

CONSTITUTIONAL LAW: Illegal milk delivered to dairy products
MILK: plant which has not been purchased by such
 plant may be colored with harmless color-
ing matter by agents of Department of Agriculture or any "A" or "C"
grader licensed by said department. Sec. 14103, Laws of Mo. 1945,
p. 83, is constitutional.

May 22, 1948



Honorable Tom R. Douglass
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"In the enforcement of Section 14103 of the Missouri Dairy Law, which relates to the coloring of illegal dairy products, the question arises whether or not the Agents of the Missouri State Department of Agriculture or any licensed 'A' or 'C' grader, as defined in Section 14114, Laws of Missouri, 1945, would have authority to color illegal milk, which has been delivered to the platform of a dairy products plant but which has not been accepted or purchased by the plant.

"Since there is a question as to the investment of title in this milk, we would appreciate your opinion whether or not the ownership of such milk has changed from the producer to the plant when it is delivered on the platform of the processing plant. If this title has not changed from the producer to the plant, would the Agents of the Department of Agriculture or any licensed 'A' or 'C' grader be acting within their authority if they colored this milk before it was returned to the producer?

"We should also appreciate your opinion as to the constitutionality of Section 14103, Laws of Missouri, 1945."

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The first question to be answered is whether or not Section 14103, Laws of Missouri, 1945, page 83, placing the duty upon the commissioner, his agents, or any licensed "A" or "C" grader to color any illegal dairy product which is delivered, sold, accepted, purchased, or held in possession for human food purposes with a permanent and harmless coloring matter, is constitutional.

Many courts have upheld the rule that such a provision, being one for the preservation of the health of the people, is not unconstitutional and does not violate the constitutional inhibition against taking property without due process of law. Statutes and ordinances enacted under authority of statutes have been invariably upheld as being constitutional when such statutes provided for the summary seizure and destruction of food declared by such statute or ordinance to be unlawful and injurious to the public health.

In the case of North American Storage Co. v. Chicago, 211 U. S. 306, the United States Supreme Court upheld an ordinance of the city of Chicago which provided that the employees of the health department of the city could enter any place where food was stored and were to forthwith seize, condemn and destroy any putrid, decayed, poisoned and infected food which any inspector might find in and upon such premises. The court said, l. c. 320:

"* * * The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of

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the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. * * *

In the case of *Blazier v. Miller*, 10 Hun. (N.Y.) 435, the Fourth Department of the Supreme Court of New York held that where the city of Syracuse, in an ordinance, provided that the inspector of milk had authority to seize, take in his possession and examine all milk offered for sale, or brought for sale into the city, upon having reasonable cause to believe that the milk was below the standard quality of pure and wholesome milk, and to destroy the same, that such ordinance did not violate the provision of the state constitution declaring that no person shall be deprived of his life, liberty or property without due process of law. The court said, l. c. 437:

" * * * But the functions of the milk inspector, under the ordinance in question, are simply ministerial. He is to destroy the milk if it is found to be below the prescribed standard; otherwise, not. In order to ascertain whether it is below the standard, he has only to measure its specific gravity by an instrument made for the purpose. He has no discretion in the matter. It is immaterial, therefore, whether the owner is present or not. If present, he could do nothing to change the result. Notice, consequently, would not avail him, and so need not be given. * * *

In the case of *Shivers v. Newton*, 45 N. J. L. 469, the Supreme Court of New Jersey held that a statute which empowered a milk inspector, if he found any can, vessel or package of milk which had been adulterated, to condemn the same and pour the contents of such can or vessel upon the ground or return the same to the consignor, was constitutional. The court said, l. c. 473:

"That the title to all private property is held subject to the paramount consideration

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of the health and safety of the entire public, is too well settled for discussion. It is equally well established that the authority inherent in the state under the title of police power, enables the legislature to fix upon certain kinds of property or upon the manner in which property is used, the brand of noxiousness to public safety or health. And when the character of a nuisance has been so affixed to property or its use, it is a frequent exercise of legislative power in addition to the visitation of a penalty to be recovered by action, or imprisonment upon conviction under indictment to also provide for the abatement of the nuisance itself by means of a seizure and destruction of the property itself. The exercise of this power is illustrated by the numerous statutes in other states, which have received judicial sanction, among others, those providing for the seizure and destruction of liquor, the arrest and sale of straying animals, the impounding and destruction of dogs, and for the seizure and destruction of illegally baked bread. Sedg. Stat. & Const. Law 434 note, 455 note. In the case of *Weller v. Snover*, 13 Vroom 341, this court sanctioned the act of a fish warden in destroying a fish-basket by virtue of the act of 1871 (Rev., p. 433,) and the sanction is put upon the ground of the right to authorize an officer to abate a nuisance.

"In the section of the act now under inspection, the authority of the officer to destroy rests upon the fact of the adulteration or impurity of the milk, and the section further provides that if a subsequent analysis shall disclose the fact that the officer was mistaken in the result of his examination, the owner is to be paid the value of the article destroyed."

In the case of *Deems v. Mayor and City Council of Baltimore*, 30 Atl. 648, the Court of Appeals of Maryland held that an ordinance of Baltimore making it unlawful to sell or offer for sale any impure, adulterated, sophisticated or unwholesome milk or other food products, and defining pure, unadulterated, unsophisticated and wholesome milk, and providing that the milk in the possession of the person violating or neglecting to comply with

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the provisions of the ordinance might be confiscated and destroyed by the inspector examining the same, was constitutional. The court said, l. c. 650:

" * * * And the real question, it seems to us, under the demurrer, is whether it has the power to direct that milk which is found upon inspection not to come up to the standard as thus prescribed shall be destroyed. What is termed the 'police power' has been the subject of a good deal of consideration by both the federal and state courts, and all agree that it is a difficult matter to define the limits within which it is to be exercised. Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public; and, as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, 'Salus populi suprema lex'; and the constitutional guaranties for the security of private rights relied on by the appellant have never been understood as interfering with the power of the state to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. * * *

" * * * And in *Mugler v. State*, to which we have heretofore referred, Mr. Justice Harlan says: 'The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a possessor of his property without due process of law.' * * *"

In the case of *Nelson v. City of Minneapolis*, 127 N. W. 445, the Supreme Court of Minnesota held that an ordinance of Minneapolis which provided that no person should bring into the city, or offer for sale in the city, any milk unless the owner of the cows from

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which it was drawn should first file in the office of the commissioner of health a certificate of a licensed veterinary stating that the cows have been examined and inspected by him, given the tuberculin test, and found free from all contagious diseases, was constitutional. The court said, l. c. 447:

"Whether the ordinance, in so far as it authorizes a seizure and destruction of milk taken from uninspected cows, and brought within the city for sale, in violation of the ordinance, so violates the constitutional rights of plaintiffs, and constitutes a taking of their property without due process of law, is the important question in the case. It is urged that before destroying the milk the authorities should be required to ascertain whether it is in fact unwholesome and unfit for food, and that to permit them to destroy the same without regard to whether it is or is not free from disease germs authorizes a taking of property for public use without compensation, and is not that due process of law guaranteed by the Constitution. It is further claimed, with respect to the enforcement of police regulations, that power in the municipal officers, if constitutional rights be respected, must be limited to those methods that will work the least injury to private rights. Counsel's argument in support of their theory of the law is plausible and forceful, but we are unable to concur therein. The council determined that the tuberculin test was a reasonable and the most practicable method of insuring purity in the milk brought into the city. To enforce the regulation the council had the power to impose such penalties as would render the regulations effective and serve the purpose intended. It provided, in addition to fine and imprisonment, a destruction of the condemned milk. The authorities sustain regulations of this character. It is in fact the only feasible method of preventing contaminated or unwholesome milk from reaching the citizens, and to enforce or compel a compliance with the ordinance. A mere fine or imprisonment of the offender would not prevent the milk reaching the consumers; but its destruction, when brought into the city, is effective for all purposes. * * *"

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Since the courts have uniformly upheld the doctrine that unwholesome, impure and illegal food products may be summarily seized and destroyed, it is obvious that Section 14103, Laws of Missouri, 1945, page 83, providing for the addition only of a harmless coloring matter to such illegal products, and the addition of which coloring matter could not affect the value of the product except in so far as it would prevent consumption by human beings, does not offend the inhibitions in the state and federal constitutions prohibiting the taking of property without due process of law.

Section 14127, Laws of Missouri, 1945, page 83, sets up a standard under which a determination can be made as to whether or not the milk referred to in Section 14103 does not violate any provision of the state or federal constitutions.

The second question is: Does the fact that title does not pass between the producer and the dairy products plant prevent the coloring of unlawful milk by the commissioner, his agents, or a licensed "A" or "C" grader, when such milk is delivered to the dairy products plant?

"Deliver" is defined in Funk & Wagnalls New Standard Dictionary of the English Language, as follows:

"To place in the power or possession of another, surrender possession of; * * *"

From the fact that the terms "delivered, sold, accepted, purchased, or held in possession for human food purposes" appear in Section 14103, we believe it is obvious that the word "delivered" as used in such section should, under the provisions of Section 655, R. S. Mo. 1939, be given its plain, ordinary and usual sense.

Therefore, we are of the opinion that Section 14103 does apply to a case where a producer delivers milk to a dairy products plant, and that it is the duty of the commissioner, his agents, or a licensed "A" or "C" grader to color milk so delivered if such milk is illegal.

CONCLUSION

It is the opinion of this department that Section 14103, Laws of Missouri, 1945, page 83, is constitutional.

It is further the opinion of this department that where a producer delivers to a dairy products plant illegal milk, it is the duty of the commissioner, his agents, or a licensed "A" or

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"C" grader to color such milk with a permanent harmless coloring matter.

Respectfully submitted,

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APPROVED:

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Attorney General