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Constitutional Law--Regulation of the Milk Industry Through Price Control

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**Constitutional Law — Regulation of the Milk Industry
Through Price Control**

Action by the State Dairy Commission to enjoin *D*, a retail grocer, from selling milk at a price below the minimum fixed by the Commission, acting pursuant to authority under a state statute. *D* demurred to the complaint on the ground that the price fixing provisions of the act were unconstitutional in that they violated due process of law as guaranteed by the state constitution. *Held*, affirmed by a three to two decision. Control of business by fixing prices is justifiable under the police power only when the industry is "affected with a public interest." Certain characteristics of milk require regulation for the protection of the public health, but do not render the industry so "affected with a public interest" that the state may subject it to price control. *Gwynette v. Myers*, 115 S.E.2d 673 (S. C. 1960).

The court bases its decision on the rule stated in *Munn v. Illinois*, 94 U.S. 113 (1876). In the *Munn* case the Court held that a state statute fixing the price which could be charged for the storage of grain at commercial elevators did not violate due process as guaranteed by the fourteenth amendment of the United States Constitution. The property was held to be "affected with a public interest" in that it was devoted to a use in which the public had an interest and was therefore subject to price control for the public good. However, *Nebbia v. New York*, 291 U.S. 502 (1934), modified the rule established in the *Munn* case, *supra*. Here the Court held that the phrase "affected with a public interest" meant no more than that a business "for adequate reasons, is subject to control for the public good."

A state statute authorizing the fixing of milk prices was held not to violate due process in the *Nebbia* case, *supra*; an opposite result was reached in the case under comment. These conflicting results were not due to a substantial difference between federal and state due process but because the South Carolina court followed the *Munn* case rather than the broadened concept of permissive regulation under state police power set forth in the *Nebbia* decision. While courts are still employing this earlier concept in determining to what extent business may be regulated under the police power, it "has lost the greater part, if not all, of its mystical power." ROTT-SCHAEFER, CONSTITUTIONAL LAW 487 (1939). Hence, the decision in the *Nebbia* case has been followed by many of the courts

wherein the constitutionality of statutes fixing milk prices has been challenged. *Shiver v. Lee*, 89 So.2d 318, 321-22 (Fla. 1956). The question might be asked: Why is it generally held that such statutes do not violate due process?

The decision in the *Nebbia* case makes the "test of liability of any business to governmental price control depend on whether it could be justified by principles applicable in determining the validity of any other form of exercise of a state's police power." ROTTSCHAEFER, *supra* at 486-87. The Court stated in the *Nebbia* case that any business may be controlled to the extent of fixing prices where the purpose of the legislature is to promote the general welfare and the manner in which it seeks to effectuate such purpose is reasonable. Such legislation will not be deemed unconstitutional so long as it is not arbitrary or discriminatory or an unwarranted interference with individual liberty.

In a case decided shortly after the *Nebbia* decision, the Virginia court, in sustaining the validity of a statute fixing milk prices, stated that the legislature was better equipped to determine the necessity and character of regulating an industry which new and perplexing conditions might require, and that the conclusion of the legislature should not be disturbed unless it was arbitrary or unreasonable. *Reynolds v. Milk Comm'n.*, 163 Va. 957, 967, 179 S.E. 507, 510 (1935). Another case decided in the same decade, *Rohrer v. Milk Control Bd.*, 322 Pa. 257, 186 Atl. 336 (1936), held a milk price fixing statute valid. Here the court stated that the statute was enacted for a valid legislative purpose, that is, the promotion of public welfare by insuring the availability of an adequate supply of pure milk. Two more recent cases have also upheld statutes allowing milk prices to be controlled. *Shiver v. Lee*, *supra*; *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 237 La. 768, 112 So.2d 606 (1959). In the *Shiver* case the court stated that the police power was invoked for the "protection of the public health, safety and welfare." The court stated further that the power to fix prices is not dependent upon the existence of an economic emergency, but that such power may be exercised because of the "peculiar nature of the problem incident to marketing the commodity."

However, in addition to the principal case, there is other authority contra to the holding in the *Nebbia* case. In *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951), the court held that price

fixing in the milk industry violates the right of the individual's freedom of contract which is protected by both the federal and state constitutions. The court, in overruling prior decisions sustaining the validity of the price fixing statute, held that the legislature can only fix prices where business is "affected with a public interest." The milk industry, according to the court, is not so affected.

Both the Georgia case and the case under comment represent the minority view. For the most part the courts seem inclined to follow the *Nebbia* case, which is the law today at least so far as an interpretation of federal due process is concerned. Mr. Justice McReynolds, speaking for the minority in the *Nebbia* case, expressed the fear that by allowing the fixing of milk prices, price control would extend to other goods. *Nebbia v. New York, supra* at 551. However, since that decision over twenty-five years ago, there have been relatively few extensions of price fixing to other goods and services. That courts are going to be cautious in extending the doctrine is shown by two fairly recent cases. In *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436, 254 P.2d 29 (1953), the court held unconstitutional a statute authorizing the fixing of minimum prices for dry cleaning. In *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951), a state law fixing minimum prices for barbering services was declared invalid. These statutes were held to be beyond the scope of the police power as their purpose was not primarily the promotion of public welfare.

Nevertheless, the fixing of prices is not in itself unconstitutional. The test, as stated previously, is whether a statute allowing price control, has as its purpose a legitimate end, and seeks to attain such end in a reasonable manner. If it meets these requirements it should not be violative of due process.

Peter Uriah Hook

Contracts — Conditions — Restraint of Remarriage

P's brothers entered into a contract with *D* in which *D* promised to pay royalties (on the sale of corn husking machines) to *P*'s mother during her life and upon her death to pay like royalties to *P* "provided she shall not have theretofore remarried; such royalties to be paid to her until her death or remarriage." *P* remarried in 1944 and her mother died in 1945. *P* alleges that the condition