

Court has been held not to violate the concept of due process.¹² Of course the findings here would not be final at all, since the term "questions of law" would include such questions as whether there was competent evidence to support the findings. One court stated that judicial review is quite well established and that erroneous findings cannot be final.¹³ It remarked that the issues should be decided judicially and not arbitrarily.

Proper notice of a hearing must be given, and the methods used by administrative officials in notifying parties concerned may sometimes be questioned. The action of California agricultural officials in proceeding with the formulation of a marketing and stabilization plan for the milk industry in response to an expression of opinion obtained by the sending of individual postcards accompanied by plan-supporting letters was said to satisfy the demands of procedural due process.¹⁴ During a serious emergency in New York milk officials devised a plan to notify three thousand milk dealers by a press release and the posting of a notice in the office of the Milk Control Board. Under the circumstances of emergency this notice was held to be sufficient.¹⁵

The agencies established for the regulation and/or supervision of the milk industry can be classified into several well-defined groups. In a few states there are two or more bodies, some with overlapping and interrelated functions. Special supervisory agencies are set up under the federal program and the laws of twenty-four states. Most of the jurisdictions in this category have milk commissions or similar bodies. In this classification are the agencies of the federal government¹⁶ and the states of Alabama,¹⁷ Florida,¹⁸ Georgia,¹⁹ Maine,²⁰ Massachusetts,²¹ Montana,²² Nevada,²³ New Hampshire,²⁴ New Jersey,²⁵ New York,²⁶ North Carolina,²⁷ Pennsylvania,²⁸ Rhode Island,²⁹ South Carolina,³⁰

¹² Milk Marketing Bd. v. Johnson, 295 Mich 644, 295 N.W. 346 (1940).

¹³ Andes Co-op. Dairy Co. v. Baldwin, 238 App. Div. 726, 266 N.Y. Supp. 18 (1933).

¹⁴ Ray v. Parker, 15 Cal. 2d 275, 101 P.2d 665 (1940).

¹⁵ Baldwin v. Dellwood Dairy Co., 150 Misc. 762, 270 N.Y. Supp. 418 (Sup. Ct. 1934).

¹⁶ 49 Stat. 753 (1935), as amended, 7 U.S.C. § 608c(7C) (1958).

¹⁷ ALA. CODE tit. 22, § 207 (Supp. 1955).

¹⁸ FLA. STAT. ANN. § 501.03 (Supp. 1959).

¹⁹ GA. CODE ANN. § 42-525 (1957).

²⁰ ME. REV. STAT. ANN. ch. 33, § 2 (Supp. 1959).

²¹ MASS. ANN. LAWS ch. 94A, § 2 (1954).

²² MONT. REV. CODES ANN. § 27-404 (Supp. 1959).

²³ NEV. REV. STAT. §§ 584.420 (Supp. 1959).

²⁴ N.H. REV. STAT. ANN. §§ 183:1, :3 (1955).

²⁵ N.J. REV. STAT. §§ 4:1-24 to -41 (1959).

²⁶ N.Y. AGRIC. & MKTS. LAWS §§ 252.

²⁷ N.C. GEN. STAT. § 106-266.7 (Supp. 1959).

²⁸ PA. STAT. ANN. tit. 31, § 700j-201 (1958).

²⁹ R.I. GEN. LAWS ANN §§ 21-4-2 (1956).

³⁰ S.C. CODE § 32-1610.1 (Supp. 1959).

South Dakota,³¹ Vermont,³² Virginia,³³ and Washington.³⁴ In another group are the states which have milk or dairy commissioners, including Arizona,³⁵ Connecticut,³⁶ Kansas,³⁷ New Mexico,³⁸ North Dakota,³⁹ and Tennessee.⁴⁰ In California⁴¹ and Texas⁴² local boards operate under the state departments of agriculture, a practice somewhat similar to the set-up in Utah where the administration is left in the hands of the State Board of Agriculture⁴³ while the local boards handle the marketing⁴⁴ with the state board in a supervisory capacity.⁴⁵ Idaho has a Director of Dairying⁴⁶ but puts inspection in the hands of the Departments of Health⁴⁷ and Agriculture⁴⁸ while investing the Department of Health alone with the licensing power.⁴⁹ Iowa has a Dairy Industry Commission⁵⁰ with promotional and statistical duties and another agency with certain inspection duties which is known as the State Dairy Association.⁵¹ The established control agencies are variously related to pre-eminent authorities such as departments of agriculture under the federal statute and in California, New York, North Carolina, North Dakota, and Tennessee, and there is a special departmental dairy division in Oklahoma.⁵² State departments of agriculture have a general and to a certain degree varying authority over the milk industry in another group of states. This power takes the form of general supervision and sanitary regulation in Colorado,⁵³ Illinois,⁵⁴ Louisiana,⁵⁵

³¹ S.D. CODE §§ 4.2202 (Supp. 1952).

³² VT. STAT. ANN. tit. 6, ch. 2503 (1958).

³³ VA. CODE ANN. §§ 3-347 (Supp. 1958).

³⁴ WASH. REV. CODE § 15.44.020 (Supp. 1959).

³⁵ ARIZ. REV. STAT. ANN. §§ 3-602 (1956).

³⁶ CONN. GEN. STAT. REV. § 22-206 (1958). In 1959 the functions of the administrator were transferred to the Commissioner of Agriculture. CONN. GEN. STAT. REV. § 22-206a (Supp. 1959).

³⁷ KAN. GEN. STAT. ANN. § 75-1401 (1949).

³⁸ N.M. STAT. ANN. § 52-1-13 (Supp. 1959). In 1959 the duties of the State Dairy Commissioner were transferred to the Board of Regents of the New Mexico College of Agriculture and Mechanical Arts, operating within the State Department of Agriculture.

³⁹ N.D. REV. CODE §§ 4-1701, -1702 (1943).

⁴⁰ TENN. CODE ANN. § 44-2007 (Supp. 1959).

⁴¹ CAL. AGRIC. CODE § 4251.

⁴² TEX. REV. CIV. STAT. ANN. art. 165-2, § 3 (1959).

⁴³ UTAH CODE ANN. § 5-2-4 (1953).

⁴⁴ UTAH CODE ANN. §§ 5-3-8 to -10 (1953).

⁴⁵ UTAH CODE ANN. §§ 5-3-2 to -7, -9 (1953).

⁴⁶ IDAHO CODE ANN. § 37-501 (1948).

⁴⁷ IDAHO CODE ANN. § 37-302 (1948).

⁴⁸ IDAHO CODE ANN. § 37-401 (Supp. 1959).

⁴⁹ IDAHO CODE ANN. §§ 37-802, -804 (1948).

⁵⁰ IOWA CODE ANN. §§ 179-2 (1949).

⁵¹ IOWA CODE ANN. §§ 178-1 (1949).

⁵² OKLA. STAT. ANN. tit. 2, § 7-1 (Supp. 1959).

⁵³ COLO. REV. STAT. ANN. § 7-8-1 (1953).

⁵⁴ ILL. ANN. STAT. ch. 56½, § 238 (Smith-Hurd 1951).

⁵⁵ LA. REV. STAT. ANN. §§ 40:882, :883 (1951), as amended, LA. REV. STAT. ANN. § 40:882 (Supp. 1959).

Maryland,⁵⁶ Michigan,⁵⁷ Minnesota,⁵⁸ Mississippi,⁵⁹ Missouri,⁶⁰ Nebraska,⁶¹ Ohio,⁶² Oregon,⁶³ West Virginia,⁶⁴ Wisconsin,⁶⁵ and Wyoming.⁶⁶ The State Board of Health seems to be entrusted with supervisory authority over the milk industry in Arkansas⁶⁷ and Indiana⁶⁸ and to a certain extent in Maryland,⁶⁹ Oregon,⁷⁰ and Texas.⁷¹ Medical milk commissions have been established in a few states.⁷² As far as the administrative control of the milk industry is concerned, there has been little or no effort in Kentucky on a statewide basis.

DEFINITIONS OF TERMS

When certain terminology is employed in a milk control statute, it becomes important to ascertain its meaning and the circumstances surrounding its use. The industry has its own jargon which is unintelligible to those not connected with the production, handling, or distribution of milk or its derivative products. The usual statute is replete with terms which require statutory and judicial definition and interpretation. The same is true of statutes governing the industry in states other than those having milk control laws.

The construction of terms employed in such statutes tends to be fairly strict, as is shown by an interpretation of the words "producer" and "dealer" used in an Alabama price-fixing provision as not including one who sold milk to customers who solicited its purchase at the door and furnished their own containers.⁷³ A Louisiana court held that one who had once owned a herd of cattle, but whose animals had been reduced to a few heifers not yet in the milking stage, was not actually engaged in the "production of milk" in such a manner as to make him eligible for membership on a state milk administrative agency.⁷⁴ In a now defunct Indiana milk control statute the term "producer-distrib-

⁵⁶ MD. ANN. CODE art. 66c, §§ 440-42 (1957).

⁵⁷ MICH. STAT. ANN. § 12.615, .615(1) (1958).

⁵⁸ MINN. STAT. ANN. §§ 17.01 to .04 (1946), as amended, MINN. STAT. ANN. §§ 17.01, .013 (Supp. 1959).

⁵⁹ MISS. CODE ANN. § 4560-41 (1957).

⁶⁰ MO. ANN. STAT. § 196.535 (Supp. 1959).

⁶¹ NEB. REV. STAT. § 81-229 (1958).

⁶² OHIO REV. CODE §§ 917.02, .03 (Anderson 1954).

⁶³ ORE REV. STAT. §§ 616.005 to .025 (Supp. 1955).

⁶⁴ W. VA. CODE ANN. § 2038 (1955).

⁶⁵ WIS. STAT. ANN. § 93.07(17), (20), (24) (a) (1957).

⁶⁶ WYO. COMP. STAT. ANN. §§ 11-15, 35-283 (1957).

⁶⁷ ARK. STAT. ANN. § 82-915 (1947).

⁶⁸ IND. ANN. STAT. § 35-2505 (1949); IND. ANN. STAT. § 35-2504 (Supp. 1959).

⁶⁹ MD. ANN. CODE art. 43, § 575 (1957).

⁷⁰ ORE. REV. STAT. §§ 616.005 to .025 (Supp. 1955).

⁷¹ TEX. REV. CIV. STAT. ANN. art. 4420 (1951).

⁷² *E.g.*, MICH. STAT. ANN. §§ 14.181 to .191 (1956); N.J. STAT. ANN. §§ 24:10-77 to -88 (1940).

⁷³ *Taylor v. State ex rel. Alabama State Milk Control Bd.*, 237 Ala. 178, 186 So. 463 (1939).

⁷⁴ *Ricks v. Louisiana Milk Comm'n*, 32 So. 2d 643 (La. Ct. App. 1947).

tor" was employed as referring to one controlling a dairy herd who put milk in bottles or other containers, who cooled or otherwise processed the product, and who sold or distributed such milk. The words "such milk" thus used were interpreted as not referring to just any milk produced by someone controlling a herd, but as indicating milk placed in containers, cooled or otherwise. Hence it was held that a farmer selling milk in bulk without making any processing effort was not a producer-distributor and therefore could not be classified as a "milk dealer" within a statute connecting the two applications and requiring a license.⁷⁶ In another instance a California court said that the term "distributors" used in milk marketing legislation refers to distributors of fluid milk and cream and does not include those who manufacture or sell dairy products of other kinds.⁷⁶ In regard to rules and regulations of administrative agencies like milk control boards a similar strict construction can be said to be the proper one.⁷⁷

A basic term used in the statutes under consideration is the term "milk" itself. By far the greater number of state statutes define this term as referring to the cow's or other animal's "lacteal secretion."⁷⁸ Two states of this group vary the definition somewhat in other statutes,⁷⁹ and in several others different definitions exist.⁸⁰

A Virginia statute described a market as any city, county, or village in the jurisdiction along with the surrounding territory. As here employed the term "market" was held to refer only to territory within state boundaries.⁸¹

Sometimes a term will be used differently in conjunction with two or more other terms. Thus the phrase "orders and regulations" has

⁷⁶ Milk Control Bd. v. Pursifull, 219 Ind. 396, 38 N.E.2d 246 (1941).

⁷⁷ In re Willing, 12 Cal. 2d 591, 86 P.2d 663 (1939).

⁷⁸ Appeals of Port Murray Dairy Co., 6 N.J. Super. 285, 71 A.2d 208 (1950).

⁷⁹ ALA. CODE tit. 2, § 187; tit. 22, § 206 (1940); ARK. STAT. ANN. § 82-912 (1947); CAL. AGRIC. CODE § 742; ILL. ANN. STAT. ch. 56½, § 221 (Smith-Hurd 1951); IND. ANN. STAT. § 15-1726 (1950); KAN. GEN. STAT. ANN. § 65-707 (Supp. 1959); MICH. STAT. ANN. § 12.601 (1956); MISS. CODE ANN. § 4537 (1957); MO. ANN. STAT. § 196.525(37) (Supp. 1959); NEB. REV. STAT. § 81-230(7) (1958); N.H. REV. STAT. ANN. § 184:36 (1955); N.J. STAT. ANN. § 24:10-1 (Supp. 1959); N.J. STAT. ANN. § 4:12A-1 (1959); N.M. STAT. ANN. § 52-1-18 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS § 46; N.C. GEN. STAT. § 106-266.6 (Supp. 1959); N.D. REV. CODE § 4-18A01 (Supp. 1957); OKLA. STAT. ANN. tit. 63, § 225-1 (Supp. 1959); ORE. REV. STAT. § 621.055 (Supp. 1957); S.C. CODE, Rules & Regs. p. 186 (Supp. 1959); S.D. CODE § 22.0501 (Supp. 1952); TENN. CODE ANN. § 52-303(5) (1955); TEX. REV. CIV. STAT. ANN. art. 165-2, § 2(e) (1959); UTAH CODE ANN. § 4-21-1 (1953); VA. CODE ANN. § 3-346 (1950); WASH. REV. CODE § 15.36.010 (Supp. 1959); W. VA. CODE ANN. § 2037(a) (Supp. 1959); WIS. STAT. ANN. § 97.02(5) (1957); WYO. COMP. STAT. ANN. § 35-279 (1957).

⁷⁹ N.Y. AGRIC. & MKTS. LAWS § 253; N.C. GEN. STAT. § 106-260 (1952).

⁸⁰ CONN. GEN. STAT. REV. §§ 22-127, -192, -205 (1958); FLA. STAT. ANN. § 501.02 (Supp. 1959); GA. CODE ANN. § 42-524 (1957); MASS. ANN. LAWS ch. 94, § 1 (1951); NEV. REV. STAT. § 584.355 (Supp. 1959); PA. STAT. ANN. tit. 31, §§ 645, 700j103 (1958); R.I. GEN. LAWS ANN. § 21-4-1 (1956); VT. STAT. ANN. tit. 6, § 2502 (1958).

⁸¹ Pet Dairy Prods. Co. v. State Milk Comm'n, 195 Va. 396, 78 S.E.2d 645 (1953).

been said to comprise those acts of administrative officials with respect to which the legislative element predominates and which establish a pattern thereafter to be followed, whereas the phrase "orders and determinations" used in another provision has been construed to refer to actions in which there is more of the judicial function and which deal with a particular and present situation.⁸²

A co-operative which received milk in its own approved plant in behalf of a corporation whose plant was closed was held to be a "handler" within the terms of a federal administrative order and therefore subject to required contributions to a fund for producers, despite the co-operative's status as a mere gratuitous bailee which had no relationship to the transaction other than a rather nebulous agency arrangement.⁸³

A provision of the Federal Agricultural Adjustment Act requires administrative officials to classify milk in accordance with the form in which or purpose for which it is to be used. In an instance where milk had been processed into cream at a handler's plant and then shipped to another party to be made into ice cream, this provision was held to be disjunctive and a right was recognized on the part of administrative officials to classify for price-fixing purposes solely according to the use of the product by the handler and without regard to the ultimate intended use by the transferee.⁸⁴ It was argued that the word "form" as here employed would refer solely to the state in which the milk would be marketed for ultimate consumption, thus indicating an ice cream classification here. The court refused to adopt this view and declared it would not sanction any interpretation which would obliterate the differentiation between the terms "form" and "purpose" and thus result in cancelling out of the statute the language concerning use. It seems that it is the handler's use of the product that controls the operation of the established formula. Moreover, the term "use" or the past tense "used" as employed in the act has not been construed in a liberal manner. One court has remarked that in respect to classification these words are entitled to be given a practical significance in relation to the activities of the handlers and their manner of doing business.⁸⁵

A federal milk order for the New York metropolitan area followed the familiar practice of classifying milk in accordance with its use by the handlers. A proviso stated that if the product was moved from the original receiving plant to a second plant and thence transferred in a form that was in a class to which a lower price was attached by the order's classification, it might be classified according to the utilization at the second plant. In one instance a dairy products company which had

⁸² Appeals of Port Murray Dairy Co., 6 N.J. Super. 285, 71 A.2d 208 (1950).

⁸³ Shawangunk Co-op. Dairies, Inc. v. Jones, 153 F.2d 700 (2d Cir. 1946).

⁸⁴ Queensboro Farms Prods., Inc. v. Wickard, 137 F.2d 969 (2d Cir. 1943).

⁸⁵ Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87 (8th Cir. 1946).

processed milk into cream shipped its product in large refrigerated trucks to a distributing plant of its own in Long Island City. Some of the cream was unloaded at the plant platform and then reloaded into smaller trucks for delivery to various customers. The remaining portion was transhipped in the street alongside the plant. The court held that the transfer to trucks was an operation at a "second plant" and that the Market Administrator had been right in classifying the cream on that basis.⁸⁶ In another instance a handler sold cream from some of the milk delivered at its country plant to a milk broker who ordered that it be shipped by rail and truck to the refrigeration rooms of a creamery. Later the cream was delivered in the original containers to a candy factory in another city for use in making milk chocolate. The court upheld the market administrator's finding that the creamery was the "second plant" and that the classification should have been made on that basis.⁸⁷

LICENSES

The statutory provisions respecting licenses or permits are many and there is much variation in wording.⁸⁸ A typical statute makes pro-

⁸⁶ *Queensboro Farm Prods., Inc. v. Wickard*, 137 F.2d 969 (2d Cir. 1943).

⁸⁷ *Wetmiller Dairy & Farm Prod. Co. v. Wickard*, 149 F.2d 330 (2d Cir. 1945).

⁸⁸ ALA. CODE tit. 2, § 193; tit. 22, §§ 213-215, 217 (1940); ARIZ. REV. STAT. ANN. § 3-607 (1956); ARK. STAT. ANN. § 82-915 (1947); CAL. AGRIC. CODE §§ 4244, 4375-86, 4410, 4415; COLO. REV. STAT. ANN. § 66-1-7(15) (1953); CONN. GEN. STAT. REV. §§ 22-172, -173, -176 to -178, -229 to -234, -236 to -238 (1958), as amended, CONN. GEN. STAT. REV. §§ 22-230, -236, -237 (Supp. 1959); DEL. CODE ANN. tit. 3, § 3103 (1953); FLA. STAT. ANN. § 501.09 (1943); GA. CODE ANN. §§ 42.515, .533, to .535 .543 to .546 (1957), as amended, GA. CODE ANN. § 42.535 (Supp. 1958); IDAHO CODE §§ 37-802, -804 (1948); ILL. ANN. STAT. ch. 56½, §§ 222, 223, 228-34 (Smith-Hurd 1951); IND. ANN. STAT. §§ 35-2508, -2523 to -2527, -2529, -2530 (1949); IND. ANN. STAT. §§ 15-1736 to -1739, -1741 (Supp. 1959); IOWA CODE ANN. §§ 192.1 to .4, 195.15 to .19 (1949); KAN. GEN. STAT. ANN. §§ 65-708, -722 to -24 (Supp. 1959); KY. REV. STAT. §§ 260.330, .370, .440 to .510 (1959); ME. REV. STAT. ANN. ch. 32, § 92 (Supp. 1959); ME. REV. STAT. ANN. ch. 32, §§ 93, 94; ch. 33, § 5 (1954); MD. ANN. CODE art. 43, §§ 570, 571 (1957); MASS. ANN. LAWS ch. 94, §§ 40-42, 42B, 43; ch. 94A §§ 4-9 (1954); MICH. STAT. ANN. §§ 12.609, .610 (1958); MINN. STAT. ANN. §§ 31.61, 32.071 to .075, .09, .10 (Supp. 1959); MISS. CODE ANN. §§ 4540, 4543, 4545-05, 4560-22, -26, -27, -35, -45, 4565, 4570(3), (15) (1957); MISS. CODE ANN. § 4560-24 (Supp. 1958); MO. ANN. STAT. §§ 71.720, 73.110(17), 77.560, 79.370, 196.575, .606 to .620 (1952); MO. ANN. STAT. §§ 75-110(18), 196.605 (Supp. 1959); MONT. REV. CODES ANN. §§ 3-2408, -2416 to -2418 (1957); MONT. REV. CODES ANN. §§ 27-408 to -411 (1957), as amended, MONT. REV. CODES ANN. §§ 27-409, -410 (Supp. 1959); MONT. REV. CODES ANN. §§ 46-232, -233 (1954); NEB. REV. STAT. §§ 81-238, -239, -242, -245 to -250 (1958); NEV. REV. STAT. §§ 584.180, .185, .195, .210 (1957); NEV. REV. STAT. §§ 584.595, .615 (Supp. 1959); N.H. REV. STAT. ANN. §§ 183:11, 184:4 to :8, 185:1 to :3, :9, :14, :15 (1955); N.H. REV. STAT. ANN. §§ 183:9, 185:4 (Supp. 1959); N.J. STAT. ANN. §§ 4:12-2, -3, -5, -6, -14, -17, -18, -19, -41.3, -41.4 (1959); N.J. STAT. ANN. §§ 24:10-2 to -6, -9, -10, -22 to -31 (1940); N.M. STAT. ANN. §§ 52-1-14, -16 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS §§ 257, 258a, 258-c, 258-d, 258-i; N.C. GEN. STAT. §§ 106-266.8(k), -266.9 (Supp. 1959); N.D. REV. CODE §§ 4-1802 to -1805 (1943); OHIO REV. CODE §§ 917.04 to .06, .09, .10, .18 (Anderson 1953); OKLA. STAT. ANN. tit. 2, § 7-6 (Supp. 1959); ORE. REV. STAT. §§ 621.070 to .080, .161, .171 (Supp. 1957); PA. STAT. ANN. tit. 31, §§ 646-49, 700j401 to 700j412 (1958); R.I. GEN. LAWS ANN §§ 21-4-

vision for the procedure and methods employed in the issuance of licenses of various types and the manner of their renewal, suspension, or revocation. Administrative boards or other agencies are entrusted with the duty of carrying out the legislative mandate. These officials may have state-wide or merely local powers.

An application for license or permit, whether it be made by a producer, handler, distributor, or manufacturer, must be made before the proper authorities as designated by the several statutes. If all requirements are met by the applicant, the administrative officials cannot refuse to issue the proper documents. The reason for a refusal to grant a license must be legally sufficient. Thus a refusal to license a manufacturer of frozen desserts because the plant would constitute a traffic hazard was not allowed to stand. The court declared that the danger of accidents at the prospectively crowded place of business was not a sufficient reason for declining to approve the application.⁸⁹

Sometimes licensing officials are in doubt about the proper application of statutes or regulations to various persons who come to their attention. In one such instance a farmer who was selling about six per cent of his total production of milk to neighbors at their request was ruled not to be selling to the "public" within the proper interpretation of a statute requiring licenses of persons serving hotels, restaurants, boarding houses, or the public generally.⁹⁰ The court remarked that the statute had not been meant to require a license for every farmer who sells a pint of milk to his neighbor. However, in a New York case the operator of a dairy farm who sold an unstated quantity of milk directly to consumers in a nearby city was declared to be within the meaning of a statute requiring "milk dealers" to be licensed.⁹¹ A proviso of the instant statute stated that "a producer who delivers milk only to a milk dealer" would not be considered a "milk dealer" within the statute. The court was of the opinion that the proviso could not be extended to include a dairyman who was selling milk directly to cus-

5(g), -4-6 to -12, -4-19, -5-19, -5-20, -7-1 to -5 (1956), as amended, R.I. GEN. LAWS ANN. § 21-4-9 (Supp. 1959) (compare R.I. GEN. LAWS ANN. § 21-2-1 to -3 (1956)); S.C. CODE §§ 32-1610.9 to -1610.14, -1634.11 to -1634.24 (Supp. 1959); S.D. CODE § 4.1903 to .1907 (1939), as amended, S.D. CODE § 4.1903 (Supp. 1952); TENN. CODE ANN. §§ 52-313 to -316 (1955); TEX. REV. CIV. STAT. ANN. arts. 165-2, § 7, 165-3, § 3 (1959); TEX. PEN. CODE ANN. art. 10576 (1948); UTAH CODE ANN. §§ 4-21-9, 5-2-4, -3-18, -3-20, -3-26 (1953); VT. STAT. ANN. tit. 6, § 1963 (1958); VT. STAT. ANN. tit. 6, § 1964 (Supp. 1959); VA. CODE ANN. §§ 3-307, -360, -364 to -367, -398, -452 to -454, -458 to -463 (1950); WASH. REV. CODE §§ 15.32.100, .110 (1951); WASH. REV. CODE § 15.36.080 (Supp. 1959); W. VA. CODE ANN. § 2038(1) (1955); WIS. STAT. ANN. §§ 97.04(2), .05, .06, 100.06 (1957); WYO. COMP. STAT. ANN. §§ 33-66, 35-290 (1957). Importation permits are provided for in 44 Stat. 1101 (1927), 21 U.S.C. § 141 (1958).

⁸⁹ Chamberland v. Selectmen of Middleborough, 328 Mass. 628, 105 N.E.2d 389 (1952).

⁹⁰ People v. Powell, 280 Mich. 699, 274 N.W. 372 (1937).

⁹¹ Baldwin v. Burdick, 243 App. Div. 250, 276 N.Y. Supp. 675 (1935).

tomers in the city or anywhere else. He was classified as a producer-distributor and therefore subject to regulation and restrictions imposed on every milk dealer. In another instance, moreover, an Indiana distributor, after expiration of a previous license, sold a large portion of his product, and later the whole amount, in bottles bearing caps designating it as "cat and dog milk." It was understood that the public thought of the product as being inferior but considered it fit for human consumption. The distributor had followed the customary manner of getting the milk to the public. The court said that this was an unworthy attempt to process milk and sell it without a license.⁹² A penalty under a milk control statute was imposed and an injunction granted.

Under broad powers given by statute a West Virginia health council promulgated a regulation prohibiting the sale of milk without a permit from county officials. This regulation was held valid, though no statute expressly authorized the council to make the granting of a permit a prerequisite for conducting business.⁹³ The court evidently considered the permit as a formal certification that the milk to be sold by a named vendor had been produced under council rules.

The authority to license is often stated in such a manner as to give the issuing official a certain degree of discretion. Unless the authority is arbitrarily exercised or an abuse of rights is shown, the official's decision is not open to question.⁹⁴ This is particularly true where a mistake has been made by a subordinate official and corrected by a superior whose discretion was in question.⁹⁵ Where there is a definite legal right to the license, however, proper relief in the form of a writ of mandamus must be granted.⁹⁶

A person properly licensed under an act concerning the manufacture and sale of ice cream and who is engaged solely in that business cannot be forced to obtain an additional license as a milk dealer under statutes controlling the fluid milk industry.⁹⁷

Anyone who desires to sell milk in a community may be required to obtain a license, and this is true notwithstanding the existence of a statute giving every farmer the right to sell his produce in any place or market.⁹⁸ It is also true that proper inspection may be required as a condition of the right to carry on a milk business.⁹⁹

⁹² Milk Control Bd. v. Phend, 104 Ind. App. 196, 9 N.E.2d 121 (1937).

⁹³ State v. Bunner, 126 W. Va. 280, 27 S.E.2d 823 (1943).

⁹⁴ Walker v. City of Birmingham, 216 Ala. 206, 112 So. 823 (1927); City of Wewoka v. Rose Lawn Dairy, 202 Okla. 286, 212 P.2d 1056 (1949).

⁹⁵ State *ex rel.* Peterson v. Martin, 180 Ore. 459, 176 P.2d 636 (1947).

⁹⁶ State *ex rel.* Nashville Pure Milk Co. v. Town of Shelbyville, 192 Tenn. 194, 240 S.W.2d 239 (1951).

⁹⁷ Commonwealth v. Snee, 80 Pa. D. & C. 391 (1951).

⁹⁸ City of Quincy v. Burgdorf, 235 Ill. App. 560 (1924).

⁹⁹ City of Newport v. Hiland Dairy Co., 291 Ky. 561, 164 S.W.2d 818 (1942).

Although a municipality is entitled to make reasonable regulations to insure the purity of milk brought into its boundaries, its officials cannot adopt ordinances, or measures under existing ordinances, to guarantee such purity which at the same time will prevent the sale or distribution in the city of milk that is in fact pure, wholesome, and in every way unobjectionable for human consumption. A Pennsylvania applicant for a permit to sell milk in a certain city was shown to have been licensed by the State Milk Control Commission and there was no evidence that the product offered for sale was impure. The reason for the city's refusal to issue the permit had been that some of the applicant's supplying farms were as much as two hundred miles away and that it could prove administratively difficult and impractical for city health officials and milk inspectors to examine all these farms and the plants where the milk was pasteurized. These reasons were held not to constitute sufficient grounds for the refusal to issue the permit.¹⁰⁰ However, the city was given a choice in regard to the matter. Either the officials, at their option and after such reasonably efficacious inspections of the applicant's dairy farms, pasteurization plants, and distributing stations as was expedient under the circumstances, were required to make a proper decision or a mandamus might be applied for to compel the issuance of the permit. If they found from the investigation that the production, care, and treatment of the applicant's milk sufficiently complied with the city's sanitary and public health regulations, a permit would necessarily be forthcoming immediately.

A Kentucky city ordinance exempted "farm products" from payment of sales license fees. Certain milk producers who were engaged in the sale and distribution of milk within the city and whose product came from outside the city limits were held not to be exempt from the payment of these fees.¹⁰¹

License fees which raise only enough money to pay all or a portion of the cost of administration are not considered to be "taxes" within the usual meaning of the term as used in certain constitutional and statutory provisions.¹⁰² Neither can such a fee be considered as an "occupation tax" within a statute preventing cities from imposing such taxes upon producers of farm products.¹⁰³ Moreover, license fees are not invalid because some surplus revenue is produced, but in such case the assessment must have been incidental to the regulation of the industry and not primarily for the purpose of producing revenue.¹⁰⁴ Of course ex-

¹⁰⁰ *Otto Milk Co. v. Rose*, 375 Pa. 18, 99 A.2d 467 (1953).

¹⁰¹ *Pure Milk Producers & Distributors Ass'ns v. Morton*, 276 Ky. 736, 125 S.W.2d 216 (1939).

¹⁰² *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939); *Pure Milk Producers & Distributors Ass'ns v. Morton*, *supra* note 101.

¹⁰³ *Dorssom v. City of Atchison*, 155 Kan. 225, 124 P.2d 475 (1942).

¹⁰⁴ *Opinion of the Justices*, 98 N.H. 527, 96 A.2d 733 (1953).

cessive or unreasonable fees would be invalid, as is seen when one notes the invalidation of a city ordinance in Oklahoma which required the payment by processors of additional license and inspection fees which had been levied against the producers and had not been paid by them.¹⁰⁵

A New Hampshire city ordinance limiting the issuance of non-resident permits to such applicants as already held them has been declared invalid as a denial of equal protection of the laws.¹⁰⁶ A very similar New York regulation provided that an applicant for a particular class permit to deliver milk as an independent distributor in the metropolitan area must be of sufficient experience in the industry and must have been a bona fide independent milk distributor therein prior to a certain date. This regulation would certainly seem to limit any future permits to those distributors already in business. However, the court ruled that equal protection was not denied.¹⁰⁷ The dissenting judge cited the New Hampshire decision and wrote an opinion taking the view that the regulation was invalid. It is believed that the New Hampshire view is the correct one.

In a highly populated area like New York state the competitive situation in the milk industry makes itself felt at all times in the struggle for markets. Particularly is this true in days of economic depression when markets get scarce. During such periods small business firms may be squeezed and driven to the wall. The surviving larger companies may wish to expand with the coming of better times and take up the slack left by the bankruptcy of small business in the area. There also may be a tendency to overcrowd existing markets. To combat such forces the advocates of a stabilized economy have turned more and more toward statutory and administrative controls. In New York an application for the entrance or extension of a milk dealer's business into an area depends upon whether the public interest is served. Administrative officials must determine whether the market is adequately served, whether the applicant is qualified by way of character and equipment, and whether the additional facilities will create a destructive competition within the local marketing area.¹⁰⁸ On hearing the evidence the administrative officials are supposed to approve or deny the application. One court has said that an administrative order in such cases should be confirmed in the absence of testimony showing that the determination was arbitrary or capricious or that there had been no competent proof of

¹⁰⁵ *City of Henrietta v. Rose Lawn Dairy*, 205 Okla. 590, 239 P.2d 774 (1952).

¹⁰⁶ *Whitney v. Watson*, 85 N.H. 238, 157 Atl. 78 (1931).

¹⁰⁷ *Stracquadiano v. Department of Health*, 285 N.Y. 93, 32 N.E.2d 806 (1941), *affirming* 259 App. Div. 994, 20 N.Y.S.2d 965 (1940).

¹⁰⁸ *Dusinberre v. Noyes*, 284 N.Y. 304, 31 N.E.2d 34 (1940); *Elite Dairy Prods., Inc. v. Ten Eyck*, 271 N.Y. 488, 3 N.E.2d 606 (1936); *Application of Jones*, 1 App. Div. 2d 920, 149 N.Y.S.2d 620 (1956); *Application of Grandview Dairy, Inc.*, 273 App. Div. 921, 77 N.Y.S.2d 856 (1948).

facts that had influenced the decision.¹⁰⁹ The fact that dealers already serving the community were operating at less than full capacity could be influential in a refusal to allow additional milk concerns to enter the area.¹¹⁰ The number of dealers in a community may be largely determinative.¹¹¹ When an area was adequately served it was not deemed sufficient that an extension applicant could supply the communities under consideration with milk of high butterfat content from Guernsey and Jersey cows, there being little demand in that neighborhood for premium milk of this type.¹¹² The application for an extension must be free from false statements in regard to the areas previously served.¹¹³ Delivery of milk in certain localities without a license has also been held to be a cogent reason for declining to approve an application.¹¹⁴ There must be sufficient need for additional service, and an administrative decision that destructive competition would come about as the result of the licensing of a second dealer in a village with a population of 2,300, the daily deliveries of the community's lone handler amounting to 970 quarts, was held not to be contrary to the weight of the evidence.¹¹⁵ With respect to the matter of proving that the issuance or extension of a license will tend to bring about destructive competition among milk operators in the vicinity the burden of proof on judicial review is upon the administrative officials.¹¹⁶

Under provisions of the New York statute no city health officer shall approve premises upon which milk is produced or handled or authorize the shipment of milk therefrom for sale or use within the state without a definite showing that the proposed added milk supply is needed and that no other municipality will thereby be deprived of its supply. It is also necessary to show that the new supply may be inspected without too great expense. All these elements must be shown to satisfy administrative officials.¹¹⁷ It would seem that under this statute the health officials would have to show that the qualifications had been met. Where a formal request for an extension was attached to an existing license, however, the health officials were relieved of the necessity of taking affirmative action to satisfy the Commissioner of Agriculture in respect to these matters.¹¹⁸

¹⁰⁹ Application of Bullis, 276 App. Div. 882, 93 N.Y.S.2d 799 (1949).

¹¹⁰ Application of Kotcher, 3 App. Div. 2d 957, 162 N.Y.S.2d 708 (1957).

¹¹¹ Grimstead v. Carey, 1 App. Div. 2d 985, 150 N.Y.S.2d 657 (1956).

¹¹² *In re Ginsberg*, 2 App. Div. 2d 733, 152 N.Y.S.2d 856 (1956).

¹¹³ Application of Goldstein, 279 App. Div. 965, 111 N.Y.S.2d 127 (1952).

¹¹⁴ Petition of Kyes, 273 App. Div. 829, 75 N.Y.S.2d 665 (1948).

¹¹⁵ Application of Williams, 282 App. Div. 76, 121 N.Y.S.2d 830 (1953).

¹¹⁶ *Friendship Dairies, Inc. v. DuMond*, 248 App. Div. 147, 131 N.Y.S.2d 51 (1954).

¹¹⁷ *Dellwood Dairy Co. v. Brown*, 106 N.Y.S.2d 749 (Sup. Ct. 1951).

¹¹⁸ *Washburn's Dairy, Inc. v. Mansfield*, 200 Misc. 1017, 112 N.Y.S.2d 274 (Sup. Ct. 1951).

In granting a license to move into an area served by other interests the administrator is not required to give reasons or to make formal findings, and the courts should confirm his decision unless it can be shown that the action was arbitrary or capricious or that the official did not have before him all of the pertinent facts.¹¹⁹

The economic interest of a milk dealer already entrenched in a marketing area does not entitle him to be heard on matters of constitutional rights prior to the admission of others into the territory, the due process clause making no guarantee of freedom from economic competition in spite of the fact that the new ventures may seriously affect the interests of those already operating in the vicinity.¹²⁰

Where the refusal to permit an additional facility interferes with the flow or volume of interstate commerce in milk, the Supreme Court has held that state authorities may not promote the economic interests of the state's own residents by refusing to allow a firm doing an interstate business to establish an additional store within an area alleged to be overcrowded.¹²¹ As pointed out in dissenting opinions, this holding, if not circumscribed by a limited application, might easily destroy or badly upset the whole fabric of a state milk control program. The language of the majority opinion might well be interpreted to mean that an interstate operator could not be excluded or limited even when the marketing area was oversupplied.

In some other jurisdictions the surfeiting of the market will not always justify a refusal to issue a license. In Oregon administrative officials were held not to be authorized to deny a license permitting a dealer to purchase milk in one marketing area for processing in another followed by return to the first area for sale in the applicant's store merely for the reasons that the community was receiving adequate service and that the added facility would have an adverse effect upon persons already in business.¹²² The court remarked that the important question was whether or not the applicant was equipped to render efficient and responsible service to the community. In a New Jersey case¹²³ the decision in favor of the applicant seems to have been influenced a great deal by a stipulation in the statement of facts before the court asserting that the corporate applicant had a license authorizing it to "sell and distribute milk in the state." The court repudiated the contention that privileges under state permits were limited to localities named therein. The health officials of the affected community were said to have no discretionary

¹¹⁹ Application of Bullis, 276 App. Div. 882, 93 N.Y.S.2d 779 (1949).

¹²⁰ Application of Dairymen's League Co-op. Ass'n, Inc., 282 App. Div. 69, 121 N.Y.S.2d 857 (1953).

¹²¹ H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949), reversing 297 N.Y. 209, 78 N.E.2d 476 (1948).

¹²² Safeway Stores, Inc. v. State Bd. of Agriculture, 198 Ore. 43, 255 P.2d 564 (1953).

¹²³ Sheffield Farms, Co. v. Seaman, 114 N.J.L. 455, 177 Atl. 372 (1935).

authority in a situation of this kind. The city's negative decision would be set aside where it was based merely upon the allegations that the present supply of milk was adequate and that the community was surfeited with milk dealers. The city authorities lacked funds for a thorough investigation and had admitted that they had no knowledge with respect to the quality of the applicant's milk or concerning the sanitary conditions under which it was produced, handled, and marketed. The court declared that there was no justification for the refusal to grant the permit. The applicant's right to engage in a lawful business could not be curtailed in this manner. This case was decided under early statutes and would not necessarily be followed under more modern laws.

A New York license authorized a milk company to distribute its product in places named in the application "and others." This language was interpreted in such a manner that the distribution of milk in a city not named in the application would be unauthorized.¹²⁴ It was apparent that there would have to be a request for an extension.

As far as the extension or renewal of a milk dealer's license is concerned, the administrative agencies and courts may take into consideration past compliance or non-compliance with laws and regulations, the adequacy of equipment, and the financial responsibility of the applicant.¹²⁵

Under the police power a provision of a statute which authorized the suspension of a permit to transport, sell, offer for sale, or store milk or milk products has been held valid, since other provisions made it clear that there could be no revocation without a hearing and that an allegedly recalcitrant licensee would be given an opportunity to present his side of the matter.¹²⁶ The action of the Pennsylvania Milk Control Commission in revoking a dealer's license for failure to make minimum monthly payments to producers as he was commanded to do by a general order requiring payment before the fifteenth day of each succeeding month was not disturbed upon appeal to the courts, even though the dealer had in other months of the license year made payments in excess of the minimum requirements which aggregated more than the below-minimum underpayments made in the spring months.¹²⁷ In the same jurisdiction it was held to be arbitrary and unreasonable to suspend a dealer's license for giving away free samples of milk to demonstrate new

¹²⁴ *Crowley's Milk Co. v. Ten Eyck*, 270 N.Y. 328, 1 N.E.2d 119 (1936), *affirming* 246 App. Div. 654, 283 N.Y. Supp. 166 (1935).

¹²⁵ *Application of Echelman*, 283 App. Div. 276, 127 N.Y.S.2d 287 (1954); *Buhler v. Department of Agriculture and Mkts.*, 225 Wis. 133, 280 N.W. 367 (1938).

¹²⁶ *Sunny Brook Farms v. Omdahl*, 42 Wash. 2d 788, 259 P.2d 383 (1953).

¹²⁷ *Pennsylvania Milk Control Comm'n v. Royale Dairy Co.*, 73 Pa. D. & C. 431 (1948).

products or containers.¹²⁸ The court noted the lack of any specific prohibition and pointed out that the practice had been permitted in a few instances. The court declared that it was unreasonable for the Milk Commission, for an alleged violation, to direct as punishment that the dealer cease all operations for a fifteen-day period, starting five days after notice. It was said that any such order would work a hardship upon producers and consumers as well as the dealer and would make it very difficult for him to maintain his establishment, thereby endangering his livelihood.

Marketing areas are usually marked out by milk control authorities and licenses are commonly issued with these areas in mind. Thus a license may be limited to one or more towns, districts, or counties. These marketing areas are sometimes referred to in statutes as "milk sheds"¹²⁹ and may be altered and rearranged with impunity.¹³⁰

BONDING PROVISIONS

Under statutes concerning the milk industry bonds are sometimes required to protect the interests of various groups. A common one is the bond of a distributor or handler used to secure payments and thus protect producers from the hazards of a complex economy and the risks inherent in the marketing of a perishable commodity. These bonds and the equalization funds set up under some statutes form the chief protective devices which make the lot of the dairy farmer a little less unstable. Examples of statutory bonds securing the satisfaction of milk-purchasing agreements are seen in the laws of some states.¹³¹ In a rather early case¹³² the Maine court held invalid an act requiring operators of milk-gathering stations, as a condition of obtaining a license, to give a bond to secure the payment of purchases of milk and cream which they might acquire. The statute was said to be violative of the equal protection guarantee because the bonds would be required with respect to the milk industry and not to others which the court deemed to be just as important from the standpoint of amenability to regulation. The court seemed to believe that there was no fair, just, or reasonable con-

¹²⁸ *Greenville Dairy Co. v. Pennsylvania Milk Control Comm'n*, 68 Pa. D. & C. 597 (1949).

¹²⁹ See ALA. CODE tit. 22, § 209 (1940); GA. CODE ANN. § 42-524, -527 (1957); GA. CODE ANN. § 42-528 (Supp. 1958); WIS. STAT. ANN. § 146.24 (1957).

¹³⁰ *Taylor v. State ex rel. Alabama State Milk Control Bd.*, 237 Ala. 178, 186, So. 463 (1939).

¹³¹ See ALA. CODE tit. 22, § 216 (1940); CAL. AGRIC. CODE §§ 4376-80, 4382, 4385; CONN. GEN. STAT. REV. §§ 22-239 to -242 (1958); DEL. CODE ANN. tit. 3, §§ 3161-74 (1953); LA. REV. STAT. ANN. §§ 3:641 to -645, as amended, LA. REV. STAT. ANN. §§ 3:641; :645 (Supp. 1959); MASS. ANN. LAWS ch. 94, §§ 42A-42E (1954); NEV. REV. STAT. §§ 584.600 to .615, .625, .640 (Supp. 1959); N.J. STAT. ANN. §§ 4:12-4, -9, -11 (1959); N.Y. AGRIC. & MKTS. LAWS § 258-b; OHIO REV. CODE § 917.14 (Anderson 1953); PA. STAT. ANN. tit. 31, §§ 700j501 to 513 (1958); UTAH CODE ANN. § 5-3-19 (1953).

¹³² *State v. Old Tavern Farm Inc.*, 133 Me. 468, 180 Atl. 473 (1935).

nection between this bonding requirement and the common good. The view of the dissenting judge that the legislature should have the right to enact such protective measures under the police power would be more likely to be followed today. In fact the validity of such bonding provisions seems to have been approved in a Pennsylvania case¹³³ where a milk dealer and the surety on his bond were both barred from denying responsibility because of the asserted unconstitutionality of the bonding requirements. However, the assigned reason for denying the requested relief was that both named parties, having obtained the approval of the Milk Control Board by tendering the required bond with the application for a license, were not afterwards to be heard denying liability on the bond. The view that such provisions are valid finds support in a California decision approving the requirement of such bonds for the purpose of securing distributors' indebtedness to producers.¹³⁴

In an early New York case the lower courts took the view that such security provisions could not be supported as a proper use of the police power. Language was employed indicating an opinion that the bonding requirement had not been enacted primarily as a deterrent to fraud and chicanery but with the purpose of making ordinary debts for the purchase of milk more readily collectible.¹³⁵ However, the Court of Appeals denied that any constitutional guarantees had been violated.¹³⁶

A federal case from New Jersey concerned the bonds deposited with state agricultural officials to protect producers who had supplied milk to a corporate milk dealer who had gone into a receivership. The court summarily directed the bonds to be turned over to the receiver for distribution to unpaid producers.¹³⁷ The funds arising from the bonds would be administered apart from the other receivership assets for the producers' benefit. Under New Jersey law the resident producers were preferred over the non-resident producers. The proceeds from the bonds were insufficient to satisfy the claims in full, and all resident producers who had properly filed their claims were said to be entitled to a ratable share of the funds.

STATISTICAL INFORMATION

The collection of statistics concerning one or more stages of the milk marketing process is specifically referred to in the statutes of many jurisdictions,¹³⁸ and much additional information of this kind is avail-

¹³³ Commonwealth *ex rel.* Margiotti v. Ortwein, 132 Pa. Super. 166, 200 Atl. 859 (1938).

¹³⁴ In the Matter of Willing, 12 Cal. 2d 591, 86 P.2d 663 (1939).

¹³⁵ People v. Perretta, 228 App. Div. 420, 239 N.Y. Supp. 63 (1930), *affirming* 134 Misc. 652, 236 N.Y. Supp. 293 (Sup. Ct. 1929).

¹³⁶ People v. Perretta, 253 N.Y. 305, 171 N.E. 72 (1930).

¹³⁷ Young v. Pequest Dairy, Inc., 13 F. Supp. 164 (D.N.J. 1935).

¹³⁸ CAL. AGRIC. CODE §§ 447, 448, 4403; IOWA CODE ANN. § 179.6 (Supp. 1959); KAN. GEN. STAT. ANN. §§ 65-701, 74-504b (1949); LA. REV. STAT. ANN. § 40:932

able, with limitations in some quarters, in required reports. Milk dealers and distributors are required in various states to file reports which are annual,¹³⁹ monthly,¹⁴⁰ or indefinite as to time.¹⁴¹ Statutes in Idaho¹⁴² and South Dakota¹⁴³ command producers to make annual reports. Some regulatory commissions or other bodies are required by statute to make reports, annual,¹⁴⁴ biennial,¹⁴⁵ or even quarterly.¹⁴⁶

TRANSFER OF TITLE AND TRANSPORT

The production, sale, and transportation of milk may sometimes generate special problems resulting in enough pressure to produce statutory provisions enacted with the idea of meeting special needs or curing particular abuses. State legislators have noted the varied problems as they have arisen and have taken steps to remedy them.

Thus a few states have enacted statutes specifically making fraud in the sale of milk an unlawful act.¹⁴⁷ An Indiana statute¹⁴⁸ makes interference with sales a felony, while a Massachusetts act¹⁴⁹ outlaws the sale of sub-standard milk. North Carolina penalizes the raising of milk

(1951); MASS. ANN. LAWS ch. 94, §§ 42D, 42F, 42G (1954); MICH. STAT. ANN. § 28.506 (1938); MINN. STAT. ANN. §§ 32.18 to .20 (1946), as amended, MINN. STAT. ANN. §§ 32.18, 19 (Supp. 1959); MONT. REV. CODES ANN. § 3-2403 (1957); NEV. REV. STAT. §§ 584.650, .665 (Supp. 1959); N.J. STAT. ANN. §§ 4:12-12, .12A-37, -54 to -56 (1959); N.Y. AGRIC. & MKTS. LAWS § 258-f; OHIO REV. CODE § 917.03 (Anderson 1953); OKLA. STAT. ANN. tit. 2, § 394 (1951); OKLA. STAT. ANN. tit. 63, § 295.4 (Supp. 1957); ORE. REV. STAT. §§ 621.191, .196 (Supp. 1957); PA. STAT. ANN. tit. 31, §§ 653, 700j701 (1958); R.I. GEN. LAWS ANN. § 21-4-5(f) (1956); VA. CODE ANN. §§ 3-400.36, -456 (1950); VA. CODE ANN. § 3-359.1 (Supp. 1958) (accounting systems); WASH. REV. CODE § 15.32.690 (1951); WIS. STAT. ANN. § 100.07 (1957).

¹³⁹ ALA. CODE tit. 2, § 200 (1940); GA. CODE ANN. § 42-517 (1957); MICH. STAT. ANN. § 12.609 (1958); MINN. STAT. ANN. §§ 32.18 to .20 (1946), as amended, MINN. STAT. ANN. §§ 32.19 (Supp. 1959); MISS. CODE ANN. § 4552 (1957); NEV. REV. STAT. §§ 584.650, .655 (Supp. 1959); N.H. REV. STAT. ANN. § 184:75 (1955); N.C. GEN. STAT. § 106-236 (1952) ORE. REV. STAT. §§ 621.191, .196 (Supp. 1957); S.D. CODE § 4.2207 (Supp. 1952); UTAH CODE ANN. § 4-20-55 (1953); WASH. REV. CODE § 15.32.690 (1951).

¹⁴⁰ CAL. AGRIC. CODE § 4400; FLA. STAT. ANN. § 501.09 (1943); LA. REV. STAT. ANN. §§ 40:932, :933 (1951); N.C. GEN. STAT. § 106-261 (1952); N.D. REV. CODE § 4-1809 (1943); OHIO REV. CODE §§ 917.12, .13, .14, .17 (Anderson 1953); OKLA. STAT. ANN. tit. 2, § 7-3 (Supp. 1959); VT. STAT. ANN. tit. 6, § 1969 (1958); WASH. REV. CODE §§ 15.34.010, .020 (Supp. 1959).

¹⁴¹ ALA. CODE tit. 22, §§ 216, 219 (1940); MONT. REV. CODES ANN. § 27-416 (Supp. 1959); N.H. REV. STAT. ANN. § 183:12 (1955) N.Y. AGRIC. & MKTS. LAWS § 258-g; PA. STAT. ANN. tit. 31, § 700j702 (1958); WASH. REV. CODE § 15.44.110 (Supp. 1959).

¹⁴² IDAHO CODE ANN. § 37-325 (1948).

¹⁴³ S.D. CODE § 4.2207 (Supp. 1952).

¹⁴⁴ FLA. STAT. ANN. § 501.16 (1943); IOWA CODE ANN. § 179.6 (Supp. 1959); N.J. STAT. ANN. § 24:10-17 (1940); PA. STAT. ANN. tit. 71, § 1237 (1942); R.I. GEN. LAWS ANN. § 21-4-50(f) (1956); S.D. CODE § 4.2209 (Supp. 1952); VT. STAT. ANN. tit. 6, § 1967 (1958).

¹⁴⁵ UTAH CODE ANN. § 5-3-25 (1953).

¹⁴⁶ Ore. Laws 1953, ch. 688, § 5, repealed in 1957.

¹⁴⁷ CAL. AGRIC. CODE § 453; KY. REV. STAT. § 217.060, .130 (1959); OHIO REV. CODE §§ 3717.04, .32 to .34 (Anderson 1953); WASH. REV. CODE § 15.32.790 (1951).

¹⁴⁸ IND. ANN. STAT. § 10-4916 (1956).

¹⁴⁹ MASS. ANN. LAWS ch. 94, §§ 20, 22 (1954).

from one class to another before resale¹⁵⁰ and sales below cost with the idea of destroying competitors.¹⁵¹ Sales tickets are authorized in New Hampshire¹⁵² and Vermont.¹⁵³

An exception in favor of milk is often made in respect to the Blue Law prohibition against Sunday sales.¹⁵⁴ The validity of such an exception has been affirmed.¹⁵⁵ A New York statute guaranteeing one day's rest in seven makes an exception in the case of workers in dairies and other milk products establishments.¹⁵⁶

Statutes in several states¹⁵⁷ require milk to be transported in sanitary vehicles, while a few¹⁵⁸ make marking or lettering necessary. A Minnesota statute requiring that all railway shipments of milk in excess of sixty-five miles be made in refrigerated cars, with an exception in the case of products which were pasteurized, was declared unconstitutional because it failed to distinguish between interstate and intrastate commerce.¹⁵⁹

In states having milk control legislation problems concerning deliveries sometimes arise. The Virginia court has held that the Milk Commission has a right, in the absence of unreasonable, arbitrary, or capricious designations, to point out a proper place where producers must make deliveries and where distributors must pick up their purchases.¹⁶⁰ It was ruled that the fact that the place designated for the transfer was not within the marketing area to which the milk had been assigned would not invalidate the order. A New York court approved a provision in a license which it interpreted as requiring that deliveries to a certain housing development be made at a central point where customers could meet the trucks and carry the milk home and as not per-

¹⁵⁰ N.C. GEN. STAT. § 106-263 (1952).

¹⁵¹ N.C. GEN. STAT. § 106-266.21 (Supp. 1959).

¹⁵² N.H. REV. STAT. ANN. §§ 339:1, :2 (1955).

¹⁵³ VT. STAT. ANN. tit. 6, § 2051 (1958).

¹⁵⁴ CONN. GEN. STAT. REV. § 53-300 (Supp. 1959); MD. CODE ANN. art. 27, § 521 (Supp. 1959); N.H. REV. STAT. ANN. § 578:4 (1955); N.J. STAT. ANN. § 2A:171-6 (1953); OKLA. STAT. ANN. tit. 21, § 908 (1958); PA. STAT. ANN. tit. 18, § 4699.4 (1945); TEX. PEN. CODE ANN. art. 287 (1952); WASH. REV. CODE § 9.76.010 (Supp. 1956).

¹⁵⁵ State v. Hurliman, 143 Conn. 502, 123 A.2d 767 (1956); State v. Grabinski, 33 Wash. 2d 603, 206 P.2d 1022 (1949).

¹⁵⁶ N.Y. LAB. LAWS § 161.

¹⁵⁷ CAL. AGRIC. CODE §§ 530-32; ILL. ANN. STAT. ch. 56½, § 226 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 214 (Smith-Hurd Supp. 1959); IOWA CODE ANN. § 192.11 (1949); S.C. CODE, Rules & Regs. p. 195 (Supp. 1959); S.D. CODE § 4-2011 (Supp. 1952); VA. CODE ANN. § 3-400.28 (1950); WASH. REV. CODE §§ 15.32.260, 270 (1951).

¹⁵⁸ ILL. ANN. STAT. ch. 56½, § 24 (Smith-Hurd 1951); IOWA CODE ANN. § 192.5 (1949); PA. STAT. ANN. tit. 53, §§ 24643, 24644 (1957); TENN. CODE ANN. § 52-312(3) (1955).

¹⁵⁹ MINN. STAT. ANN. § 32.17 (1946), declared unconstitutional in State v. Chicago Great W.R.R., 125 Minn. 332, 147 N.W. 109 (1914).

¹⁶⁰ Southside Co-op. Milk Producers Ass'n Inc. v. State Milk Comm'n, 198 Va. 108, 92 S.E.2d 351 (1956).

mitting door to door deliveries.¹⁶¹ It was shown that the licensee had misinterpreted this provision and had made such deliveries. Under these circumstances the wholesale dealer was not permitted to challenge the power of the commissioner to so limit the deliveries to the central point where quantities of milk cases were shown to be available.

In New Jersey it was said that the Milk Authority had no delegated power to regulate the hours of delivery in certain marketing areas.¹⁶² In an attempt to show that such power existed at that time the proponent introduced a statement of purpose attached to an act which had repealed a previous statute actually permitting the regulation of hours for delivery. This statement recited that it would be best for the Milk Authority to control such hours. The court ruled that the statement could not be read into the repealer in such a manner as to confer a present authority. In California a federal court declared that it had a duty to consider testimony concerning an alleged invasion of private rights by a city ordinance regulating the time of milk deliveries.¹⁶³ It was said that such an investigation must be conducted before a decision on the validity of the ordinance could be reached. The court declared that the ordinance was presumed to be supported by factual circumstances rendering it valid. A temporary injunction *pendente lite* was granted, the court being of the opinion that the enforcement of the doubtfully valid ordinance would result in irreparable damage to the complaining milk dealer and that little or no non-compensable damage would result to the city if the ordinance could not be enforced for a short while.

With refrigeration almost universal throughout the nation, it was inevitable that milk dealers should propose deliveries on every other day as an economy measure. In fact there are regulations in some localities prohibiting deliveries more frequent than every forty-eight hours. The courts have differed in their treatment of these provisions, and there is much doubt about their validity. It may be said that the wording of the particular statute or regulation under consideration has greatly influenced the divergent views expressed concerning various provisions. Such an order by an Alabama milk control agency was approved in spite of a statute reciting that milk is a perishable commodity which must be produced and distributed fresh daily.¹⁶⁴ The court declared that an every-other-day staggered delivery system would satisfy the mandate of the statute for daily deliveries, even though cus-

¹⁶¹ In the Matter of Consumer-Farmer Co-op, Inc., 284 App. Div. 999, 135 N.Y.S.2d 451 (1954).

¹⁶² Sherry v. Schomp, 31 N.J. Super. 267, 106 A.2d 350 (1954).

¹⁶³ Birkheiser v. City of Los Angeles, 11 F. Supp. 689 (S.D. Cal. 1935).

¹⁶⁴ Alabama State Milk Control Bd. v. Graham, 250 Ala. 49, 33 So. 2d 11 (1947).

tomers would be compelled to become storers for a two-day supply. However, a Pennsylvania court decided that the Milk Commission had no authority to prohibit dealers from making deliveries more frequently than every forty-eight hours.¹⁶⁵ It was said that such a regulation would be detrimental to dealers with an established clientele because it would allow other dealers to make inroads into their groups of customers by making deliveries on the days when the former could not. The court was of the opinion that the regulation would violate the due process guarantee. The argument that all dealers might use the same tactics with respect to their competitors' customers was disregarded.

In a war-time case from New Hampshire a forty-eight hour restriction of this kind was held valid with respect to transportation by vehicles run by motor or equipped with rubber tires, there being emergency restrictions on the use of gasoline and rubber, but void as to other forms of transport.¹⁶⁶ The order was not wholly void because it was unconstitutional when applied to certain means of carriage. The court also held that the order was not invalid because deliveries by wholesale establishments were not as restricted in frequency as retail deliveries.

In one instance labor unions representing the employes of persons engaged in the milk business tried to raise a constitutional objection to an order by the Pennsylvania Milk Commission restricting deliveries in the Philadelphia marketing area. It was the opinion of the court¹⁶⁷ that the order would materially affect only milk dealers, handlers, distributors, producers, and consumers. It was said that any effect upon the employes of such persons or the unions representing them was remote, indirect, and incidental, and that therefore there was no proper ground on which the appeal of the unions could be based. The fact that the Commission had stipulated that the unions were parties aggrieved did not confer the right of appeal from a decision of a lower court.

TESTS AND PROCESSES

A common provision in state codes is the one concerning milk testing, usually with particular emphasis upon the standard Babcock butterfat test.¹⁶⁸ In the more elaborate statutes the equipment for making the

¹⁶⁵ Commonwealth *ex rel.* Milk Comm'n v. Hollinger, 79 Pa. D. & C. 49 (1951).

¹⁶⁶ Cloutier v. State Milk Control Bd., 92 N.H. 199, 28 A.2d 554 (1942).

¹⁶⁷ Pennsylvania Commercial Drivers Conference v. Pennsylvania Milk Control Comm'n, 360 Pa. 477, 62 A.2d 9 (1948).

¹⁶⁸ ALA. CODE tit. 2, §§ 194, 195, 199 (1940); ARIZ. REV. STAT. ANN. § 3-617 (1956) (Babcock not mentioned); ARK. STAT. ANNS § 82-914 (1947); CAL. AGRIC. CODE §§ 685-89; COLO. REV. STAT. ANN. § 7-8-6 (1953); CONN. GEN. STAT. REV. §§ 22-138 to -104, -142, -151 (1958); DEL. CODE ANN. tit. 3, §§ 3111-34 (1953); FLA. STAT. ANN. § 502.15 (1943); GA. CODE ANN. § 42-504 to -506.3 (1957); IDAHO CODE ANN. §§ 37-506 to -519, -601 to -606 (1948), as amended,

test is described and there are certain references to techniques. A tester's license is generally required to avoid conflicting and fraudulent analyses. Furthermore, provision is usually made for the taking of milk samples.¹⁰⁰ Many of the statutes mention processing and pasteurization plants and laboratories where the analyses are made. Homogenization, certification,

IDAHO CODE ANN. §§ 37-515, -601 (Supp. 1959); ILL. ANN. STAT. ch. 56½, § 22 (Smith-Hurd 1951); IND. ANN. STAT. § 15-1731 to -1735, -1737 to 1741 (Supp. 1959); IOWA CODE ANN. §§ 192.14 to .22 (1949), as amended, IOWA CODE ANN. § 192-14 (Supp. 1959); KAN. GEN. STAT. ANN. § 65-704 (1949); KY. REV. STAT. §§ 260.400 to .530, .990 (1959); LA. REV. STAT. ANN. §§ 40:885 to :894, :896 (1951), as amended, LA. REV. STAT. ANN. §§ 40:889, :896 (Supp. 1959) (also mentions Gerber test); ME. REV. STAT. ANN. ch. 32, §§ 190, 110 (1954); MASS. ANN. LAWS ch. 94, §§ 25-30 (1954); MICH. STAT. ANN. §§ 12.631 to .634, .641 to .644, .646, .647 (1958); MINN. STAT. ANN. § 32.25 (Supp. 1959); MISS. CODE ANN. §§ 4541, 4542 (1957); MO. STAT. ANN. § 196.595 (1952); MONT. REV. CODES ANN. §§ 3-2405, -2406, -2410 to -2414 (1957); NEB. REV. STAT. §§ 81-253 to -256 (1958); NEV. REV. STAT. §§ 584.215 to .240 (1957); NEV. REV. STAT. §§ 584.245 to .295 (Supp. 1959); N.H. REV. STAT. ANN. §§ 184:9, :11, :12, :14, :63 to :74, :76 (1955); N.H. REV. STAT. ANN. §§ 184:76a, :77 (Supp. 1959); N.J. STAT. ANN. §§ 4:12-41.1 to -41.25 (1959); N.Y. AGRIC. & MKTS. LAWS §§ 56, 56-a, 57; N.C. GEN. STAT. §§ 106-267 to -267.5 (1952), as amended, N.C. GEN. STAT. § 106-267.1 (Supp. 1959); N.D. REV. CODE §§ 4-1817 to -1826 (1943); OHIO REV. CODE §§ 917.07, .08, .15, .19, .20, 3717.07, .08 (Anderson 1953); OKLA. STAT. ANN. tit. 2, §§ 7-32, -39, -54 (Supp. 1959); ORE. REV. STAT. §§ 621.231 to .246 (Supp. 1957); PA. STAT. ANN. tit. 76, §§ 383-87 (1953); PA. STAT. ANN. tit. 31, §§ 700j601-08 (1958); R.I. GEN. LAWS ANN. §§ 21-5-34 to -42 (1956); S.C. CODE §§ 32-1607 to -1609 (1952); S.D. CODE § 22.0515 (1939); TENN. CODE ANN. §§ 44-2001 to -2012 (1955), as amended, TENN. CODE ANN. §§ 44-2002 to -2012 (Supp. 1959); TEX. REV. CIV. STAT. ANN. arts. 5736a, 5736d (1958); UTAH CODE ANN. § 4-20-17 (1953); VT. STAT. ANN. tit. 6, §§ 2212-18, 2251-64 (1958) (Babcock not mentioned); VA. CODE ANN. §§ 3-401 to -415 (1950); WASH. REV. CODE §§ 15.32.580 to .670 (1951); W. VA. CODE ANN. §§ 2038(1)-(11) (1955); WIS. STAT. ANN. §§ 98.13 to .15 (1957); WIS. STAT. ANN. § 98.146 (Supp. 1959); WYO. COMP. STAT. ANN. §§ 35-284, -285 (1957).

¹⁰⁰ ARIZ. REV. STAT. ANN. §§ 3-618, -619 (1956); ARK. STAT. ANN. § 82-913 (1947); CAL. AGRIC. CODE § 442; COLO. REV. STAT. ANN. § 7-8-6 (1953); CONN. GEN. STAT. REV. §§ 22-140, -142 to -144, -165 (1958), as amended, CONN. GEN. STAT. REV. §§ 22-165 (Supp. 1959); DEL. CODE ANN. tit. 3, § 3115 (1953); GA. CODE ANN. § 42-407 (1957); IDAHO CODE ANN. §§ 37-506, -510 (1948); ILL. ANN. STAT. ch. 56½, §§ 21c, 227 (Smith-Hurd 1951); IND. ANN. STAT. §§ 15-1732, -1737a (Supp. 1959); IOWA CODE ANN. § 195.25 (1949); KAN. GEN. STAT. ANN. § 65-701 (1949); KY. REV. STAT. § 260.400, .410, .420, .460 (1959); LA. REV. STAT. §§ 40:885 to :888 (1951); LA. REV. STAT. ANN. § 40:882 (Supp. 1959); ME. REV. STAT. ANN. ch. 32, §§ 88, 95 (1954); MO. CODE ANN. art. 43, § 586 (1957); MASS. ANN. LAWS ch. 94, § 33 (1954); MICH. STAT. ANN. § 12.645 (1958); MISS. CODE ANN. §§ 4540, 4560-29, 4569 (1957); MO. ANN. STAT. § 196.570 (1952); MONT. REV. CODES ANN. §§ 3-2405 to -2407, -2465, -2466 (1957); NEB. REV. STAT. §§ 81-244, -255 (1958); NEV. REV. STAT. §§ 584.245, .265 (Supp. 1959); N.H. REV. STAT. ANN. § 184.63 (1955); N.J. STAT. ANN. §§ 4:12-41.5 to -41.8 (1959); N.M. STAT. ANN. § 52-1-19 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS §§ 51, 56-a; N.C. GEN. STAT. § 106-267.4 (1952); N.D. REV. CODE §§ 4-1704, -1822 (1943); OHIO REV. CODE §§ 917.07, .08, .15, .19, .20 (Anderson 1953); OKLA. STAT. ANN. tit. 2, § 7-3 (Supp. 1959); PA. STAT. ANN. tit. 31, § 700j606 (1958); R.I. GEN. LAWS ANN. § 21-5-27, -40, -43 (1956); S.C. CODE §§ 32-1601, -1609.3 (1952); S.C. CODE, Rules & Regs. p. 190 (Supp. 1959); S.D. CODE § 4.2013 (Supp. 1952); TENN. CODE ANN. § 44-2005 (Supp. 1959); TEX. REV. CIV. STAT. ANN. art. 5736d (1958); UTAH CODE ANN. §§ 4-20-17 (1953); VT. STAT. ANN. tit. 6, §§ 2214, 2251, 2253-55, 2258 (1958); VA. CODE ANN. § 3-408 (1950); WASH. REV. CODE §§ 15.32.520, .530, .540, .620, .670 (1951); W. VA. CODE ANN. § 2038(5) (1955); WIS. STAT. ANN. §§ 97.34, 98.13 (1957); WYO. COMP. STAT. ANN. §§ 35-285 (1957) (unfair samples).

and the addition of vitamins are often referred to. The grading or scoring is often provided for in varying degrees of elaboration.¹⁷⁰ Statutes may provide for bacterial counts¹⁷¹ or sediment tests.¹⁷²

SANITATION AND ADULTERATION

Provisions calling for sanitary premises¹⁷³ and containers or uten-

¹⁷⁰ ALA. CODE tit. 22, § 223 (1940); ARIZ. REV. STAT. ANN. § 3-606 (1956); ARK. STAT. ANN. § 82-914 (1947); CAL. AGRIC. CODE §§ 469, 470, 476-79; COLO. REV. STAT. ANN. § 66-1-7(15) (1953); CONN. GEN. STAT. REV. § 22-192 (1958) (grade names); FLA. STAT. ANN. § 501.04(9) (1943); FLA. STAT. ANN. § 502.04 (Supp. 1959); GA. CODE ANN. § 42-522.1 (1957); IDAHO CODE ANN. §§ 37-402, -801 (Supp. 1959); ILL. ANN. STAT. ch. 56½, §§ 173a, 174, 175 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 172a (Smith-Hurd Supp. 1959); IND. ANN. STAT. § 35-2504 (Supp. 1959); IOWA CODE ANN. §§ 195.1 to .5, .7 to .27 (1949), as amended, IOWA CODE ANN. §§ 195.3, .7, .10, .12 to .14, .22 (Supp. 1959); IOWA CODE ANN. § 192.10 (Supp. 1959); LA. REV. STAT. ANN. § 40: 921 (Supp. 1959); MICH. STAT. ANN. §§ 12.694(3), (4) (1958); MINN. STAT. ANN. §§ 32.491, 492 (Supp. 1959); MISS. CODE ANN. §§ 4540, 4562-66 (1957); MO. ANN. STAT. §§ 196.640, .655 (1952); MONT. REV. CODES ANN. § 3-2461 (1957); N.H. REV. STAT. ANN. § 183:8 (1955); N.M. § 52-2-11 to -17 (1953); N.C. GEN. STAT. § 106-266.8(j) (Supp. 1959); N.D. REV. CODE § 4-1815 (1943); N.D. REV. CODE §§ 4-1816, -18A01 (Supp. 1957); OKLA. STAT. ANN. tit. 2, §§ 7-53, -55, -56; tit. 63 § 295.6 (Supp. 1959); ORE. REV. STAT. §§ 621.065, .216, .221 (Supp. 1957); R.I. GEN. LAWS ANN. §§ 21-5-1, -3 to -5, -14 (1956); S.C. CODE, Rules & Regs. pp. 190-91, 193-94, 196 (Supp. 1959); S.D. CODE §§ 4.2002 to .2007 (Supp. 1952); TEX. REV. CIV. STAT. ANN. art. 165-3, §§ 1-8 (1959); VT. STAT. ANN. tit. 6, §§ 2216, 2507 (1958); VA. CODE ANN. §§ 3-396, -400.1 to -400.12, -400.33 (1950); WASH. REV. CODE §§ 15.36.120 to .460 (Supp. 1959); WASH. REV. CODE § 15.36.470 (1951); WIS. STAT. ANN. § 97.047 (1957); WYO. COMP. STAT. ANN. §§ 35-278, -291, -292 (1957). See 44 Stat. 1101 (1927), 21 U.S.C. § 142(3) (1958) (standards set according to scoring methods of U.S. Department of Agriculture).

¹⁷¹ ARIZ. REV. STAT. ANN. § 3-620 (1956); CAL. AGRIC. CODE §§ 460, 478; COLO. REV. STAT. ANN. § 66-1-7(15) (1953); ILL. ANN. STAT. ch. 56½, § 184 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 187a (Smith-Hurd Supp. 1959); IOWA CODE ANN. § 192.12 (Supp. 1959); IOWA CODE ANN. § 192.13 (1949) (dairy bacteriologist); MASS. ANN. LAWS ch. 94, § 13E (1954); MISS. CODE ANN. §§ 4545-02, 4547 (1957) (milk for ice cream); N.Y. AGRIC. & MKTS. LAWS §§ 56-b, 57-a; OHIO REV. CODE § 3717.53 (Anderson 1953) (milk for frozen desserts); OKLA. STAT. ANN. tit. 63, §§ 295.1(5), 295.3, 295.6(B) (Supp. 1959); ORE. REV. STAT. § 621.082 (Supp. 1957); PA. STAT. ANN. tit. 31, § 660 (1958); R.I. GEN. LAWS ANN. §§ 21-5-13, -7-14 (1956); S.C. CODE, Rules & Regs. p. 190 (Supp. 1959); VA. CODE ANN. § 3-400.13 (1950); WIS. STAT. ANN. § 97.045(6d) (1957) (pasteurized cream). Cf. 14 Stat. 1101 (1927), 21 U.S.C. §§ 142(4), 143 (1958).

¹⁷² ARK. STAT. ANN. § 82-914 (1947); COLO. REV. STAT. ANN. § 66-1-7(15) (1953); ILL. ANN. STAT. ch. 56½, § 187a (Smith-Hurd Supp. 1959); IOWA CODE ANN. §§ 195.13, .14 (Supp. 1959); MICH. STAT. ANN. §§ 12.684, .685 (1958); MISS. CODE ANN. §§ 4560-01 to -06, 4567 (1957); MO. ANN. STAT. § 196.670 (Supp. 1959); N.D. REV. CODE § 4-1828 (1943); OKLA. STAT. ANN. tit. 2, §§ 7-41, 7-57 (Supp. 1959); ORE. REV. STAT. § 621.211 (Supp. 1957); S.D. CODE § 4.2008 (Supp. 1952).

¹⁷³ ALA. CODE tit. 2, § 190 (1940); ARIZ. REV. STAT. ANN. § 3-605 (1956); ARK. STAT. ANN. § 82-914 (1947); CAL. AGRIC. CODE §§ 526-29, 535-43, 545, 550-56; COLO. REV. STAT. ANN. § 7-8-1 (1953); CONN. GEN. STAT. REV. §§ 22-189 to -191 (1958); FLA. STAT. ANN. § 502.23 (1943); GA. CODE ANN. §§ 42-401 to -406, -508 (1957); IDAHO CODE ANN. §§ 37-316 (1948); IDAHO CODE ANN. § 37-317 (Supp. 1959); ILL. ANN. STAT. ch. 56½, §§ 190-99 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 214 (Smith-Hurd Supp. 1959); IOWA CODE ANN. § 192.11 (1949); KAN. GEN. STAT. ANN. § 65-706 (1949); ME. REV. STAT. ANN. ch. 32, § 95 (1954); MD. ANN. CODE art. 660, § 441 (1957); MICH. STAT. ANN. §§ 12.605, .674, .838 to .840 (1958); MINN. STAT. ANN. §§ 31.28, .29, 32.13 to .16 (1946); MISS. CODE ANN. §§ 4538, 4539 (1957); MO. ANN. STAT. § 196.585 (Supp. 1959); MONT.

sils¹⁷⁴ are very common, and in some states it is specifically stated in the statutes that standards are to be set by various administrative agencies.¹⁷⁵ In many states standards of quality and cleanliness are set up with a varying degree of elaboration and clarity. In a few others certain statutes might well be interpreted to allow the setting of standards.

REV. CODES ANN. §§ 3-2422, -2424, -2425 (1957); NEB. REV. STAT. § 81-258 (1958); N.J. STAT. ANN. §§ 24:10-15, -38 to -41 (1940); N.J. STAT. ANN. §§ 24:10-16, -42 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS § 47; N.C. GEN. STAT. § 106-246 (Supp. 1959) (ice cream, butter and cream); N.D. REV. CODE §§ 4-1701, -1806, -1808 (1943); OKLA. STAT. ANN. tit. 2, §§ 7-32, -52 (Supp. 1959); ORE. REV. STAT. §§ 621.176, .181 (Supp. 1957); PA. STAT. ANN. tit. 31, § 652 (1958); R.I. GEN. LAWS ANN. §§ 21-2-3, -13, -5-19, -7-14 (1956); S.C. CODE, Rules & Regs. pp. 191-95 (Supp. 1959); TENN. CODE ANN. § 52-306 (1955); UTAH CODE ANN. § 4-20-25 (1953); VT. STAT. ANN. tit. 6, § 2302 (1958); VA. CODE ANN. §§ 3-342, -343 (1950); WASH. REV. CODE §§ 15.32.060 to 0.80, .240, .250 (1951); WASH. REV. CODE §§ 15.36.155 to .200, .230 to .270, .320 to .430 (Supp. 1959); WIS. STAT. ANN. §§ 97.31, .32, .34 (1957); WYO. COMP. STAT. ANN. § 35-302 (1957). The federal law provides that sanitary conditions at dairies or milk plants must conform to standards and scoring methods set up by the U. S. Department of Agriculture. 44 Stat. 1101 (1927), 21 U.S.C. § 142(3) (1958).

¹⁷⁴ ALA. CODE tit. 2, §§ 190, 191 (1940); ARK. STAT. ANN. § 82-914 (1947); CAL. AGRIC. CODE § 461; COLO. REV. STAT. ANN. §§ 7-8-3, -4 (1953); GA. CODE ANN. § 42-508 (1957); IDAHO CODE ANN. §§ 37-306, -308, -310 (1948); ILL. ANN. STAT. ch. 56½, §§ 16, 17, 200-04 (Smith-Hurd 1951); IND. ANN. STAT. § 35-2515 (1949); IOWA CODE ANN. §§ 192.11, 195.23 (1949); KAN. GEN. STAT. ANN. § 65-706 (1949); ME. REV. STAT. ANN. ch. 32, §§ 95(I) (H) (1954); MD. ANN. CODE art. 43, § 578 (1957) (pasteurized milk); MASS. ANN. LAWS ch. 94A §§ 46-48 (1954), as amended, MASS. ANN. LAWS ch. 94, §§ 46, 48 (Supp. 1959); MICH. STAT. ANN. §§ 12.674, .680 (1958); MINN. STAT. ANN. §§ 32.08 (1959); MISS. CODE ANN. §§ 4538, 4539, 4568 (1957); MO. ANN. STAT. §§ 196.590 (1952); MO. ANN. STAT. § 196.585 (Supp. 1959); MONT. REV. CODES ANN. § 3-2431 (1957); NEB. REV. STAT. §§ 81-235(1), -240, -243, -258 (1958); NEV. REV. STAT. § 584.300 (Supp. 1959); N.H. REV. STAT. ANN. §§ 184:28, :29, :33 (1955); N.J. STAT. ANN. §§ 24:10-15(14) to (16), -43 to -45 (1940); N.J. STAT. ANN. §§ 14:10-16(9), (12), (17) (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS §§ 47, 48, 49; N.C. GEN. STAT. § 106-247 (1952) (milk for ice cream); N.D. REV. CODE §§ 4-1704, -1807, -1808 (1943); OKLA. STAT. ANN. tit. 63, §§ 291-93 (1949); OKLA. STAT. ANN. tit. 2, §§ 7-32, -52; tit. 63, § 295.6 (Supp. 1959); ORE. REV. STAT. § 621.186 (Supp. 1957); PA. STAT. ANN. tit. 31, §§ 661, 681, 682 (1958); R.I. GEN. LAWS ANN. §§ 21-2-3, -5-31 to -33 (1956); S.C. CODE, Rules & Regs. pp. 194-95, 196-97 (Supp. 1959); S.D. CODE § 4.2012 (Supp. 1952); TENN. CODE ANN. §§ 52-306(2), -306(8) (1955); UTAH CODE ANN. §§ 4-20-33, -23 (1953); VT. STAT. ANN. tit. 6, §§ 2171-73 (1958); VA. CODE ANN. §§ 3-342, -345, -400.23, -400.29 (1950); WASH. REV. CODE §§ 15.36.205. to .225, .395 (Supp. 1959); WIS. STAT. ANN. §§ 97.32, .33, .34, .66 (1957); WYO. COMP. STAT. ANN. §§ 35-282, -302 (1957).

¹⁷⁵ See CAL. AGRIC. CODE § 411; CONN. GEN. STAT. REV. § 22-152 (1958); FLA. STAT. ANN. § 502.01 (Supp. 1959); IDAHO CODE ANN. §§ 37-320 to -323 (1948); IDAHO CODE ANN. § 37-402 (Supp. 1959); ILL. ANN. STAT. ch. 56½, § 40 (Smith-Hurd 1951); LA. REV. STAT. ANN. §§ 40:896, :922 (Supp. 1959); ME. REV. STAT. ANN. ch. 32, §§ 100-13 (1954); MASS. ANN. LAWS ch. 94, §§ 20, 22 (1954); MASS. ANN. LAWS ch. 94, § 12 (Supp. 1959); MO. ANN. STAT. § 196.530 (1952); N.H. REV. STAT. ANN. §§ 184:25, :31 to :37 (1955); N.J. STAT. ANN. §§ 24:10-14 to -16 (1940), as amended, N.J. STAT. ANN. § 24:10-16 (Supp. 1959); N.M. STAT. ANN. § 52-1-17 (Supp. 1959); N.C. GEN. STAT. § 106-268 (1952); OHIO REV. CODE §§ 3717.07, .08 (Anderson 1953); OKLA. STAT. ANN. tit. 2, § 7-81 (Supp. 1959); ORE. REV. STAT. §§ 616.075, .405 to .475, .515 (Supp. 1955); ORE. REV. STAT. §§ 621.060, .176, .181, .211, .216, .405, .410 (Supp. 1957); R.I. GEN. LAWS ANN. § 21-2-3 (1956); S.C. CODE §§ 32-1610.15 (Supp. 1959); UTAH CODE ANN. §§ 4-20-14, -16, -21-6 (1953); VT. STAT. ANN. tit. 6, § 2095 (1958); VA. CODE ANN. § 3-400.32 (1950); WASH. REV. CODE §§ 15.32.020, .030, .36.130, .140, .290 to .320, .450, .460 (Supp. 1959); WASH. REV. CODE § 15.36.550 (1951); W. VA. CODE ANN. § 2037 (Supp. 1959); WYO. COMP. STAT. ANN. §§ 35-280, -298 (1957).

In fact proper and well defined standards are essential to the validity of any comprehensive milk control program.¹⁷⁶

Most of the states have statutes providing for some form of inspection of dairies and distributors' plants and processing facilities.¹⁷⁷ Where inspection of producers' plants was not required by New Hampshire statutes then in effect and was carried out merely as a means of insuring the continued good quality of the milk, it was ruled in a mandamus proceeding that a municipal board of health would not be justified in denying a license to sell milk solely because of the added cost of inspection.¹⁷⁸ The board had not acted in a quasi-judicial capacity in denying the license but had merely set up a regulation in the nature of an administrative rule. The reasonableness of the regulation was said to be a question of law which the applicant for a license was entitled to have judicially determined. An issue was also presented in Texas where, under a city ordinance embodying a statute, a local health officer made no reasonable attempt to make a proper inspection effort to determine whether a permit to sell milk should be granted. The corporate applicant's products had met the federal and state inspection requirements, and it was ruled that the health officer's refusal to issue a permit had been shown to be arbitrary and an abuse of discretion.¹⁷⁹ A mandatory

¹⁷⁶ State *ex rel.* State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 Atl. 116 (1935); Jersey Maid Milk Prods. Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 557 (1939).

¹⁷⁷ ARIZ. REV. STAT. ANN. § 3-604 (1956); ARK. STAT. ANN. § 82-913 (1947); CAL. AGRIC. CODE §§ 490-512; COLO. REV. STAT. ANN. § 7-8-1 (1953); CONN. GEN. STAT. REV. § 22-175 (1958); FLA. STAT. ANN. § 502.25 (Supp. 1959); GA. CODE ANN. §§ 42-402, -407, -408, -503, -522.4 (1957); IDAHO CODE ANN. §§ 37-302 (1948); IDAHO CODE ANN. § 37-401 (Supp. 1959); ILL. ANN. STAT. ch. 56½, §§ 223, 227 (Smith-Hurd 1951); IOWA CODE ANN. §§ 178.2, 195.24 (1949); KAN. GEN. STAT. ANN. § 65-701 (1949); LA. REV. STAT. ANN. §§ 40:895, :935 (1951); ME. REV. STAT. ANN. ch. 25, § 148; ch. 32, §§ 88, 95; ch. 100, §§ 153-56 (1954); MD. ANN. CODE art. 43, § 572; art. 66C, § 441 (1957); MASS. ANN. LAWS ch. 94 §§ 16K, 16L, 33, 35, 36 (1954); MICH. STAT. ANN. §§ 12.608, 838 to 840 (1958); MINN. STAT. ANN. § 32.29 (1946); MINN. STAT. ANN. §§ 32.29 (1946); MINN. STAT. ANN. § 32.30 (Supp. 1959); MISS. CODE ANN. § 4539 (1957); MO. ANN. STAT. §§ 71.720, 73.110(17), 77.560, 79.370 (1952); MO. ANN. STAT. §§ 75.110(18), 196.535 (Supp. 1959); MONT. REV. CODES ANN. §§ 3-2425, -2452 (1957); MONT. REV. CODES ANN. § 27-415 (1955); NEV. REV. STAT. §§ 81-244, -262 (1958); NEV. REV. STAT. §§ 584.190, .200, .205 (1957); N.H. REV. STAT. ANN. §§ 184:1 to :3, :61, :62 (1955); N.J. STAT. ANN. § 4:12-41.14 (1959); N.M. STAT. ANN. § 52-1-19 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS § 51; N.C. GEN. STAT. § 106-264 (1952); N.D. REV. CODE § 4-1704 (1943); OKLA. STAT. ANN. tit. 2, §§ 7-2, -31; tit. 63 § 295.6(A) (Supp. 1959); ORE. REV. STAT. §§ 616.055, .070 (Supp. 1955); ORE. REV. STAT. § 621.291 (Supp. 1957); PA. STAT. ANN. tit. 31, § 700j310 (1958); R.I. GEN. LAWS ANN. §§ 21-2-15, -7-6, -7-8 (1956); S.C. CODE, Rules & Regs. p. 190 (Supp. 1959); S.D. CODE § 4.2013 (Supp. 1952); TENN. CODE ANN. § 52-320 (1955); TEX. REV. CIV. STAT. ANN. arts. 1175(19) (1953); TEX. REV. CIV. STAT. ANN. art. 4420 (1951); UTAH CODE ANN. §§ 4-20-2, -21-10 (1953); VT. STAT. ANN. tit. 6, § 2302 (1958); VA. CODE ANN. § 3-361 (1950); WASH. REV. CODE §§ 15.32.510 to .530, .560, .36.100, .560, .570 (1951); WIS. STAT. ANN. § 97.08 (1957); WYO. COMP. STAT. ANN. §§ 35-274, -238, -287, -289, -301 (1957). Inspection of milk products used in foreign commerce. 35 Stat. 254 (1908), 21 U.S.C. § 94a (1958); 44 Stat. 1100 (1927), as amended 21 U.S.C. 143 (1958).

¹⁷⁸ H. P. Hood & Sons, Inc. v. Boucher, 98 N.H. 399, 101 A.2d 466 (1953).

¹⁷⁹ City of Greenville v. Cabell's Inc., 207 S.W.2d 898 (Tex. Civ. App. 1948).

injunction was granted, but the court declared that the permit could be canceled at any future date if the established standards were not met.

Often a question will arise concerning the power of a municipality to enact ordinances with respect to milk inspection. The Pennsylvania court has held that a city of a specified class may constitute the local board of health a milk inspection bureau and confer upon its officers authority to enforce a milk inspection ordinance.¹⁸⁰ The ordinance creating the inspection bureau was held not to be invalid as being unreasonable or as containing material on more than one subject.

Inspection fees, set up by city ordinance or promulgated by municipal agencies, are valid if not unreasonable and if they do not exceed the cost of the administration of the inspection program.¹⁸¹ Such inspection fees are not invalid merely because a sum slightly in excess of the expenses connected with the inspection program is raised thereby. The evidence introduced in one case so holding established that there was no excess in the aggregate and that only in some categories did an excess exist.¹⁸² The ordinance there under consideration imposed a milk inspection fee of one and one-third cents upon each one hundred pounds of distributors' milk and a fee of only two-thirds of a cent upon the same quantity of producers' milk. This was ruled neither excessive nor discriminatory, there being evidence that distributors were benefited more by inspection than the producers.

Milk should at all times be kept free from contamination and contact with disease germs which affect cattle and/or human beings. On the statute books are many laws which try to carry out this policy. The most common of these laws are those which make unlawful the sale of milk from diseased cows.¹⁸³ A federal statute¹⁸⁴ prohibits the importa-

¹⁸⁰ Hoar v. Lancaster City, 290 Pa. 117, 137 Atl. 664 (1927).

¹⁸¹ Coleman v. Little Rock, 191 Ark. 844, 88 S.W.2d 58 (1935); Belzung v. State, 183 Ark. 472, 36 S.W.2d 397 (1931); City of Newport v. Hiland Dairy Co., 291 Ky. 561, 164 S.W.2d 818 (1942).

¹⁸² Terry Dairy Prods. Co. v. Beard, 214 Ark. 440, 216 S.W.2d 860 (1949).

¹⁸³ ALA. CODE tit. 2, § 192 (1940); ARIZ. REV. STAT. ANN. §§ 3-612 to -614 (1956); CAL. AGRIC. CODE § 442; CONN. GEN. STAT. REV. § 22-166 (1958); GA. CODE ANN. § 42-508 (1957); ILL. ANN. STAT. ch. 38, §§ 9, 10 (Smith-Hurd 1935); ILL. ANN. STAT. ch. 56½, § 189 (Smith-Hurd Supp. 1959); KAN. GEN. STAT. ANN. § 65-706 (1949); ME. REV. STAT. ANN. ch. 137, § 4 (1954); MD. ANN. CODE art. 66C, § 456 (1957); MICH. STAT. ANN. § 12.604 (1958) (see also MICH. STAT. ANN. § 14.23 (1956)); MINN. STAT. ANN. § 32.21 (1946); MISS. CODE ANN. § 4539 (1957); MO. ANN. STAT. § 196.545 (1952); MONT. REV. CODES ANN. §§ 27-103 (1955); MONT. REV. CODES ANN. § 94-1206 (1949); NEB. REV. STAT. § 81-235 (1) (1958); N.H. REV. STAT. ANN. § 184:41 (1955); N.J. STAT. ANN. § 24:10-15 (6) (1940); N.D. REV. CODE §§ 4-1704, 36-1402 (1943); OHIO REV. CODE §§ 3717.12, .31 (Anderson 1953); OHIO REV. CODE § 3717.53 (Anderson 1953) (must be pasteurized if used in manufacturing frozen desserts); OKLA. STAT. ANN. tit. 63, § 295.6(C) (Supp. 1959); ORE. REV. STAT. §§ 621.117, .118, .119, .124 (Supp. 1957) (must be pasteurized to permit sale and not as grade A); PA. STAT. ANN. tit. 3, § 401 (1930) (must be pasteurized before using as food for animals); R.I. GEN. LAWS ANN. §§ 21-2-3, -3-1 to -3-6 (1956); S.C. CODE, Rules & Regs. p. 191 (Supp. 1959); TENN. CODE ANN. § 52-304(1) (1955); TEX. REV. CIV. STAT. ANN. art. 4474 (1951); UTAH CODE ANN. § 4-21-6 (1953) (cows with diseased udders);

tion from foreign countries of milk coming from cows which have not had both a health examination and a tuberculosis test within one year. Many states have statutes which require tests for bovine tuberculosis¹⁸⁵ and brucellosis or Bang's disease.¹⁸⁶ Furthermore, some states have legislation prohibiting diseased persons from working in or being closely associated with dairies and/or milk plants.¹⁸⁷ In Illinois the personal cleanliness of dairy workers is required.¹⁸⁸ Moreover, it is noted that condemnation of impure and/or unsanitary milk has been decreed by

WASH. REV. CODE § 15.32.160 (1951); W. VA. CODE ANN. §§ 1370, 2035 (1955); WIS. STAT. ANN. § 97.36(1) (1957); WIS. STAT. ANN. § 97.36(7) (1957) (limited sales permitted if milk pasteurized or sterilized); WYO. COMP. STAT. ANN. §§ 35-281, -303 (1957). The Nebraska, Tennessee, and Wyoming statutes include milk from unclean or filthy cows.

¹⁸⁴ 44 Stat. 1101 (1927), 21 U.S.C. § 142(1), (2) (1958).

¹⁸⁵ ARIZ. REV. STAT. ANN. § 3-611 (1956); CAL. AGRIC. CODE § 450(b); COLO. REV. STAT. ANN. § 8-5-26 (1953); CONN. GEN. STAT. REV. § 22-192 (1958); ILL. ANN. STAT. ch. 56½ § 189 (Smith-Hurd Supp. 1959); IND. ANN. STAT. §§ 16-1801 to -1809 (Supp. 1959); IOWA CODE ANN. §§ 165.1 to .36, 192.6 (1949), as amended, IOWA CODE ANN. § 165.17 (Supp. 1959); ME. REV. STAT. ANN. ch. 32, § 95(I) (A) (1954); MO. ANN. STAT. § 196.840 (1952); MONT. REV. CODES ANN. § 27-106 (1955); NEB. REV. STAT. § 81-235(2) (1958); N.H. REV. STAT. ANN. 443:47, :51 to :54 (1955); N.J. STAT. ANN. §§ 4:5-19 to -33 (1959); N.J. STAT. ANN. § 24:10-15(4) (1940); N.M. STAT. ANN. §§ 47-5-4, -6-2, -6-6 (1953); N.Y. AGRIC. & MKTS LAWS § 78; OKLA. STAT. ANN. tit. 63, § 295.6(C) (Supp. 1959); ORE. REV. STAT. §§ 597.206 to .290 (Supp. 1957); PA. STAT. ANN. tit. 31, § 654 (1958); S.C. CODE, Rules & Regs. p. 191 (Supp. 1959); S.D. CODE § 22.0505 (1939); TENN. CODE ANN. §§ 44-901 to -913 (1955); UTAH CODE ANN. §§ 4-20-21 (1953); VT. STAT. tit. 6, §§ 1281-1339 (1958); VA. CODE ANN. §§ 3-400.15 (1950); VA. CODE ANN. §§ 3-584, -589 (Supp. 1958); WASH. REV. CODE § 15.36.150 (Supp. 1959); W. VA. CODE ANN. §§ 2016-18 (1955); WIS. STAT. ANN. § 95.25 (1957); WYO. COMP. STAT. ANN. § 35-299 (1957); see 58 Stat. 734 (1944), as amended, 21 U.S.C. § 114a (1958).

¹⁸⁶ ARIZ. REV. STAT. ANN. §§ 3-641 to -647 (1956), as amended, ARIZ. REV. STAT. ANN. §§ 3-641, -643, to -645 (Supp. 1959); CONN. GEN. STAT. REV. § 22-192 (1958); ILL. ANN. STAT. ch. 56½, § 220.5 (Smith-Hurd Supp. 1959); ME. REV. STAT. ANN. ch. 32, §§ 74-77 (1954); N.H. REV. STAT. ANN. §§ 443:47 to :50 (1955); N.M. STAT. ANN. §§ 47-6-2, -6 (1953); N.Y. AGRIC. & MKTS. LAWS § 90; OKLA. STAT. ANN. tit. 63, § 295.6(C) (Supp. 1959); ORE. REV. STAT. §§ 597.206 to .290 (Supp. 1957); S.C. CODE, Rules & Regs. p. 191 (Supp. 1959); TENN. CODE ANN. §§ 44-601 to -614 (1955); VT. STAT. ANN. tit. 6, § 1546 (1958); VA. CODE ANN. §§ 3-400.15 (1950); VA. CODE ANN. § 3-584, -589, -593 (Supp. 1958); WASH. REV. CODE § 15.36.150 (Supp. 1959); W. VA. CODE ANN. §§ 1982, 1991 (1955); WIS. STAT. ANN. § 95.26 (1957); WYO. COMP. STAT. ANN. § 35-299 (1957); see 58 Stat. 734 (1944), as amended, 21 U.S.C. § 144a (1958).

¹⁸⁷ ARIZ. REV. STAT. ANN. § 3-610 (1956); CAL. AGRIC. CODE § 467, 469; CONN. GEN. STAT. REV. § 22-188 (1958); IDAHO CODE ANN. §§ 37-315, -316 (1948); ILL. ANN. STAT. ch. 56½ §§ 225 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 213 (Smith-Hurd Supp. 1959); KAN. GEN. STAT. ANN. § 65-706 (1949); ME. REV. STAT. ANN. ch. 32, § 95(I) (O) (1954); MD. ANN. CODE art. 43, § 577 (1957); MISS. CODE ANN. § 4536 (1957); MO. ANN. STAT. §§ 196.545, .630 (1952); NEB. REV. STAT. § 81-235(2) (1958); N.J. STAT. ANN. §§ 24:10-15(5), -40 (1940); N.J. STAT. ANN. § 24:10-16(1) (Supp. 1959); N.J. STAT. ANN. § 26:4-17, -18 (Supp. 1959); N.J. STAT. ANN. § 26:4-42 (1940); N.Y. AGRIC. & MKTS. LAWS § 47; ORE. REV. STAT. § 434.180 (1959) (venereal); R.I. GEN. LAWS ANN. § 21-2-3 (1956); TENN. CODE ANN. § 52-307 (1955) (health certificates required); TEX. REV. CIV. STAT. ANN. arts. 4474, 4474(24) (1951); VA. CODE ANN. §§ 3-400.30, -400.31 (1950); WASH. REV. CODE §§ 15.36.270, .425 (Supp. 1959); WASH. REV. CODE § 15.36.520 (1951); WYO. COMP. STAT. ANN. § 35-300 (1957).

¹⁸⁸ ILL. ANN. STAT. ch. 56½, §§ 207, 208 (Smith-Hurd 1951).

statute in several states.¹⁸⁰ Four of the states having such laws, Iowa, Missouri, Oklahoma, and Oregon, make it compulsory to put coloring matter in the condemned milk, but two others make it unlawful to introduce extraneous coloring matter into any milk whatsoever.¹⁰⁰ In fact most of the states have milk laws forbidding or regulating diluting or adulteration.¹⁰¹ A few states outlaw the use of preservatives for purposes of conservation.¹⁰²

To discourage the use of fats or oils other than milk in milk products the filled milk acts have been enacted by the Federal Government¹⁰³ and by the legislatures of many states.¹⁰⁴ These statutes vary in length

¹⁰⁰ CAL. AGRIC. CODE §§ 443, 444; COLO. REV. STAT. ANN. § 7-8-1 (1953); IOWA CODE ANN. § 195.19 (1949) (cream); KAN. GEN. STAT. ANN. § 65-701 (1949); MO. ANN. STAT. § 196.550 (Supp. 1959); MONT. REV. CODES ANN. § 3-2438 (1957); N.H. REV. STAT. ANN. § 184:45 (1955); N.C. GEN. STAT. § 106-268 (1952); OKLA. STAT. ANN. tit. 2, §§ 7-5, -35, -58 (Supp. 1959); ORE. REV. STAT. §§ 621.085, .226 (Supp. 1957); PA. STAT. ANN. tit. 31, § 660e (1958); UTAH CODE ANN. § 4-21-12 (1953).

¹⁰⁰ MONT. REV. CODES ANN. § 3-2443 (1957); PA. STAT. ANN. tit. 31, § 527 (1958).

¹⁰¹ ALA. CODE tit. 2, §§ 188, 189 (1940); ARIZ. REV. STAT. ANN. § 3-630 (1956); COLO. REV. STAT. ANN. § 7-8-1 (1953); CONN. GEN. STAT. REV. §§ 22-153, -158 (1958); FLA. STAT. ANN. §§ 500.10, .13 (1943) (food in general); GA. CODE ANN. §§ 42-508, -511 (1957); IDAHO CODE ANN. §§ 37-313, -314 (1948); ILL. ANN. STAT. ch. 38, § 14 (Smith-Hurd 1935); KAN. GEN. STAT. ANN. § 65-707 (Supp. 1959); ME. REV. STAT. ANN. ch. 137, § 3 (1954); MD. ANN. CODE art. 43, § 576 (1957); MASS. ANN. LAWS ch. 94, § 19 (1954); MICH. STAT. ANN. §§ 12.602, .604 (1958); MICH. STAT. ANN. § 28.215 (Supp. 1959); MINN. STAT. ANN. § 32.21 (1946); MISS. CODE ANN. § 4556 (1957); MO. ANN. STAT. § 196.600 (1952); MONT. REV. CODES ANN. § 27-103 (1957); NEV. REV. STAT. § 81-233 (1958); NEV. REV. STAT. § 584.290 (Supp. 1959); N.H. REV. STAT. ANN. § 184:41 (1955); N.J. STAT. ANN. § 24:10-15(3) (1940); N.M. STAT. ANN. § 52-1-20 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS §§ 46, 50; N.C. GEN. STAT. § 106-268 (1952); N.D. REV. CODE § 4-1704 (1943); N.D. REV. CODE § 4-1846 (Supp. 1957); OHIO REV. CODE §§ 3717.01, .09, .31 (Anderson 1953); OHIO REV. CODE §§ 3717.44 to .49 (Anderson 1953) (evaporated and condensed milk); OKLA. STAT. ANN. tit. 63, §§ 295.1(M), 295.2 (Supp. 1959); ORE. REV. STAT. §§ 616.205 to .320 (Supp. 1955); ORE. REV. STAT. §§ 621.088 (Supp. 1957) (food in general); PA. STAT. ANN. tit. 31, § 521 (1958) (see also PA. STAT. ANN. tit. 31, §§ 526, 527 (1958)); R.I. GEN. LAWS ANN. §§ 21-5-24, -7-10 (1956); S.C. CODE § 32-1602 (1952); S.C. CODE, Rules & Regs. p. 189 (Supp. 1959); S.D. CODE §§ 22.0502, .0503, .0506 (1939); TENN. CODE ANN. §§ 52-304(3), (4), -322 to -328 (1955); TEX. REV. CIV. STAT. ANN. art. 4474 (1951); TEX. PEN. CODE ANN. art. 712 (Supp. 1959); UTAH CODE ANN. §§ 4-20-1, -20-24, -20-26 -21-2, -21-6 (1953); VT. STAT. ANN. tit. 6, § 2098 (1958); VA. CODE ANN. §§ 3-344, -385 (1950); WASH. REV. CODE §§ 15.32.120 to .150, .36.070 (1951); WASH. REV. CODE §§ 15.36.030 (Supp. 1959); W. VA. CODE ANN. § 1370 (1955); WIS. STAT. ANN. §§ 97.34, .36, .37, .38 (1957); WYO. COMP. STAT. ANN. § 35-303 (1957).

¹⁰² ILL. ANN. STAT. ch. 56½, § 23 (Smith-Hurd 1951); PA. STAT. ANN. tit. 31, § 527 (1958); TENN. CODE ANN. § 52-305 (1955) (with exceptions); UTAH CODE ANN. § 4-20-18 (1953).

¹⁰³ 42 Stat. 1486-87 (1923), as amended, 21 U.S.C. §§ 61-63 (1958); 49 Stat. 885 (1935) as amended, 21 U.S.C. § 64 (1958).

¹⁰⁴ ALA. CODE tit. 2, § 189 (1940); ARK. STAT. ANN. §§ 82-919, -920 (1947); COLO. REV. STAT. ANN. § 7-8-25 to -32 (1953); CONN. GEN. STAT. REV. § 22-171 (1958); FLA. STAT. ANN. § 502.29 to .34 (1943); FLA. ANN. STAT. § 502.01 (Supp. 1959); IDAHO CODE ANN. §§ 37-1101 to -1104 (1948); KAN. GEN. STAT. ANN. §§ 65-725 to -732 (Supp. 1959); KY. REV. STAT. §§ 217.260, .270 (1959); ME. REV. STAT. ANN. ch. 32, § 120 (1954); MASS. LAWS ANN. ch. 94, § 17A (1954); MICH. STAT. ANN. § 12.618(21) to (27) (1958); MINN. STAT. ANN. §§ 32.49, .53, to .533

and some of them are very elaborate. They prohibit the use of various oils and fats in mixtures which are represented as natural lactic products. Many of them, together with the laws in effect in these and other jurisdictions controlling the manufacture of ice cream and other frozen milk products, refer to combinations of milk with other ingredients. Such concoctions, with or without non-milk fats or oils, may contain various named types of processed or treated milk. Quite a few of the statutes list such usual lactic products as concentrated, condensed, desiccated, dried, evaporated, and powdered milk, and there are more or less frequent references to buttermilk and aerated, certified, chocolate, emulsified, homogenized, imitation, malted, manufacturing, modified, pasteurized, and skimmed milk.

While several of these filled milk acts prohibiting the use of fats and oils other than butterfats were held in comparatively early cases to be an arbitrary and unwarranted exercise of the police power,¹⁹⁵ the more recent decisions have favored the validity of such legislation as a health measure which does not deny due process.¹⁹⁶ Approval has also been given to statutes regulating the amount of butterfat required for chocolate drinks¹⁹⁷ or ice milk.¹⁹⁸ The need for the chocolate milk statute was demonstrated by the fact that large quantities of a sub-standard product were being sold to children for school lunches in spite of an inscription on the bottle cap concerning the reduced amount of butterfat. The United States Supreme Court has also upheld the federal act prohibiting the shipment of "filled milk" in interstate commerce.¹⁹⁹ A lower federal court has remarked that such legislation was enacted with the idea of avoiding the competition of cocoanut groves with the American cow.²⁰⁰

(Supp. 1957); MO. ANN. STAT. §§ 196.695, .710 to .715 (1952); MONT. REV. CODES ANN. § 3-2439 (1957); N.H. REV. STAT. ANN. § 184:42 (1955); N.M. STAT. ANN. § 52-2-5 to -10 (1953); N.Y. AGRIC. & MKTS. LAWS §§ 60, 64; N.D. REV. CODE §§ 4-18B01 to -18B05 (Supp. 1957); R.I. GEN. LAWS ANN. § 21-9-14 (1956); S.D. CODE §§ 22.05A01 to .05A06 (Supp. 1952); TENN. CODE ANN. §§ 52-324 to -328 (1955); TEX. PEN. CODE ANN. art. 713a (1948); UTAH CODE ANN. §§ 4-20-59 to -63 (1953) ("imitation milk"); VT. STAT. ANN. tit. 6, §§ 2131-33 (1958); VA. CODE ANN. §§ 3-471 to -476 (1950); WASH. REV. CODE §§ 15.38.001 to .050 (1951); W. VA. CODE ANN. § 2036 (1955); WIS. STAT. ANN. § 97.39 (1957).

¹⁹⁵ *Carolene Prods. Co. v. McLaughlin*, 365 Ill. 62, 5 N.E.2d 447 (1936); *People v. Carolene Prods. Co.*, 345 Ill. 166, 177 N.E. 698 (1931); *Carolene Prods. Co. v. Thomson*, 276 Mich. 172, 267 N.W. 608 (1936); *Carolene Prods. Co. v. Banning*, 131 Neb. 429, 268 N.W. 313 (1936).

¹⁹⁶ *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32 (1944); *Setzer v. Mayo*, 150 Fla. 734, 9 So. 2d 280 (1942); *Carolene Prods. Co. v. Mohler*, 152 Kan. 2, 102 P.2d 1044 (1940); *Carolene Prods. Co. v. Hanrahan*, 291 Ky. 417, 164 S.W.2d 597 (1941); *Poole & Creber Mkt. Co. v. Breshears*, 343 Mo. 1133, 125 S.W.2d 23 (1939); *Carolene Prods. Co. v. Harter*, 329 Pa. 49, 197 Atl. 627 (1938).

¹⁹⁷ *Thayer v. Department of Agriculture*, 323 Mich. 403, 35 N.W.2d 360 (1949).

¹⁹⁸ *Dairy Belle, Inc. v. Freeland*, 175 Kan. 344, 264 P.2d 894 (1953).

¹⁹⁹ *Carolene Milk Prods. Co. v. United States*, 323 U.S. 18 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

²⁰⁰ *Carolene Prods. Co. v. Wallace*, 27 F. Supp. 110 (D.D.C. 1939).

Filled milk statutes may be validly enforced despite the correct labeling of the product as being not up to standard or as containing the prohibited substitutes.²⁰¹ There are also decisions to the effect that wholesomeness of the product is no defense to an indictment under the federal act.²⁰² In one case of doubtful accuracy, however, it was said that an indictment under a valid statute of this kind may be sufficiently answered by proof of facts showing that as pertaining to a particular article of food the application of the act is unreasonable because the food, though within the proscribed class, is so different from similar products as to give no reason why its use should be prohibited, the effect of such proof depending upon the circumstances of each particular case.²⁰³ The probabilities are that reasoning such as this would receive little support today.

The Missouri court has ruled that it must be presumed legislators have investigated the propriety of the enactment of filled milk laws from the public health standpoint, and that a statute should not be ruled invalid unless it can be shown to be arbitrary or unreasonable.²⁰⁴ This holding seems to state a far better rule than that stated by two cases decided under the federal statute to the effect that the legislative body is the final arbiter in respect to public health and that its decision cannot be interfered with either by the judgment of a court or the verdict of a jury.²⁰⁵

To come within the prohibition of these filled milk statutes the product must be in semblance of milk,²⁰⁶ and, if such is the case, it will not matter that no misrepresentation had been made concerning its true content.²⁰⁷

Filled milk regulations with limited scope may be found. A provision in a Pennsylvania statute prohibited the sale of any compound containing skimmed milk in other than five-pound cans labeled with the words "concentrated skimmed milk" and "unfit for infants" inscribed on the containers in letters half an inch high. This provision had as its object the prevention of the sale of sub-standard products to or for small children. The statute was held to be non-discriminatory even though it failed to regulate the sale of ordinary skimmed milk, since the regular beverage, although equally unfit for small children, was commonly

²⁰¹ *Carolene Prods. Co. v. Hanrahan*, 291 Ky. 417, 164 S.W.2d 597 (1941); *Poole & Creber Mkt. Co. v. Breshears*, 343 Mo. 1133, 125 S.W.2d 23 (1939).

²⁰² *Carolene Milk Prods. Co. v. United States*, 323 U.S. 18 (1944); *Carolene Prods. Co. v. Wallace*, 27 F. Supp. 110 (D.D.C. 1939).

²⁰³ *Setzer v. Mayo*, 150 Fla. 734, 9 So. 2d 280 (1942).

²⁰⁴ *Poole & Creber Mkt. Co. v. Breshears*, 343 Mo. 1133, 125 S.W.2d 23 (1939).

²⁰⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Carolene Prods. Co. v. Wallace*, 27 F. Supp. 110 (D.D.C. 1939).

²⁰⁶ *Carolene Prods. Co. v. United States*, 323 U.S. 18 (1944); *Carolene Prods. Co. v. Hanrahan*, 291 Ky. 417, 164 S.W.2d 597 (1941).

²⁰⁷ *Carolene Prods. Co. v. Hanrahan*, *supra* note 206.

packaged in such a manner that purchasers were not likely to be deceived. The court declared that the validity of this type of regulation rests not alone upon whether the article of food is in whole or in part unwholesome or injurious, but also upon whether the food is of such a character that few will eat it when they know its real nature.²⁰⁸

During World War II there was some relaxation of restrictions on the use of substitutes for fats and other scarce commodities needed for the national war effort. In one instance the War Food Administrator promulgated a food order prohibiting any person from selling or delivering filled cream having a total content of all oils and fats in excess of nineteen per cent. A mixture was produced by the defendant, a manufacturer, and sold as a substitute for whipping cream. The defendant claimed that the order was arbitrary and unreasonable in respect to his "cream" product on the ground that the restrictions in effect might prohibit the sale of combination products of low as well as high milk fat content. The court refused to listen to this argument and ruled that there had been no denial of due process of law.²⁰⁹

Several states provide by statute for the addition of various vitamins to milk.²¹⁰ A New York court has held that the action of a manufacturer of a product known as "evaporated skimmed milk" in adding vitamin A in the form of concentrated oil and vitamin B³ to skimmed milk did not adulterate the product or preclude its sale.²¹¹

A California statute required labels for "imitation milk products." A manufacturing concern had stated its intention of making and selling a food product containing no milk or milk fat. The product was prepared for use by bakeries and similar establishments as topping for pies and other confections. In considering the product the court decided that it was not an imitative food within the meaning of the statute and that therefore labeling was unnecessary. It was said that a contrary interpretation would involve an unconstitutional and invalid application of the statute resulting in an unreasonable interference with business and property.²¹² There can be no doubt that a statute valid upon its face may be unconstitutionally applied.

²⁰⁸ *Carolene Prods. Co. v. Harter*, 329 Pa. 49, 197 Atl. 627 (1938).

²⁰⁹ *United States v. Russell-Taylor, Inc.* 64 F. Supp. 748 (E.D. Mich. 1946).

²¹⁰ CONN. GEN. STAT. REV. § 22-127 (1958); ILL. ANN. STAT. ch. 56½, § 171 (Smith-Hurd 1951); ILL. ANN. STAT. ch. 56½, § 115.12 (Smith-Hurd Supp. 1959); MD. ANN. CODE art. 43, § 569(p) (1957); MISS. CODE ANN. § 4560-11 (1957); MO. ANN. STAT. § 196.525 (Supp. 1959); OKLA. STAT. ANN. tit. 63, § 295.1(G) (Supp. 1959); S.C. CODE RULES & REGS. pp. 187, 188 (Supp. 1959); TENN. CODE ANN. § 52-303(9) (1955); TEX. REV. CIV. STAT. ANN. art. 165-3 § 1(I) (1959); UTAH CODE ANN. § 4-21-1 (1953); VA. CODE ANN. §§ 3-400.32, -416 to -424 (1950); VA. CODE ANN. §§ 3-424.1 to -424.6 (Supp. 1958); WASH. REV. CODE § 15.36.010 (Supp. 1959).

²¹¹ *Defiance Milk Prods. Co. v. DuMond*, 285 App. Div. 337, 136 N.Y.S.2d 619 (1954).

²¹² *Midget Prods., Inc. v. Jacobsen*, 140 Cal. App. 2d 517, 295 P.2d 542 (1956).

Statutes regulating the milk industry are not always held to cover the purchase and use of milk or cream for the purpose of manufacturing ice cream or other similar frozen desserts.²¹³ Hence there are many special laws covering such frozen products, and these enactments vary in length and elaboration.

A study of the cases concerning attempts on the part of states and various governmental subdivisions and departments to regulate the frozen milk product industry shows the necessity for the controls. One case involved the efforts of a purported dairy products concern to force a Pennsylvania borough board of health to issue it a license to sell ice cream. The board had adopted a regulation making it unlawful to use false labels and requiring ice cream wrappers to bear the manufacturer's name. The applicant was using labels stating that the product which was being put on the market had been manufactured by the concern itself. The labels referred to the applicant under a trade name. As a matter of fact, the products being sold were manufactured by another company. The labels were false and hence there was no compliance with the regulation. The applicant had already obtained a license from the state Department of Agriculture, but its issuance was deemed improper as a violation of a state statute forbidding the sale of falsely labeled ice cream. The court held that the borough board's regulation was neither arbitrary nor capricious and that it was valid as a public health measure.²¹⁴

Questions are continually arising concerning concoctions with unusual or peculiar ingredients or names and their inclusion in or exclusion from various food regulations. Thus a Nebraska statute stating that ice cream or products made in semblance thereof would be considered adulterated if they did not contain at least fourteen per cent butterfat was held to be applicable to a product known as "frozen luxury" containing milk, eggs, sugar, and coffee; moreover, such a statute represented a proper exercise of the police power.²¹⁵ A New York regulation banning "cream to which any substance has been added and for use in fluid state or whipped," thus bringing within its terms a patented product composed of pasteurized cream, sugar, and vanilla, into which nitrous oxide gas had been introduced to produce foaminess, thereby giving it the character of whipped cream, was held unreasonable and arbitrary and therefore invalid as denying due process and equal protection.²¹⁶ The opinion stated that the fact that the classification was arbitrary might appear on the face of the statute or by way of circumstances admitted or proved.

²¹³ *New Jersey ex rel. State Bd. of Milk Control v. Richman Ice Cream Co.*, 117 N.J. Eq. 296, 175 Atl. 796 (1934).

²¹⁴ *Simco Sales Serv., Inc. v. Brackin*, 344 Pa. 628, 26 A.2d 323 (1942).

²¹⁵ *State v. McCosh*, 134 Neb. 780, 279 N.W. 775 (1938).

²¹⁶ *Aerated Prods. Co. v. Godfrey*, 290 N.Y. 92, 48 N.E.2d 275 (1943).

A Wisconsin statute provided that food products must be marked or tagged in such a manner as the Department of Agriculture might direct, the purpose being to indicate whether the tagged products satisfied departmental standards and to show other pertinent information. Another provision prohibited the manufacture or sale of imitation ice cream. A food product concern began the preparation of a semi-frozen concoction known as "Dairy Queen," similar to ice cream but containing a smaller amount of butterfat. There had been no effort on the part of the manufacturer to sell the product as ice cream. Expert testimony had been introduced to attempt to show that butterfat had no uniquely nutritive value and that certain other milk ingredients were present here in even greater quantities than in ice cream. The concoction was shown to be both healthful and nutritious. As applied to this product, the tagging provision was said to be inapplicable. The only purpose of the tagging provision was to protect customers from buying a product different from the one intended, and it was not meant to prevent anyone from selling a food product which was nutritious and healthful.²¹⁷ The court also refused to apply the prohibition against imitation ice cream, ruling that any such interpretation would encourage monopolies.

A congressional enactment covering the District of Columbia prohibited importation into or sale in the jurisdiction of cream without a health officer's permit. With respect to a product known as "Pantry Cream" brought in from mid-western plants it was shown that milk from Michigan farms was tuberculin tested and well inspected by health authorities in two large cities. After being so inspected the milk was chilled and brought to the plant manufacturing the product, there having been no foreign matter or preservatives added. At the plant the milk was warmed and separated and placed in hermetically sealed cans. Then it was sterilized by raising the temperature inside the cans, the equipment used for the purpose being the same as that employed in the production of evaporated milk. The product was held to be "cream" within the statute and hence subject to its provisions.²¹⁸ The statutory regulation was deemed neither unreasonable, oppressive, nor absurd. There seemed to be no doubt that the permit could be required.

The legislature's permission to sell a named product is usually accepted by the courts unless the evidence clearly shows that the frozen dessert is harmful to health. Thus a New York statute expressly authorizing the manufacture of "French ice cream," a product without egg content and containing coloring matter to make the dessert resemble egg yolk, was held to justify the producers, there being no violation of

²¹⁷ *Dairy Queen, Inc. v. McDowell*, 260 Wis. 471, 51 N.W.2d 34 (1952), *re-hearing denied*, 260 Wis. 478a, 52 N.W.2d 791 (1952).

²¹⁸ *Leaman v. District of Columbia*, 55 F.2d 1020 (D.C. Cir. 1932).

the New York City Sanitary Code involved.²¹⁹ A city health department chemist testified that the ingredients used in preparing the coloring matter were harmless certified dyes, and there had been no misleading deception or misbranding of the commodity as containing eggs.

The Secretary of Agriculture, with congressionally conferred authority to make regulations under the Agricultural Marketing Agreements Act, set up a milk classification that included all milk the butterfat from which was on hand at or moved out from a plant in the form of frozen desserts or in the form of "homogenized mixture" used in the manufacture of such products. A quantity of the manufactured "mix," a product which might have been used in preparing frozen concoctions, was sold to a purchaser who intended to use it in making a preparation resembling whipped cream. The court approved the classification and held that a proper interpretation of the regulation would not require that all purchasers freeze the product.²²⁰ The wording of the regulation provided an alternative and the "mix" was lawfully sold to the purchaser.

Sometimes a statute will be enacted requiring a particular kind of label for a certain frozen product. Thus a Florida statute prohibited the sale of ice milk unless it was "contained" in a "package" or "enclosed" in a "wrapper" upon which the words "ice milk" were conspicuously printed in not less than fourteen-point type. The requirements of this statute were held to be met by a sale of the product with proper sized inscriptions conspicuously embossed upon open cups or pastry cones.²²¹

There have been instances involving attempts to regulate retail marketing of frozen milk products in respect to the locations at which they or their substitutes may be sold. Thus a local board of health regulation in Massachusetts prohibited the sale of ice cream on the streets and public ways. A statute gave local health boards authority to make and enforce regulations concerning conditions under which all articles of food might be kept or exposed for sale. The court held that the statute could not be said to have authorized the stated regulation and that a conviction based upon its violation would not stand.²²² Furthermore, the court declared that the regulation could not be made retroactive by the enactment of an enabling act which would give validity to similar regulations if enacted at a later date. In another instance a California statute prohibited the sale of imitation ice cream or ice milk in any "place" where the genuine products were sold. The court held that the use of a general term like "place," which had no definitely accepted

²¹⁹ *People v. Blue Ribbon Ice Cream Co.*, 148 N.Y.S.2d 408 (Magis. Ct. 1956).

²²⁰ *Crowley's Milk Co. v. Brannan*, 198 F.2d 861 (2d Cir. 1952).

²²¹ *Mayo v. Ar-tik Sys. Inc.*, 62 So. 2d 408 (Fla. 1953).

²²² *Commonwealth v. Rivkin*, 329 Mass. 586, 100 N.E.2d 838 (1952).

meaning either in general usage or in the trades and industries affected by this legislation, had rendered the act so vague, indefinite, and uncertain as to make it repugnant to the concept of due process.²²³

CONTAINERS

Many states have statutes enumerating and regulating the sizes or proper measures of bottles or other containers used in the marketing of milk or its immediate derivatives like cream.²²⁴ These laws often prohibit the use of containers of capacities or sizes other than those authorized. The validity of such a statute with reasonable limitations has been upheld.²²⁵ Furthermore, it has been held that a Colorado city ordinance which had the effect of prohibiting milk or cream from being sold in gallon bottles was neither unreasonable nor arbitrary and hence not invalid.²²⁶ The court said that gallon bottles were easily chipped, hard to keep sterile, and difficult to handle. But a statute prohibiting the sale of evaporated skimmed milk in containers of less than ten pounds capacity has been ruled invalid.²²⁷ All that was required to sustain the burden of proving the invalidity of the statute was a showing that there was no reasonable basis for the limitation.

The great majority of the states have statutes specifically protecting milk dealers in the use of trade marks on bottles and other containers and making the unauthorized use of such containers unlawful.²²⁸ The

²²³ *Market Basket, Inc. v. Jacobsen*, 134 Cal. App. 2d 73, 285 P.2d 344 (1955).

²²⁴ DEL. CODE ANN. tit. 3, § 3101 (1953); ILL. ANN. STAT. ch. 147, § 25 (Smith-Hurd Supp. 1959); KAN. GEN. STAT. ANN. § 83-118 (1949); ME. REV. STAT. ANN. ch. 32, §§ 100-01, 104-08, 111 (1954), as amended, ME. REV. STAT. ANN. ch. 32, § 106 (Supp. 1959); MICH. STAT. ANN. §§ 12.621 to .623 (1958); MONT. REV. CODES ANN. §§ 90-141 (1959); MONT. REV. CODES ANN. § 90-140 (Supp. 1959); NEB. REV. STAT. § 89-118 (1958); N.J. STAT. ANN. §§ 51:1-10, -30 (1955); N.J. STAT. ANN. §§ 51:1-31.1 to -31.10 (1955) (ice cream); N.M. STAT. ANN. § 76-1-44, -45 (Supp. 1959); OHIO REV. CODE § 1327.29 (Anderson Supp. 1959); R.I. GEN. LAWS ANN. §§ 21-5-28 to -30 (1956); TEX. PEN. CODE ANN. art. 1037 (1948); VA. CODE ANN. §§ 59-120 to -124 (1950), as amended, VA. CODE ANN. § 59-120 (Supp. 1958); WASH. REV. CODE §§ 19.93.290, .300 (Supp. 1959); W. VA. CODE ANN. § 4531 (1955); WIS. STAT. ANN. § 98.12 (1957).

²²⁵ *State v. DeWitt*, 49 Ariz. 197, 65 P.2d 659 (1937).

²²⁶ *Independent Dairymen's Ass'n Inc. v. City of Denver*, 142 F.2d 940 (10th Cir. 1944).

²²⁷ *Defiance Milk Prods. Co. v. Du Mond*, 309 N.Y. 537, 132 N.E.2d 829 (1956), *affirming* 285 App. Div. 337, 136 N.Y.S.2d 619 (1954).

²²⁸ ALA. CODE tit. 2, §§ 402-04 (1940); ARIZ. REV. STAT. ANN. § 3-626 (1956); ARK. STAT. ANN. § 82-913 (1947); CAL. AGRIC. CODE §§ 690-702; COLO. REV. STAT. ANN. § 7-8-8 (1953); DEL. CODE ANN. tit. 3, §§ 3141-50 (1953); FLA. STAT. ANN. §§ 506.01 to .18 (1943); GA. CODE ANN. § 42-508 (1957); IDAHO CODE ANN. §§ 37-901 to -907 (1948); ILL. ANN. STAT. ch. 56½, §§ 94-100 (Smith-Hurd 1951), as amended, ILL. ANN. STAT. ch. 56½, § 99 (Smith-Hurd Supp. 1959); IND. ANN. STAT. §§ 35-2516, -2517 (1949); IOWA CODE ANN. §§ 192.33 to .39 (1949), as amended, IOWA CODE ANN. § 192.33 (Supp. 1959); KAN. GEN. STAT. ANN. § 65-706 (1949); KY. REV. STAT. §§ 365.150 to .200 (1959); ME. REV. STAT. ANN. ch. 32, §§ 114-16, 118 (1954); MD. ANN. CODE art. 27, §§ 275, 471-81 (1957); MICH. STAT. ANN. §§ 12.675 to .679 (1958); MO. ANN. STAT. § 417.300 to .360 (1952), as amended, MO. ANN. STAT. § 417.310 (Supp. 1959); NEB. REV. STAT. §§ 28-1228 to -1233 (1956); N.H. REV. STAT. ANN. §§ 351:1 to :4 (1955); N.J. STAT. ANN.

usual statute applies only where the trade mark is actually used²²⁹ and permits the use of the containers with the owner's consent, usually required to be in writing. In considering the New York statute a court declared that a demand from an owner of marked milk cans was not a condition precedent to his right to recover the statutory penalty for unlawful detention.²³⁰ The penalty was held to have been properly assessed against a defendant who had taken possession of the plaintiff's milk cans and was using them without the latter's consent. It has been held that a consumer subjects himself to no penalty under such a statute simply by accepting the milk in a bottle and later returning the empty container to the milk dealer, this not being the "use" the legislature intended to prohibit.²³¹

Statutes and regulations of this kind are within the police power and have been upheld by the courts.²³² However, such statutes must not violate fundamental constitutional guarantees. In one instance the equal protection guarantee was held to be violated by a North Carolina statute prohibiting the use of receptacles designed for milk or its derivatives, the name, brand, or trade mark of any person or corporation being inscribed thereon, for any purpose other than as containers of dairy products.²³³ The court declared that it could find no proper relation between other uses of milk containers, whether by the owner or by one in lawful possession, and the exigences of the public health, unless, of course, there was some intention to use the receptacles, then or thereafter, for the distribution of milk products.

Some of the statutes provide for the use of search warrants in locating the milk containers. In considering such a provision the Utah court remarked that the statute authorized the use of an essentially

§ 51:1-30 (1955); N.J. REV. STAT. ANN. §§ 56:3-42 to -47 (1955), as amended, N.J. STAT. ANN. § 56:3-47 (Supp. 1959); N.M. STAT. ANN. § 52-1-20 (Supp. 1959); N.Y. AGRIC. & MKT. LAWS §§ 70, 71; N.Y. GEN. BUS. LAWS §§ 270-74; N.D. REV. CODE §§ 4-1834, -1835 (1943); OHIO REV. CODE § 3717.54 (Anderson 1953) (frozen milk products); OKLA. STAT. ANN. tit. 2, §§ 7-121 to -123 (Supp. 1959); ORE. REV. STAT. §§ 616.605 to .640 (Supp. 1955); PA. STAT. ANN. tit. 73, §§ 61-63 (1953); S.C. CODE §§ 32-1642 to -1650 (1952); S.D. CODE § 4-2012 (Supp. 1952); TEX. REV. CIV. STAT. ANN. arts. 844-50 (1953); UTAH CODE ANN. § 4-20-22 (1953); VT. STAT. ANN. tit. 9, §§ 2571-75 (1958); WASH. REV. CODE §§ 15.32.440 to .460, .700 (1951); W. VA. CODE ANN. §§ 4531, 4552-57 (1955). A Virginia statute, VA. CODE ANN. §§ 59-120 to -124 (1950), as amended, VA. CODE ANN. § 59-120 (Supp. 1958), requires trade marks to be on bottles but has no use or protective features. A similar ordinance in a Florida city was held valid. *Logan v. Alfieri*, 110 Fla. 439, 148 So. 872 (1933).

²²⁹ *State ex rel. Otero v. McLeod*, 139 Fla. 287, 190 So. 596 (1939).

²³⁰ *Dairymen's League Co-op. Ass'n v. Ferguson*, 247 App. Div. Div. 856, 286 N.Y. Supp. 954 (1936).

²³¹ *People v. Ryan*, 230 App. Div. 252, 243 N.Y. Supp. 644 (1930).

²³² *Thompson v. Alabama State Milk Control Bd.*, 241 Ala. 100, 1 So. 2d 381 (1941); *State ex rel. Otero v. McLeod*, 139 Fla. 287, 190 So. 596 (1939); *Associated Dairies v. Fletcher*, 143 Kan. 561, 56 P.2d 106 (1936); *People v. Ryan*, 230 App. Div. 252, 243 N.Y. Supp. 644 (1930).

²³³ *State v. Brockwell*, 209 N.C. 209, 183 S.E. 378 (1936).

criminal procedure for the attainment of civil ends.²³⁴ The tribunal declared that the unusual remedy was not reasonably related to the objects sought to be attained and therefore invalidated the statute. Such reasoning might not stand up in view of the simple effectiveness which might be expected to flow from an efficient enforcement of the statute. Here the court was concerned not so much with what was actually done under the circumstances presented in this particular situation as it was with what the enactment made possible. In another instance the Florida court held invalid an ordinance prohibiting the use of any milk container bearing a name or trademark other than that of the person or company producing or distributing the product. The court declared that the ordinance as written would prohibit the use of milk bottles with the trademark of the bottle manufacturer blown into the sides or bottom.²³⁵ In other words the language was too broad. The tribunal was evidently of the opinion that if the ordinance had gone only so far as to prohibit producers or distributors from using bottles or other containers bearing the names or trademarks of other persons or firms in the milk business, the legislation would then have been valid and effective as a reasonable effort to accomplish a lawful purpose.

A familiar provision in some of these statutes is the one requiring finders of branded bottles to make a diligent search for the owner. The California statute also makes it the duty of the finder to return the containers to the owner. The word "diligent" has been given its generally accepted meaning in a case where the statute was held not be invalid as being too vague and uncertain or as violating constitutional provisions requiring uniform operation.²³⁶

There are statutes and ordinances which require certain places of public accommodation to serve milk in original containers. Typical of this kind of regulation is a New Hampshire act²³⁷ applying to hotels, restaurants, and various other establishments which serve meals. The Wisconsin court upheld a Milwaukee ordinance requiring such sales of milk within the city limits to be in original containers, sealed and well capped, the opening to be in the presence of the customer.²³⁸ In the case of the instant violation the restaurant proprietor's employees had dipped the milk from a large container in the kitchen and carried it to the patron, thus creating a greater risk of contamination.

An Iowa statute provided that ice milk must be sold only in packages or wrappers with the manufacturer's label inscribed thereon. In a

²³⁴ *Allen v. Trueman*, 100 Utah 36, 110 P.2d 355 (1941).

²³⁵ *Logan v. Alfieri*, 110 Fla. 439, 148 So. 872 (1933).

²³⁶ *Pacific Coast Dairy v. Police Court of San Francisco*, 241 Cal. 668, 8 P.2d 140 (1932).

²³⁷ N.H. REV. STAT. ANN. § 184:24 (1955).

²³⁸ *City of Milwaukee v. Childs Co.*, 195 Wis. 148, 217 N.W. 703 (1928).

case arising under this act cake cups and pastry cones were considered as "packages" within this labeling requirement.²³⁰

As paper containers came more and more into general use as utensils for everyday milk deliveries, questions arose as to the legality of their use under various governmental regulations. In Pennsylvania paper containers were held to be "bottles" within the meaning of a city board of health regulation requiring the use of bottles for milk.²⁴⁰ Furthermore, an ordinance prohibiting the sale of milk in quantities of less than one gallon in containers other than standard transparent glass milk bottles was held to be so arbitrary, unreasonable, and discriminatory as to violate the due process clause of the fourteenth amendment.²⁴¹ On the other hand, the term "milk bottle" used in a Chicago ordinance requiring milk to be delivered in standard milk bottles has been interpreted to refer to the familiar glass bottle and not to a paper container.²⁴² A state statute governing pasteurization plants mentioned single service containers and indicated that they might be used, but the court declared that there was nothing in the act which could be construed as prohibiting a city from enacting an ordinance preventing their use. At that time the single service container had not won universal approval as a sanitary means of packaging milk; however such cartons are in general use today.

An order of the Florida Milk Commission prohibited dealers and distributors from purchasing bottles from customers for more than the amount of deposits which they were required to make to offset breakage or loss. In considering this order the court ruled that it was in no way arbitrary, capricious, discriminatory, or unreasonable.²⁴³ By paying more than the deposit for the bottles a distributor increases the number of bottles returned and as a result he buys fewer new bottles than he ordinarily would, and thus his total cost is decreased. There having been no injury alleged or proven except a non-actionable loss from an anticipated increase in the cost of doing business, the court denied an injunction directed at the Commission to restrain the enforcement of the order. In determining whether the order was reasonable the court took judicial notice of the general practice of those selling milk in the areas in requiring deposits to guarantee the return of glass bottles.

DELEGATION OF AUTHORITY

Many of the early milk control laws were challenged because of possible unconstitutionality. At that time there were many in the legal profession and elsewhere who opposed the injection of governmental interference into a previously unregulated field of endeavor. One of the

²³⁰ *Linnenkamp v. Linn*, 243 Iowa 329, 51 N.W.2d 393 (1952).

²⁴⁰ *Otto Milk Co. v. City of Washington*, 363 Pa. 243, 69 A.2d 399 (1949).

²⁴¹ *Otto Milk Co. v. City of Washington*, 80 Pa. D. & C. 233 (1951).

²⁴² *Dean Milk Co. v. City of Chicago*, 385 Ill. 565, 53 N.E.2d 612 (1944).

²⁴³ *Milk Comm'n v. Dade County Dairies, Inc.*, 145 Fla. 579, 200 So. 83 (1940).

more common reasons advanced for the supposed invalidity was the alleged inability of state legislative bodies to so delegate their regulatory power to administrative bodies.

A few of the early control statutes were ruled invalid because of their failure to set up proper administrative standards which were sufficiently definite, the authority given by the legislation being too broad and/or not sufficiently succinct.²⁴⁴ However, it has been held that there is no improper delegation of legislative power in the case of properly drawn statutes which definitely delineate the duties of the control agency and leave it with the duty of formulating detailed rules and regulations for the proper effectuation of the program.²⁴⁵ In selecting the instrumentality to achieve the legitimate end of regulation the legislature must choose an agency which is adapted to the purpose.²⁴⁶

In the field of administrative law it is generally held that legislative bodies may enact statutes making the violation of administrative regulations a crime.²⁴⁷ Hence a Louisiana holding²⁴⁸ which invalidated a statute stating that violations of the regulations of the Milk Commission would constitute misdemeanors is not supported by the best legal theory. However, it is clear that an administrative agency cannot be granted authority to give criminal status to violations of its own regulations.²⁴⁹ Furthermore, statutory provisions giving California administrative officials authority to fix the amount of damages for a failure on the part of a distributor to pay certain obligations have been held to constitute an unconstitutional delegation of judicial power.²⁵⁰

In construing the provisions of the federal Agricultural Marketing Agreement Act pertaining to milk, the Supreme Court ruled that there had been no improper delegation of authority in giving the administrative agency broad powers, the enactment having clearly stated the purpose sought to be accomplished and having provided adequate standards for the preparation of programs which might implement and carry out the desired ends.²⁵¹ Moreover, the Court decided that there had been no unlawful delegation of legislative power in requiring the ap-

²⁴⁴ *State v. Stoddard*, 126 Conn. 623, 13 A.2d 586 (1940); *Ferretti v. Jackson*, 88 N.H. 296, 188 Atl. 474 (1936); *Rowell v. State Bd. of Agriculture*, 98 Utah 353, 99 P.2d 1 (1940).

²⁴⁵ *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939); *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E. 897 (1938); *Bd. of Supervisors of Elizabeth City County v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35 (1950).

²⁴⁶ *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939).

²⁴⁷ *United States v. Grimaud*, 220 U.S. 506 (1911); *Note*, 1 N.C.L. Rev. 50 (1922).

²⁴⁸ *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939); *cf. Schwegmann Bros. Giant Super Mkts. v. McCrory*, 237 La. 768, 112 So. 2d 606 (1959).

²⁴⁹ *State v. Curtis*, 230 N.C. 169, 52 S.E.2d 364 (1949).

²⁵⁰ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940); *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939).

²⁵¹ *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

proval of the program in any given area by the Secretary of Agriculture and by the affected producers, since tests had been set up under the statute for the guidance of the Secretary and adequate procedure outlined for the producers' determination. The Court remarked that Congress might have put the milk control program into effect without providing for the approval of anyone and that definite limitations on the Secretary's freedom of choice had been established. The point was made that there was nothing improper in authorizing the Secretary to execute marketing agreements or to issue orders establishing marketing areas and fluctuating minimum prices. Procedural safeguards were said to furnish protection against any arbitrary or improper use of properly delegated authority. There was said to be nothing wrong in requiring the approval of producers and providing no similar procedure for the consent of milk handlers.

To show a proper delegation of the power to make regulations for the milk industry a definite intention on the part of the legislative body must be shown. Thus boards of health without specific authorization to regulate milk generally have been held not to be authorized to make regulations for the dairy industry which are clearly beyond the scope of the legislation giving them power to act in a limited manner.²⁵² The administrative agency must be given the authority in clear and concise language. In one instance where this clarity was lacking an administrative agency was held to be without power to require producers selling and dealers buying milk to contribute to a dairy council in Milwaukee the sum of one half cent per hundred pounds on milk sold or bought, the proceeds to be used in building up a fund for advertising and in furtherance of an educational campaign encouraging greater consumption of milk and its products.²⁵³

To be valid any act of an administrative agency in furtherance of a milk control project must derive its validity from the statute setting up the program. New Jersey administrative officials adopted a regulation prescribing a "norm and excess" plan designed to induce dairy farmers to stabilize milk production and to combat the natural tendency of herds to yield much more milk in the spring than in the autumn. Although this regulation was positive and to the point, it was held that it lacked statutory authorization.²⁵⁴ Moreover, an administrative agency cannot be permitted to override the statute authorizing it to make regulations for the milk industry. The Connecticut Dairy and Food Commission failed to comply with statutory provisions in setting up tests with respect to the butterfat content of milk purchased by dealers from producers.

²⁵² *Loftus v. Russell*, 69 Ariz. 245, 212 P.2d 91 (1949); *State v. Curtis*, 230 N.C. 169, 52 S.E.2d 364 (1949).

²⁵³ *State v. Dairy Distributions, Inc.*, 217 Wis. 167, 258 N.W. 386 (1935).

²⁵⁴ *Appeals of Port Murray Dairy Co.*, 6 N.J. Super. 285, 71 A.2d 208 (1950).

As a result of these tests an administrative official directed a certain dealer to pay producers additional sums. The official was held to have no power to compel the dealer to make payments, since they were made in violation of a statute forbidding the use of such tests as a basis for computation.²⁵⁵

Questions have arisen with respect to specific powers granted to the milk control agencies. Statutes are not rendered invalid by provisions which permit the administrative body to designate such marketing areas as it may deem advisable²⁵⁶ or to regulate markets after they are established.²⁵⁷ Neither are the statutes rendered unconstitutional because they provide that they are to go into effect only upon the majority request or vote of the producers, distributors, and/or consumers in a designated marketing area.²⁵⁸ Approval was also given to a California provision which authorized administrative officials to designate such marketing areas as they deemed necessary for those localities where they found "the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform."²⁵⁹ Provisions giving authority to set minimum prices on the basis of the economic relationship of the price of fluid milk for the marketing area involved to the price of "manufacturing milk" have been held to delegate a valid authority.²⁶⁰ The same is true with respect to provisions which confer an unfettered and positive authority to classify milk and to prescribe minimum prices for any one or more of the designated grades.²⁶¹

GENERAL CONSTITUTIONAL PRINCIPLES APPLIED TO MILK CONTROL LEGISLATION

The first big test of the validity of milk control legislation with price-fixing features was brought before the public eye in *Nebbia v. New York*,²⁶² where in one of its famous five-to-four split decisions of the New Deal years the Supreme Court ruled that such regulation of a commodity as important to the public welfare as milk was not unconstitutional. The majority of the Justices were of the opinion that it was not necessary for an industry to be a public utility to legitimize such unusual controls. The price-fixing features of the New York

²⁵⁵ *Hammerberg v. Holloway*, 131 Conn. 616, 41 A.2d 791 (1945).

²⁵⁶ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940).

²⁵⁷ *State ex rel. Department of Agriculture v. Marriott*, 237 Wis. 607, 296 N.W. 622 (1941).

²⁵⁸ *Alderman v. Puritan Dairy, Inc.*, 146 Fla. 345, 1 So. 2d 177 (1941); *Milk Comm'n v. Dade County Dairies, Inc.*, 145 Fla. 579, 200 So. 83 (1940); *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939); *Maryland Co-op. Milk Producers, Inc. v. Miller*, 170 Md. 81, 182 Atl. 432 (1936).

²⁵⁹ *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939).

²⁶⁰ *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939).

²⁶¹ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940).

²⁶² 291 U.S. 502 (1934), *affirming* *State v. Nebbia*, 262 N.Y. 259, 186 N.E. 694 (1933).

statute were approved, the Court holding that there had been no violation of either the due process or equal protection clauses of the fourteenth amendment. The chief purpose of the legislation was to eliminate cut-throat competition which depressed prices below production cost, thereby establishing a monopoly. The extension of the public interest concept to price regulation in respect to an industry of this kind was evidently more than the four dissenting Justices could stomach. These conservatives of the old school were of the opinion that a state's police power could not be so extended.

Since the *Nebbia* decision there has been no doubt about the validity of the basic patterns of state milk regulation. The proposition that a state may regulate the milk business and set prices in furtherance of that policy has been reiterated in many opinions, and the validity of such programs, when proper standards are set, is no longer in doubt.²⁶³

A state constitutional provision like the one in California requiring uniformity of operation on the part of all general statutes is not violated by a provision dividing the milk industry into two classifications, one governing the marketing of fluid milk and the other controlling the marketing of "manufacturing milk" or the milk that goes into the making of milk products.²⁶⁴ Neither was there a violation of this uniformity provision where the statute punished a dereliction in respect to the unfair practices clauses of a stabilization program with a 500 dollar civil penalty, notwithstanding the fact that the penalty was to be exacted only from culprits in a marketing area where a stabilization plan was in effect.²⁶⁵ Another point made in the case so holding was that there had been no violation of uniformity because certain license fees required to be paid by distributors, whether or not they operated in a stabilized marketing area, were to go into a fund for the enforcement of the act or any program put into effect thereunder. Furthermore, it was ruled that neither the provisions for assessments on producers and distributors nor the exemption of retail stores from licensing requirements destroyed uniformity. The court added that there was no lack of uniformity, though the statute was said to contemplate a classification program with different prices established for each of the four classes mentioned. It is quite evident that the interpretation given this uniformity provision is

²⁶³ *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937); *Franklin v. State ex rel. Alabama State Milk Control Bd.*, 232 Ala. 637, 169 So. 295 (1936); *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940); *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939); *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 124 Fla. 797, 169 So. 541 (1936); *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E. 897 (1938); *In re Opinion of the Justices*, 88 N.H. 497, 190 Atl. 713 (1937); *State ex rel. State Bd. of Milk Control v. Neward Milk Co.*, 118 N.J. Eq. 504, 179 Atl. 116 (1935); *Rohrer v. Milk Control Bd.*, 322 Pa. 257, 186 Atl. 336 (1936); *Board of Supervisors of Elizabeth City County v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35 (1950).

²⁶⁴ *Jersey Maid Milk Prods. Co. v. Brock*, 13 Cal. 2d 620, 91 P.2d 577 (1939).

²⁶⁵ *Ray v. Parker*, 15 Cal. 2d 275, 101 P.2d 665 (1940).

much the same as the familiar reasonable classification analysis with respect to equal protection.

It is not every inequality that will render a statute setting up classifications in the milk industry unconstitutional. The states possess a wide discretion in making reasonable groupings. Under the equal protection guarantee, however, classifications must be based upon substantial differences. Moreover, it is necessary that there be a reasonable relation to the subject of the legislation. Thus a classification will not be considered arbitrary or unreasonable unless, when viewed in the light of facts made known or generally assumed, the content of the statute precludes the supposition that the classification rests upon a rational basis. Here the burden of proof would rest upon the party asserting that the statute was invalid. With these principles in mind the Vermont court held that clauses exempting charitable organizations from certain price-fixing provisions of milk control legislation and permitting continued distribution among members of producers' co-operatives of the proceeds of milk sales, pursuant to contracts between the co-operatives and their members, could not be considered as being discriminatory.²⁶⁶ Certain groups in the industry may be given preferred treatment without invalidating the legislation. Thus a Pennsylvania milk control statute was not rendered invalid because its application might have resulted in special privileges for producers.²⁶⁷ However, there must be a reasonable basis for such privileges.

Milk control laws regulating the industry and setting up certain standards have been held not to be repugnant to state constitutional provisions prohibiting the taking of private property without just compensation.²⁶⁸ Of course the standards have to be reasonable. It would seem that the operation of such a constitutional provision would be very much the same as that of a due process clause.

The New York Court of Appeals has said that a proper milk control statute will set up an administrative agency along with procedural directives, guarantee adequate hearings upon proper notice, delineate powers and outline matters which must be considered as a basis for any decisions or orders which are capable of proper enforcement, and make provision for an effective judicial review.²⁶⁹ Every matter mentioned here seems to be an essential element in any valid milk control program. In fact a lack of enforceable standards was held to invalidate a milk program in the state of Utah.²⁷⁰

²⁶⁶ *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

²⁶⁷ *Rohrer v. Milk Control Bd.*, 322 Pa. 257, 186 Atl. 336 (1936).

²⁶⁸ *Albert v. Milk Control Bd.*, 210 Ind. 283, 200 N.E. 688 (1936); *State ex rel. State Bd. of Milk Control v. Newark Milk Co.*, 118 N.J. Eq. 504, 179 Atl. 116 (1935).

²⁶⁹ *Noyes v. Erie & Wyo. Farmers Co-op. Corp.*, 281 N.Y. 187, 22 N.E.2d 334 (1939).

²⁷⁰ *Rowell v. State Bd. of Agriculture*, 98 Utah 353, 99 P.2d 1 (1940).

In spite of earlier decisions approving the usual type of milk control laws,²⁷¹ the Georgia Supreme Court evidently changed its mind and ruled that a similar statute was invalid because the milk industry was not sufficiently affected with a public interest. The tribunal held that this was true in spite of the fact that it concluded that the legislature had been correct in finding that the milk industry is large, that milk is a product of virtually universal use throughout the state, that it is a perishable commodity, important as a human food, and that the health of the people demands the sanitary safeguards surrounding its production and distribution, and in finding further that it is of the greatest importance that an adequate and constant supply of milk be kept flowing to markets at a fair price to both the producer and the consumer. It was said that such legislation violated the concept of due process. The court declared that the alleged right of a seller and a buyer to agree upon a price, in other words the right to contract, was a property right protected by the due process clause of the state constitution, and, in the absence of a dedication to public usage, a private interest like the dairy industry would not be subject to state regulations of the price-fixing variety. The court stated that the previous decisions were not binding because they were not full-bench determinations, whatever that means.²⁷² This case is one of those anomalies which sometimes creep into the law and which can be disregarded as being contrary to the overwhelming current of judicial opinion. It is interesting to note that there is now a milk control statute²⁷³ in Georgia and that no case has been found invalidating this program.

It has been said that it is the province of the legislature to decide whether unrestricted competition in the milk industry has brought about ruinous conditions and created an intolerable economic situation.²⁷⁴ The legislature will often limit the operation of a milk control statute to a definite period and may even state that the enactment shall be in effect only for such time as the present emergency exists. In the absence of such a provision the fact that there have been several sessions of the legislature at which a milk control statute might have been repealed or terminated by a simple resolution would tend to show that there had been no intention to abandon a program already in effect.²⁷⁵ One court has said that the failure to so limit the operation of such a statute will not render the act invalid so long as conditions prevail which could

²⁷¹ *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939); *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E. 897 (1938).

²⁷² *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

²⁷³ GA. CODE ANN. §§ 42-501 to -561 (1957), as amended, GA. CODE ANN. §§ 42-513, -528, -532, -535, -554, -559 (Supp. 1958).

²⁷⁴ *Shiver v. Lee*, 89 So. 2d 318 (Fla. 1956).

²⁷⁵ *Board of Supervisors of Elizabeth City County v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35 (1950).

justify its existence.²⁷⁶ Expressions in some opinions would make it appear that an emergency of some kind is necessary in order to justify the enactment of milk control legislation.²⁷⁷ There may be varied emergencies at different times, and it would not matter that critical circumstances existing during a later crisis were of a different character from those which prevailed at the time the statute was originally enacted.²⁷⁸ The courts will usually accept a statement in the preamble of a statute with respect to the existence of an emergency,²⁷⁹ although it might be that judicial interference would be justified where the industry was in no particular economic trouble.

There may be situations where a legislature has enacted two or more statutes dealing with the general subject of milk and its sale to the public. The lawmakers may grant a general authority to an established agency like the state Department of Agriculture and then a few or many years later enact another statute setting up a special agency as the controlling authority without repealing the first enactment. The passage of two or even more control laws of the administrative or commission type is not unheard of, and questions arise concerning interpretations and possible conflicts. In one instance the Vermont court said that two statutes dealing with the sale of milk are *in pari materia* and must be construed as part of one legislative system.²⁸⁰ Where a seeming conflict exists, the court would of course try to adjust the differences and in this effort should be guided by the judges' opinions concerning legislative intent.

When milk control legislation provided that the act would not go into effect except upon the petition of a body of representative producers, the term "representative group" used in the statute was not so indefinite as to render the act unenforceable for lack of clarity rendering it contrary to the concept of due process.²⁸¹ A Michigan statute, insofar as it required purchasers of milk and cream for resale to make monthly payments to producers, commanded that milk sold contain at least three per cent butterfat, and required revocations of licenses in case of violations, was held not to be unconstitutional as denying due process, the provisions being neither arbitrary nor unreasonable.²⁸² The United States Supreme Court decided that a Virginia provision making it pos-

²⁷⁶ Jersey Maid Milk Prods. Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577 (1939).

²⁷⁷ Franklin v. State *ex. rel.* Alabama State Milk Control Bd., 232 Ala 637, 169 So. 295 (1936); Bohannon v. Duncan, 185 Ga. 840, 196 S.E. 897 (1938); Board of Supervisors of Elizabeth City County v. State Milk Comm'n, 191 Va. 1, 60 S.E.2d 35 (1950).

²⁷⁸ Como Farms, Inc. v. Foran, 6 N.J. Super. 306, 71 A.2d 201 (1950).

²⁷⁹ Board of Supervisors of Elizabeth City County v. State Milk Comm'n, 191 Va. 1, 60 S.E.2d 35 (1950).

²⁸⁰ *In re* Swanton Market Area, 112 Vt. 285, 23 A.2d 536 (1942).

²⁸¹ Milk Comm'n v. Dade County Dairies, Inc., 145 Fla. 579, 200 So. 83 (1940).

²⁸² Johnson v. Commissioner of Agriculture, 314 Mich. 548, 22 N.W.2d 893 (1946).

sible to cancel prices established on a particular market upon the request of the majority of the producers and distributors in the affected area could not be held invalid.²⁸³

An order promulgated by a milk commission, though having the effect of a legislative act, cannot be declared invalid because it is operative only in an area selected by the commission with a view to setting up a control program for that particular market, the abortive theory in the cases so holding being that the order amounted in effect to a "local act" or "special act" and hence allegedly violated state constitutional provisions requiring laws to be general and of uniform operation throughout the state.²⁸⁴ The legislative program was said to be general for the reason that it was worded in such a manner as to become applicable to any particular area as and when the administrative officials determined in conformity with the machinery set up by the statute that a control plan would be in force in that area.²⁸⁵

The fact that a statute conferred upon the Virginia Milk Commission authority to collect sums needed for its own operating expenses by levying assessments on producers and distributors without giving notice thereof has been held not to render the act invalid, such persons needing no notice because the amounts of the assessments were based upon reports which they were required to file.²⁸⁶ The tribunal was of the opinion that an assessment of this kind could not be regarded as a tax.

A milk control statute is not violative of state constitutional provisions guaranteeing a jury trial because it fails to provide for a jury in hearings before the administrative agency.²⁸⁷ The same is true with respect to a New Jersey Reorganization Act to the effect that an appeal to the Appellate Division in cases of this kind should be conducted by its judges without a jury.²⁸⁸

A joint suit by various groups, such as dealers, distributors, and consumers, to restrain the Georgia Milk Control Board from proceeding under the control statute on the ground that the act was unconstitutional was held by the state court not to be "a suit against the state" in such a sense that the action could not be maintained without the state's consent.²⁸⁹

Where the power to enact milk control legislation is conceded or well-established, it may be said that no further consideration of alleged

²⁸³ Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937).

²⁸⁴ Alderman v. Puritan Dairy, Inc., 146 Fla. 345, 1 So. 2d 177 (1941); Milk Comm'n v. Dade County Dairies, Inc., 145 Fla. 579, 200 So. 83 (1940).

²⁸⁵ Milk Comm'n v. Dade County Dairies, Inc., *supra* note 284.

²⁸⁶ Reynolds v. Milk Comm'n, 163 Va. 957, 179 S.E. 507 (1935).

²⁸⁷ Franklin v. State *ex rel.* Alabama State Milk Control Bd., 232 Ala. 637, 169 So. 295 (1936).

²⁸⁸ Como Farms, Inc. v. Foran, 6 N.J. Super. 306, 71 A.2d 201 (1950).

²⁸⁹ Holcombe v. Georgia Milk Producers Confederation, 188 Ga. 358, 3 S.E.2d 705 (1939).

unconstitutionality will be taken up unless a litigant shows by proper pleadings that he comes within the purview of the act and that some feature of the statute or of the orders or regulations issued under its authority have caused or are threatening to cause him injury.²⁹⁰

THE FEDERAL PROGRAM AND INTERSTATE TRANSACTIONS

The federal milk control program was set up under the Agricultural Marketing Agreement Act²⁹¹ of 1937. This statute, applying to other farm products besides milk, was enacted with a view to filling the void created when the Supreme Court in 1935 declared the original Agricultural Adjustment Act invalid.²⁹² The Secretary of Agriculture was given authority to establish the milk program. The constitutionality of federal milk orders issued under authority of the act was soon questioned in the courts. The basis for federal regulation of the industry was of course the commerce clause, and in *United States v. Rock Royal Co-op., Inc.*²⁹³ in 1939 the validity of the federal program was definitely established.

In this important decision the highest federal tribunal reaffirmed for the federal milk program the things it had said about public interest in the *Nebbia* case²⁹⁴ where state regulation was the theme. The Court declared that "the people of great cities depend largely upon an adequate supply of pure fresh milk." In fact the opinion states that milk is so essential "for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by the municipal health authorities." It is to be remembered, however, that this opinion was written some twenty years ago and that in some areas at least the consumer's experience with control programs and high minimum prices may have cooled his ardor somewhat. The distributor has a definite stake in the program, and among some people there is a sneaking suspicion, perhaps more pronounced in regard to state administrative boards than to federal agencies, that some of the segments of the industry itself have a little too much to do with the regulation of their own economy.

The requirements imposed upon the federal government by the appropriate guarantees of the fifth amendment seem to be identical with those which burden the states under the due process clause of the fourteenth.²⁹⁵ These guarantees have been invoked in many cases involving

²⁹⁰ *Noyes v. Erie & Wyo. Farmers Co-op. Corp.*, 281 N.Y. 187, 22 N.E.2d 334 (1939).

²⁹¹ 50 Stat. 246 (1937) (codified in scattered section of 7 U.S.C.)

²⁹² *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁹³ 307 U.S. 533 (1939).

²⁹⁴ Discussed in text accompanying note 262 *supra*.

²⁹⁵ *Heiner v. Donnan*, 285 U.S. 312 (1932).

the validity of the federal legislation and the many and varied kinds of orders promulgated under the authority granted by its provisions.

A decision fundamental to the federal program for milk control was made when the Supreme Court in the *Rock Royal* case upheld the bitterly opposed provision for an equalization fund designed to make the program fairer to all concerned. The abortive contention was that the machinery of the fund took one persons's property to alleviate the burdens of another and that the fundamental conception of due process was thus violated. The refusal to adopt this view was considered a decided boost for the backers of the milk control program. In addition the Court declined to rule that discrimination existed because of provisions of a New York area order commanding proprietary handlers to pay a uniform price while excepting bona fide co-operatives from such obligations, or because of requirements making it mandatory for handlers selling milk both inside and outside the marketing area to expend minimum class prices with respect to milk made available in the marketing area or moving through a plant located therein.

Other issues involving due process have arisen with respect to federal milk marketing orders. At about the same time that the *Rock Royal* case came before the courts a creamery company operating in the same area had been ordered by federal milk officials to pay certain obligations arising out of the Secretary of Agriculture's milk marketing program for the New York area. The lower court decision in the *Rock Royal* case had gone against the government and the operation of the milk marketing order was suspended. Prior to this action, however, the creamery had refused to pay certain obligations which had accrued under the program. When the *Rock Royal* case was reversed by the Supreme Court some months later, the question of the status of the past-due obligations was revived. The federal appellate court said that the creamery had had three alternatives. It could have complied with the order, quit business entirely, or continued doing business without compliance. Having made the latter choice, the creamery had committed itself, and it could not be said that coercion was involved. The court declared that nothing retroactive was involved here and that enforcement of the past-due indebtedness was not a "taking" without due process of law.²⁹⁶ In another instance certain handlers raised the point that there had been a denial of due process because administrative officials' judgment in conducting hearings and rendering decisions might well be influenced by the fact that a certain portion of the money collected to cover the costs of administering the control program and the expenses connected with marketing services was allegedly used to extend the influence and bureaucratic powers of the Secretary of Agriculture

²⁹⁶ *United States v. Adler's Creamery, Inc.*, 107 F.2d 987 (2d Cir. 1939).

and his subordinates. It was claimed that they should be disqualified from making decisions which might redound to their advantage. The tribunal ruled that the imputed interest in the outcome of hearings was so remote as to be insignificant and that the judgment of the officials would not thereby be affected. Therefore the true character of a fair hearing which is inherent in the concept of due process could not be said to have been violated in this instance.²⁹⁷ There is a grain of truth in the argument of the proponent, however, and it would not be amiss to consider the bureaucratic dangers, especially with respect to the selection of personnel on the administrative boards.

According to a federal order pertaining to a middle western marketing area all milk was classified. There was class one, including milk the utilization of which would not establish it as being in class two, and class two, consisting of the product used or disposed of in any form other than fluid milk. The order provided that handlers selling milk in both classifications had to allocate the milk of local producers to class one usage to the extent of ninety-five per cent of the particular handler's class one usage before an allocation was made of imported milk. This regulation was held not to violate the due process guarantee.²⁹⁸ The argument was made that this order violated two other federal constitutional provisions, one stating that all duties, imposts, and excises must be uniform throughout the nation, and the other providing that no preferences shall be given by any regulation of commerce or revenue to the ports of one state over ports of another. The court stated that the instant situation involved no duties, imposts, or excises. With respect to the preference provision it was argued that the advantages given the city of St. Louis under the order violated the fundamental law of the land. The court dismissed this contention with the remark that the Constitution forbids discrimination between states as units but not discrimination between individual ports located in the same or different states. The handler made the point that the order would have the effect of limiting interstate commerce in milk between Chicago and St. Louis. The court answered that there was no constitutional repugnance here, since, consistent with due process alone, the fundamental law does not prevent federal restrictions upon any portion of interstate commerce, there being no guarantee with respect to uniformity.

The whole fabric of the federal milk control program rests basically upon the power of Congress to legislate with respect to interstate and foreign commerce. Most of the litigation in the federal courts would seem to revolve around definitions of the term "interstate commerce" as a fundamental concept of American constitutional law and the reach

²⁹⁷ *Kewashkum Dairy Co. v. Brannan*, 8 Agri. Dec. 834 (1952).

²⁹⁸ *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87 (8th Cir. 1946), *affirming* *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209 (E.D. Mo. 1945).

of the commerce clause into transactions which might appear to be merely local in character. Of course matters which neither interfere with nor affect interstate business are considered purely intrastate transactions and hence not subject to federal regulation. As sanitary and refrigeration facilities and safeguards have increased in efficiency, the milk and dairy product business in the nation as a whole has tended to reach out into broader horizons and to become less localized. The complex industry of today with complicated interrelations with the rest of the commercial world is a far cry from the four or five cow dairy unit which was so common in years not too long past.

Two basic lines of inquiry developed with respect to the incidence of the commerce clause upon the varied facets of the dairy industry. One line of cases involved the controversies concerning the extent to which a state or its political subdivisions may regulate interstate business activity. The second line contained the decisions which determined to what extent the congressional power can reach into the state's economic scheme.

It is clear that a state will not be permitted to establish economic blocks with respect to milk being transported across its borders. In an early opinion the Supreme Court decided that the state of New York could not enforce minimum price regulations concerning milk brought across the state line from Vermont.²⁰⁰ In another instance a Massachusetts corporation serving the city of Boston had for some time been distributing milk produced in New York state to supply the city's needs. Needing to increase its three receiving stations, this distributor applied to the New York milk control authorities for a permit to operate an additional facility. The application was turned down because of allegations that the establishment of the fourth receiving station would not be in the public interest and would introduce destructive competitive dangers into a market alleged to be adequately served. A state statute gave the milk authorities power to make such decisions. The basis for not granting the permit was a desire to aid local interests by restricting outside competition and to promote an increased local supply for the consuming public. The Supreme Court found that the refusal to approve the application had thrown a barrier in the way of interstate commerce and that there had been a violation of the commerce clause. It was said that a state could not thus benefit its own industrial interests by limiting the number of receiving stations a firm doing an interstate business might have. The Court refused to listen to the argument that the establishment of the additional facility would take supplies needed for local consumption. The state authorities contended that refusal of the permit did not obstruct interstate commerce because the licensed

²⁰⁰ *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 499 (1935). The federal district court's decision in this case is discussed in Note, 13 N.C.L. Rev. 500 (1934).

distributor had been allowed to operate at its other plants without limitation upon the quantity of milk it might buy. The Court refused to make such a ruling. The state statute under which the action was taken was declared invalid.³⁰⁰

Some state statutes have provisions limiting their operation to milk which is to be furnished to consumers within the jurisdiction. In one instance such a provision was placed in a forward section of a Virginia milk control law. It was held that this limitation in the power-granting portion of a comprehensive law would qualify the later provisions of the act, including the section authorizing the fixing of prices, and that therefore no power had been conferred upon administrative officials to fix prices to be paid Virginia producers for milk sold and processed in that state for distribution in Kentucky and Tennessee, two states which had no milk price control legislation of their own.³⁰¹

A Virginia county ordinance levied a license tax on peddlers. A question arose with respect to the application of this ordinance to out-of-state milk distributors who were selling their products from trucks which moved in from other jurisdictions. In the case of a District of Columbia dealer certain sales were consummated within the county after the milk products had been transported across the state line. It was decided that these transactions were purely local in character and that the application of the peddler's tax to them would impose no burden upon interstate commerce.³⁰² With respect to deliveries across the state line in response to orders previously made by Virginia citizens, however, the court decided that such transactions constituted interstate business which the county as a subdivision of the state could not lawfully tax. It was declared that the fact that a portion of the distributor's business was interstate commerce which could not be taxed locally would not prevent its purely local activities from being so taxed.

According to an interpretation given to a Virginia statute distributors' sales were not to be affected by pricing restrictions unless the business was transacted within the boundaries of a designated marketing area located in the state. With this interpretation in mind the United States Supreme Court held that no burden upon interstate commerce had been imposed by the incidence of a provision of the statute defining the term "distributors" used therein as referring to persons, whether located or operating within or without the confines of the state, who purchased, marketed, or handled milk for resale as the fluid product within state boundaries.³⁰³ The Court held that the pricing provisions

³⁰⁰ *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

³⁰¹ *Pet Dairy Prods. Co. v. State Milk Comm'n*, 195 Va. 396, 78 S.E.2d 645 (1953).

³⁰² *Thompson's Dairy, Inc. v. County Bd.*, 197 Va. 623, 90 S.E.2d 810 (1956).

³⁰³ *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937), *affirming* 16 F. Supp. 575 (E.D. Va. 1936).

of the act were inapplicable to a concern which had a plant for pasteurization and treatment located outside the state, bought milk for its plant from Virginia farmers, and sold its entire output of the bottled product to a company which had retail outlets in the state and elsewhere for the sale of milk, ice cream, and other dairy products. Here the statute would not apply until a local resale.

Nothing is better established in our federal system than the proposition that a commodity, be it milk or something else, is not fully immunized by the commerce clause from state legislative control by reason of its out-of-state origin. The important inquiry is whether or not a particular state or municipal regulation casts a burden on the movement of the commodity across state lines. Sometimes a case will discuss various provisions of a milk control regulation and approve some while rejecting others. In one such instance a New Jersey court refused to uphold a public health regulation requiring monthly reports of persons doing an interstate business in respect to non-local transactions, a regulation requiring that all plants approved for the distribution of fluid milk have their permanent permits so conditioned that state authorities could control fifty per cent of the approved milk at all times during the periods the permits were in effect, and a regulation providing that the label of any packaged milk sold locally for fluid consumption state unequivocally the place from whence the product came, whether the source was within the state or beyond its borders; but it gave its approval to a regulation that shipping tags attached to and bills of lading accompanying shipments of fluid milk entering a sanitarily approved plant specify the classification of the milk in transit.³⁰⁴

A different aspect of the above labelling regulations can be illustrated by a Florida case. A statute required all persons selling milk or shipping it into the state to label containers, with the idea of informing customers with respect to the producers and their state and county residences. Since this act applied to Florida residents as well as those of other states, it was held not to be violative of the fourteenth amendment's equal protection guarantee as making it practically impossible for milk from other states to compete with milk produced in Florida.³⁰⁵ The out-of-state dealers did not raise the question with regard to the commerce clause.

Under certain regulations West Virginia health officials were required to inspect all dairy farms and milk plants every six months. Other regulations prescribed that milk products from beyond the limits of routine inspection were not to be sold in the jurisdiction unless they were produced and pasteurized under equivalent rules. In a controversy

³⁰⁴ *Welsh Farms, Inc. v. Bergsma*, 16 N.J. Super. 295, 84 A.2d 631 (1951).

³⁰⁵ *Noble v. Carlton*, 36 F.2d 967 (S.D. Fla. 1930).

involving these regulations the health officials declined to issue a permit to a Pennsylvania dairy concern for the distribution of milk in West Virginia. Testimony of Pennsylvania witnesses adduced that only ten per cent of the dairy farms and plants in that jurisdiction were inspected as often as four times each year. It was shown that an inspection routine was usually carried out by the employees of the producer or shipper and that this procedure had been followed in the instant case. The federal appellate court ruled that there had been an abuse of authority with respect to the refusal to issue a permit.³⁰⁶ The federal court had taken jurisdiction on the ground of diversity of citizenship. The issue of the incidence of the commerce clause does not seem to have been raised in this case, and it might be that the controversy was considered to have involved a health regulation which would have little or no effect upon interstate milk shipments. If the matter had been considered, an issue might have been raised with regard to double inspection and any possible effect it might have upon interstate transactions. This theory is graphically illustrated by an Arkansas case involving the acts of municipal health officials operating under a city ordinance in authorizing inspection services in addition to those required by the laws of Texas, the state from which the milk came. This action was held to impose unnecessary burdens upon interstate commerce, the court declaring that the pyramiding of inspection fees might well result in the erection of prohibitive trade barriers.³⁰⁷

As applied to out-of-state plants or dealers, city ordinances or health regulations prohibiting the sale of milk or cream unless it was produced within a prescribed distance from a specified point in a city have been held to be invalid as a burden upon interstate business.³⁰⁸

In matters affecting interstate commerce which require a diversity of treatment because of special local conditions, the general rule is that a state is free to legislate, under the usual interpretation of the commerce clause, until Congress sees fit to act with respect to the particular subject under consideration. An issue arose concerning the application to interstate transactions of a Pennsylvania statute setting up milk price control and requiring all dealers to obtain licenses and keep records. An attempt was made to apply this statute to a company-operated receiving plant which cooled milk before shipping a small part of it to another state. The milk processed at the plant was shipped across state lines and it was decided that the matters regulated were mainly of a local nature. With the above construction of the commerce clause in mind the Supreme Court held that the effect of the legislation upon interstate commerce was only

³⁰⁶ *Sleeth v. Dairy Prods. Co.*, 228 F.2d 165 (4th Cir. 1955).

³⁰⁷ *McClendon v. City of Hope*, 217 Ark. 367, 230 S.W.2d 57 (1950).

³⁰⁸ *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Miller v. Williams*, 12 F. Supp. 236 (D. Md. 1935).

incidental and that no interference could be said to have been presented here.³⁰⁹ The Court has also approved the application of state-imposed minimum resale prices to sales of milk by District of Columbia handlers to customers in Virginia.³¹⁰ It seems safe to say that a state milk control law is not invalid merely because it indirectly or incidentally affects interstate business transactions.

One court has declared that protection of interstate commerce might involve the incidental regulation of business intrastate in character.³¹¹ This tribunal went on to say that the shipment of milk which has not been taken across a state line but has been distributed together with other milk moving interstate into the marketing area in such a manner that the transaction represents, from the public viewpoint, a single marketing operation involving both intrastate and interstate milk, will be subject to regulation under federal law whenever it can be said to have been obstructive to interstate business.

In *United States v. Wrightwood Dairy Co.*³¹² the Supreme Court held that milk moving strictly intrastate might be regulated under orders issued by federal agricultural officials if during the marketing process it moved in competition with other milk which was being transported across state lines. In this instance a distributor in the Chicago area purchased milk from Illinois producers and processed, sold, and distributed it solely within the state. However, it was shown that thirty per cent of the milk sold in the metropolitan area came from other states, and the Court declared that the incidence of the intrastate product upon the price structure set up under the instant federal order was enough to confer jurisdiction over the local milk upon federal agricultural officials. The *Wrightwood* case has been followed in an instance where a substantial portion of the milk was moving in the current of interstate commerce.³¹³ In fact the right of federal officials to regulate intrastate milk has been upheld where the proportion of the product moving interstate was very small.³¹⁴ Early opposing opinions³¹⁵ stating the lack of federal power to control the intrastate portion of the milk or derivative products can now be disregarded.

Questions may arise with respect to whether a particular transaction is intrastate or interstate in character. In one instance a milk dealer

³⁰⁹ *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939).

³¹⁰ *County Bd. of Arlington County v. State Milk Comm'n*, 346 U.S. 932 (1954); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937).

³¹¹ *United States v. Adler's Creamery, Inc.*, 107 F.2d 987 (2d Cir. 1939).

³¹² 315 U.S. 110 (1942), *reversing* 123 F.2d 100 (7th Cir. 1941).

³¹³ *Crull v. Wickard*, 137 F.2d 406 (6th Cir. 1943).

³¹⁴ *Belazs v. Brannan*, 87 F. Supp. 119 (N.D. Ohio 1949); *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363 (D. Kan. 1947); *United States v. Telling-Belle Vernon*, 7 Agri. Dec. 848 (1948).

³¹⁵ *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass. 1935); *Royal Farms Dairy, Inc. v. Wallace*, 8 F. Supp. 975 (D. Md. 1934); *Edgewater Dairy Co. v. Wallace*, 7 F. Supp. 121 (N.D. Ill. 1934).

with a plant in Pennsylvania was accused of doing business in New York without a state license. The New York statute specifically exempted interstate transactions from the operation of its provisions. The dealer had made contracts with New York producers, providing for delivery f.o.b. dealer's plant. However, his truck drivers were instructed to go to the dairies and pick up milk containers and carry them to the Pennsylvania plant, the producers paying only the amount it would have cost to carry the milk to the nearest plant located in New York. As a part of the deal coolers had been loaned to certain producers for use on their farms. The New York appellate court considered both the sale and the point of delivery to have been outside the producing state, and so decided that federal and not state law would be applicable.³¹⁶ The fact that the ultimate destination of the shipment was in another state seems to have had much to do with this decision, the tribunal declaring that the act of taking the milk from one state to another constituted interstate commerce. The opinion stated that in such a transaction the producers' payment of inadequate transportation charges plus a fixed point of delivery, even if it had been located in the producing state, would not have made the contract an intrastate one. It was said that a similar conclusion would have been reached with respect to the Pennsylvania dealer's solicitation of the producers' business, even though the actual negotiations for the agreement had taken place in New York. The result would not have been affected even though title was considered to have passed in New York and even if the dealer could have disposed of the milk within the state, where he did not do so but took it to his plant across the state line. The court decided that no intrastate business was involved and that no state license could be required.

In considering the entire program established under the Agricultural Marketing Agreement Act one court, in a case involving transactions in milk, has stated that its objective was to establish such orderly conditions for the marketing of agricultural commodities in interstate business as would maintain prices paid to farmers at a proper level.³¹⁷ To maintain the economic position of the dairy farmer Congress inserted in the statute a provision establishing price supports for milk and its derivative products at not more than ninety nor less than seventy-five per cent of parity.³¹⁸ A "parity price" was defined by the statute as one which will give the producers of agricultural commodities a "purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities during the base period."³¹⁹

³¹⁶ *De Korte v. Du Monde*, 273 App. Div. 188, 76 N.Y.S.2d 750 (1948).

³¹⁷ *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87 (8th Cir. 1946).

³¹⁸ The present provision is 63 Stat. 1052 (1954), 7 U.S.C. § 1446 (1958).

³¹⁹ 48 Stat. 32 (1933). The provision was amended in 1948 to conform to that in 62 Stat. 1257 (1948), 7 U.S.C. § 1301(a)(1) (1958). See also *Parker v. Brown*, 317 U.S. 341 (1943); *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87 (8th. Cir. 1946).

THE FIXING OF PRICES

There has been no doubt about the constitutionality of the broad concept of price fixing by state and federal milk control administrative agencies since the *Nebbia*³²⁰ and *Rock Royal*³²¹ decisions. In fact the validity of legislation giving such powers to administrative boards or officials has been reiterated in cases³²² where the statutes were more or less similar. There is authorization for these officials to set milk prices in the federal Agricultural Marketing Agreement Act³²³ and in the milk control laws of Alabama,³²⁴ California,³²⁵ Connecticut,³²⁶ Florida,³²⁷ Georgia,³²⁸ Maine,³²⁹ Massachusetts,³³⁰ Mississippi,³³¹ Montana,³³² New Hampshire,³³³ New Jersey,³³⁴ New York,³³⁵ North Carolina,³³⁶ Pennsylvania,³³⁷ Rhode Island,³³⁸ South Carolina,³³⁹ Utah,³⁴⁰ Vermont,³⁴¹ and Virginia.³⁴² Some of these statutes mention resale prices specifically while the language of others may leave the impression that producers' prices alone were meant to be regulated. A majority mention minimum prices alone and some are worded in a somewhat hazy fashion. In five states, however, both maximum and minimum prices are mentioned. Thus the Florida and Virginia acts refer to "minimum and maximum" prices while those in New Hampshire, Pennsylvania, and Vermont read in the alternative in some such vein as "minimum or maximum." The wording of the Virginia statute has been interpreted to

³²⁰ Discussed in text at note 262 *supra*.

³²¹ Discussed in text at note 293 *supra*.

³²² *E.g.*, *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939); *Shiver v. Lee*, 89 So. 2d 318 (Fla. 1956); *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 124 Fla. 797, 169 So. 541 (1936); *State ex rel. Milk Control Bd. v. Newark Milk Co.*, 118 N.J. Eq. 504, 179 Atl. 116 (1935); *Noyes v. Erie & Wyo. Farmers Co-op. Corp.*, 181 N.Y. 187, 22 N.E.2d 334 (1939); *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

³²³ 48 Stat. 30 (1933), 7 U.S.C. § 608c(5) (A), (18) (1958).

³²⁴ ALA. CODE tit. 22, § 223 (1940).

³²⁵ CAL. AGRIC. CODE §§ 4229, 4230, 4230.5, 4231, 4245, 4250, 4259, 4280, 4281, 4292-95, 4350-55.5, 4357, 4359-63.

³²⁶ CONN. GEN. STAT. REV. § 22-215 to -219 (1958). These provisions have been repealed as of Dec. 31, 1960, Conn. Pub. Acts 1959 ch. 116, § 7.

³²⁷ FLA. STAT. ANN. §§ 501.04, .13 (1943).

³²⁸ GA. CODE ANN. §§ 42-554 to -561 (1957), at amended, GA. CODE ANN. §§ 42-554, -559 (Supp. 1958).

³²⁹ ME. REV. STAT. ANN. ch. 33, § 4 (Supp. 1959).

³³⁰ MASS. ANN. LAWS ch. 94A §§ 10-12A (1954).

³³¹ MISS. CODE ANN. §§ 4560-51 to -62 (1957), as amended, MISS. CODE ANN. §§ 4560-52, -56, -59, -60 (Supp. 1958).

³³² MONT. REV. CODES ANN. § 27-407 (Supp. 1959).

³³³ N.H. REV. STAT. ANN. § 183:7 (1955).

³³⁴ N.J. STAT. ANN. § 4:12A-21 (1959).

³³⁵ N.Y. AGRIC. & MKTS. LAW § 258-m.

³³⁶ N.C. GEN. STAT. § 106-266.8(j) (Supp. 1959).

³³⁷ PA. STAT. ANN. tit. 31, §§ 700j-801 to -809 (1958).

³³⁸ R.I. GEN. LAWS ANN. § 21-4-5(c) (1956).

³³⁹ S.C. CODE §§ 32-1634.33, .34, .41 to .50 (Supp. 1959).

³⁴⁰ UTAH CODE ANN. §§ 5-2-4(b)5, -3-11 (1953).

³⁴¹ VT. STAT. ANN. tit. 6 § 2506 (1958).

³⁴² VA. CODE ANN. § 3-359 (1950).

give the Milk Commission authority to fix minimum and maximum prices in conjunction with one another and not to authorize the setting of minimum prices alone.³⁴³ The New Jersey court has said that it is legitimate to set a price for milk which will operate both as a maximum and a minimum,³⁴⁴ the administrative officials showing a somewhat unusual concern for the welfare of the consumer.

Where no maximum resale price had been authorized for New York dealers and a complaining dealer had not been making what he considered to be a reasonable profit, an administrative order requiring dealers to pay minimum prices to producers was said not to be confiscatory merely because the officials had nullified a previous order setting dealers' minimum selling prices.³⁴⁵ Each dealer had an equal opportunity to sell milk at a price that gave a reasonable return. The court declared that the officials were under no compulsion to fix minimum selling prices at such a figure as would yield a reasonable return to every milk dealer.

A milk control law is not unconstitutional because it authorizes the administrative agency to designate "natural marketing areas" for price fixing purposes.³⁴⁶ In the various localities or markets set up by administrative edict separate and differing prices may be established.³⁴⁷ Under a recent interpretation of the Virginia act, however, it seems that the Milk Commission has no authority to approve differing prices for the same grade of milk in various localities within the state. But the lack of such power was held not to prevent the authorization of discounts in price for quantity sales.³⁴⁸ A "natural marketing area" has been defined by the Vermont court as an area where milk is sold in response to consumer demand, the word "natural" being interpreted as meaning normal and the term "market" denoting geographic location.³⁴⁹

Some of the more modern milk control laws contain provisions authorizing an equalization of prices. The New York provision has been approved by the state Court of Appeals.³⁵⁰ To establish uniform prices to producers a marketing order may provide for the pooling of their milk. These pooling arrangements are of two kinds. There is the marketwide pool by the terms of which all milk handlers in the marketing area are obligated to pay a minimum uniform price to producers, there being various adjustments for butterfat content, transportation

³⁴³ *Safeway Stores, Inc. v. Milk Comm'n*, 197 Va. 69, 87 S.E.2d 769 (1955).

³⁴⁴ *Abbott's Dairies Inc. v. Armstrong*, 14 N.J. 319, 102 A.2d 372 (1954).

³⁴⁵ *Muller Dairies, Inc. v. Baldwin*, 242 App. Div. 296, 274 N.Y. Supp. 975 (1934).

³⁴⁶ *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

³⁴⁷ *Opinion to the House of Representatives*, 80 R.I. 409, 97 A.2d 578 (1953).

³⁴⁸ *Safeway Stores, Inc. v. Milk Comm'n*, 197 Va. 69, 87 S.E.2d 769 (1955).

³⁴⁹ *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

³⁵⁰ *Noyes v. Erie & Wyo. Farmers Co-op. Corp.*, 281 N.Y. 187, 22 N.E.2d 334 (1939).

expense, or other factors. The other type of arrangement is the individual handler pool which provides for a differing uniform price, the figure depending upon the use to which the particular quantity of milk is put. The use would determine the class and the handler would be required to pay the producer the minimum class price set for the marketing area. The individual handler pool would of course have varying arrangements for one-product and multi-product operations. Under the federal act a producer majority of three-fourths is required for the establishment of an individual handler pool, while the marketwide pool may be set up if just two-thirds of the producers approve. In pooling arrangements generally the money set aside for the satisfaction of producers' claims is known as the producer settlement fund.

In the important *Rock Royal* case³⁵¹ a federal marketing order set up a program for the New York City area. This plan established quotas for producers in the area and established an equalization pool making it possible for each producer doing business with a proprietary handler to receive for his milk a uniform or weighted price with differentials provided for location, quality, and other market variants. The pooling provisions of the order were held not to violate the fifth amendment's due process clause.

In a somewhat similar pooling arrangement price differentials were set up based on the location of the producers' farms. A federal appellate court ruled that such differentials were not unlawful, refusing to accept the contention that the only differentials of this sort authorized were those based upon the location where delivery was to be made.³⁵² The court made the point that neither the dealers nor the handlers could challenge this plan where the differentials had no effect upon the cost of the milk to these persons as computed on the basis of established minimum prices but affected only distributive shares to be paid producers out of the equalization pool. The court also refused to deny the validity of provisions of the order excluding from computation of the blended or uniform price the milk of handlers in default with respect to required equalization payments "for milk received during the delivery period next preceding but one." It was evidently believed that the purpose of these provisions was to minimize the risk that the equalization pool would not be self-liquidating for a later delivery period because of the failure of handlers obligated to the pool to make the required payments. The court reasoned that a failure to meet these obligations for one delivery period was indicative of an intention to refuse to make future payments.

Under an Oregon milk control program an order established quotas and authorized the pooling of returns, thereby making possible the pay-

³⁵¹ Discussed in text at note 293 *supra*.

³⁵² *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342 (1st Cir. 1939).

ment of a uniform price to producers. Certain producer-distributors of grade A raw milk claimed that they had not received the established minimum price for their entire quotas. Pool companions of these grade A dairymen produced grade B milk and also lactic fluid which was being prepared to go into grade A pasteurized products. It was claimed that these grade B producers had failed to make full sales of their quotas, thereby allegedly diminishing the pool shares of grade A dairymen. The proponents maintained that grade A milk was superior and cost more to produce than the inferior grades. They stated that they were not producing more than they could sell. Taking the program set up by the statute as a whole, the court was of the opinion that there had been no violation of the basic guarantees of due process and equal protection of the laws. The advantages of the pool and quota program were said to offset the alleged disadvantages at least to a certain extent. The tribunal defended the employment in the statute of terms in common use in the industry like "pooling" and "basic averages" and said that no fatal vagueness or ambiguity could be pointed to here.³⁵³

Some milk control statutes authorize the establishment of production quotas. When this has been done the quantity set by administrative officials is called "quota milk," while any excess production is known as "surplus milk." According to contracts between a California milk distributor and producers in two marketing areas the former was required to pay for "quota" milk at class 1 prices, with provisions included stating that "surplus" milk must be paid for at the class 4 rates unless it was intended to be used in categories covered by other class prices. The agreements provided that each producer's milk would be deemed to be pooled with the milk of other dairy farms at all times. In construing the contracts the court declared that they authorized the distributor to pool the entire milk supply of all the producers in each marketing area without regard to the distinction between "quota" and "surplus" milk, but did not permit him to pool the whole milk production of all dairy farms in every area under consideration.³⁵⁴

The Agricultural Marketing Agreement Act prescribes uniform minimum prices to be paid by handlers in respect to each use classification. A New York area marketing order added to the cost of non-pool milk and milk products a charge based on class prices in the area where the milk was produced rather than the actual cost to the handler. The payments required by the order were to be made through the producer settlement fund and were intended to be considered in the computation of the "minimum price." The federal appellate court considered this charge a penalty and not a compensatory payment. It was held that

³⁵³ *Savage v. Martin*, 161 Ore. 660, 91 P.2d 273 (1939).

³⁵⁴ *Marin Dairymen's Milk Co. v. Brock*, 100 Cal. App. 2d 686, 224 P.2d 374 (1950).

penalty payments of this kind resulted in price discrimination between handlers who purchased non-pool milk products and those who bought from a pool, even though both had made the same use thereof. Since such penalties were considered as being in conflict with the statutory guarantee of uniformity, the order could not be sustained under any reasonable interpretation of the statutory provision permitting anything "incidental to" and "not inconsistent with" the stated requirements.³⁵⁵ The dissenting judge, the eminent Learned Hand, believed the charge to be a proper one.

A provision of the federal order considered in the *Rock Royal* case³⁵⁶ limited the application of the minimum price regulations to milk which was sold in the marketing area covered by the order or which passed through a plant located therein. A handler selling milk in this marketing area alone claimed that this regulation was discriminatory in that it would permit handlers who sold milk both inside and outside the marketing area to offset losses, sustained because they were required to pay minimum prices to the area producers, with profits made from the unpriced milk sold outside the area. The Supreme Court refused to follow this reasoning, declaring that this was a competitive situation which the order did not create and with which it did not deal.

Administrative agencies are not supposed to ignore or transgress statutory limitations upon their authority to fix prices, even to accomplish what may be thought to be desirable ends. In one situation which developed in Virginia the Milk Commission had indulged in unauthorized price-setting practices for a rather lengthy period. Certain individuals and companies had acquiesced for many years in the Commission's unauthorized acts. The court declared that a chain grocery store's failure to object could not be said to preclude it ultimately from testing the validity of the administrative practices. The grocery store was said to be a "person aggrieved" and therefore entitled to raise objections to adverse decrees.³⁵⁷ A complainant who wishes to contest the validity of allegedly unlawful minimum milk price orders issued by a legally set up milk control agency must not only show a loss but must also prove that he had not been losing money before the offending orders went into effect and that others similarly situated were unsuccessful under the protested program.³⁵⁸

A loss or lessening of milk supply may be an influential factor with respect to the initial establishment of a control program or the changing of milk prices in an existing authorized marketing area.³⁵⁹

³⁵⁵ *Kass v. Brannan*, 196 F.2d 791 (2d Cir. 1952).

³⁵⁶ Discussed in text at note 293 *supra*.

³⁵⁷ *Safeway Stores, Inc. v. Milk Comm'n*, 197 Va. 69, 87 S.E.2d 769 (1955).

³⁵⁸ *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934).

³⁵⁹ *In re Swanton Market Area*, 112 Vt. 285, 23 A.2d 536 (1942).

Sometimes a statute or administrative order will grant an exemption from price-fixing provisions of milk control laws. The Vermont court ruled in favor of an exemption of charitable institutions.³⁶⁰ A New York court approved a so-called exemption which permitted certain wholesale distributing stations operating through the Welfare Department to sell milk at a figure lower than the price set for ordinary retail sales.³⁶¹

A New York statute contained a provision stating that dealers in unadvertised milk would be permitted to sell the fluid product to stores at a price one cent a quart below that fixed for milk sold by companies with well-advertised brands, the stores being allowed to resell at the same differentials. The Borden Company, with one of the more important brands in the nation, claimed that discrimination was present here and that the equal protection guarantee had been violated. There had been a similar voluntary differential in effect even before regulation. The Supreme Court declared that the differential was not unreasonable under the circumstances and held that the statute was valid.³⁶² The opinion stated that in a situation like this judicial inquiry should not concern itself with the accuracy of legislative determinations, but should place more emphasis upon the reasonable basis for the findings. A short time later, however, the High Court refused to approve a similar one cent differential unfavorable to name brands and having application only to those dealers in non-brand milk who had been in business at the time the statute was originally enacted.³⁶³ The differential was said to be discriminatory against those dealers in unadvertised milk who had gone into business after the statute had first become effective.

Under the present New York statute there seems to be no doubt that differentials in price may be set up in favor of the milk of certain breeds of cattle.³⁶⁴ The basis for the higher prices has been said to be the goodly percentage of butterfat in the milk of Guernsey and other allegedly superior cows. To be proper beyond criticism it is necessary that the order setting up such breed differentials contain findings or determinations of facts upon which the administrative action is predicated. To a great degree production costs will enter into the determination of the issue, but there are other factors which must be considered

³⁶⁰ State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939).

³⁶¹ People, *ex rel.* McDonough v. Bratowsky, 154 Misc. 432, 276 N.Y. Supp. 418 (Magis. Ct. 1934).

³⁶² Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194 (1934), *reversing* 7 F. Supp. 352 (S.D.N.Y. 1934); Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251 (1936), *affirming* 11 F. Supp. 599 (S.D.N.Y. 1935).

³⁶³ Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936), *reversing* Mayflower Farms, Inc., 267 N.Y. 9, 195 N.E. 532 (1935).

³⁶⁴ See Noyes v. Landel, 18 N.Y.S.2d 676 (Sup. Ct. 1940), *aff'd*, 259 App. Div. 1108, 21 N.Y.S.2d 616 (1940), *aff'd*, 285 N.Y. 749, 34 N.E.2d 906 (1941); New York State Guernsey Breeders Co-op., Inc. v. Noyes, 284 N.Y. 197, 30 N.E.2d 471 (1940).

in deciding whether the differential should be granted, including other quality criteria, location or distance, and the efficiency of the services rendered.³⁶⁵ A differential of this sort cannot be put into effect where there is no conclusive proof of the superior quality of the milk of the particular breed of cattle in question.³⁶⁶ In a case from the New York City marketing area a federal milk order established a butterfat differential of four cents a hundredweight for each one-tenth of one per cent above or below a stated butterfat test percentage figure. A Guernsey co-operative objected to the order and alleged that the result of this formula would be that over a period of years the use of the milk of the Guernsey breed would decline if it did not cease altogether. A decrease in the supply because of inadequate returns would inevitably result in a decrease in the market and the reestablishment of the market would be difficult. An additional "grade" or "quality" differential was urged, but the court declared that the evidence supported the decision of the administrator that no such differential be granted. The tribunal stated that the failure to provide the favored treatment did not violate the constitutional rights of the producers of Guernsey milk.³⁶⁷

There is no doubt that a higher minimum price may be set for milk where the container is furnished than where it is not.³⁶⁸ However, the courts seem less sure when considering differentials in price which are based upon the different types of containers used in delivering the product. The California,³⁶⁹ Oregon,³⁷⁰ and Virginia³⁷¹ courts have refused to approve differentials favoring milk delivered in paper containers over that delivered in the time-honored glass bottle. The California court said that a fiber container had no inherent quality that would give it a peculiar value. The Oregon court took the view that the price-fixing provisions of the statute must make a rather definite grant of this power, and if the language cannot be considered to authorize differentials of this sort, then any attempt to put them into effect would be unlawful. In Massachusetts a one-cent differential for store sales of milk in paper containers was established. The validity of the increase was said to depend upon whether the use of the containers for which the extra charge was made was a more expensive method of marketing

³⁶⁵ *Niagara Frontier Co-op. Milk Producers Agency, Inc. v. Du Mond*, 297 N.Y. 75, 74 N.E.2d 315 (1947).

³⁶⁶ *Noyes v. Landel*, 18 N.Y.S.2d 676 (Supp. Ct. 1940); *New York State Guernsey Breeders Co-op., Inc. v. Noyes*, 284 N.Y. 197, 30 N.E.2d 471 (1940).

³⁶⁷ *New York State Guernsey Breeders Co-op., Inc. v. Wickard*, 141 F.2d 805 (2d Cir. 1944).

³⁶⁸ *American Can Co. v. Milk Control Bd.*, 316 Mass. 337, 55 N.E.2d 453 (1944).

³⁶⁹ *Challenge Cream & Butter Ass'n v. Parker*, 23 Cal. 2d 137, 142 P.2d 737 (1943).

³⁷⁰ *Sunshine Dairy v. Peterson*, 183 Ore. 305, 193 P.2d 543 (1948).

³⁷¹ *Lucerne Cream & Butter Co. v. Milk Comm'n*, 182 Va. 490, 29 S.E.2d 397 (1944) (with strong dissent).

milk than the use of containers of other types with respect to which no additional charge had been imposed.³⁷² The administrative order allowing the increase in price was declared to have been unjustified, but the court refused to approve a provision which would have had the effect of preventing the future promulgation of directives imposing a non-refundable container charge with respect to milk or cream to be delivered in paper cartons. When one considers the consensus of judicial opinion as portrayed in these decisions, it can scarcely be said that the courts have been favorably disposed toward these container differentials.

From what has been said in one opinion from Oregon,³⁷³ it would seem to be reasonable to suppose that the courts would not disapprove of differentials in price between cash and credit sales and price variants depending upon whether house deliveries are made by dealers or stores. Furthermore, an Oregon statute³⁷⁴ authorizes differentials for the various grades of dairy products. A generally applicable South Dakota statute³⁷⁵ provides for bona fide price differentials.

Fair hauling charges may be set by administrative officials³⁷⁶ acting under control legislation. In pricing milk they may make transportation and related allowances and base them upon the distance which must be covered in carrying the product to market. In one case a federal order for the Philadelphia area established three zones, each being determined by the distance of the milk plants from the City Hall. For the closer zone the order made no provision for any such allowances; for the next zone stated transportation allowances were authorized; while in the farthest zone a receiving station allowance was added. The latter allowance was in addition to the one for transportation and compensated the handler for weighing, testing, and cooling services rendered at his establishment. These allowances were approved as being fair and non-discriminatory.³⁷⁷ The California court affirmed the validity of an administrative order establishing minimum prices to be paid by distributors in the San Diego marketing area for fluid milk purchased "F. O. B. distributor's plant" and stating that any distributor who received milk for sale or distribution within the area might deduct from the minimum prices specified an amount not in excess of the lowest rate for transportation to the distributor's area plant.³⁷⁸ The regulation was sustained as a reasonable stipulation in implementing the minimum price program. It was said to violate no basic guarantee of the fourteenth

³⁷² *American Can Co. v. Milk Control Bd.*, 316 Mass. 337, 55 N.E.2d 453 (1944).

³⁷³ *Sunshine Dairy v. Peterson*, 183 Ore. 305, 193 P.2d 543 (1948).

³⁷⁴ ORE. REV. STAT. § 621.221 (Supp. 1959).

³⁷⁵ S.D. CODE §§ 4.2004, .2014 (Supp. 1952).

³⁷⁶ *State ex rel. N. C. Milk Comm'n v. Galloway* 249 N.C. 658, 107 S.E.2d 631 (1959).

³⁷⁷ *Wawa Dairy Farms, Inc. v. Wickard*, 149 F.2d 860 (3d Cir. 1945).

³⁷⁸ *Knudson Creamery Co. v. Brock*, 37 Cal. 2d 485, 234 P.2d 26 (1951).

amendment and to create no "creeping monopoly." The delivery to the distributor was considered a marketing cost factor which would affect the price payable to producers for raw milk, while other expenses which might develop with respect to later stages of handling the product would be considered as distributive rather than production factors. The court considered the freight expense of shipping the milk to a distant market as a marketing cost over which the producer would have no control. Therefore this item would not be a proper one to be considered in the calculation of the minimum prices to be paid to producers.

In New Jersey milk authorities provided for "cartage" allowances only in instances where the retailer's establishment was located more than six miles from the wholesaler's plant. This regulation was held to be invalid as discriminating against metropolitan wholesale milk plants, as many more of their retailers were within a six mile radius.³⁷⁹

An administrative body will commonly set producers' minimum prices and dealers' minimum selling prices at the same time. In the early days of the milk control program in New York the resale prices were annulled for certain metropolitan areas while producers' minimum prices were left in effect. One inferior court took the view that this action was discriminatory and constituted a denial of due process.³⁸⁰ In another case arising the same year, however, the Appellate Division was evidently of the opinion that action of this kind was not invalid as confiscating the complaining dealer's property.³⁸¹ The decision by the inferior court was severely criticized, the appellate tribunal declaring that the primary purpose of the milk control program was to help the producers, not the dealers, and that it could not be said that the concept of due process would demand that the administrative body fix a minimum selling price for dealers which would yield a reasonable return to every one of them with no consideration for the efficiency of the operator.

The New York Milk Control Law enacted in 1933 made no provision for the regulation of prices in transactions between dealers, the administrative officials not being given such authority until the 1934 act went into effect. A contract for the sale of milk was made by two dealers before such authority was granted. The selling dealer breached the contract by charging more than the agreed price and tried to justify himself by claiming that the Milk Control Law had forced him to raise prices. The court held that the buying dealer could recover the increased charge he had paid for the period before the proper officials had

³⁷⁹ *Garden State Farms, Inc. v. Armstrong*, 31 N.J. Super. 61, 105 A.2d 884 (1954).

³⁸⁰ *Baldwin v. Dellwood Dairy Co.*, 150 Misc. 762, 270 N.Y. Supp. 418 (Sup. Ct. 1934).

³⁸¹ *Muller Dairies, Inc. v. Baldwin*, 242 App. Div. 296, 274 N.Y. Supp. 975 (1934).

acted under the 1934 statute and not afterwards.³⁸² Prior to the administrative action there had been nothing to justify the breach. The setting of prices for transactions between dealers was said to have been unauthorized under the interpretation³⁸³ given to an early New Jersey statute. Hence it would appear that the authority to set such prices will not be readily implied.

Several states³⁸⁴ require milk dealers to post prices to be charged to customers for various grades of milk and make it necessary to publish them by a certain time for the next selling period, usually on a monthly basis. Typical of this kind of requirement is a New Jersey regulation which compelled every licensed dealer, processor, and retail storekeeper to post lists enumerating the prices for the succeeding month, the dealers and processors being required to file on the twenty-sixth day of the passing month and the retail stores on the last day. This regulation was held to be a reasonable and valid one.³⁸⁵ Furthermore, a somewhat similar California statute providing for compulsory filing before any offer to sell was made was deemed paramount to certain inconsistent municipal charter provisions concerning sealed bids with respect to contracts to supply milk.³⁸⁶

UNFAIR PRACTICES AND COMPETITION— ANTI-TRUST LAWS

Many milk control statutes contain provisions outlawing various unfair practices which had been common in the industry prior to regulation. Price cutting is often made the subject of particular reference, and sometimes a statute will point out the illegality of discriminatory prices.³⁸⁷ In fact discriminatory price-cutting practices are sometimes outlawed by statute in states³⁸⁸ which have no truly representative milk control programs.

³⁸² *Knoeller v. Karsten*, 157 Misc. 130, 283 N.Y. Supp. 58 (N.Y. City Ct. 1935).

³⁸³ *Supplee-Wills-Jones Milk Co. v. Duryee*, 116 N.J.L. 75, 181 Atl. 908 (1935).

³⁸⁴ CAL. AGRIC. CODE § 4362; KAN. GEN. STAT. ANN. § 65-702 (1949); MISS. CODE ANN. § 4564 (1957) (cream); MO. ANN. STAT. § 196.665 (1952); MONT. REV. CODES ANN. § 3-2468 (1947) (butterfat); NEB. REV. STAT. § 81-251 (1958); NEB. REV. STAT. § 81-261 (1958) (co-operatives excepted); N.J. STAT. ANN. § 4:12-13 (1959); N.C. GEN. STAT. § 106-266.9 (Supp. 1959); N.D. REV. CODE § 4-1816 (Supp. 1957) (cream); ORE. REV. STAT. § 621.221 (Supp. 1959) (dairy products); S.D. CODE § 4.1802 (1939); WYO. COMP. STAT. ANN. § 35-293 (1957) (cream or fat).

³⁸⁵ *Appeals of Port Murray Dairy Co.*, 6 N.J. Super. 285, 71 A.2d 208 (1950).

³⁸⁶ *Dairy Belle Farms v. Brock*, 97 Cal. App. 2d 146, 217 P.2d 704 (1950).

³⁸⁷ See, e.g., VT. STAT. ANN. tit. 6 §§ 2441-44 (1958), as amended, VT. STAT. ANN. tit. 6, ch. 2441 (Supp. 1959).

³⁸⁸ IDAHO CODE ANN. §§ 37-1001 to -1010 (1948), as amended, IDAHO CODE ANN. §§ 37-1003a to -1003f (Supp. 1959); MINN. STAT. ANN. §§ 32.11, .12 (Supp. 1959); MO. ANN. STAT. §§ 416.140, .150 (1952); NEB. REV. STAT. §§ 59-509, -1001 -1002 (1952); NEV. REV. STAT. §§ 584.570, .585, .590 (Supp. 1959); TENN. CODE ANN. §§ 52-331 to -341 (Supp. 1959).

The unfair practices provisions of the milk control or related laws of several states point out various methods employed by persons engaged in the industry to gain a competitive advantage over others. Among these are discounts, rebates, and other schemes which are aimed at the customer's desire for an immediate bargain. The control programs seek to eliminate such practices. For example several states, some of which have no true control programs, have statutes³⁸⁹ outlawing rebates or making them possible only with administrative or some other sort of public approval. Some of these statutes enumerate and proscribe other unfair practices as well. In an appellate opinion from New York, one of the states making rebates unlawful, a contract calling for the return of a portion of the purchase price of milk has been held to be illegal and void.³⁹⁰ In a California case³⁹¹ it was alleged by administrative officials that a dairy company had sold fluid milk to school district authorities at a price below the minimum figure set by the officials in pursuance of the authority invested in them by the Milk Control Act. The transaction was said to be connected with another agreement or offer to sell other dairy products like butter and cheese to the school authorities at a price below cost. An injunction was sought and the court decided that there had been no sale or effort to sell at a figure below the fixed price. The consensus of the evidence supported the trial court's findings that the distributor's bids in response to the official requests with respect to the various desired products were severable and that there was nothing to show that there had been sufficient relation between the several transactions as to amount to a rebate, discount, free service, or gift in connection therewith. It was shown that the distributor and the milk control officials used different cost accounting systems. The distributor's accountant testified that no product had been sold below cost and there was other evidence which seemed to confirm this view of the matter. The court refused to grant the requested injunction.

In general it may be said that milk control legislation does not forbid free services, combination sales, extensions of credit, and other similar schemes when price-cutting is not effected thereby. In Pennsylvania a milk dealer furnished retail grocers with refrigerated display cabinets of the self-serving type. By agreement the title to the cabinets remained

³⁸⁸ALA. CODE tit. 22, §§ 223, 228 (1940); CAL. AGRIC. CODE §§ 4280, 4361; IDAHO CODE ANN. § 37-1003 (1948); MASS. ANN. LAWS ch. 94A, § 14 (1954); MISS. CODE ANN. § 4560-58 (1957); NEV. REV. STAT. § 584.570 (Supp. 1959); N.Y. AGRIC. & MKTS. LAWS § 258-m; N.C. GEN. STAT. § 106-266.9 (Supp. 1959); PA. STAT. ANN. tit. 31, §§ 700j-807, -809 (1958); R.I. GEN. LAWS ANN. § 21-4-16 (1956); S.C. CODE § 32-1634.67 (Supp. 1959); TENN. CODE ANN. § 52-332(f) (Supp. 1959); UTAH CODE ANN. § 5-3-12(a) (1953); WIS. STAT. ANN. §§ 100.201 to .26 (1957).

³⁸⁹Bosson Dairy Co. v. Rockdale Creamery Corp., 258 App. Div. 961, 16 N.Y.S.2d 720 (1940).

³⁹¹Jacobsen v. Dairy Mart Farms, Inc., 154 Cal. App. 2d 287, 315 P.2d 932 (1957).

in the dealer who was servicing them at his own expense, the grocers being obligated to furnish operational electric current alone. The dealer bore the cost of amortization and only his products were allowed to be shown. Products other than milk were displayed and the grocers' existing equipment was freed for other uses. However, there was nothing to show that the additional space thus afforded had been of any particular advantage to the grocers. In fact it seemed that the sole purpose of the scheme was to promote the sales of the dealer by making his wares more convenient and conspicuous. It was decided that this arrangement could not be held invalid.³⁹² It would not matter that a somewhat similar scheme might conceivably be set up which would, in fact, be a price-cutting device. The difficulties which milk officials might experience in making proper distinctions could not be allowed to influence the court in a matter of this nature.

In North Dakota certain portions of a statute prohibiting various trade practices in the dairy industry limited wholesalers in furnishing advertising matter to retailers, permitted payments to wholesalers for the storage or display of dairy products, and restricted wholesalers in making loans to retailers. In a recent case these provisions were ruled unconstitutional as impairing the obligations of contract and as being violative of the concept of due process.³⁹³ The court remarked that these provisions could not reasonably be related to practices creating monopolies or restricting competition in the dairy industry.

There are some state statutes³⁹⁴ applying specifically to the milk industry which outlaw agreements to fix prices for the purpose of gaining a competitive advantage. It is also worthy of note that a North Carolina statute³⁹⁵ prohibits the sale of milk below cost for the purpose of destroying or injuring competitors.

In a case arising in California a complaining ice cream company claimed that a large concern, a corporation with diverse interests, had attempted to destroy its competitors in the ice cream business by cutting prices on that particular product and compensating for its sales below prices customarily and necessarily charged in nearby markets with profits from other branches of its dairy and milk product business. An action was brought under the Robinson-Patman amendment to the Clayton Act,³⁹⁶ and the claim was made that the defendant had acted unlawfully and was liable for treble damages as provided by the statute. The court

³⁹² *Sylvan Seal Milk Inc. v. Pennsylvania Milk Control Comm'n*, 74 Pa. D. & C. 289 (1951).

³⁹³ *Fairmont Foods Co. v. Burgum*, 81 N.W.2d 639 (N.D. 1957).

³⁹⁴ See, *e.g.*, IND. ANN. STAT. §§ 23-128 to -133 (1950); MO. ANN. STAT. § 196.660 (1952); NEB. REV. STAT. §§ 59-1001, -1002 (1952) (see also NEB. REV. STAT. § 59-509 (1952)); TENN. CODE ANN. §§ 52-331 to -341 (Supp. 1959); WASH. REV. CODE § 15.32.780 (1951).

³⁹⁵ N.C. GEN. STAT. § 106-266.21 (Supp. 1959).

³⁹⁶ 49 Stat. 1526-28 (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a (1958).

decided that the conduct of the defendant was actionable and allowed a recovery.³⁹⁷

A Minnesota statute prohibited any firm, corporation, or other person buying milk, cream, or butter from paying a higher price in one place than in another, thus outlawing discriminatory sales on the basis of location. The statute provided for differing transportation allowances. The act was alleged to have been meant to prevent buyers with unusual purchasing power from establishing a monopoly by excessive bidding in an effort to stifle competition. As the statute was worded in such a manner as to be operative irrespective of motive, the United States Supreme Court ruled that contract rights had been interfered with to an extent which would violate fundamental rights under a proper interpretation of the due process clause of the fourteenth amendment.³⁹⁸

In an action brought under Wisconsin anti-trust laws the maximum statutory penalty was demanded from foreign and domestic corporations and partnerships for conspiracy to control milk prices and to restrict competition. The prosecution asked for an injunction and the cancellation of the defendants' charters and licenses to do business within the jurisdiction. Though the pleadings did not specifically allege an agreement by the individuals involved to fix or maintain prices prior to their concerted action in fixing identical prices at the same moment, it was ruled that enough had been stated to make such detailed allegations unnecessary, thereby making the pleadings sufficient to withstand demurrer.³⁹⁹

The Agricultural Marketing Agreement Act provides that the Secretary of Agriculture shall have authority to enter into marketing agreements with processors and others engaged in the handling of agricultural commodities without risking violation of the anti-trust laws. Parties placing themselves under the federal program submit to supervision and regulation. The statute has been held to authorize the use of a classification plan for computing the prices distributors must pay producers, both groups being said to be immune to prosecution under the anti-trust laws. The Secretary had adjusted the price of milk in the District of Columbia milkshed area, his orders affecting both the distributors and the association of producers, in accordance with the fluctuations of prices on the New York Commodity Exchange. However, the producers' co-operative association withdrew its assent to the marketing agreement embodying the classification plan. Thereafter the association continued to execute "full supply" contracts with the distributors, these instruments containing provisions which were not unlike

³⁹⁷ *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D. Cal. 1950).

³⁹⁸ *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927).

³⁹⁹ *State v. Golden Guernsey Dairy Co-op.*, 257 Wis. 254, 43 N.W.2d 31 (1950).

the classification provisions of the Secretary's program. It was held that these latter "full supply" contracts, being executed after withdrawal, were in effect agreements to fix prices in restraint of trade and therefore invalid under the Sherman Anti-Trust Act.⁴⁰⁰

In the *Rock Royal* case⁴⁰¹ it was contended that producers' co-operatives having a vital interest in the establishment of an efficient marketing system in the New York City area were stimulated by ulterior motives of corporate aggrandizement in putting pressure on handlers to compel them to agree to a certain order prepared by administrative officials of the Department of Agriculture. Even though such motives might be established, it was declared that there could be no infraction of the law unless there had been a violation of the anti-trust statutes. The Supreme Court refused to rule that there had been a violation of the Sherman Act here despite the fact that there was very little doubt that the net effect of the arrangement under the statute and order would be to give the milk co-operatives a practical monopoly in this marketing area.

Some states, notably Michigan⁴⁰² and North Carolina,⁴⁰³ exempt dairy co-operatives from the operation of the local anti-trust laws. Thus it is proper for the milk producers in these states to combine in co-operatives and thus gain a competitive advantage. They are freed from certain worries about acting in restraint of trade.

APPLICATION OF STATE LAWS TO FEDERAL AGENCIES

Price regulations promulgated by state milk control agencies are applicable to sales to agencies of the federal government consummated within the jurisdiction.⁴⁰⁴ State price regulations have been held by the Supreme Court to be applicable to a milk handler who did business with a military installation located on ground leased from a state but still under state control.⁴⁰⁵ The tribunal was of the opinion that the regulations imposed no unconstitutional burden upon the federal government through interference with its necessary or proper functions or with its announced policy of competitive bidding. It was declared that there could be no immunity from state regulation despite an army rule providing that invitations for bids for supply contracts would not have to be in accordance with state law. The Court remarked that there had been no expression of any congressional desire to take over the regulation of

⁴⁰⁰ *United States v. Maryland & Virginia Milk Producers' Ass'n*, 90 F. Supp. 681 (D.D.C. 1950).

⁴⁰¹ Discussed in text accompanying note 293 *supra*.

⁴⁰² MICH. STAT. ANN. § 28.31 (1938).

⁴⁰³ N.C. GEN. STAT. § 106-266.19 (Supp. 1959).

⁴⁰⁴ *Patterson Milk & Cream Co. v. Milk Control Bd.*, 118 N.J.L. 383, 192 Atl. 838 (1937).

⁴⁰⁵ *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943) (with Justices Black, Douglas and Jackson dissenting), *affirming* 344 Pa. 635, 26 A.2d 431 (1942).

milk prices for military installations in general and that a policy to that effect would not be inferred. This decision should be contrasted with another Supreme Court case⁴⁰⁶ from California. Here the federal government made a large and expensive purchase of land from the state for the purpose of setting up an air force base. A milk handler made selling bids to supply the base, and an issue arose concerning the applicability of state price regulations. The federal government was said to have exclusive jurisdiction with respect to the base, and it was decided that the handler, in the absence of positive congressional directives, could not be compelled to abide by state price regulations.

CO-OPERATIVES

Courts usually look at milk co-operatives very thoroughly to determine their exact status in respect to the milk marketing process. An Arizona statute imposed a tax upon any "person" engaged in bottling or otherwise preparing agricultural products for sale. This act was held to be applicable to a non-profit co-operative which was manufacturing milk products as an agent for and on behalf of the dairymen who formed the association.⁴⁰⁷ Statutory provisions in New York⁴⁰⁸ imposed a penalty upon any person or corporation buying milk or cream from a producer without possessing a license. The term "producer" was said by a state court to refer to those persons who obtain milk from cows and was held not to be applicable to a co-operative association which received milk from many producers, blended it into a fluid mass, and distributed the funds received from its sale ratably among its members. The court declared that the statute had not been intended to cover purchases from co-operatives.⁴⁰⁹ Moreover, in a situation involving the amount of payments into an equalization pool, a federal appellate court declared that the term "producer" employed in the appropriate portion of the Agricultural Marketing Agreement Act could not be construed in such a manner as to have reference to a co-operative organization which had been established by officials and stockholders of a pre-existing corporation engaged in handling milk. The co-operative had taken over the business of the corporation. Title had been taken to the farmers' cattle, return mortgages and stock being given to them in consideration thereof. The co-operative had not taken possession of the cattle and there had been no substantial change in the farmers' status. The court was of the opinion that the co-operative could not avoid making large payments into the equalization pool on the ground that it was a pro-

⁴⁰⁶ *Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U.S. 285 (1943), reversing 19 Cal. 2d 818, 123 P.2d 442 (1942).

⁴⁰⁷ *Arizona Tax Comm'n v. Dairy & Consumers Co-op. Ass'n*, 70 Ariz. 7, 215 P.2d 235 (1950).

⁴⁰⁸ A former version of the present N.Y. AGRIC. & MKTS. LAWS § 257.

⁴⁰⁹ *People v. Shoemaker*, 228 App. Div. 314, 239 N.Y. Supp. 71 (1930).

ducer.⁴¹⁰ However, producers' co-operatives have been held to be "distributors" within the Vermont Milk Control Act and hence subject to its provisions regulating prices.⁴¹¹

Co-operatives are frequently mentioned and are sometimes given specific treatment in the milk control laws of the various states. Sometimes an exemption will be given with respect to pricing⁴¹² and other provisions of these statutes. Nebraska exempts co-operatives from the duty of posting prices.⁴¹³ As a contrast, however, the Massachusetts lawmakers deemed it proper to insert a provision stating that minimum prices are applicable to co-operatives.⁴¹⁴ These are only a few of the references to co-operatives and they have received increasing attention as their importance in the industry has grown.

The federal act⁴¹⁵ and several of the more recent state statutes⁴¹⁶ have provisions permitting dairy co-operatives to blend prices or proceeds or both and pay the resulting sums ratably to their members. With a provision of this type in force along with other clauses applicable to co-operatives, a New Jersey court has said that a bona fide association would not be bound by minimum prices which administrative officials had set for the payments of others.⁴¹⁷ If the co-operative had been set up as a mere automaton, however, its application for a dealer's license should be denied. Here it was ruled that the pseudo-co-operative involved in this case was a mere "barebones" organization established for the purpose of circumventing lawful and expedient price regulations. The evidence indicated that pressure had been put upon the producers to form the organization for the purpose of enabling the applicant to purchase milk below the minimum prices set by administrative officials. In the *Rock Royal* case⁴¹⁸ the Supreme Court found that the provisions of the federal act concerning blending were valid.

According to an early New York statute a bond was required as security for payment in situations where milk was bought by dealers from producers but not where the transaction was between dealers. In a case arising under this statute a dairy co-operative, without buying milk from its member producers, contracted to sell milk to a dealer and arranged to have each producer deliver at his place of business. Accord-

⁴¹⁰ *Elm Spring Farm, Inc. v. United States*, 127 F.2d 920 (1st Cir. 1942).

⁴¹¹ *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

⁴¹² UTAH CODE ANN. § 5-3-29 (1953).

⁴¹³ NEB. REV. STAT. § 81-261 (1952).

⁴¹⁴ MASS. ANN. LAWS ch. 94A, § 15 (1954).

⁴¹⁵ 49 Stat. 753 (1935), 7 U.S.C. § 608c(5) (F) (1958).

⁴¹⁶ ALA. CODE tit. 22, § 228 (1940); CONN. GEN. STAT. REV. § 22-218 (1958) (repealed as of Dec. 31, 1960, Conn. Pub. Acts (1959), ch. 116, § 17); FLA. STAT. ANN. § 501.14 (1943); N.J. STAT. ANN. § 4:12A-31 (1959); N.Y. AGRIC. & MKTS. LAWS § 258-m; PA. STAT. ANN. tit. 31, § 700j-809 (1958); S.C. CODE § 32-1634.50 (Supp. 1959).

⁴¹⁷ *In re Welsh Producers Co-op. Milk Marketing Ass'n*, 40 N.J. Super. 318, 123 A.2d 16 (1956).

⁴¹⁸ Discussed in text accompanying note 293 *supra*.

ing to the agreement the dealer would pay the co-operative and all payments by him would be merged in a fund belonging to all members, certain deductions and charges being authorized before distribution. The dealer and his sureties were held liable on the executed bond, the co-operative being considered a mere agent and not a dealer within the contemplation of the statute.⁴¹⁹

The provision of the federal statute permitting administrative officials to make regulations which are "incidental to" and "not inconsistent with" the act was given close scrutiny in *Stark v. Wickard*,⁴²⁰ a case from the Boston marketing area. Here an inconsistency with the statute was claimed with respect to payments to co-operatives authorized by administrative order. Milk officials directed that certain deductions be made from an equalization pool belonging in equity to all the area milk producers subject to the program and that the sums involved be turned over to certain co-operatives. A question was raised with respect to the right of individual producers to maintain an action to enjoin the enforcement of these directives. The argument was advanced by administrative officials that these producers lacked an interest sufficient to give them standing in a federal court to raise the issue concerning the legality of the payments to the co-operatives. On the first hearing the Supreme Court refused to go along with this contention and held that the producers had an interest which the federal courts must consider. The Court left the legality of the payments to the lower court on the remand. When the case came up a second time, the Court in a split decision reaffirmed the right of the producers to sue and ruled that the payments to the co-operatives had no statutory authorization. It was declared that non-member producers would get little or no benefit from the payments.⁴²¹ But where the co-operatives render marketwide services beneficial to all producers and not just association members, payments in return for these services were held to be legitimate and not inconsistent with the statutory provisions concerning the setting of uniform prices.⁴²²

In the *Rock Royal* case⁴²³ proprietary handlers claimed that the federal act discriminated against them because co-operatives were exempted from paying uniform minimum prices to their members. The Supreme Court refused to hold the exemption invalid, declaring that "when proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the

⁴¹⁹ *Pyrke v. Brundo*, 243 App. Div. 493, 278 N.Y. Supp. 353 (1935).

⁴²⁰ *Stark v. Wickard*, 321 U.S. 288 (1944).

⁴²¹ *Brannan v. Stark*, 342 U.S. 451 (1952), *affirming* 185 F.2d 871 (D.C. Cir. 1950), *affirming* 82 F. Supp. 614 (D.D.C. 1949).

⁴²² *Grant v. Benson*, 229 F.2d 765 (D.C. Cir. 1955).

⁴²³ Discussed in text accompanying note 293 *supra*.

other hand, the co-operative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons."

ADMINISTRATIVE HEARINGS TO REGULATE PRICES

A hearing before an administrative body for the purpose of fixing milk prices must of course conform to proper concepts of due process.⁴²⁴ Before a commission, board, or official may promulgate or revise a price-fixing order, some pertinent or substantial evidence must be presented to show that the proposed prices are justified.⁴²⁵ Suppositions and presumptions cannot be substituted for facts which are important in the determination of material issues.⁴²⁶ In the absence of evidence to the contrary a presumption exists that a proper hearing has been held and that competent evidence has been introduced to support the findings.⁴²⁷

The sufficiency of the evidence for the purpose of inducing a decision that established minimum prices should be revised with general mark-ups is a matter for administrative judgment, and conclusions reached are not to be overturned unless there has been a capricious refusal to take up items which should have been considered, an examination of irrelevant items, or a failure to give proper weight to testimony of a persuasive nature.⁴²⁸ When such errors have been committed, the proper procedure is to return the case to the administrative body for a new hearing.⁴²⁹

Sometimes those attending a hearing will request or suggest that the administrative agency undertake an independent survey of conditions affecting the milk industry in order that more informative data may be collected and applied with respect to the determination of fair prices. Even in an instance where the available information could not be said to have been complete, the court was of the opinion that an administrative agency could not be compelled to make an independent survey, especially where the matter at issue was not the promulgation of an original order but the revision of an existing one.⁴³⁰

To provide a fair return for producers and dealers and to insure proper consumer prices a cross-section of representative investments

⁴²⁴ *National Dairy Products Co. v. Milk Control Bd.*, 133 N.J.L. 491, 44 A.2d 796 (1945).

⁴²⁵ *Supplee-Wills-Jones Milk Co. v. Duryee*, 116 N.J.L. 75, 181 Atl. 908 (1935); *Meadow Gold Dairies, Inc. v. Milk Control Comm'n*, 70 Pa. D. & C. 223 (1949).

⁴²⁶ *Royce v. Rosasco*, 159 Misc. 236, 287 N.Y. Supp. 692 (Sup. Ct. 1936).

⁴²⁷ *Supplee-Wills-Jones Milk Co. v. Duryee*, 116 N.J.L. 75, 181 Atl. 908 (1935).

⁴²⁸ *Milk Control Comm'n v. United Retail Grocers Ass'n*, 361 Pa. 221, 64 A.2d 818 (1949); *Colteryahn Sanitary Dairy v. Milk Control Comm'n*, 332 Pa. 15, 1 A.2d 775 (1938).

⁴²⁹ *Colteryahn Sanitary Dairy v. Milk Control Comm'n*, *supra* note 428.

⁴³⁰ *Milk Control Comm'n v. United Retail Grocers Ass'n*, 361 Pa. 221, 64 A.2d 818 (1949).

and expenses of normally efficient dealers and producers in the industry should be utilized in obtaining data from which accurate calculations may be made leading to the establishment of prices fair to all.⁴³¹

SUSPENSION OF PRICE CONTROLS

Sometimes it may seem feasible to discontinue a pricing program for a long or short while. In Florida the action of the Milk Commission in a recent suspension of price controls was taken without giving any notice of its intention to do so, without affording an opportunity for those opposed to present evidence, and without the formal hearing prescribed by the statute. Under these circumstances the Commission's action was said to have no legal effect, and the administrative body was required to continue the enforcement of its latest price orders until their revocation, amendment, or revision by orders properly promulgated.⁴³² About a decade ago the Governor of New Jersey decided to recommend as an experiment that all resale prices for milk be eliminated for an indefinite period. The Director of the Milk Industry was persuaded to adopt this course. Certain dealers objected because there had been no notice and hearings, and the matter was carried to the state courts. It was argued that by following the Governor's suggestion and adopting the proposal the Director had unlawfully surrendered the duty imposed upon him by law. Testimony was introduced to the effect that the Director had become convinced that the course the Governor had recommended was the right one. As no evidence to the contrary had been offered, it was decided that the Director's action in this instance had not been unlawful, arbitrary, or beyond the scope of the authority given him by the statute.⁴³³

PRODUCER REFERENDUMS

The Agricultural Marketing Agreement Act⁴³⁴ gives the Secretary of Agriculture authority to hold referendums among producers in any area within federal jurisdiction for the purpose of determining whether a milk control program is to be established therefor. The Secretary is empowered to make rules and regulations concerning the participants and methods of conducting the voting. The authority is of a somewhat elastic nature. In one of the earliest Supreme Court cases⁴³⁵ involving the federal program administrative officials refused permission to vote in a referendum to producers outside the milkshed whose milk could not be sent into the Boston marketing area in fluid form because the handlers

⁴³¹ Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 1 A.2d 775 (1938).

⁴³² Adams v. Lee, 89 So. 2d 217 (Fla. 1956).

⁴³³ Appeals of Port Murray Dairy Co., 6 N.J. Super. 285, 71 A.2d 208 (1950).

⁴³⁴ 49 Stat. 753 (1935), as amended, 7 U.S.C. § 608c (1958).

⁴³⁵ H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939), *affirming* 26 F. Supp. 672 (D. Mass. 1939).

with whom they dealt were not licensed under Massachusetts law to sell milk there. However, producers who had no registration certificates were permitted to vote in the referendum wherever their milk was sold in the marketing area by handlers who had licenses. Such action on the part of administrative officials was deemed to be well within the authority granted to the Secretary. As far as the validity of the referendum was concerned the Court said that it was immaterial that less than fifty per cent of the milk at some of the collecting stations had been shipped to the area during a representative period by approving producers. It was deemed sufficient that the handlers of these producers' products did send part of the milk produced into the area and could have sent it all. It was also said to be immaterial that some handlers to whom voting producers delivered milk had shipped only cream during the representative period. At other times these handlers could have sent fluid milk into the marketing area and in most instances actually did so. Under the statute the approval or disapproval of persons to be affected by the program was a matter to be determined by the Secretary or his agents. Additional referendums with respect to the members of co-operatives were said to be unnecessary, since the votes of co-operatives in behalf of their members in favor of the promulgation or amendment of a marketing order were binding upon all. This case illustrates some of the issues which may arise with respect to the machinery involved in referendums of this sort.

PETITION FOR STABILIZATION PLAN

The provisions of a California statute stated that petitions asking for the promulgation of a plan to control milk marketing and to stabilize the industry had to be signed by sixty-five per cent of the producers in the area whose major interest was the production of milk and cream. This language was interpreted in such a manner as to make these provisions applicable to all important producers in a given area except certain large distributors who had been engaging in the production of milk as a side line to their regular business. Therefore it was ruled that participation in the determinative hearing on a stabilization plan would be limited to those producers whose paramount concern was the production of milk as compared to their interest in the distributive phase of the business. An intrinsic difference was said to exist here. The distinction was said to be a reasonable one and the statute was held not to violate the uniformity provision of the state constitution.⁴³⁶

LEGAL, EQUITABLE, AND ADMINISTRATIVE REMEDIES

Issues concerning the type of remedy to be employed may sometimes arise with respect to actions brought under or having reference to milk

⁴³⁶ Jersey Maid Milk Prods. Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577 (1939).

regulations. Thus where the New York Commissioner of Agriculture refused to renew the license of a dealer and the latter claimed that this failure to act had been arbitrary and amounted to a practical confiscation of his property, a proceeding authorized by statute against licensing officials was deemed to be an adequate remedy at law which would prevent the maintenance of an equitable action within the familiar rule to that effect.⁴³⁷ But note may be taken of a Connecticut statute⁴³⁸ which permitted the Milk Administrator to seek an injunction to compel milk dealers to pay minimum prices to producers despite the availability of a legal remedy.⁴³⁹

Under the federal Agricultural Marketing Agreement Act administrative remedies, including application for review, must be exhausted before a complainant may resort to the federal courts, and a case may be thrown out for a failure to do so.⁴⁴⁰ The same would be true under state milk laws generally.

INTERGOVERNMENTAL COMPACTS

In a good many states, most of which have milk control legislation, there are statutes authorizing officials with a varying degree of power over the industry to make compacts with control agencies of the federal government and the respective states.⁴⁴¹ Thus administrators may coordinate their programs with those of other jurisdictions.

MUNICIPAL REGULATION OF MILK INDUSTRY

Municipal ordinances concerning the local regulation of the milk industry and its sanitary aspects must be reasonable and not arbitrary and must conform in general to the proper concepts of procedural and substantive due process.⁴⁴² Such ordinances must operate upon various groups of persons and types of things in accordance with the usual

⁴³⁷ Gillespie v. Du Mond, 189 Misc. 403, 72 N.Y.S.2d 34 (Sup. Ct. 1947).

⁴³⁸ CONN. GEN. STAT. REV. § 22-254 (1958).

⁴³⁹ Hammerberg v. Leinert, 132 Conn. 596, 46 A.2d 420 (1946).

⁴⁴⁰ United States v. Ruzicka, 329 U.S. 287 (1946); United States v. Turner Dairy Co., 166 F.2d 1 (7th Cir. 1948); Gudgel v. Iverson, 87 F. Supp. 834 (W.D. Ky. 1949); United States v. Hogansburg Milk Co., 57 F. Supp. 897 (N.D.N.Y. 1944).

⁴⁴¹ ALA. CODE tit. 22, § 229 (1940); CAL. AGRIC. CODE § 4257; FLA. STAT. ANN. § 501.15 (1943); GA. CODE ANN. § 42-558 (1957); MASS. ANN. LAWS ch. 94A, §§ 23, 24 (1954); MONT. REV. CODES ANN. § 27-421 (1955); NEV. REV. STAT. § 584.540 (Supp. 1959); N.H. REV. STAT. ANN. § 183:17 (1955); N.J. STAT. ANN. § 4:12A-25 (1949); N.Y. AGRIC. & MKTS. LAWS § 258-n; N.C. GEN. STAT. § 106-266.8 (Supp. 1959); ORE. REV. STAT. § 621.105 (Supp. 1959) (out-of-state milk permitted by reciprocal arrangement); PA. STAT. ANN. tit. 31, § 700j-311 (1958); R.I. GEN. LAWS ANN. § 21-4-5(h) (1956); S.C. CODE § 32-1634.2 (Supp. 1959); TENN. CODE ANN. § 52-318 (1955) (reciprocal inspection agreements); UTAH CODE ANN. § 4-21-13 (1953); VT. STAT. ANN. tit. 6, § 2508 (1958); VA. CODE ANN. § 3-352 (1950).

⁴⁴² City of Des Moines v. Fowler, 218 Iowa 504, 255 N.W. 880 (1934); Creaghan v. Mayor of Baltimore, 132 Md. 442, 104 Atl. 180 (1918); Grider v. City of Ardmore, 46 Okla. Crim. 33, 287 Pac. 776 (1930).

reasonable classification doctrine under the equal protection clause. In one instance it was said that practical necessity justified the enactment of an Oklahoma City ordinance classifying milk facilities into three groups, pasteurization plants, "farm dairies" which limit their deliveries to pasteurizing concerns, and "inspected dairies" which offer raw milk for sale to consumers alone, and fixing license fees accordingly.⁴⁴³ However, approval was denied with respect to an ordinance of the same city denying eligibility to receive a permit to sell raw milk to anyone who had not been licensed at the time the ordinance was enacted.⁴⁴⁴ The New Jersey court refused to approve an ordinance imposing license fees for the owners of milk vending machines which were greater than those charged to competitors who did not use machines, there being no evidence that the difference in treatment was justified. It was pointed out that the machine owners and their competitors were required to abide by state-controlled price regulations.⁴⁴⁵

There seems to be a general rule that where a state has general statutes which thoroughly cover a particular and definite aspect of the milk industry, county or municipal governing bodies may not enact ordinances which conflict with or add qualifications or conditions to the general law.⁴⁴⁶ However, it is worthy of note that some states have statutory provisions⁴⁴⁷ authorizing municipalities to set up standards for milk which are stricter than those established under the general law. A Tennessee town established standards which were additional to those set up by the state and considerably higher than those of a neighboring community where the milk of certain producers had been given a very good rating by the local health authorities. The additional qualifications having been established after the trial in the instant case had started, the producers of the nearby rural area were given time to comply with the added requirements.⁴⁴⁸ The court commented that the statute permitting the establishment of higher standards would not give a municipality the right to enact an ordinance which disregarded the state's regulatory milk laws or denied fundamental rights. But municipal ordinances which merely complement the general laws of a state pertaining to milk and dairies are not objectionable. Where ordinance and general

⁴⁴³ *Stephens v. City of Oklahoma City*, 150 Okla. 190, 1 P.2d 367 (1931).

⁴⁴⁴ *Oklahoma City v. Poor*, 298 P.2d 459 (Okla. 1956).

⁴⁴⁵ *Gilbert v. Town of Irvington*, 20 N.J. 432, 120 A.2d 114 (1956).

⁴⁴⁶ *City of Flagstaff v. Associated Dairy Prods. Co.*, 75 Ariz. 254, 255 P.2d 191 (1953); *Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 206 P.2d 1041 (1949).

⁴⁴⁷ FLA. STAT. ANN. § 502.24 (1943); GA. CODE ANN. § 42-522.5 (1957); N.D. REV. CODE § 4-18A07 (Supp. 1957); ORE. REV. STAT. §§ 621.090, .095, .291 (Supp. 1959); PA. STAT. ANN. tit. 31, § 6606 (1958); R.I. GEN. LAWS ANN. §§ 21-2-16, -5-15 (1956); S.C. CODE § 32-1610.25 (Supp. 1959); TENN. CODE ANN. § 52-317 (1955); UTAH CODE ANN. § 4-21-20 (1953); VA. CODE ANN. § 3-400.37 (1950).

⁴⁴⁸ *State ex rel. Beasley v. Mayor of Fayetteville*, 196 Tenn. 407, 268 S.W.2d 330 (1954).

statute both make provision for the commonly mentioned bacterial plate count an added alternative microscopic count has been approved.⁴⁴⁹ However, an ordinance requiring that all milk offered for sale in a Texas city have a milk fat content of at least four per cent was ruled invalid as being in conflict with the standards established under state statutes and regulations.⁴⁵⁰

There appears to be a difference of opinion concerning the validity of a city ordinance or health regulation requiring the pasteurization of milk. Local pasteurization requirements have been ruled valid in Arizona⁴⁵¹ and North Carolina⁴⁵² on the basis of the maintenance of the public health. Requirements that made it necessary to pasteurize all milk sold to consumers save the certified product were approved in California, the court being of the opinion that the legislature had left the door open for the establishment of higher standards of this type in the municipalities.⁴⁵³ A city board of health regulation stating that only pasteurized or grade A certified milk could be sold in a New York community was held to be valid.⁴⁵⁴ However, ordinances prohibiting the sale of milk without pasteurization have been declared unconstitutional in Connecticut,⁴⁵⁵ Missouri,⁴⁵⁶ and Texas.⁴⁵⁷ The Connecticut decision was quite evidently influenced by the accompanying declaration that the state's general statutes covered the same ground as the ordinance. The court remarked that a later statute covering the same general subject matter would supersede an ordinance. In the Missouri case local conditions were not so bad that raw milk could not be sold without endangering the public health, and this lack of peril seems to have influenced judicial opinion. The better view appears to be that an ordinance requiring pasteurization cannot be invalidated unless special circumstances such as those mentioned above militate against it.

There would seem to be no doubt about the constitutionality of an ordinance prohibiting the sale of non-pasteurized milk as the pasteurized product.⁴⁵⁸

If there is no conflict with the general milk laws of the state, it would appear to be true that municipalities can legislate with respect to sanitation, transportation, supply, and other aspects of the milk industry

⁴⁴⁹ *Leach v. Coleman*, 188 S.W.2d 220 (Tex. Civ. App. 1945).

⁴⁵⁰ *Cabell's, Inc. v. City of Nacogdoches*, 288 S.W.2d 154 (Tex. Civ. App. 1956).

⁴⁵¹ *City of Phoenix v. Breuninger*, 50 Ariz. 372, 72 P.2d 580 (1937).

⁴⁵² *State v. Edwards*, 187 N.C. 259, 121 S.E. 444 (1924).

⁴⁵³ *Natural Milk Producers Ass'n v. City and County of San Francisco*, 20 Cal. 2d 101, 124 P.2d 25 (1942).

⁴⁵⁴ *Moll v. City of Lockport*, 118 Misc. 573, 194 N.Y. Supp. 250 (Supp. Ct. 1922).

⁴⁵⁵ *Shelton v. City of Shelton*, 111 Conn. 433, 150 Atl. 811 (1930).

⁴⁵⁶ *State ex rel. Knese v. Kinsey*, 314 Mo. 80, 282 S.W. 437 (1926).

⁴⁵⁷ *Melton v. City of Welasco*, 301 S.W.2d 470 (Tex. Civ. App. 1957).

⁴⁵⁸ *Lang's Creamery, Inc. v. City of Niagara Falls*, 224 App. Div. 483, 231 N.Y. Supp. 368 (1928).

within the city limits.⁴⁵⁹ Of course a conflict with a state statute⁴⁶⁰ or health regulation⁴⁶¹ will render the municipal legislation invalid. Furthermore, the Illinois court has held that a city cannot make provision for the convenient location of milk plants in order to subject them to regulation.⁴⁶²

Under regulations promulgated by controlling state health officials in Texas a local health officer must satisfy himself that milk sold by distributors whose plants were located outside the limits of a city's routine inspection area was produced and pasteurized under specifications equivalent to those adopted by the state authorities. It was provided that a municipal permit must be issued before any sale was consummated. A compliance with the requirements was said to be indispensable for anyone who wished to receive or retain a permit, but the court remarked that there was no intention to bar permanently past violators who were actually ready to comply. Unless there had been a violation of state regulations a distributor who had been awarded a permit in one Texas city was entitled to operate in another city without a permit in the second city, and the evidence in the instant case sustained a finding that a milk company from a nearby county had brought in milk of sufficiently high quality to entitle it to a city permit.⁴⁶³ Under this system of state regulation a court refused to approve a city ordinance providing that milk pasteurized outside the city limits could be sold only by authority of permits issued by the city health officer upon the establishment of a health service rating of ninety per cent.⁴⁶⁴ Since a state statute set up a different grading standard, the ordinance was struck down as imposing an arbitrary and unreasonable restriction under a standard different from the established formula and one which could not be said to have been legally authorized. Disapproval has also been voiced of an ordinance providing that no milk or cream pasteurized outside county boundaries should be sold within the city limits, except as such sales might be authorized by the city health officer. The court declared that this ordinance clothed the city health officer with authority to make arbitrary decisions and went beyond the power extended to municipalities by the general statutes concerning pasteurization, han-

⁴⁵⁹ Witt v. Klimm, 97 Cal. App. 131, 274 Pac. 1039 (1929); Wright v. Richmond County Dep't of Health, 182 Ga. 651, 186 S.E. 815 (1936); Felt v. City of Des Moines, 247 Iowa 1269, 78 N.W.2d 857 (1956).

⁴⁶⁰ LaFranchi v. City of Santa Rosa, 8 Cal. 2d 331, 65 P.2d 1301 (1937); City of Grand Haven v. Grocer's Co-op. Dairy Co., 330 Mich. 694, 48 N.W.2d 362 (1951).

⁴⁶¹ City of Port Arthur v. Carnation Co., 238 S.W.2d 559 (Tex. Civ. App. 1951).

⁴⁶² Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E.2d 751 (1949).

⁴⁶³ City of El Paso v. Russell Glenn Distrib. Co., 237 S.W.2d 818 (Tex. Civ. App. 1950).

⁴⁶⁴ City of Electra v. Carnation Co., 207 S.W.2d 192 (Tex. Civ. App. 1947).

dling, and the sale of milk and its derivatives.⁴⁶⁵ A like decision was rendered in a case from Kentucky where plants constructed beyond the city limits were prohibited by an ordinance from supplying milk in the city except as such business was permitted by the municipal health authorities. The court said that the health officials might act in a discriminatory manner.⁴⁶⁶ These decisions would seem to establish the proposition that a blanket authority of this kind without proper directives or standards will probably never receive judicial approval.

Municipal health officials may sometimes wish to regulate the shipment of dairy products into their cities for reasons of sanitation or because they desire to set up barriers to products coming in to compete with local interests. A Georgia health edict banned the shipment of ice cream into a municipality "from outside the inspection area of local board of health within a radius of 60 miles." The most logical interpretation of this language is that shipments from a distance of more than sixty miles were prohibited, since a construction which would outlaw shipments from outside the inspection area and yet within sixty miles while permitting deliveries from further away would appear illogical in the extreme. Even though there was a general statute covering various phases of the dairy industry, the court was of the opinion that the regulation was not invalid as a special law.⁴⁶⁷ It was also held that there had been no violation of due process. As a contrast, however, a New Jersey court refused to uphold a borough board of health's regulation prohibiting the sale in the municipality of milk produced outside the state.⁴⁶⁸ The court decided that a milk company had been deprived of its right to engage in business in the community and that the regulation violated the equal protection clause as being discriminatory against importers of out-of-state products. The milk company failed to raise the apparently justiciable issue under the commerce clause. While being different in various aspects, the factual situations in these two cases are enough alike to offer an interesting comparison. The New Jersey decision seems to present the better view.

Occasionally there will be a statement in some case to the effect that a municipal milk ordinance can have no extraterritorial application except as permitted by statute.⁴⁶⁹ In the application of this declaration one court has remarked that regulation beyond the city limits cannot be accomplished by permitting local sales or distribution only on the condition that there be a compliance with municipal regulations.⁴⁷⁰ However,

⁴⁶⁵ *Prescott v. City of Borger*, 158 S.W.2d 578 (Tex. Civ. App. 1942).

⁴⁶⁶ *Grant v. Leavell*, 259 Ky. 257, 82 S.W.2d 283 (1935).

⁴⁶⁷ *Wright v. Richmond County Dep't of Health*, 182 Ga. 651, 186 S.E. 815 (1936).

⁴⁶⁸ *Borden's Farm Prods. Inc. v. Board of Health of the Borough of Somerville*, 36 N.J. Super. 104, 114 A.2d 788 (1955).

⁴⁶⁹ *Dean Milk Co. v. City of Waukegan*, 403 Ill. 597, 87 N.E.2d 751 (1949).

⁴⁷⁰ *Dean Milk Co. v. City of Aurora*, 404 Ill. 331, 88 N.E.2d 827 (1949).

the following discussion of cases concerning inspection fees and pasteurization makes it doubtful whether this generalization is fully accepted.

There appears to be a difference of opinion as to whether a municipality may require milk companies with plants outside its boundaries to pay inspection fees for the privilege of selling their products within the city. Such fees have been approved by decisions in Iowa⁴⁷¹ and Oregon⁴⁷² and disapproved in Illinois⁴⁷³ and Texas.⁴⁷⁴ In some of these cases the payment of license fees was also required. The difference in the wording of the statutes under which the several municipalities acted could have had much to do with the contrariety of opinion here.

There is also a marked difference of opinion concerning the validity of ordinances requiring all pasteurized milk sold within the city limits to be pasteurized locally. Such ordinances have been upheld in New York⁴⁷⁵ and Wisconsin⁴⁷⁶ but were declared invalid in Florida,⁴⁷⁷ Illinois,⁴⁷⁸ and Minnesota.⁴⁷⁹ Objections advanced to defeat the ordinances were based upon extraterritorial invasion and the violation of property and contractual rights. In California a rather peculiar situation developed. In the early case, *Witt v. Klimm*,⁴⁸⁰ an appellate court upheld a San Francisco ordinance requiring that milk be pasteurized locally within the city or county. Here the milk had been brought in from another of the inspection districts established under state statutes. The court declared that the ordinance was neither unreasonable nor discriminatory and that there was no conflict with the milk laws covering the state in general. A few years later a very similarly worded ordinance came before the state Supreme Court in *La Franchia v. City of Santa Rosa*.⁴⁸¹ In this instance the milk came from a producer within the same state inspection district as the municipality. In respect to the milk from this producer the ordinance requiring pasteurization within the corporate limits was held to be invalid. The court explained the apparent conflict with the *Witt* case by pointing out that in the instant controversy a milk inspection service had been established for this particular district in accordance with the procedure outlined in the state milk laws. Much emphasis was placed upon the fact that the milk had

⁴⁷¹ *Felt v. City of Des Moines*, 247 Iowa 1269, 78 N.W.2d 857 (1956).

⁴⁷² *Korth v. City of Portland*, 123 Ore. 180, 261 Pac. 895 (1927).

⁴⁷³ *Dean Milk Co. v. City of Elgin*, 405 Ill. 204, 90 N.E.2d 112 (1950); *Higgins v. City of Galesburg*, 401 Ill. 87, 81 N.E.2d 520 (1948).

⁴⁷⁴ *Falfurrias Creamery Co. v. City of Laredo*, 276 S.W.2d 351 (Tex. Civ. App. 1955).

⁴⁷⁵ *Lang's Creamery, Inc. v. City of Niagara Falls*, 224 App. Div. 483, 231 N.Y. Supp. 368 (1928).

⁴⁷⁶ *Dyer v. City Council of Beloit*, 250 Wis. 613, 27 N.W.2d 733 (1947).

⁴⁷⁷ *Gustafson v. City of Ocala*, 53 So. 2d 658 (Fla. 1951).

⁴⁷⁸ *Dean Milk Co. v. City of Waukegan*, 403 Ill. 597, 87 N.E.2d 751 (1949).

⁴⁷⁹ *State ex rel. Larson v. City of Minneapolis*, 190 Minn. 138, 251 N.W. 121 (1933).

⁴⁸⁰ 97 Cal. App. 131, 274 Pac. 1039 (1929).

⁴⁸¹ 8 Cal. 2d 331, 65 P.2d 1301 (1937).

come from the same district. As the milk had been inspected and graded in accordance with state standards, it was held that no municipal agency located in the district could enforce any limitation or restriction not recognized under state laws. The line drawn here is a very thin one, and it may be said that some justification exists for criticism.

NORTH CAROLINA LEGISLATION

There has never been a real test of the validity of the North Carolina Milk Control Law of 1953. Since the basic conception behind the statute has been approved in other states, there appears to be little doubt of the constitutionality of its fundamental provisions. However, this does not mean that the program has escaped criticism, some of which has been acrimonious in the extreme. One of the chief objections is that the program established under the statute permits the control of the milk industry by a self-interested group. The original act set up a commission of seven members consisting of one producer, one producer-distributor, two distributors, one retail store operator, the Secretary of Agriculture serving *ex-officio*, and one public representative who was supposed to protect the interest of the consumer.⁴⁸² The Secretary of Agriculture was a producer-distributor and hence the control agency was top-heavy with representatives of the industry, particularly its distributing segment. This unfairness having been clearly pointed out, the General Assembly of 1955 added two public members to the control agency.⁴⁸³ The three public representatives now serving are a bank official, a former member of the State Highway Commission who is a past president of the State Association of County Commissioners, and a member of the North Carolina Bakers Council. Only the latter could be said to have much interest in keeping milk prices down, and he only with respect to wholesale prices. Hence it is submitted that the consumer still has no adequate representation on the agency which regulates the state's dairy industry. Furthermore, the heavy distributor representation is not calculated to satisfy those engaged solely in the producing segment of the business. Perhaps a smaller commission with a minimum of industry representation would be the answer.

There is no doubt that the North Carolina milk industry has had material growth since the milk control program was put into effect in 1953. The farm economy has been given a big boost just at the time when diversification was most needed to offset difficulties with respect to the marketing of crops which had been of the greatest importance in the state's agricultural scheme for many years. Much capital has been poured into the industry and it bids fair to become a very important one.

⁴⁸² N.C. Sess. LAWS 1953, ch. 1338, § 2.

⁴⁸³ N.C. GEN. STAT. § 106-266.7 (Supp. 1959).

The Milk Commission has helped to give stability and to encourage farmers to build up adequate herds and to construct modern dairy barns and silos. The equipment and sanitation requirements were raised to a point where many small producers were unable to operate profitably. Many marginal producers were driven out of business. There is no doubt that a great number of these farmers were not equipped to produce milk of a quality sufficient to satisfy proper health regulations. But there may be those who produce milk which would be healthful and yet be graded down because of some building or equipment regulation which is not essential. There has been a decrease in the number of dairy operators in North Carolina during the years that the milk control program has been in effect.⁴⁸⁴ The Commission has said it regrets this and has reasoned that it is uneconomical to operate a small dairy business at the present time.⁴⁸⁵ Of course many of those who were forced to quit were marginal operators who should have been compelled to get out of the field. However, there is the possibility that powerful interests might influence the Commission to set up inordinately high equipment standards and then pick up the business as the small operators drop out one by one. The health of small business is very important and it does not necessarily follow that the public welfare would be enhanced by a concentration of the industry in the hands of a few big companies, even in the name of greater efficiency.

The lack of efficiency of an adolescent industry has been used to justify the higher prices for milk in North Carolina as compared to prices in other states where the dairy industry is well established.⁴⁸⁶ If the weeding out of small operators continues, this argument will lose much of its force. The state Commission sets the minimum prices which may be paid to producers for milk of the various grades. It does not set retail or wholesale prices to be charged by dealers and distributors, although a 1959 amendment⁴⁸⁷ gives it power to do so in emergency situations. Supporters of the present system contend that unfair practices such as secret rebates or discounts are less likely to occur if the distributors are permitted to use price as a weapon of competition.⁴⁸⁸ There have been periods during the last few years when prices paid to producers remained static while retail prices were increasing. It has been said that there has been a wide profit margin in favor of the distributor or processor at the expense of both the producer and the consumer.⁴⁸⁹ The distributors would probably deny this claim. According

⁴⁸⁴ N.C. MILK COMM'N, NORTH CAROLINA MILK, YESTERDAY, TODAY, AND TOMORROW (1958).

⁴⁸⁵ N.C. MILK COMM'N, *op. cit. supra* note 484.

⁴⁸⁶ Winston-Salem Journal-Sentinel, Dec. 1, 1957, p. —, col. —.

⁴⁸⁷ N.C. GEN. STAT. § 106-266.8 (Supp. 1959).

⁴⁸⁸ Winston-Salem Journal-Sentinel, *supra* note 486.

⁴⁸⁹ Carter, *State Regulation of Milk in the Southeast*, XXIV SOUTHERN ECONOMIC JOURNAL 63 (1957).

to figures released by the Commission in 1957, the distributor's profit margin was one-half cent a quart.⁴⁹⁰ It would seem that this profit would not be excessive, but one would have to break down the figures with respect to salaries, wages, overhead, the cost of equipment and transportation, and other expenses to get a true picture. The distributor must publish his selling prices for each succeeding month by a certain day in the previous month,⁴⁹¹ and this requirement offers the consumer a measure of protection from sudden increases without proper notice. There is nothing to prevent retail price hikes except consumer resistance and the competition of other milk interests. A 1955 amendment⁴⁹² gave the Commission power to outlaw sales below cost for the purpose of injuring competitors. Thus the distributor is protected from price wars without any legal responsibility to keep consumer prices within reason. It has been suggested⁴⁹³ that the Commission has been reluctant to test the validity of the pricing provisions of the 1955 amendment.

It is incumbent upon the Commission to be fair to producers, distributors, and consumers alike. It has been pointed out that prices paid to producers in 1956 were less than in 1953, the year the milk control program went into effect, and that during the same period there was a definite rise in retail prices.⁴⁹⁴ Of course there are other distributing cost factors to be considered here, but at least the figures show that producer's profits were not to blame for the increase. The burden of inflationary costs would seem to bear as heavily upon the producer as it does upon the distributor, but this would be the case only to the extent that the producer furnished his own equipment and other supplies. Many distributors provide the producers from whom they buy with milk tanks, cooling units, and other aids to dairying.

There is the long range danger that high retail prices may decrease consumer demand for fluid milk. Already discernible is a trend to powdered and other types of unregulated milk on the part of certain elements in the consuming public.

Large companies from other sections of the nation were attracted to the controlled market and began to pour capital into the local dairy industry and its processing plants. Some of the well-established interests expanded their facilities and the industry made rapid progress. The growth has been signaled by high consumer prices and bigger and more efficient plants. There is no doubt that a thriving and relatively new industry has been added to the state's farm economy and that the milk control program has helped to bring this about. There had been

⁴⁹⁰ Winston-Salem Journal-Sentinel, *supra* note 486.

⁴⁹¹ N.C. GEN. STAT. § 106-266.9 (Supp. 1959).

⁴⁹² N.C. GEN. STAT. § 106-266.21 (Supp. 1959).

⁴⁹³ Carter, *supra* note 489, at p. 70.

⁴⁹⁴ *Ibid.*

some fear that the Commission's licensing power might be used to keep new enterprises, both foreign and domestic, from entering the field, but provincialism has not been the bugaboo that the critics believed it to be.

The success of the milk control program in North Carolina will depend upon the manner in which it is administered. There must be a recognition of the rights and interests of all affected groups. Too much concern for the building up of a new industry can lead to results which may be detrimental to the welfare of the state as a whole. If the Commission realizes its responsibilities and gives everyone impartial treatment, it can render a useful and beneficial service.