CHAPTER XI

MILK CONTROL

IN the field of human nutrition there is no more important food than pure milk. Physicians and scientists are generally agreed that a liberal amount of pure milk is indispensable in the daily diets of all normal infants and growing children and of all expectant and nursing mothers, and that milk of good quality is necessary or desirable for invalids, malnourished persons, and all normal adults.[1]

Pure milk is commonly known as "our most nearly perfect food," because it is an exceptionally well-balanced combination of most of the chemical substances required by the human body, including fat, carbohydrate, complete proteins, minerals, vitamins, and water. An adequate supply of clean and safe milk is, therefore, a matter of definite and acknowledged significance to the public health.

It has been pointed out by the Supreme Court of the United States[2] that the production and distribution of milk is a paramount industry of a State (in this case, New York) and largely affects the health and prosperity of its people. The dairy industry is, in fact, the greatest single source of agricultural income in the United States, yielding about 20 per cent of the total agricultural income in this country.

Milk Control and the Public Health

Since milk is in universal use as a food and when pure is the most wholesome of all foods, and since milk is a perishable product that is also peculiarly liable to dangerous contamination and adulteration, the reasonable regulation of the production, processing, storage, handling, distribution, and sale of milk and dairy products in the interest

NOTE. A more comprehensive discussion of this subject, together with a list of approximately 400 court decisions on milk, is given in the author's book, *Legal Aspects of Milk Sanitation,* published (1947) by the Milk Industry Foundation, Washington, D. C. Subsequent court decisions on milk control are, however, mentioned in this chapter.

1. See S. J. Crumbine and J. A. Tobey, *The Most Nearly Perfect Food,* Baltimore, Williams & Wilkins, 1929; J. A. Tobey, *Milk, the Indispensable Food,* Milwaukee, Olsen, 1933; and *Nutrition,* Final report of the League of Nations mixed committee for the study of problems of nutrition, New York, Columbia University Press, 1937.

2. *Nebbia* v. *New York* (1934), 291 U.S. 502, 78 L. Ed. 563, 54 S. Ct. 505, 89 A.L.R. 1469.

of the public health is universally recognized as an established and proper function of government.[3]

The necessity for such legal regulation of milk is indicated by the fact that there were reported annually in the United States between 1924 and 1936 an average of forty-three milk-borne epidemics each year, involving more than 1,500 cases of preventable diseases and some fifty needless deaths annually.

Most of these outbreaks have been of typhoid fever, with septic sore throat in second place. Other diseases represented have included diphtheria, scarlet fever, gastro-enteritis, bacillary dysentery, diarrhea, and food poisoning. In addition to these communicable maladies, contaminated milk may also cause the spread of tuberculosis and brucellosis (undulant fever), bovine diseases that are transmissible to man. Poliomyelitis (infantile paralysis) has been mentioned in one or two instances as having been spread by infected milk, but the scientific evidence on this matter is not conclusive.

Nearly all the milk-borne epidemics reported in the United States and also in Canada have been caused by contaminated raw milk of grades below that known as certified milk. In 1927, for example, an epidemic of typhoid fever in Montreal, responsible for 5,110 cases and 537 deaths, was traced to the infection of raw milk by a human carrier of this disease and the subsequent mixing of this raw milk with a pasteurized supply.

Public health authorities and other scientists are agreed that pasteurization of all market milk supplies is a necessary safeguard for this important food. Pasteurization, the heating of all particles of milk to at least 142° F. for thirty minutes, or the heating of the milk to at least 160° F. for fifteen seconds, following in each instance by rapid cooling to 50° F. or less, is a process that has been proven to be destructive to all pathogenic bacteria, if they are present in a milk supply.[4]

Since the adoption of the first state law prohibiting the adulteration of milk, a Massachusetts act of 1856, and the first recorded court decisions on milk control, handed down in Massachusetts in 1860 and 1864,[5] all States in this country have adopted legislation on this subject and also on the sanitary control of milk supplies. On numerous occasions these laws and the manner of their enforcement have come

3. Tobey, *Legal Aspects of Milk Sanitation, op. cit.*

4. See also page 192.

5. *Comm.* v. *Flannelly* (1860), 81 Mass. (15 Gray) 195. *Comm.* v. *Farren* (1864), 91 Mass. (9 Allen) 489.

before courts of last resort.[6] The earlier cases were concerned mainly with the adulteration of milk, but since 1896, when the first important decision on a milk sanitation ordinance was reported,[7] most of the adjudications on milk control have been concerned with the legality and validity of state and local sanitary requirements for the production and distribution of milk and other dairy products.

These decisions have, in general, upheld as constitutional and valid the proper regulation of milk by the State under its police power, the delegation of this responsibility to municipal corporations and boards of health, the imposition of reasonable standards for commercial milk and dairy products, the requirement of licenses and permits for the production and sale of these products, the inspection and sanitary supervision of public milk supplies, the seizure and destruction of impure milk, the requirement of tuberculin testing of all dairy cattle and the destruction of diseased animals, requirements for the pasteurization of market milk supplies, requirements for sanitary containers properly labelled, and, in recent years (since 1937), emergency control by the State of the prices of milk and dairy products.

Although the courts have been liberal in upholding all reasonable regulations and control of milk by the legislative and executive branches of the government, the judiciary has also recognized the existence of certain constitutional limitations upon the scope and extent of such control, especially when the legal rights of individuals under the federal and state constitutions have been or are likely to be infringed. In order to be lawful, the application of official sanitary control of milk, like any other phase of public health administration, must be reasonably calculated to protect and preserve the health of the people.[8]

Standards for Milk and Dairy Products

Legislatures cannot wholly forbid or prevent the sale of a wholesome article of food such as milk, but legislatures may regulate an industry and impose reasonable standards of purity, freedom from adulteration, and proper chemical composition upon a food or food

6. See Tobey, *Legal Aspects of Milk Sanitation, op. cit.*

7. *State* v. *Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066.

8. *Adams* v. *Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610. *Sheffield Farms* v. *Seaman* (1935), 114 N.J.L. 455, 177 A. 372.

product[9] and prohibit the sale of products of a quality inferior to that required by law.[10]

In accordance with this power, legal standards for milk and dairy products have been adopted in all States, although there is considerable variation in the statutory requirements.[11] These laws usually impose minimum standards for butterfat and total solids of milk and dairy products, prohibit the use of certain dangerous preservatives, adulterants, and deceptive coloring materials, set minimum bacterial standards for various defined grades of milk and milk products, and outline necessary procedures for determining the sanitary and chemical quality of products that are actually offered for sale. The sale of a substandard product is, in general, a criminal offense regardless of the knowledge or lack of knowledge on the part of the seller.

Where an arbitrary standard for the chemical composition of milk, as fixed by the legislature, cannot be met by certain breeds of cattle, the law is not thereby invalidated, since milk of the proper standard can be secured from cattle of mixed herds.[12] Where, however, an unreasonably high standard of chemical composition is required for a product, and it has no substantial relation to the public health, the law is invalid.[13] In this case, the court held that a municipal ordinance requiring a minimum of 12 per cent butterfat for plain ice cream and 10 per cent for fruit ice cream was unreasonable.

The standards for milk and dairy products required by state legislation may, in general, be exceeded or made more rigid in an ordinance adopted by a municipality of the State in accordance with the powers conferred in its charter or by legislation, provided that the ordinance is not inconsistent with the state law and does not contravene its terms.[14] Thus, where a state law permitted the sale of a chocolate milk drink having only 2 per cent butterfat but authorized cities

9. *St. John* v. *New York* (1906), 201 U.S. 633, 50 L. Ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909. *Hutchinson Ice Cream Co.* v. *Iowa* (1916), 242 U.S. 153, 61 L. Ed. 217, 37 S. Ct. 28, Ann. Cas. 1917 B 643. *People* v. *Biesecke* (1901), 169 N.Y. 53, 57 L.R.A. 178, 88 A.S.R. 534, 61 N.E. 990.

10. *St. Louis* v. *Liessing* (1905), 190 Mo. 464, 1 L.R.A. (N.S.) 918, 109 A.S.R. 774, 4 Ann. Cas. 112, 89 S.W. 611.

11. *Milk Control; Governmental Regulation of the Dairy Industry in the United States,* Chicago, Public Administration Service, 1937.

12. *People* v. *Cipperly* (1886), 37 Hun. 319, rev. in 101 N.Y. 634, 4 N.E. 107. *People* v. *Butler* (1910), 140 App. Div. 705, 125 N.Y.S. 556.

13. *Rigbers* v. *Atlanta* (1910), 7 Ga. App. 411, 66 S.E. 991.

14. *Kansas City* v. *Henre* (1915), 96 Kans. 794, 153 P. 548. *City of Phoenix* v. *Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580.

to adopt higher standards, a municipal ordinance requiring that all chocolate milk drinks should be manufactured from grade A whole milk, raw or pasteurized, containing 3.5 per cent butterfat, has been upheld by the courts.[15]

Milk has been defined for legal purposes as "the whole, fresh lacteal secretion obtained by the complete milking of one or more healthy cows, excluding that obtained within 15 days before and 5 days after calving, or such longer period as may be necessary to render the milk colostrum free. The name 'milk' unqualified means cow's milk."[16] This same definition is given in the United States Public Health Service Standard Milk Ordinance and Code,[17] with the addition of the following at the end of the first sentence: "which contains not less than eight per cent of milk solids-not-fat, and not less than three and one quarter per cent of milk fat"; the second sentence is omitted.

A milk company which standardized its market milk with pasteurized cream which had also been homogenized, so that it contained 5 per cent butterfat, has been held not to have violated a city ordinance prohibiting the sale of milk which has had the cream line increased by any artificial means.[18] The court stated in this case that the mechanical process of homogenization was not an artificial means within the intent of the ordinance. A product consisting of pasteurized cream, sugar, vanilla, and nitrous oxide gas to give it a foamy character, and sold under a trade name, has been held not to be a milk product as defined in the Sanitary Code of New York, despite an amendment to the code adding to the definition of milk products the words, "cream to which any substance has been added and for use in fluid state or whipped."[19] Here the court held that the amendment as applied to this product was unreasonable, discriminatory, and arbitrary and a denial of due process of law and the equal protection of the laws.

The Administrative Control of Milk

The right to conduct a lawful business, such as dairying and the sale of milk and its products, does not also confer the absolute right

15. *Anderson* v. *Tampa* (1935), 121 Fla. 670, 164 So. 546.

16. *Service and regulatory announcements, food and drug no. 2* (5th rev.): *Definitions and standards for food products, for use in enforcing food and drugs act.* U. S. Food and Drug Administration, November 1936.

17. *Public Health Service Milk Ordinance and Code: 1939,* Public Health Bulletin No. 220, 1939 edition, U.S. Public Health Service.

18. *Arden Farms Co.* v. *City of Seattle* (1940), 2 Wash. (2d) 640, 99 P. (2d) 415.

19. *Aerated Products Co.* v. *Godfrey* (1943), 290 N.Y. 92, 48 N.E. (2d) 275. See *Aerated Products* v. *Dep't Health* (N.J. 1945), 59 F. Supp. 652.

upon the vendor to conduct his business in any way that he may see fit, regardless of any resulting effect upon the public health. Any such business must be undertaken only in accordance with reasonable sanitary requirements of the State and its political subdivisions.[20]

In every State some aspect of milk sanitation and control is undertaken at the state level in accordance with law. In about one half of the States this activity is the function of the health department; in the remainder it is the duty of the department of agriculture or some similar authority. In counties, cities, and other local jurisdictions, milk control is almost invariably the function of the local health department, which acts as agent of the State in the enforcement of the statutes and duly authorized regulations, and also enforces any applicable local ordinances and regulations, which must be consistent with state requirements.

In some States both the health department and the department of agriculture are concerned with certain aspects of the sanitary control of milk and dairy products. In 1940 it was necessary for the Supreme Court of Kansas to make an exhaustive study of the relative functions of the two departments in a case involving the conviction of a milk dealer for violation of certain regulations of the state board of health. It was decided that, with the exception of the adulteration and misbranding of milk, the control of this product was within the exclusive jurisdiction of the board of agriculture of that State.[21]

Where a state agricultural code authorized municipalities to provide higher standards for grades of market milk than that provided in the state laws, and authorized municipalities to set up their own systems of dairy inspection, it was held that other powers over milk vested in the State had not been relinquished, and that a city ordinance providing that no person should be issued a permit to sell milk in the city unless the dairy had been inspected by the health officer of the city was in direct conflict with the agricultural code, which stated that when a producer sold in two or more cities or counties, the director of agriculture shall designate the county or city to conduct the inspection.[22]

So, too, where a state law had set up a comprehensive scheme for the control of the manufacture and sale of frozen desserts, and had placed its administration with the commissioner of the department of agriculture and markets, and the commissioner had issued a permit

20. *Owensboro* v. *Evans* (1916), 172 Ky. 831, 189 S.W. 1153.

21. *State* v. *Reynolds* (1940), 152 Kan. 762, 107 P. (2d) 728.

22. *Meridian* v. *Sippy* (1942), 54 Cal. App. (2d) 214, 128 P. (2d) 884.

to a company to manufacture such products in a sanitary and well-kept basement in New York City, it was held that the department of health of New York City could not refuse to issue a permit for the retail sale of these products, despite a regulation prohibiting manufacture in basements.[23]

Sanitation and Inspection of Milk Supplies

For the administration and enforcement of necessary sanitary standards, state and city governments may appoint or delegate officers and employees to inspect dairies, examine milk-producing cattle, test the products, and take such other proper measures as are necessary to the effective administration of the laws, ordinances, and duly adopted regulations.[24]

Although the jurisdiction of a municipal ordinance extends only to persons and things within the corporate limits of the municipality, the courts have uniformly held that inspections of dairies beyond the city limits are justifiable and proper measures for the protection of the public health and do not represent extraterritorial operation of a milk ordinance.[25]

A municipality may not lawfully prohibit the entry and sale of wholesome milk or other foods from beyond its borders,[26] but reasonable limitations may be placed upon the extent of an inspection area, and uninspected milk usually may be debarred from sale within the city. What is a reasonable limit to an inspection area seems to depend upon the circumstances in a particular case. Thus, in a recent decision it was held that a city ordinance prohibiting the shipment of ice cream into the city from outside a board of health's inspection area having a radius of sixty miles from the city was a reasonable public health measure,[27] but in another recent case it was held that the regulation of a city health commissioner prohibiting the use of cream produced

23. *S. H. Kress & Co.* v. *Department of Health of City of New York* (1940), 283 N.Y. 55, 27 N.E. (2d) 431.

24. *Norfolk* v. *Flynn* (1903), 101 Va. 473, 62 L.R.A. 771, 99 A.S.R. 918, 44 S.E. 717.

25. *State* v. *Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066. *Norfolk* v. *Flynn* (1903), 101 Va. 473, 62 L.R.A. 771, 99 A.S.R. 918, 44 S.E. 717.

26. *Whitney* v. *Watson* (1931), 85 N.H. 238, 157 A. 78. *Grant* v. *Leavell* (1935), 259 Ky. 267, 82 S.W. (2d) 283. *Meridian* v. *Sippy* (1942), 54 Cal. App. (2d) 214, 128 P. (2d) 884. *Bryant & Chapman Co.* v. *Lowell* (1942), 129 Conn. 321, 27 A. (2d) 637.

27. *Wright* v. *Richmond County Dept. of Health* (1936), 182 Ga. 651, 186 S.E. 815.

more than fifty miles from the city for the manufacture of ice cream in the city, was an unreasonable interference with a legitimate business and hence invalid.[28] This court pointed out that the sanitary condition of all cream could be easily ascertained by the health department, and if found unwholesome it could be prohibited from entry, but if it was wholesome and pure it could not be excluded merely on the capricious grounds of distance.

Among the specific sanitary requirements for milk that have been upheld by the courts as valid have been the prohibition of the employment at dairies of persons suffering from contagious or infectious diseases,[29] the requirement of a maximum temperature for milk,[30] the requirement of a separate room for cooling and bottling milk[31] and of the proper cleansing of bottles and utensils.[32]

In order to protect the public health from the danger of contaminated milk supplies, health officials and other appropriate public authorities may place embargoes upon unwholesome milk supplies from insanitary dairies,[33] order the closing of dairies for proper cause,[34] and seize and destroy milk and dairy products if they are actually dangerous to the public health.[35] The health officer who confiscates and destroys private property such as milk in a summary manner must, however, be able to prove the impurity of the milk in a court action, should it arise.

Similar precautions must be observed by health officers in taking samples of milk and milk products for analysis. Where, for example, only one of twenty cans of milk was tested in a supply which was to be commingled, it was held that there was insufficient evidence to convict.[36]

28. *Miller* v. *Williams* (Md. 1935), 12 F. Supp. 236. *City of Rockford* v. *Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317.

29. *Hoar* v. *Lancaster* (1927), 290 Pa. 117, 137 A. 664.

30. *Chi.* v. *C. & N.W. Ry. Co.* (1916), 275 Ill. 30, L.R.A. 1917 C 238, 113 N.E. 849.

31. *State* v. *Davis* (1911), 1 Tenn. C.C.A. 550.

32. *People* v. *Frudenberg* (1913), 209 N.Y. 218, 103 N.E. 166. *People* v. *Soiefer Farms* (1938), 295 N.Y.S. 177, 251 App. Div. 174. See page 195.

33. *Bellows* v. *Rayner* (1913), 207 N.Y. 389, 101 N.E. 181. *Leontas* v. *Savannah* (1927), 164 Ga. 278, 138 S.E. 154.

34. *Alston* v. *Charleston Board of Health* (1913), 93 S.C. 553, 77 S.E. 727.

35. *Nelson* v. *Minneapolis* (1910), 112 Minn. 16, 29 L.R.A. (N.S.) 260, 127 N.W. 445. *Adams* v. *Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610.

36. *People ex rel. Goldstein* v. *Eichen* (1938), 5 N.Y.S. (2d) 817, 168 Misc. 276.

Licenses and Permits

Since the dairy business is vested with a public interest, municipal corporations and boards of health are recognized as having the right to require the licensing of all persons undertaking this business and to deny or revoke such licenses for adequate causes.[37] Even where no statute expressly authorizes the requirement for a permit, it has been held that a public health council regulation prohibiting sale of milk without a permit is valid under the general power to adopt regulations for clean and safe milk.[38] The regulation in this case was, however, held to be void for failure to state the day on which it took effect, pursuant to the terms of the state code.

Licensing requirements must, however, operate without discrimination upon all classes of persons, although a certain amount of classification of milk dealers and dairymen, such as according to the number of cows giving milk, may be proper, provided the fees and other requirements operate equally upon all persons within the appropriate classifications.[39] Licenses may be required by a municipality from dairymen and others whose farms or plants are beyond the municipal limits.[40]

A reasonable fee may be charged for licenses and permits, since this cost is an inspection charge and not a tax.[41]

Under a state law requiring anyone who sells milk or cream to a hotel, restaurant, boarding house, or the public to obtain a license from the commissioner of agriculture, it was held by the Supreme Court of Michigan in 1937 that a farmer who sold about twenty quarts of surplus milk a day to his friends and neighbors was not selling to the public, and so was not guilty of selling milk without a license.[42] There was considerable discussion in this decision as to what was meant by the term "the public," the court stating that if the defendant

37. *State* v. *Milwaukee* (1909), 140 Wis. 38, 133 A.S.R. 1060, 121 N.W. 658. *Stracquando* v. *Dep't of Health of N.Y. City* (1941), 285 N.Y. 93, 32 N.E. (2d) 806. *Reck Milk Co.* v. *Humphreys* (1938), 119 N.J.L. 526, 197 A. 279. *Milk Control Board* v. *Phend* (1937), 104 Ind. App. 196, 9 N.E. (2d) 121. *Leach* v. *Coleman* (Tex. 1945), 188 S.W. (2d) 220.

38. *State* v. *Bunner* (1943), 126 W. Va. 280, 27 S.E. (2d) 823.

39. *Noble* v. *Carlton* (Fla. 1930), 36 F. (2d) 967. *Stephens* v. *Oklahoma City* (1931), 150 Okla. 199, 1 P. (2d) 367. *Coleman* v. *Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

40. *Korth* v. *Portland* (1927), 123 Ore. 180, 261, P. 895.

41. *Littlefield* v. *State* (1894), 42 Neb. 223, 28 L.R.A. 588, 47 A.S.R. 697, 60 N.W. 724. *Asheville* v. *Nettles* (1913), 164 N.C. 315, 80 S.E. 236. *City of Newport* v. *Hiland Dairy* (1942), 291 Ky. 561, 164 S.W. (2d) 818.

42. *People* v. *Powell* (1937), 280 Mich. 699, 274 N.W. 372, 111 A.L.R. 721.

should extend his business of selling to a substantial part of the people of the locality or to anyone who might desire or seek to purchase milk to the extent of his capacity or ability to furnish it, there would be no question but that he might be liable under the statute. The ruling in this case would not apply in States where the laws do not use the phrase "sell to the public" and are so framed that no person is allowed to sell any milk to consumers without a permit from the proper authorities.

The administration of the licensing power may be and usually is delegated to a ministerial officer, such as the health officer. While he is usually permitted considerable discretion in granting, denying, withholding, or revoking licenses, he must follow procedures set forth in the statutes, such as by holding hearings, or his actions will be invalid.[43]

A license to sell milk may not be denied for frivolous reasons having no relation to the public health, as where the applicant is a nonresident whose milk supply has not been shown to be impure,[44] or on the grounds that the municipality already has an adequate supply of milk.[45]

Tuberculin Testing

Inasmuch as milk from diseased cattle may be dangerous to health, the State and its political subdivisions may properly require that all dairy cattle shall be free from bovine tuberculosis, Bang's disease, and other maladies, as shown by appropriate scientific tests, such as the tuberculin test.[46]

On numerous occasions since 1896[47] the courts have sustained as valid and constitutional state laws, municipal ordinances, and board of health regulations prohibiting the entry of diseased cattle,[48] providing for the state-wide or county-wide eradication of bovine tuberculosis and the appropriation of monies raised by taxation for that purpose,[49] requiring the tuberculin testing of all dairy cows,[50] and

43. *Grandview Dairy* v. *Baldwin* (1934), 239 App. Div. 640, 269 N.Y.S. 116.

44. *Whitney* v. *Watson* (1931), 85 N.H. 238, 157 A. 78.

45. *Sheffield Farms* v. *Seaman* (1935), 114 N.J.L. 455, 177 A. 372. *Urban* v. *Taylor* (1936), 14 N.J. Misc. 887, 188 A. 232.

46. See Tobey, *Legal Aspects of Milk Control,* chapter VII.

47. *State* v. *Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066.

48. *Reid* v. *Colorado* (1902), 187 U.S. 137, 47 L. Ed. 108, 23 S. Ct. 92, 12 Am. Cr. R. 506. *Mintz* v. *Baldwin* (1933), 289 U.S. 346, 77 L. Ed. 1245, 53 S. Ct. 611.

49. *Schulte* v. *Fitch* (1925), 162 Minn. 184, 202 N.W. 719. *Fevold* v. *Board*

(*Continued on next page.*)

requiring or permitting the destruction of diseased cattle, with or without indemnity to their owners.[51]

Bang's Disease

Bang's disease, or contagious abortion, in cattle is a malady which may cause undulant fever (brucellosis) in man, either by contact with the cattle or through ingestion of raw milk infected with the *Brucella melitensis.* The same disease, caused by a different strain of the organism, also infective to man, occurs in goats and swine.

Legislation for the control of Bang's disease, in effect in most of the States, has been upheld by the United States Supreme Court as a valid exercise of the police power.[52] In 1940 a state law for the eradication of diseases in domestic animals, including tuberculosis, foot and mouth disease, anthrax, and Bang's disease, came before the Supreme Court of Appeals of Virginia, which was called upon to adjudicate that portion of the act which required the state veterinarian to make agglutination tests for Bang's disease and to quarantine and destroy cattle found to be infected with it.[53]

In upholding this law as constitutional, the court stated that it is in the public interest that healthy cattle be produced and kept free from disease, and that animal products, such as milk from healthy cows, be secured in abundance. The court also pointed out that it had upheld a statute providing for the eradication of disease among cedar trees, and commented, "It would, indeed, be a queer state of reasoning to hold that a disease of a tree is more dangerous to the public or more of a public nuisance than an infectious and contagious disease of an animal."

In this same year (1940) the Supreme Court of Washington sustained an award of damages against a milk dealer who had sold raw

(1926), 202 Ia. 1019, 210 N.W. 139. *People* v. *Anderson* (1934), 355 Ill. 289, 189 N.E. 338. *Stanislaus County Dairymen's Protective Ass'n* v. *Stanislaus County* (1937), 93 Cal. 230, 261, 65 P. (2d) 1305.

50. *Borden* v. *Montclair* (1911), 81 N.J.L. 218, 80 A. 30. *Adams* v. *Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610. *People* v. *Teuscher* (1928), 248 N.Y. 454, 162 N.E. 484. *Agular and Bello* v. *Brock* (Cal. 1938), 24 F. Supp. 692. *Affonso Bros.* v. *Brock* (1938), 29 Cal. App. (2d) 21, 84 P. (2d) 515. *Dorssom* v. *City of Atchison* (1942), 155 Kan. 225, 124 P. (2d) 475.

51. *Kroplin* v. *Truax* (1929), 119 Oh. St. 610, 165 N.E. 498. *Patrick* v. *Riley* (1930), 209 Cal. 350, 287 P. 455. *Anderson* v. *Russell* (1936), 268 N.W. 386, 64 S.D. 426.

52. *Mintz* v. *Baldwin* (1933), 289 U.S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

53. *Stickney* v. *Givens* (1940), 176 Va. 548, 11 S.E. (2d) 631. *Yoder* v. *Givens* (1942), 179 Va. 229, 18 S.E. (2d) 380.

milk to an individual who contracted undulant fever from it.[54] The raw milk, which had been prescribed by a sanipractor, failed to comply with a city ordinance making it unlawful to sell for human consumption milk drawn from cows suffering from any disease. The court took occasion to point out in its decision that if all milk were efficiently pasteurized or boiled there would be no brucellosis except in those occupational groups which come in contact with cattle.

Where, contrary to law, cattle having Bang's disease are sold to a person ignorant of the infection, the sale is invalid, according to a recent case decided in Alaska.[55]

Pasteurization

Pasteurization is the process of heating every particle of milk or milk products in approved and efficiently operated apparatus to a temperature of not less than 142° F. (or 143° F.) and holding at that temperature for 30 minutes, or heating to 160° F. or more for 15 seconds. It is now generally recognized as a necessary public health safeguard for all market milk supplies. The courts have even taken judicial notice of the protective value of pasteurization,[56] although the principle of judicial notice does not extend to the actual methods employed.

Since 1914, when the first decision of a higher court upholding a municipal ordinance requiring pasteurization under conditions prescribed by the health officer was reported,[57] courts of last resort in numerous States have sustained the validity of pasteurization laws, ordinances, and regulations, including requirements that *all* milk sold in a city should be pasteurized,[58] that all milk except the grade known as "certified" should be pasteurized or be from tuberculin-tested cattle,[59] and that milk may be properly classified or graded as pasteurized

54. *Nelson* v. *West Coast Dairy* (1940), 5 Wash. (2d) 284, 105 P. (2d) 76, 130 A.L.R. 606.

55. *Martin* v. *Sheely* (1944), 144 F. (2d) 754.

56. *First National Stores* v. *Lewis* (1931), 51 R.I. 448, 155 A. 534. *City of Phoenix* v. *Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580.

57. *Koy* v. *Chicago* (1914), 263 Ill. 122, 104 N.E. 1104, Ann. Cas. 1915 C 67.

58. *State* v. *Edwards* (1924), 187 N.C. 259, 121 S.E. 444.

59. *Pfeffer* v. *City of Milwaukee* (1920), 171 Wis. 514, 177 N.W. 850, 10 A.L.R. 128. *People* v. *McGowan* (1921), 118 Misc. 828, 195 N.Y.S. 286, affirm. in 200 App. Div. 836, 191 N.Y.S. 946. *Moll* v. *Lockport* (1922), 194 N.Y.S. 250, 118 Misc. 573. *State* v. *Edwards* (1929), 109 Conn. 249, 146 A. 382. *City of Phoenix* v. *Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580. *Brielman* v. *Munroe* (1938), 301 Mass. 407, 17 N.E. (2d) 187.

or raw milk for the purpose of imposing different license fees.[60] In only one instance has an ordinance requiring pasteurization been held invalid, chiefly for lack of proper presentation of evidence in favor of the process,[61] although in several cases pasteurization requirements have been overruled by the courts for purely technical reasons, such as lack of jurisdiction by local authorities[62] or conflict with state legislation.[63]

A comprehensive milk ordinance of the city and county of San Francisco provided that market milk for sale and distribution should consist of only four grades, all of which were required to be pasteurized, except certified milk. The ordinance was attacked in court by the Natural Milk Producers Association, who were interested in the sale of "guaranteed" raw milk, a grade which did not conform to certified milk. It was alleged that the ordinance conflicted with the state agricultural code, which permitted the sale of raw milk but also authorized cities and counties to adopt higher standards not in conflict with the law. It was also contended that the ordinance was discriminatory, and that there was an unconstitutional delegation of legislative power in the portion of the ordinance which provided that certified milk was the product conforming to the methods and standards of the American Association of Medical Milk Commissions, an unofficial body.

The ordinance was upheld in the court of first instance, the Superior Court for the city and county, and was appealed to the District Court of Appeals, which likewise sustained the ordinance in an able opinion. It was then appealed to the California Supreme Court, which affirmed the decision.[64] In a careful examination of the law, the court stated that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power may make such new and additional regulations as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. It was pointed out that here it was obvious that the legislature did not intend to occupy the field so that no room was left for municipal regulation.

60. *Stephens* v. *Oklahoma City* (1931), 150 Okla. 199, 1 P. (2d) 367. *Coleman* v. *Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

61. *State* v. *Kinsey* (1926), 314 Mo. 80, 282 S.W. 437.

62. *City and County of Denver* v. *Gibson* (Colo. 1933), 24 P. (2d) 751.

63. *Shelton* v. *City of Shelton* (1930), 111 Conn. 433, 150 A. 811.

64. *Natural Milk Producers Ass'n* v. *City and County of San Francisco* (1942), 20 Cal. (2d) 101, 124 P. (2d) 25, affmg. 112 P. (2d) 930; vac. in 317 U.S. 423, 63 S. Ct. 589.

In drawing attention to the substantial differences between certified and guaranteed raw milk, the court declared that the ordinance did not make an unreasonable and arbitrary classification, since the standards for certified milk are established by medical experts, a fact of which the legislature was aware; and that the reference to these standards, even if changed from time to time, was not unlawful. In discussing the due process clause, the court stated that it cannot be doubted that the requirement that all milk for human consumption be pasteurized is a proper police regulation.

Subsequently it was held by the Supreme Court of Ohio that it was proper to incorporate by reference in a regulation of a district board of health the United States Public Health Service Milk Ordinance, since legislation by reference is valid, but it was also decided in this case that it was necessary to publish the ordinance in full in order that the public might be apprised of the rules of conduct.[65]

The question as to whether a city may require milk sold as pasteurized milk to be pasteurized only within the city has come before the courts in a number of cases. A municipal ordinance of this tenor was upheld by a court of intermediate jurisdiction in New York and was affirmed in general by the Court of Appeals, although the higher court did not actually pass upon the validity of this specific requirement but held that the plaintiff in the case was not in a position to question that part of the ordinance until he had applied for and been refused a license for failure to pasteurize in the city.[66]

Although it has been held in a California decision that under existing state law a city may require pasteurization within the city of milk brought in from another inspection district,[67] it has also been held that a city may not prohibit the sale of pasteurized milk within its borders merely because the milk has been pasteurized in a plant outside the city limits but in the same milk inspection district, as provided in the state agricultural code.[68] In this case reliance was placed, in part, upon a Minnesota decision which had declared void and unreasonable an ordinance requiring all milk sold as pasteurized to be pasteurized within the city.[69]

65. *State* v. *Waller* (1944), 143 Oh. St. 409, 55 N.E. (2d) 654.

66. *Lang's Creamery* v. *Niagara Falls* (1928), 224 App. Div. 483, 231 N.Y.S. 368, affirm. in 251 N.Y. 343, 167 N.E. 464.

67. *Witt* v. *Klimm* (1929), 97 Cal. App. 13, 274 P. 1039.

68. *LaFranchi* v. *City of Santa Rosa* (1937), 8 Cal. (2d) 331, 65 P. (2d) 1301, 110 A.L.R. 639.

69. *State* v. *City of Minneapolis* (1933), 190 Minn. 138, 251 N.W. 121. *Grant* v. *Leavell* (1935), 259 Ky. 267, 82 S.W. (2d) 283.

In 1942 the District Court of Appeals of California affirmed and modified a judgment against a city which had attempted to require by ordinance that no milk should be sold in the city unless pasteurized therein.[70] Relying on its previous decision,[71] the court held that this part of the ordinance was void. So, too, in the same year the Texas Court of Civil Appeals held invalid a city ordinance to the same effect, on the grounds that it was in direct conflict with a state law. "The power to provide facilities by which the grades of milk may be determined," said the court, "does not include the power to dictate the location of the plants in which the milk is pasteurized."

Since the protection of the public health depends not upon the location of a milk pasteurizing plant, but upon the care, skill, and probity with which it is operated, there would seem to be very little legal justification for a requirement that milk be pasteurized within the city where it is sold, except in special circumstances such as extreme distance or undue difficulties of inspection and control. Such a requirement is, in general, a violation of a milk dealer's constitutional rights of property and contract.[72]

Containers for Milk

Not only may a milk dealer be required to observe proper cleanliness and sanitation in connection with the bottling and the use of bottles and other containers or packages for milk and dairy products,[73] but the State and municipalities may debar the sale of loose or dipped milk and may require that all milk be sold only in properly sealed and capped bottles and containers approved by the health authorities.[74] The nature of the labelling and the weights or volumes of these containers may also be regulated by law,[75] but this regulation must be reasonable and cannot, for example, prohibit such a proper

70. *Van Gammeren* v. *City of Fresno* (1942), 51 Cal. App. (2d) 235, 124 P. (2d) 621.

71. *Prescott* v. *City of Borger* (Tex. 1942), 158 S.E. (2d) 578.

72. *State* v. *City of Minneapolis* (see 69). *City of Rockford* v. *Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317.

73. *Covington* v. *Kollman* (1913), 156 Ky. 351, 49 L.R.A. (N.S.) 354, 160 S.W. 1052. *People* v. *Frudenberg* (1913), 209 N.Y. 218, 103 N.E. 166.

74. *Covington* v. *Kollman* (see 73). *Mannix* v. *Frost* (1917), 100 Misc. 36, 164 N.Y.S. 1050, affirm. in 181 App. Div. 961, 168 N.Y.S. 1118. *Herkimer* v. *Potter* (1924), 124 Misc. 57, 207 N.Y.S. 35. *City of Milwaukee* v. *Childs* (1928), 195 Wis. 148, 217 N.W. 703. *Economy Dairy Co.* v. *Kerner* (1940), 303 Ill. App. 259, 25 N.E. (2d) 108.

75. *Chicago* v. *Bowman Dairy Co.* (1908), 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 A.S.R. 100, 84 N.E. 913, 14 Ann. Cas. 700.

matter as the appearance of the trade name of the manufacturer on a bottle.[76]

The registration of the names and marks of owners of bottles and containers may be required, and legislation may be enacted to prevent the unlawful use of such property by others than the owners.[77]

The question of the use of paper milk bottles has come before the courts in recent leading cases. In 1935 the city of Chicago required by ordinance that milk in quantities of less than one gallon would be sold only in "standard milk bottles." A milk company, a Michigan corporation, brought suit in the Federal District Court for a decision as to whether its paper containers for milk were standard milk bottles. A master, to whom the case was referred, reported that these containers complied with the ordinance, but the District Court held that they did not. Meanwhile a state law had been enacted, containing provisions for the proper use of paper milk bottles. On appeal to the Federal Circuit Court of Appeals, this court held that the District Court had erred, but stated that the ordinance was void because in conflict with the state law. The case then went to the United States Supreme Court, which decided that the whole matter was one for the state courts to decide, and vacated the judgment of the Circuit Court.[78]

The ultimate result was that the Illinois Supreme Court decided that the ordinance of the city was valid, and that the term "standard milk bottles" was intended to mean glass and not paper bottles. The power of the city to prohibit the use of single-service containers was held not to have been abridged by the statute in question.[79] The city council was the sole judge of the necessity and wisdom of the ordinance.

Approved types of single-service paper containers for milk are, however, permitted for general use in numerous municipalities, and are regarded by public health authorities as suitable for this purpose.

76. *Logan* v. *Alfieri* (1933), 100 Fla. 439, 148 So. 872. *State* v. *Brockwell* (1936), 209 N.C. 209, 183 S.E. 378.

77. *People* v. *Cannon* (1893), 139 N.Y. 32, 34 N.E. 759, 36 A.S.R. 668. *Black* v. *Powell* (1929), 248 Mich. 150, 226 N.W. 910. *People* v. *Ryan* (1930), 230 App. Div. 252, 243 N.Y.S. 644. *Pacific Coast Dairy* v. *Police Court* (1932), 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217. *Associated Dairies* v. *Fletcher* (1936), 143 Kan. 561, 56 P. (2d) 106. *Wichita Natural Milk Producers* v. *Capp* (1936), 144 Kan. 238, 59 P. (2d) 29.

78. *City of Chicago* v. *Fieldcrest Dairies* (1942), 316 U.S. 168, 62 S. Ct. 986, 86 L. Ed. 1355, vacg. 122 F. (2d) 132.

79. *Dean Milk Co.* v. *City of Chicago* (1944), 385 Ill. 505, 53 N.E. (2d) 612.

Price Fixing of Milk

Although the sanitary control of milk and dairy products has been the recognized prerogative and duty of government for more than half a century, the economic control of these products by the State has been undertaken only in comparatively recent years. In 1933 the Congress of the United States passed a law (amended in 1935) known as the Agricultural Adjustment Act that provided, among other things, for the classification of milk shipped in interstate commerce and the fixing of uniform minimum prices for each classification. In 1937 Congress passed the Agricultural Marketing Agreement Act, which made further provisions regarding handling of milk in the "current" of interstate commerce. Since 1932 the legislatures of most of the States have adopted laws to regulate prices of market milk, under the theory that in times of emergency the economic control of milk and its products is as much justified under the police power as is its control in the interests of the public health.

These various laws have been before the courts in numerous instances.[80] In general, it has been held that the State in the exercise of its police power may enact emergency legislation for the reasonable regulation of wholesale and retail prices in a business (such as milk) affected with a public interest, may classify dealers so long as there is no discrimination, and may delegate the administration of the laws to ministerial officers whose orders issued in conformity to law are valid when not arbitrary or oppressive, but all such state laws and orders have no application to products shipped in interstate commerce.[81]

Although state health commissioners have occasionally served by appointment on milk control boards organized under these laws, health officials are concerned primarily with the public health aspects of milk control, and only secondarily with the economic features of this industry, important as these matters may be to the general welfare.

80. For a comprehensive discussion of this subject and a list of such court decisions (to 1937), see J. A. Tobey, *Federal and State Control of Milk Prices*, Chicago, International Association of Milk Dealers, 1937. For more recent decisions see 155 *American Law Reports* 1383. C. McFarland, *Milk Marketing Under Federal Control*, New York, Milk Industry Foundation, 1946.

81. See *Nebbia* v. *New York* (1934), 291 U.S. 502, 78 L. Ed. 563, 54 S. Ct. 505, 89 A.L.R. 1469. *U.S.* v. *Rock Royal Cooperative* (1938), 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446. *H. P. Hood & Sons* v. *U.S.* (1938), 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. *U.S.* v. *Wrightwood Dairy* (1941), 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726.

Ice Cream

The sanitary control of ice cream, a frozen food[82] containing milk, cream, sugar, flavoring, and sometimes other ingredients (such as eggs, gelatin, etc.), is a necessary public health measure, since contaminated ice cream may cause epidemics and outbreaks of disease. In order to achieve such sanitary control, the State or a municipality may properly require that all persons manufacturing ice cream for sale within their jurisdictions shall be licensed,[83] although it has also been held that a municipality cannot regulate and license ice cream factories situated beyond the territorial limits of the city.[84] A city sanitary code requiring that local dealers who purchase milk and cream from outside sources should obtain such products only from licensed dealers has been construed as not applying to a local dealer who purchased ice cream from an unlicensed producer, since ice cream was not mentioned in the law.[85] Where a statute required that a manufacturer of frozen desserts must be licensed, and set a fee for such licenses, it was held in a Florida case that a manufacturer who was also a retailer must pay the fee for each of his stores.[86]

A municipal ordinance requiring that ice cream cones and other forms of ice cream be consumed on the premises where sold has been held to be void as unreasonable.[87] A tax of seven cents a quart on all ice cream sold has also been declared invalid on the grounds that it was so excessive as to tend to ruin and suppress a legitimate business.[88]

A municipal ordinance prohibiting the sale of ice cream manufactured by any method other than one in which the ingredients flowed from the pasteurization apparatus directly into the freezing apparatus and from there directly into sterile containers, has been upheld as a valid exercise of the police power.[89] In this case, an injunction to

82. *Merle* v. *Beifeld* (1915), 194 Ill. App. 364. Ice cream is a food. See U.S. Public Health Service Frozen Desserts Ordinance and Code, 1940.

83. *Wright* v. *Richmond County Department of Health* (1936), 182 Ga. 651, 186 S.E. 815.

84. *City of Rockford* v. *Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317. *Miller* v. *Williams* (1935), 12 F. Supp. 236.

85. *Syracuse Ice Cream Co.* v. *Cortland* (1912), 138 N.Y.S. 338, 153 App. Div. 456.

86. *State ex rel. Sidebottom* v. *Coleman* (1936), 122 Fla. 434, 165 So. 569.

87. *Kohr Bros.* v. *Atlantic City* (1928), 104 N.J.L. 468, 142 A. 34.

88. *Martin* v. *Nocero Ice Cream Co.* (1937), 269 Ky. 151, 106 S.W. (2d) 64.

89. *Gilchrist Drug Co.* v. *Birmingham* (1937), 234 Ala. 204, 174 So. 609, 111 A.L.R. 103. *McKenna* v. *City of Galveston* (Tex. 1938), 113 S.W. (2d) 606.

prevent enforcement of the ordinance was sought by a drug store operator who had a counter freezer, a device for freezing ice cream mix prepared elsewhere, but the injunction was denied by the court. Said the court:

Complainant [the druggist] has shown extraordinary precautions in the manufacture of its ice cream, but the question for the court is whether or not the manufacture as a whole by such counter freezer methods, by various ice cream vendors in large centers of population, has a tendency for detriment to the public health. Upon that question, if men may reasonably differ in view of all the circumstances, the courts should not interfere. Has the police power of the city been manifestly transcended in this case? We cannot so declare.

On the other hand, it was held in another case that the freezing, without a permit, of a mixture of the ingredients of ice cream in a counter freezer was not a violation of a statute requiring a permit from the Commissioner of Agriculture for the manufacture of ice cream, since the law as written applied only to the place where the complete manufacture of ice cream occurs.[90] The court said:

We are not unmindful that the statute under review is a sanitary measure, and that its object and purpose are highly to be commended. But we must not overlook the further fact that this is a criminal prosecution wherein the defendant is entitled to the benefit of any reasonable doubt as to whether or not he has violated the law. To say the least, it is extremely doubtful whether this statute was intended to apply to the operations undertaken by him.

Although it has been held that prohibition of the sale of ice cream having less than 10 per cent butterfat is unconstitutional as having no real and substantial relation to public health,[91] and that a butterfat standard for frozen products such as frozen custard is invalid for the same reason,[92] laws imposing butterfat standards for ice cream have been sustained as constitutional by the United States Supreme Court.[93] Such a law was upheld by the Nebraska Supreme Court in 1938[94] in a case holding that a product made in a counter freezer and having

90. *Robertson* v. *Commonwealth* (1937), 168 Va. 752, 191 S.E. 773. See *S. H. Kress & Co.* v. *Dept. of Health* (1940), 283 N.Y. 55, 27 N.E. (2d) 431.

91. *Rigbers* v. *Atlanta* (1910), 7 Ga. App. 411, 66 S.E. 991.

92. *New Orleans* v. *Toca* (1917), 141 La. 555, 75 So. 238, L.R.A. 1917 E 761, Ann. Cas. 1918 B 1032.

93. *Hutchinson Ice Cream Co.* v. *Iowa* (1916), 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917 B 643. *Crowl* v. *Commonwealth* (1916), 243 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217; affirm'g (1914) 245 Pa. 554, 91 A. 922.

94. *State* v. *McCosh* (1938), 134 Neb. 780, 279 N.W. 775.

only 6.9 per cent butterfat, was in violation of a statute requiring that ice cream and dairy products made in the semblance of ice cream should contain not less than 14 per cent butterfat.

A regulation of a borough board of health prohibiting false labels and requiring the name and address of the manufacturer to appear on all wrappers, and providing that no license should be issued until the board was satisfied that all state laws and regulations had been complied with has been upheld in Pennsylvania.[95] In this case the ice cream had been labelled with a fictitious name, not the real name of the manufacturer.

Filled Milk

Legal aspects of filled milk are presented in Chapter XII, on Foods, Drugs, and Cosmetics.

95. *Simco Sales Service of Penna.* v. *Brackin* (1942), 344 Pa. 628, 26 A. (2d) 323.