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CONSTITUTIONALITY OF REGULATING MILK AS A PUBLIC UTILITY

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Any proposal for reducing competitive costs in the marketing of New York State milk is a matter of tremendous concern to the people of the State.

At the present moment the *farmer* is most concerned, because present marketing conditions affect him most immediately and severely. Thirteen years ago in this same State there was talk of a milk famine, and the city dweller was most concerned. Ten years before that, in 1910, although the farmer was then being paid about a cent a quart more for his milk than he now is, it was asserted that he was being paid less than the cost of production. In 1910 Attorney General O'Malley investigated the milk business and recommended that it be regulated as a public service utility.[1] In 1920 the same recommendation was made by George Gordon Battle, Royal S. Copeland and Governor Alfred E. Smith.[2] The present crisis has caused the suggestion to be renewed.

Each swing of the pendulum, whether to low price or high, to surplus or shortage, brings out the fact there are certain persistent and expensive abuses in our system of marketing milk. At such a time it is possible to lay aside our usual smugness about the "American System" of Devil-take-the-hindmost, and consider whether the abuses and costs of the competitive system do not out-weigh its benefits, at least relative to services and commodities which are universally essential to human existence.

We are familiar with the idea of the public service utility as applied to railroads, busses, telephones, telegraphs, water companies, gas and electric companies. Nobody would think of returning to the day of unrestricted competition in the serving of those public needs. At a time of trouble in the milk industry we naturally consider the possible application to it of the principles of public utility regulation. In 1920 the suggestion was advanced by the city dwellers, and now it is by the dairymen; if making milk a public utility will eliminate wasteful competitive costs of marketing without introducing other costs as great, all the public will gain by the change.

A strong argument can be made for the proposed change. If no milk receiving plant could be set up or operated without first obtain-

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[1]Senate Doc. No. 45 of 1910. [2]Legis. Doc. No. 29 of 1920.

ing a permit from some State agency, which has power to withhold the permit if the proposed territory for the plant already has adequate plant facilities, or if other plants already are supplying all the milk the market requires, we shall have curbed the competition which has caused so many unneeded and expensive plants to be erected and operated. The same regulation can be applied to distributors of milk and milk products. We may hope to see a fair price paid to the producer, and neither he nor the consumer will have the burden of supporting two plants side by side, or a multiplicity of executive organizations and sales forces. There is no more necessity for having half-a-dozen milkmen rattle through the same city street than there is for having it visited by half-a-dozen postmen; there is no more necessity for having two or three milk gathering trucks operate along the same country road than for having as many rural mail carriers.

Of course there is another side to the picture. You cannot give one milk plant the monopoly of serving a township, or one milkman the monopoly of serving a city block, without setting a limit upon the profits to be made by the monopoly you have created. Price-fixing by government necessarily means price-fixing through political processes. Many conservative people will be genuinely alarmed at having the State government, or any other, attempt fixing the price of any commodity, even such a prime essential as milk.

Proponents of the plan may urge that there is far more merit in direct limitation by the government of wasteful competitive processes, than there is for leaving those processes running wild and feeding them, on one side or the other of the struggle, many millions of taxpayers' money, as recently has been done for wheat in the United States and also in Canada. More remote and dubious arguments can be drawn from the tariff, ship subsidies, and other forms of governmental interference in the competitive struggle. It can be pointed out that this State, in the guise of emergency legislation, regulated the price of coal and other fuels in 1922–1923, and of rents in 1920–1929.

Weighing those arguments, so far as they may determine the *wisdom* of making milk a public utility, is not the present business. It may be deemed wiser to enact some form of regulation not quite so drastic, but even so, it is well to know where the constitutional limitation is drawn. Accordingly, this paper will take up the question whether the due process clauses of the State and Federal constitutions will permit milk to be made a public utility.

It is well established that the Legislature can regulate any business or profession to the extent necessary to curb practices which are to

the serious disadvantage of the general public. Likewise, it is well established that the courts will jealously review such legislation when it is challenged before them, and in any case where they believe regulation has been carried beyond what is justified by the particular public interest involved, they may determine that the regulatory statute is unconstitutional. The judicial formula in such cases usually is to say that the operation of the statute as applied to an established business, takes without due process of law the property used therein, or as applied to a person prohibited from entering the business, it deprives him of liberty.

For many years admissions to practice medicine and the law have been regulated. In the complexities of modern life it has been found necessary to extend similar regulation to a great many other professions and businesses which require some special skill or capacity, or expose the public to some special risk. In New York State today there are half-a-hundred or more businesses in which a citizen cannot engage unless he first persuades some official or board that he possesses the requisite qualifications, and obtains a license or permit.

But it will be observed that any citizen possessing the appropriate qualifications can insist upon being licensed, and it is doubtful if the courts would sustain an arbitrary limitation of the persons licensed for such a profession or business to those determined by the licensing authority to be required by "public convenience and necessity". That is a further degree in regulation, reserved for a limited class of businesses which are called public utilities, and are commonly said to be "affected with a public interest."

It is said that in colonial days, and in England at that time, it was common for legislative bodies to fix prices for all important commodities. A very different philosophy has grown up under the Constitution of the United States, and of this State. It has come to be accepted as the general rule, that so far as prices are concerned every business is a law unto itself. The tavern, the ferry, the toll-bridge, the toll-road, and the grist-mill probably were ancient exceptions to that rule, and there have long been laws regulating the rate of interest which may be charged on a loan. It was not until 1877 that our judiciary developed the concept of a "public utility" as a generic exception.

Shortly after 1870 there spread through the middle west a movement which became known as the Grange. It was somewhat associated with the Greenback movement, and was largely a protest against the unrestrained abuses of railroads, grain elevators, and other corporations. It succeeded in having passed by the Legislature of

Illinois, and other states, laws fixing maximum fares and charges. There was tremendous public interest in the legal battle which followed. On March 1, 1877, the Supreme Court of the United States sustained the laws fixing rates for railroads, and also the Illinois law fixing the maximum charge which could be made by grain elevators. The latter decision, *Munn v. Illinois*,[3] is recognized as a landmark in constitutional law.

The court in deciding that case, pointed out that the grain elevator business, established twenty years previously, had assumed immense proportions, was practically a monopoly, and "stood in the very gateway of commerce". The court said, "It is a business in which the whole public has a direct and positive interest", and announced the rule as follows:

> "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created".

It was said at the time by dissenting judges, and has been repeated many times since, that the rule affords no adequate test for its application to other businesses, and indeed that it argues in a circle. Nevertheless, it has been applied to many businesses, new and old, and utility regulation gradually has assumed the form with which we are familiar today. The utility usually is given complete or partial freedom from competition, its rates are limited to those which will produce a "fair return", and it enjoys a judicial guarantee of minimum rates which will secure such a return.

There is no satisfactory definition of a public utility, and the degree of regulation which is appropriate to one utility may be inappropriate to another. Chief Justice Taft stated the matter as follows:

> "All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction.****
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> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on

[3] 94 U. S. 113 (1876).

> the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

That quotation is from his opinion, unanimously concurred in, in the case of *Wolff Packing Co. v. Industrial Court.*[4] That decision in 1923 held invalid a Kansas act attempting to fix wages paid by packers and in certain other essential employments involving the production of food and clothing. The Supreme Court expressly left open the question whether the preparation of food could be subjected to regulation as a utility, because even if it could there was no justification for carrying regulation of such a business to the extent of fixing wages.

The usual regulation characteristic of a public utility is to limit the field to those given certificates of public convenience and necessity, and to fix the prices at which they shall deal with the public. For purposes of this inquiry into constitutional law it will be assumed that such is the regulation to which it is desired to subject the business of gathering and distributing milk.

Regulation to that extent has been sustained by the Supreme Court of the United States as to common carriers of persons and goods, grain elevators, stockyards, water companies, toll-roads, toll-bridges, wharfs, ferries, insurance companies, banks, public warehouses, electric companies, gas companies, oil pipe-lines, telephone companies and telegraph companies. Recently it has been sustained as to cotton-gins in Oklahoma[5] and as to private contract motor carriers.[6] The power to establish maximum charges for service has been sustained as to livestock commission merchants[7] and as to insurance agents.[8] The same power has been denied as to theatre ticket brokers[9]

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[4]262 U. S. 522, 538–539, 43 Sup. Ct. 630, 634 (1923).

[5]Frost v. Corporation Comm., 278 U. S. 515, 49 Sup. Ct. 235 (1929).

[6]Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181 (1932).

[7]Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

[8]O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

[9]Tyson & Bro. v. Banton, 272 U. S. 418, 47 Sup. Ct. 426 (1927).

and as to employment agencies;[10] similarly the power to limit profits of gasoline selling companies has been denied.[11] A statute attempting to regulate as a public utility the ice business in Oklahoma, has been held unconstitutional.[12]

It is somewhat difficult to deduce from those cases any set rule as to what characteristics justify classifying a business as a public utility. Perhaps those cases merely illustrate the "process of exclusion and inclusion", of which Chief Justice Taft spoke, and have not yet accomplished the "establishment of a line of distinction." However, already some points along the line can be made out.

Two characteristics almost invariably are found in connection with any business regulated as a public utility. *First*, it supplies some common necessity, so that the public generally is dependent upon it. Probably all the businesses mentioned above, and many others, have that characteristic, in varying degrees.[13] *Second*, its method of operation is such as to attain its greatest efficiency as a monopoly. Corporations supplying gas, electricity and water are not more essential than those supplying coal[14] or flour[15] or gasoline[16] but a distinction can be based upon their manner of doing business. A gas company, an electric company, a water company, a common carrier, a telephone company or a radio broadcasting company, because of the common interests it serves and because of the manner in which it operates, tends to become a monopoly through a bitter and expensive competitive struggle. It is a matter of experience that grain elevators, warehouses, stockyards, grist-mills and cotton-gins frequently manifest the same tendency when located in a community which is greatly dependent upon them. In the past the same evils have not been experienced relative to common businesses such as the grocer, the baker, and the butcher, who require a comparatively small outlay to do business, and until the advent of the chain, those have displayed no tendency towards monopoly.

Besides those two common characteristics of a public utility, certain other characteristics when present in a business aid to the

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[10]Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

[11]Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929).

[12]New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

[13]See on this point Robinson, *The Public Utility: A Problem in Social Engineering* (1928) 14 CORNELL LAW QUARTERLY 1, at 9; Robinson, *The Public Utility in American Law* (1928) 41 HARV. L. REV. 277; Hamilton, *Affectation With Public Interest* (1930) 39 YALE L. J. 1089.

[14]See Jones v. Portland, 245 U. S. 217, 38 Sup. Ct. 112 (1917).

[15]See Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. 499 (1920).

[16]See Standard Oil Co. v. Lincoln, 48 Sup. Ct. 155 (1927).

conclusion that it may appropriately be subjected to such regulation. *Third*, the tendency of a business to peculiar abuses, such as any business in which people put a special trust, either as to their health or their property, tends to justify regulation of some sort, which may the more readily take the form of utility regulation. *Fourth*, if the business depends for its operation upon the possession of special franchises, or the power of eminent domain, that fact strongly tends to the conclusion that it may not complain if it is regulated as a public utility. Mere use of the public highway for its profitable business tends to the same conclusion. In *Stephenson v. Binford*,[17] discussing a private contract motor carrier, the matter was stated as follows:

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit."

All of those tests have some application to the business of gathering and distributing milk.

There can be no doubt about its being a common necessity, so that the public is dependent upon those engaged in the milk business. The vast amount of legislation and litigation which have been expended upon it speak eloquently of the public interest in milk. It is difficult to conceive of a more essential commodity, unless it be water, and a greater proportion of our citizens are dependent upon milk dealers than are dependent upon a public water supply. Besides that dependence of our consuming population upon the milk business, our agricultural population is as dependent upon the milk plant as the pioneer was upon the grist-mill, as the farmers of Illinois were and are upon the grain elevator, as the farmer of Missouri upon the stock-yard, as the farmers of Kentucky upon the tobacco warehouse, and as the farmers of Oklahoma upon the cotton gin.

The milk business operates in such a way as to attain its greatest efficiency as a monopoly, and has the tendency to become one. This is not to say that it is now being monopolized in New York State; on the contrary the milk business appears to be engaged in one of those expensive and destructive struggles by which monopoly comes into being. In other states the tendency of the milk business to monopoly has been observed. The dairy companies of Colorado successfully challenged the anti-trust law of that state, because it was too vague in

[17] *Supra* note 6 at 255, 53 Sup. Ct. at 184.

terms.[18] Minnesota failed in its attempt to regulate unfair competition in cream buying because it did not, or could not, put into the record evidence as to how the competition operated and how its statute would curb it.[19] In New York State in the past the milk business has shown its monopolistic tendencies more obviously than at the present time, and it should be possible for the Legislature to act upon that experience, in reasonable anticipation of evils to come, without exposing the citizens of this State to a complete repetition of them.

The use which the milk business makes of the public highways probably amounts to as much in quantity, even if it is somewhat different in nature, from the use by the motor busses, the private contract motor carriers, or the taxicabs. Aside from that use of the highways there is nothing about the milk business requiring special franchises or the right of eminent domain.

The possibilities for abuses which exist in the milk business are numerous, and have resulted in its commonly being required to have permits and licenses in connection with many of its instrumentalities. The health of cattle is a matter of public concern, justifying drastic regulation.[20] Cow-barns are regulated. A milk plant operator must give a bond and be licensed. This law was sustained in *People v. Perretta*,[21] and in his opinion Chief Judge Pound mentioned that there are "conditions of the market peculiar to milk", and the law is designed not merely to protect the farmer, but "to keep open the stream of milk flowing from farm to city." The plant manager must be licensed, and so must the persons making fat tests and bacterial counts, and they are required to report their tests and counts correctly, and keep certain records. There are numerous regulations affecting every phase of the milk business, sanitary and economic, from the time the cows are brought to the barn for milking to the time the empty bottle is returned to the licensed milkman. One dealer is forbidden to use, without permission, the marked bottles and other equipment of another, and the constitutionality of that law has been sustained.[22] The milk business from beginning to end is the most completely regulated business in existence, except the rail-

[18]Cline v. Frink Dairy Co., 247 U. S. 445, 47 Sup. Ct. 681 (1927).

[19]Fairmount Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1927); *cf.* State v. Central Lumber Co., 226 U. S. 157, 33 Sup. Ct. 66 (1912) and O'Gorman & Young v. Hartford F. Ins. Co., 51 Sup. Ct., 130 (1931).

[20]People v. Teuscher, 248 N. Y. 454, 162 N. E. 484 (1928).

[21]253 N. Y. 305, 171 N. E. 72 (1930).

[22]People v. Ryan, 230 App. Div. 252, 243 N. Y. Supp. 644 (4th Dept. 1930).

roads. Making it a public utility may be a decided change in the form of regulation, but it need not be a startling change in its extent.

In sustaining the constitutionality of a law under which the license of a milk plant operator was revoked for over-reading the Babcock test of cream purchased the Supreme Court of North Dakota said:[23]

> "The creamery business is essentially a business which is affected with a public interest, and as such is generally subject to governmental regulation. * * * * The purpose of the statute, indeed, is well known, and is to build up and to develop the dairying and stock raising industries of the state. It is to destroy the unfair competition by which the financially stronger foreign creameries, and butter and cheese and ice cream factories, may destroy those of this state by overgrading or overmeasuring until the local creameries are driven to bankruptcy, and then control the grades and prices. * * * Licenses, indeed, may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless, and that they may really subserve the public good, which, after all, is the basis of all property rights."

While the cases of *Fairmount Creamery Co. v. Minn.*,[24] *Williams v. Standard Oil Co.*,[25] and *New State Ice Co. v. Liebmann*,[26] all referred to above, will require careful study in connection with the proposal to make the gathering and distribution of milk and milk products a public utility, it is probable that such a statute, if the facts in justification of it are carefully made of record by a legislative report or otherwise[27] will be held by the courts to be constitutional.

At least three experiments along the line of making milk a public utility have been attempted already. In November, 1931, the city of Portland, Oregon, passed an ordinance requiring milk dealers to file their prices with the city auditor, and to file all changes in price seventeen days before they should be effective. Early in 1932 the Province of Manitoba, Canada, amended its Public Utilities Act and authorized the Public Utilities Board of the Province, in case of an emergency when producers and distributors could not agree upon a fair price for milk, to control the buying and selling of that commodity. The Board's power has been exercised by an order of September 2, 1932, establishing a $1.55 per hundred price for 3.5 milk in

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[23]Cofman v. Osterhaus, 40 N. D. 390, 400, 401, 168 N. W. 826, 828, 829, 18 A. L. R. 219 (1918).

[24]*Supra* note 19.

[25]*Supra* note 11.

[26]*Supra* note 12.

[27]See H. W. Bikle, *Judicial Determination of Questions of Fact Affecting Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6.

Winnipeg area (an increase from less than a dollar a hundred before the order) and establishing retail prices of ten cents a quart delivered, or eight cents a quart at the stores.

In December, 1932, the Attorney General of Wisconsin advised the commissioners of agriculture and markets of that state that their power to regulate 'unfair trade practices' included power to fix prices to producers for milk to be sold in fluid form within the city of Milwaukee. By an order of December 27, 1932, the commissioners fixed such prices.