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Constitutional Law: Municipal Police Power and Restraint on Commerce

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interstate commerce unless and until Congress changes its policy and elects to exempt such regulation from the ban of the Sherman Act.

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CONSTITUTIONAL LAW: MUNICIPAL POLICE POWER AND RESTRAINT ON COMMERCE

Gustafson v. Ocala, 53 So.2d 658 (Fla. 1951)

Complainant, a dairy copartnership, sought a mandatory injunction requiring the city of Ocala to inspect complainant's dairy facilities and products and, if these passed inspection, to issue to complainant a permit to sell its products within the city. An ordinance provided in effect that inspection should be limited to the territorial boundaries of Marion County, in which Ocala is located; and an amendment thereto prohibited sale within the city of milk produced beyond the limits of routine inspection. Ocala did not contend that the dairy and its products would not pass inspection. Furthermore, the minutes of the city council indicated that a desire to protect the local dairy industry was the motivating factor in the enactment of the ordinance. Each application of complainant was denied on the theory that its pasteurization plant was not located within the prescribed area of inspection. Ocala defended the ordinance as a valid exercise of police power. On appeal, HELD, the ordinance is arbitrary and discriminatory and a violation of the equal protection clauses of the Florida and United States Constitutions.[1]

The position of the Florida Court is in keeping with its previous decisions invalidating similar ordinances favoring residents over nonresidents, or home products over foreign products.[2] A statute that deliberately and unreasonably gives an advantage to a particular group and discriminates against others cannot be upheld as a valid

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[1]FLA. CONST. Decl. of Rights §1; U.S. CONST. Amend. XIV.

[2]O'Connell v. Kontojohn, 131 Fla. 783, 179 So. 802 (1938); Whiddon v. Vickers, 127 Fla. 222, 172 So. 923 (1937); McCreary v. State, 122 Fla. 494, 165 So. 657 (1936); Hamilton v. Collins, 114 Fla. 276, 154 So. 201 (1934); *Ex parte* Smith, 100 Fla. 1, 128 So. 864 (1930).

exercise of the police power.[3] Any classification made under the police power is necessarily discriminatory in nature, but any valid classification must be reasonable and must be made for the good of the entire population.[4] Even on a health basis, absolute prohibition of certain individuals from engaging in trade left open to others cannot be justified, especially when the objective can be attained without disrupting the free flow of commodities. Mere difference in place of production or of residence cannot stand as a reasonable classification.[5]

In practical effect, the Ocala ordinance made pasteurization within Marion County a condition precedent for obtaining a permit to sell the products within the city. The Florida Court has held that a statutory condition precedent to engaging in business, when it results in practically absolute prohibition of some from engaging in such business because of impossibility of compliance, is an unconstitutional infringement of a citizen's inherent right of property in the sense of freedom to earn a livelihood in a customary manner.[6] Pasteurization is not merely an incident in the production of milk but a major and necessary step. It has nowhere been contended that an intrastate dairy servicing a large portion of the state can be forced to maintain a pasteurization plant in each county in which it sells milk. If the dairy operates on a statewide basis in Florida, a demand for 67 pasteurization plants is excessive. Some states have taken a stricter approach to the problem than Florida by removing to a great extent the control exercised by counties and municipalities over the production of milk.[7]

Although the later cases throughout the jurisdictions have uniformly struck down restrictive ordinances of this type,[8] the United States

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[3]See Liquor Stores, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949), Legis., 2 U. OF FLA. L. REV. 408 (1949).

[4]State *ex rel.* Lawson v. Woodruff, 134 Fla. 437, 184 So. 81 (1938).

[5]State *ex rel.* James v. Gerrell, 137 Fla. 324, 188 So. 812 (1938); *cf.* from the standpoint of interstate commerce Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935).

[6]Riley v. Sweat, 110 Fla. 362, 149 So. 48 (1933).

[7]Meridian v. Sippy, 54 Cal. App.2d 214, 128 P.2d 884 (1942); Dean Milk Co. v. Elgin, 405 Ill. 204, 90 N.E.2d 112 (1950); Dean Milk Co. v. Aurora, 404 Ill. 331, 88 N.E.2d 827 (1949); Dean Milk Co. v. Waukegan, 403 Ill. 597, 87 N.E.2d 751 (1949).

[8]La Franchi v. Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301 (1937); Van Gammersen v. Fresno, 51 Cal. App.2d 235, 124 P.2d 621 (1942); Moultrie Milk Shed, Inc. v. Cairo, 206 Ga. 348, 57 S.E.2d 199 (1950); Grant v. Leavel, 259 Ky. 267, 82 S.W.2d 283 (1935); State *ex rel.* Larson v. Minneapolis, 190 Minn.

Supreme Court has not been called upon to settle the validity of such ordinances with respect to intrastate commerce under the United States Constitution. On two notable occasions, *Dyer v. City of Beloit*[9] and *Dean Milk Co. v. City of Madison*,[10] the opportunity but not the necessity was present. In the *Dyer* case the Supreme Court left standing a decision of the Wisconsin court[11] when the city confessed error on appeal and amended the ordinance, thus making the question moot. In the *Dean* case the Court found it necessary to determine only the issue raised under the commerce clause, that is, that the ordinance imposed an undue burden on interstate commerce. In striking down the ordinance the Court assumed that, since Congress had not spoken to the contrary, the subject matter of the ordinance lay within the sphere of state regulation even though interstate commerce might be affected incidentally. But in erecting an economic barrier protecting a major local industry against competition from without the state, the city plainly discriminated against interstate commerce; and this it could not do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives adequate to conserve the legitimate local health interest were available. The Court found such an ordinance unnecessary for protection, inasmuch as reasonable alternatives existed.

A federal district court, in *Miller v. Williams*,[12] has soundly observed that milk and cream are not only necessary articles of food but also subjects of commerce, and that accordingly they may not be excluded from the ordinary currents of trade and commerce, interstate or intrastate, otherwise than by reasonable regulation designed to protect the health of the community. The door is perhaps open for Congressional regulation of both interstate and intrastate milk production when the two are co-existent in a locality and local regulation

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138, 251 N.W. 121 (1933); Sheffield Farms Co. v. Seeman, 114 N.J.L. 455, 177 Atl. 372 (Sup. Ct. 1935); Abilene v. Tennessee Dairies, 225 S.W.2d 429 (Tex. Civ. App. 1949); Presscott v. City of Borger, 158 S.W.2d 578 (Tex. Civ. App. 1942).

[9]333 U.S. 825 (1948).

[10]340 U.S. 349 (1951), *reversing* 257 Wis. 308, 43 N.W.2d 480 (1950). The Florida circuit court in the instant case relied heavily on this decision of the Wisconsin court, which was in the process of appeal at the time.

[11]250 Wis. 613, 27 N.W.2d 733 (1947).

[12]12 F. Supp. 236 (D. Md. 1935).