St. John's Law Review

Volume 16
Number 1 *Volume 16, November 1941, Number 1*

Article 11

Constitutional Law--Municipal Corporations--Police Power (Matter of Stracquadanio v. Department of Health of City of New York, 285 N.Y. 93 (1941))

St. John's Law Review

decided [9] that the evidence adduced by plaintiff's witness was insufficient to present a question of fact.[10] Since insufficient evidence is, in law, no evidence, it was improperly considered by the jury [11] and the case therefore was sent back for a new trial.

C. McC.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — POLICE POWER.—The petitioner, for himself and all others similarly situated, invokes the Fourteenth Amendment of the Federal Constitution and the Constitution of the State of New York [1] in support of his challenge to the validity of that part of a regulation [2] promulgated by the Board of Health of the City of New York, which requires of an applicant for a Class C permit [3] that he "have been a *bona-fide* independent individual milk distributor in this city prior to June 1, 1939." [4] A license having been denied him, he sought a mandatory order to compel the Board to grant him a license, and his motion was denied at Special Term. Upon leave to appeal to the Court of Appeals, *held,* three judges dissenting, affirmed. The power to regulate the issuance of licenses being discretionary under the New York City Charter,[5] the issue in the case depends on whether or not the discretion has been abused and hence must be confined to a search in the record for facts which will justify its exercise in such a way as to work a limitation in favor of persons who were dealers prior to June 1, 1939. The record discloses that (1) those who were engaged as small distributors before June 1, 1939, through compliance with previous regulation of the Board of Health, had invested in capital equipment which might have been impaired by indiscriminate licensing of new competitors; (2) the milk market in New York City cannot sustain as many small dealers as there are applicants for Class C licenses; and (3) indiscriminate licensing would increase the number of dealers too greatly to admit of adequate supervision by the Board of Health, to the detri-

[9] When the Appellate Division reverses a decision entered in plaintiff's favor upon a jury's verdict and dismisses the complaint upon the merits, the Court of Appeals must determine whether there was evidence which justified sending the case to the jury. Cornbrooks v. Terminal Barber Shops, 282 N. Y. 217, 26 N. E. (2d) 25 (1940).

[10] See Rippey, J. (concurring in part in instant case, p. 324).

[11] Race v. Krum, 222 N. Y. 410, 118 N. E. 853 (1918); Matter of Case, 214 N. Y. 199, 108 N. E. 408 (1915).

[1] Art. I, § 11.

[2] Regulation 3-a, subd. 3-b(3).

[3] To deal in milk as a one-vehicle dealer who does not maintain a pasteurization plant or milk depot but who utilizes the facilities of a plant or depot in New York City which is licensed by the Board of Health.

[4] Regulation 3-a, subd. 3-b(3).

[5] § 558-f.

ment of the consumer. *Matter of Stracquadanio* v. *Department of Health of City of New York,* 285 N. Y. 93, 32 N. E. (2d) 806 (1941).

In the last decade three factors in social progress have been welded together and, thus grouped, form the nucleus of governmental control of vital public industries. The pressure for public ownership; the concept of social expediency; and a newly found judicial awareness of the facts of our economic society are at last operating together to bring about the delivery of commodity goods to the greatest number with maximum efficiency. The milk industry has felt the impact of these forces beyond the common lot. With the exception of the railroads, no enterprise has been so regulated.[6] Since 1862, various statutes, now codified in the Agriculture and Markets Law of New York, have vigorously controlled the industry in the name of public health.[7]

The first great step in the direction of making milk a public utility came in 1933 when the price-fixing law [8] became effective. The present decision marks the storming of another bastion in the campaign towards public ownership of the milk industry. The decision does not, however, depend on price-fixing; it merely carries on the social philosophy which was legislatively expressed in that and similar regulatory measures. It proceeds on the theory that unrestricted competition is more invidious than controlled monopoly, and that this public calling can only effectively serve the public when the industry lacks price-cutting, milk dumping and danger of pollution.[9] In effect, one who holds out to the public must soon become public.[10]

But the petitioner claimed that the administrative action was arbitrary. It is here that the decision shows far more clearly than the words of the opinion that general fairness in the administrative control of any industry is not a theory, but a fact conditioned by the realities of life, including the evil which has come to attend upon unregulated competition.[11]

---

[6] Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

[7] *E.g.,* The Milk Control provisions of the N. Y. AGRICULTURE AND MARKETS LAW art. 21, §§ 252–258-n.

[8] N. Y. AGRICULTURE AND MARKETS LAW § 312. This section, as added by L. 1933, c. 158, § 1, was repealed by L. 1934, c. 319, § 1, in effect May 7, 1934. This article is now found in § 258-m of the N. Y. Agriculture and Markets Law.

[9] In *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91, 61 Sup. Ct. 122 (1940), the Court held that an injunction would not issue to restrain a union from picketing independent stores which patronized individual vendors of milk. The Court referred to the rapid increase in the number of independent vendors with the consequent price-cutting, low profits and disorganization of the milk distributing field which resulted from the influx of new dealers into the industry. The union was thus protected from an impairment of its status which had been built up through years of intensive negotiation and arbitration. The decision marks a judicial realization of the results of unregulated competition in a public industry.

[10] Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394 (1873); Conway v. Taylor's Executor, 1 Black 603, 17 L. ed. 191 (1869).

[11] Wolff Packing Co. v. Court of Industrial Relations, 282 U. S. 522, 43 Sup. Ct. 630 (1923).

The courts of today realize that milk is a public utility [12]—that it is affected with a public interest—and that being so, it is forced to submit to public control by the exercise of the police power.[13] The ordinance in question [14] cannot be attacked on the ground that it fosters monopoly; that is its purpose.[15] The power to turn industries into monopolies—controlled by the state—is a social and economic device by which the industry is kept under constant supervision and the welfare of the public protected. Of course, no person may be granted a monopoly as a favor or reward, but where there is reasonable ground for the legislative conclusion that effective service can only be obtained by curtailing the right to enter the business, that is consistent with the due process clause of the Federal and State Constitutions.[16]

This, then, is the meaning of the *Stracquadanio* decision. Here we find the historical trend of state control of public callings extended —strangely enough by an operative limitation.[17] The trend, if extended to its logical conclusion, might bring us to a day when a milk dealer who sells to all comers indiscriminately may be held liable for a refusal to sell milk, if he has it for sale, to any comer with the price,[18] which is the final test for a public utility.[19]

K. S. S.

CONTRACT—ACCORD AND SATISFACTION—EXECUTORY ACCORD. —The plaintiff corporation installed a machine in the defendants' premises for experimental purposes in December, 1939, and in May, 1940 the defendants demanded $6,786.82 for materials furnished in connection with the machine and for the use of the facilities of the

---

[12] In *Nebbia* v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934), the Court said: "We might as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility." The fact remains, however, that not only in the *Nebbia* case but also in subsequent decisions, the milk industry is treated as a public utility. *E.g.*, note 13, *infra*.

[13] Stracquadanio v. Department of Health of City of New York, 285 N. Y. 93, 32 N. E. (2d) 806 (1941), wherein the court says, "The distribution of milk is a business affected with a public interest—a phrase which has been defined as '* * * the equivalent of subject to the exercise of the police power.'"

[14] Regulation of the Board of Health, 3-a, subd. 3-b(3).

[15] The opinions presented in this paragraph are those of Justice Brandeis in his dissent to the opinion in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371 (1932). In his opinion Justice Brandeis struck out boldly at the notion that the police power of the state cannot be utilized as a means of creating a monopoly where the social and economic conditions of the state warrant the exercise of such power. It is significant to note that Justice Stone, now Chief Justice, concurred in the dissent.

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

[17] Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae* (1917) 30 HARV. L. REV. 812, 823, 824.

[18] See EDGAR AND EDGAR, WORKBOOK ON BAILMENTS, INNKEEPERS AND CARRIERS (1941) 181, for historical background of public utilities.

[19] N. Y. TRANSPORTATION CORPORATIONS LAW § 12.