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Constitutional Law--Equal Protection of the Laws--Discrimination on Basis of Well Advertised Trade Name--Denial to Newcomers of Milk Price Differential (Borden's Farm Products Co. Inc. v. Ten Eyck, 297 U.S. 251 (1936))

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defendant maker is estopped. Estoppel is invoked by the court because creditors suffered a loss by continuing to do business with the bank on the assumption that the bank was solvent.[8] If, however, the bank had not failed and then brought suit in its own name, it would seem that the action should fail, and the original agreement between the bank and the maker should prevail.[9] The creditors have sustained no loss and the doctrine of estoppel need not be applied.[10] And, therefore, even if the receiver should bring suit, it would seem that he should collect, not the face value of the note but only to the extent of the loss suffered by the creditors.[11] New York courts, however, have extended the doctrine of estoppel in favor of both receivers and banks regardless of loss to creditors.[12]

It is submitted that the rule that the maker of a note of this kind should be held liable is sound. The only practical way to enforce this policy is to make him pay. In the recent case of *In re Hudson River Trust Co.*,[13] a director gave his note to the trust company to be repaid when the financial conditions of the bank improved. The bank failed. The estate of the director was estopped from setting up the defense of no consideration, since the note was listed as assets in the published statements of the bank, and the depositors had relied upon it. This estoppel, invoked by the court to protect the unwary bank depositor against fraud is rooted in what has been termed "good morals and sound public policy." [14]

S. L.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—DISCRIMINATION ON BASIS OF WELL ADVERTISED TRADE NAME—DENIAL TO NEWCOMERS OF MILK PRICE DIFFERENTIAL.—Pursuant to an amendment to the New York Milk Control Act,[1] permitting price fixing in the milk industry, discrimination was made between

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[8] Niblack v. Farley, 286 Ill. 536, 122 N. E. 160 (1910); Prudential Trust Co. v. Cronin, 245 Mass. 311, 139 N. E. 645 (1923).

[9] First National Bank v. Felt, 100 Iowa 680, 69 N. W. 1057 (1896).

[10] *Ibid.*

[11] Payne v. Burnham, 62 N. Y. 71 (1875); see note 7, *supra* ("The receiver sues to protect private rights, not to punish falsifiers").

[12] Hurd v. Kelly, 78 N. Y. 588 (1879) (suit brought by receiver); Best v. Thiel, 79 N. Y. 15 (1879) (suit brought by receiver); County Trust Co. v. Mara, 242 App. Div. 206, 273 N. Y. Supp. 597 (1st Dept. 1934), *aff'd*, 266 N. Y. 540, 195 N. E. 190 (1935) (suit brought by bank); Bay Parkway National Bank v. Shalom, 270 N. Y. 172, 200 N. E. 685 (1936) (suit brought by bank).

[13] *In re* Hudson River Trust Co., *In re* Gifford's Estate, — App. Div. — (3d Dept. 1936), 287 N. Y. Supp. 916 (1936).

[14] Best v. Thiel, 79 N. Y. 15 (1879); Schmid v. Haynes, 115 N. J. Law. 271, 178 Atl. 801 (1935).

[1] N. Y. LAWS 1935, c. 158.

dealers who had and dealers who had not well advertised trade names, by permitting the latter to sell bottled milk in New York City at a price one cent less per quart than the price prescribed for the former. Plaintiff, a firm having a well advertised trade name, challenges the statute as a violation of the equal protection clause of the 14th Amendment. *Held,* the discrimination was reasonable. The factual data in the record indicate that the statute seeks to preserve a trade practice which existed prior to its passage when dealers without well advertised brands were able to compete for the trade in question, only by slightly underselling their well advertised competitors. Reynolds, Sutherland, Butler and Van Devanter, JJ., dissented. *Borden's Farm Products Co. Inc.* v. *Ten Eyck,* 297 U. S. 251, 56 Sup. Ct. 453 (1936).

To prevent economic chaos in the milk business which might have resulted from wholesale invasion by those seeking to take advantage of the price differential statute passed April 10, 1933, the legislature amended the Milk Control Act so that those entering the milk business after April 10, 1933 could not take advantage of the one cent price differential. Plaintiff, a firm without a well advertised trade name, was denied a relicense because it sold milk at one cent less than the fixed minimum. On *certiorari,* plaintiff challenges the constitutionality of the statute on the ground that discrimination between dealers entering before and after April 10, 1933, violates the equal protection clause. *Held,* the discrimination is arbitrary and unreasonable; it violates the equal protection clause. No factual data was submitted to sustain the discrimination. Cardozo, Brandeis and Stone, JJ., dissented. *Mayflower Farms Inc.* v. *Ten Eyck,* 297 U. S. 266, 56 Sup. Ct. 457 (1936).

The narrow governmental power of price fixing, restricted to industries "affected with a public interest", seemed to have been substantially enlarged by the historic case of *Nebbia* v. *New York.*[2] But the recent decision of *People* ex rel. *Tipaldo* v. *Morehead*[3] dealing with the New York minimum wage statute makes the applicable scope of the *Nebbia* case seem doubtful.[4] The two instant cases fairly present a related problem. Granted the power of industrial regulation, to what extent can the legislature pass ancillary measures to fulfill the end? Prior to the *Nebbia* case, the court had arrogated to

[2] Nebbia v. New York, 291 U. S. 502, 56 Sup. Ct. 829 (1934) (sustained constitutionality of price fixing in New York milk industry). See Note (1933) 42 YALE L. J. 1259; Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401; Goldsmith and Winks, *Price Fixing: From Nebbia to Guffey* (1936) 31 ILL. L. REV. 179; Manley, *Constitutionality of Regulating Milk as a Public Utility* (1933) 18 CORN. L. Q. 410; Merrill, *The New Judicial Approach to Due Process and Price Fixing* (1929) 18 KY. L. J. 3.

[3] Morehead v. People *ex rel.* Tipaldo, — U. S. —, 56 Sup. Ct. 918 (1936). See dissenting opinions of Hughes, C. J., and Stone, J.

[4] The separate dissenting opinions of Hughes, C. J., and Stone, J., in Morehead v. People *ex rel.* Tipaldo, — U. S. —, 56 Sup. Ct. 926, 932 (1936), clearly imply that the Nebbia case would be a sufficient *ratio decidendi.*

itself the function of declaring what industries were "affected with a public interest".[5] Will it now assume to answer how far the legislature can go in detailed regulatory measures? There is no issue where the legislation is arbitrary or capricious.[6]

In the *Borden's Farm Products* case, the majority seemed to find little difficulty in sustaining the legislation with the factual data before it. A vigorous minority seemed to be influenced more by their dissenting opinion in the *Nebbia* case than by a consideration of the case before it.[7] But a few minutes after this decision, two of the majority judges, Hughes, C. J., and Roberts, J., appeared to completely reverse themselves by declaring unconstitutional the time limitation in the *Mayflower Farms* case.[8] While the main opinion declared that no facts in the record were before it to justify the discriminatory classification between dealers in the milk business before April 10, 1933 and those entering thereafter, it was yet confronted with the legal presumption of constitutionality.[9] The presumption might have been overcome by facts showing the statute to be discriminatory.[10] But the appeal came on certiorari to the highest New York court which affirmed a determination of the Commissioner of

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[5] Finkelstein, *From Munn v. Illinois to Tyson v. Banton, A Study in the Judicial Process* (1927) 27 COL. L. REV. 769; Hamilton, *Affectation With a Public Interest* (1930) 39 YALE L. J. 1089; McAllister, *Lord Hale and Business Affected With a Public Interest* (1930) 43 HARV. L. REV. 759; Goldsmith and Winks, *loc. cit. supra,* note 1.

[6] Interstate Commerce Commission v. Union Pacific R., 222 U. S. 541, 32 Sup. Ct. 108 (1911); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 Sup. Ct. 720 (1936).

[7] McReynolds, J., dissenting at page 264, in the Borden's Products case, "In Nebbia v. New York * * * we stated reasons in support of the conclusion that the New York Milk Control Act of 1933 infringed the due process clause. We adhere to what we there said." *Cf.* Stone, J., dissenting in Morehead v. People *ex rel.* Tipaldo, — U. S. —, 56 Sup. Ct. 932, 933 (1936), "It is difficult to imagine any grounds *other than our own personal economic predilections,* for saying that the contract of employment is any the less an appropriate subject of legislation than our scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest." (Italics supplied.)

[8] Cardozo, J., dissenting in the Mayflower Farms case at 459, "The judgment just announced is irreconcilable in principle, with the judgment in the Borden's case, announced a minute or so earlier."

[9] Nebbia v. New York, 291 U. S. 502, 537, 56 Sup. Ct. 829 (1934); Ohio *ex rel.* Clarke v. Deckebach, 274 U. S. 392, 47 Sup. Ct. 630 (1927); Lawrence v. State Tax Comm., 286 U. S. 276, 52 Sup. Ct. 556 (1932); *cf.* Borden's Farm Products v. Baldwin, 293 U. S. 194, 55 Sup. Ct. 187 (1934). Note (1936) 36 COL. L. REV. 283 (presumption of constitutionality reconsidered).

[10] Liggett Co. v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57 (1928). See Notes (1923) 37 HARV. L. REV. 136, (1931) 31 COL. L. REV. 136. The data submitted in the Nebbia and the Borden's Products Corp. cases were very extensive. A prior appeal in the Borden's case was in vain because of the absence of factual data, 293 U. S. 194, 55 Sup. Ct. 183 (1934). See lower court opinion in the Borden's Farm Products case, 7 F. Supp. 352 (D. C. S. D. N. Y. 1934). See Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 331; Note (1936) 49 HARV. L. REV. 631.

Markets.[11] No rebutting facts were on the record.[12] Certainly the classification could not be declared arbitrary upon its face when the court had available the data in the *Nebbia* and *Borden Products Corp.* cases of which it could take judicial notice.[13] The court has held that a classification based upon a reasonable distinction is valid, even though some inequalities result in practice.[14] It has insisted that nothing short of "a clear and hostile determination" is invalid.[15] The object of time limitation in the *Mayflower Farms* case was not, as the majority said, to give one class an economic advantage over another. This may have resulted incidentally; the main object, of course, was to relieve an economic situation which the court had already authorized the state legislature to do. The problem was one for the legislature. When that body once determined that the time limitation had a reasonable relation to its desired purpose, and the facts reasonably justified that belief, it acted within its jurisdiction which the court had no right to invade.[16] As indicated by the *Mayflower Farms* case, the court may narrow its decision in the *Nebbia* case to a point of ineffectiveness by rejection of detailed regulations which are numberless in some industries, particularly the milk industry.[17]

T. B.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRICE FIXING —REGULATION OF LABOR CONDITIONS—BITUMINOUS COAL ACT.— Plaintiff, as a stockholder, sues to enjoin the defendant company and some of its officers from complying with the provisions of the Bitu-

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[11] Mayflower Farms v. Ten Eyck, 267 N. Y. 9, 195 N. E. 532 (1935), *aff'g*, 242 App. Div. 881, 275 N. Y. Supp. 669 (3d Dept. 1934).

[12] This is the reason for the decision in the Mayflower Farms case. But the court has said in Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584, 55 Sup. Ct. 538, 540 (1935), "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." It requires no convolutions of the imagination to conceive a state of facts to justify the discrimination in the Mayflower Farms case.

[13] WIGMORE, EVIDENCE (2d ed. 1923) § 2579.

[14] Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 33 Sup. Ct. 441 (1930).

[15] Bell's Gap. R. R. v. Pennsylvania, 134 U. S. 232, 237, 10 Sup. Ct. 533 (1890).

[16] Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338. Dissenting in the A. A. A. case, Stone, J., said, "The power of courts to declare a statute unconstitutional is subject to two guiding principles * * *. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312 (1936).

[17] Goldsmith and Winks, *loc. cit. supra*, note 2, at page 185. See (1936) 49 HARV. L. REV. 996.