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THE WISCONSIN MARKETING LAWS*

By Alvin C. Reis

The ideal administrative statute is one which allows the department or commission a broad discretion as to what its order shall contain and under what circumstances it shall be issued but circumscribes that department or commission with the requirements of due process of law: namely, notice, hearing and complete judicial review.

The Wisconsin Department of Markets' law—enacted by Chapter 571, Laws of 1921, as amended by Chapter 366, Laws of 1923, and now existing as Chapter 99 of the Wisconsin Statutes—is perhaps the most intensive administrative statute in Wisconsin.

SUBSTANTIVE POWERS

The substantive powers of the department may be summarized under nine heads:

1. Furnishing market and trade information relative to prices, supply, demand, profits, costs of distribution and other data related to marketing.
2. Assisting and supervising co-operative associations.
3. Assisting and supervising such public markets as are authorized by law.
4. Standardization, labeling and inspection of food products and farm products.
5. Adoption of Wisconsin brands.

*Author's Note: The outline on Unfair Competition is from the brief in the action by the Standard Oil Company against the Department of Markets, in the Circuit Court of Dane County, 1922. The layman's dissertation upon Standardization, Inspection and Labeling is a reflection of addresses delivered before the Western Canners' Convention, 1923, and the International Stewards' Association, 1924. Compulsory Inspection and Interstate Commerce is excerpted from an unused brief in a test case under the declaratory relief statute, the brief never being used because the statute was repealed. It is hoped that the foregoing heterogeneous circumstances will constitute an apology for the mixed scheme of presentation and for the weird medley of law, cheese-making and potato grades.

1 Assistant Attorney General and Counsel, Department of Markets.
(6) Prohibition of unfair methods of competition and unfair trade practices and the prescribing of fair methods of competition and fair trade practices.

(7) Enjoining of waste in the marketing of food and fuel.

(8) Emergency power to relieve or avert a scarcity of food or fuel.

(9) Assisting the Attorney General in enforcing the anti-trust, anti-discrimination, boycott and other trade statutes.

Powers to Obtain Evidence

In order to make its substantive powers effective, the department is clothed with three powers to obtain evidence, which are the real teeth in the statute (contrary to popular diagnosis).

(1) The first method of obtaining evidence is by issuance of a subpoena, violation of which is a misdemeanor! The pathetic part about the subpoena power in the laws of several other administrative agencies in the state is that the administrative subpoena means nothing—the party may disregard it ad libitum—and the commission's only recourse is to go to court and get a second subpoena. This is a little awkward, especially when the hour of the hearing has arrived and the subpoenaed party has chosen to disregard the commission's script in re his attendance. To approach the circuit court for an actual virulent subpoena at that time is to lock the stable door after the culprit has made his exit. Moreover, the Supreme Court of Missouri has held that a court cannot be called upon to issue a subpoena in aid of an administrative proceeding, since this is the exercise of a non-judicial function. If such is the law of Wisconsin, then other administrative bodies in Wisconsin are thrown back solely on their invitations to be present, which carry no force of law. The subpoena of the Wisconsin Department of Markets, however, is itself given the force of law by statute providing that violation of that administrative subpoena shall be a crime.

(2) The second method of obtaining evidence is through issuance of a special order directed to the individual and ordering him to submit the information in writing, sworn or unsworn, at the department's option. This enables the department—through the use of fourteen cents in postage stamps—to obtain evidence without resort to subpoena process, with its concomitant statutory travel rate of eight cents per mile each way. Violation of such an order is punishable by a maximum of $5,000 fine and one year's imprisonment. (No minimum is provided. Indeed, the marketing statute, as an entirety, does the trial court the courtesy of never prescribing a minimum.)

(3) The third method of obtaining evidence is embraced in the power conferred upon the department to have actual access to the
documents in the possession of the party from whom the information is elicited. This power naturally can be exercised only for purposes within the department's powers and, further, must be read in the light of the constitutional inhibition against unlawful searches and seizures.

**Analysis of Substantive Powers**

The substantive powers of the department are not all of equal significance nor of the same legal import.

The investigative or inquisitorial power: namely, to probe and publish price and profit figures, seems to be the most conspicuous and notorious. The average newspaper reader probably feels that the primary function of the Department of Markets is to investigate the price of bread and coal and gasoline. (The department has even been asked to report upon alleged profiteering by undertakers.) Yet investigation is not one half of one per cent of the department's activity.

Assistance to co-operative associations has so far been the department's paramount task. During the past biennium, the department has done the actual legal organization work, that is, drafting of Articles of Incorporation, By-Laws and Marketing Contracts—for seventy co-operative organizations of Wisconsin farmers. Some of these projects are designed to reach considerable proportions. The contract, for instance, of the Wisconsin Co-operative Creamery Association with its member creameries will apply to at least THIRTY MILLION DOLLARS' worth of butter, this agreement being an instrument drawn to cover three years of operation, with a minimum of 25,000,000 pounds annual production of butter as a starting point.

The authority to assist such public markets "as are authorized by law" has been a dormant authority, inasmuch as there are no public markets authorized by law. Engaging by the state itself in the marketing business is generally considered to be forbidden by Article VIII, section 10, of the state constitution and the city marketing bill has been defeated in a half dozen consecutive sessions of the legislature.

**Delegation of Power**

Neither the investigative power nor the power in relation to co-operative associations or public markets presents the typical administrative statute. Nor do some of the other groupings, in the above enumeration of nine, after a perfect exemplification of administrative law.

"Administrative law is a convenient term to indicate that branch of modern law relating to the executive department of government, when acting in a 'quasi-legislative' or 'quasi-judicial' capacity": i. e., when
making rules for the future conduct of others (legislative) or hearing and determining merits of particular cases (judicial).—Preface to The Growth of American Administrative Law, Thomas Law Book Company, 1923.

If we are gullible enough to swallow this tasteless Latin prefix—"quasi," which means "as if," a sort of device used by courts in performing the ostrich trick—I say, if we are to look at the functions of the department which appear "as if" they were legislative or judicial, just as a general safety order of the Industrial Commission looks "as if" it were legislative and its award to an injured employee under the compensation act seems "as if" it were judicial—then the outstanding administrative powers in the marketing law are those relating to (1) Prohibition of Unfair Methods of Competition in Business; (2) Standardization of Food Products, Compulsory Inspection, and Labeling Requirements; (3) Enjoining Waste and Needless Duplication in the Distribution of Food or Fuel; (3) Emergency Power to Assist the Governor in Averting or Relieving a Scarcity of Food or Fuel.

I omit from this paper all discussion of the latter two powers, because there is such a dearth of judicial decision in regard to both of them that their exposition would smack more of a philosophical monograph than of a law review article intended to refer, at least casually, to law.

The Unfair Competition power and the Standardization power (with its accompaniments) embrace many legal aspects—constitutional considerations—some of which are elaborated in the following discourse, others of which will be connoted to the normal legal mind.

Prohibition of Unfair Methods of Competition in Business

Wisconsin has the following unique section in its statutes—unparalleled in the legislation of any state. Its only counterpart is the Federal Trade Commission Act in interstate commerce.

Section 99.14, Wisconsin Statutes, reads:

“(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

“(2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

“(3) The department, after public hearing, may issue a special order against any person, enjoining such person from employing any method of competition in business or trade practice in business which is determined by the department to be unfair. The department, after public
hearing, may issue a special order against any person, requiring such
person to employ the method of competition in business or trade practice
in business which is determined by the department to be fair."

I.

I. THE POWER IN SECTION 99.14, SUBSECTION 2—TO ISSUE GENERAL
ORDERS PROHIBITING METHODS OF COMPETITION WHICH THE
DEPARTMENT DETERMINES TO BE UNFAIR—IS CONSTITUTIONAL

(a) The prohibition of unfair methods of competition in business is
within the police power.

The Federal Trade Commission Act, the only other enactment in the
country which contains this power, has been sustained.

(1922). National Harness Manufacturers' Association v. Federal

(b) The statute contains the procedural incidents requisite to due
process of law.

(1) There must be a public hearing before an order is issued (sec.
99.24 (2)), notice of public hearing must be published (sec. 99.24 (1))
and the general orders must be published (sec. 99.24 (3)).

The Supreme Judicial Court of Massachusetts has held, incidentally,
that a hearing is not a prerequisite to a general order. The evident
ground is that a general order is legislative in character, as distinguished
from judicial.

Belcher v. Farrar, 8 Allen (Mass.) 325 (1864).—Our Supreme Court
has held, in a case involving the status of a certain medical college, that
hearing is implied as a preliminary.—State ex rel. Milwaukee Medical
College v. Chittenden, 127 Wis. 468 (1906).

(2) Judicial review of the department's order is provided, exactly
as is stipulated for review of the railroad commission's orders in public
utility cases, and the department's findings of fact are expressly stated
to be merely presumptive (sec. 99.27 (1)).

Indeed, it must be said that the Supreme Court of the United States,
by a divided opinion, has recently cast a grave doubt over administrative
statutes, or at least certain types of them, which make findings of fact
"conclusive." The decision apparently is that—as matter of due process
of law, thus always raising a federal question, as distinguished from the
matter of delegation of power, which is a state question—judicial review
must be provided not only upon the law but also upon the facts, at
least under some circumstances.

(3) The penalties in the law are not so excessive as to intimidate persons from resort to the courts to test its legality or the validity of an order. There are no cumulative penalties provided in the statute nor are the penalties imposed for vague and indefinite offenses, since the order is, itself, the definition of the general phrase "unfair competition."

Trading Stamp Cases, 166 Wis. 613, 627 (1917). Wadley Southern Ry. v. Georgia, 235 U. S. 651 (1915). The statute in this case, though imposing a $5,000 penalty for each violation of an order and TREATING EVERY DAY THE VIOLATION CONTINUES AS A SEPARATE OFFENSE, was nevertheless held not to be a denial of due process, so long as the party affected had opportunity for hearing before the issuance of the order and a right to bring action to review the order.

The maximum penalties provided in the marketing law for violation of an order issued under sec. 99.14 (2) are identical with those contained in the state's anti-trust and anti-discrimination statutes: namely, $5,000 fine and one year's imprisonment and—in the case of a corporation—revocation of corporate rights.

(c) There is no denial of equal protection of the law in sec. 99.14 (2).

Sec. 99.14 (2) relates to orders forbidding unfair methods of competition in business. "Business" is defined, in sec. 99.01, as "any business, except that of banks, building and loan association, insurance companies and public utilities subject to the jurisdiction of the railroad commission."

The reason for the exceptions is obvious. Banks, building and loan associations, insurance companies and public utilities are, respectively, under the jurisdiction of other state commissions. Reasonable exemption is not arbitrary classification. The definition of business in the Federal Trade Commission Act is similarly circumscribed.


There is no more opportunity afforded by sec. 99.14 (2) for discrimination between industries or occupations or acts than is conferred in the industrial commission's power to issue safety orders for a particular industry or the railroad commission's authority to issue service orders applicable to a given class of utilities. The statute, though authorizing orders which may recognize classifications, is not, inherently, a discrimination against particular classes. Whether or not a particular order represents an arbitrary classification is a matter to be decided as to each order when its legality is questioned.

(d) The authority in sec. 99.14 (2) to issue general orders forbid-
There is no unconstitutional delegation in placing the definition of the term "unfair methods of competition" in the hands of the department and imposing a penalty for violation of its general order. The legislature has declared that "methods of competition in business . . . shall be fair" and that "unfair methods of competition in business . . . are hereby prohibited." The department's determination that a particular method of competition is unfair is not final; it is subject to review by the courts. Even its findings of fact are only presumptively correct. Hearing and notice are required before the department makes its determination. Under these circumstances, the power of definition given to the department does not constitute a void delegation.


"That act declares unlawful 'unfair methods of competition' and gives the Commission authority after hearing to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the act is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the review provided, has the determination of practice which come within the scope of the act."


"With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges the administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is only so in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the Commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court."

The railroad commission's authority to prescribe "reasonable" rates is comparable, in a measure, to the Department of Markets' authority to enjoin "unfair" methods of competition. The railroad commission law has been sustained.

There is no more pronounced delegation to the Department of Markets in sec. 99.14 (2) than is made to the railroad commission under certain miscellaneous provisions of its law.

State v. Kenosha E. R. Co., 145 Wis. 337 (1911).
The statute upheld in this case (sec. 1797m-74 of Chap. 499 of the Laws of 1907) provided that no public utility could enter a municipality, where one already existed, unless it secured from the commission a declaration "that public convenience and necessity require such second utility."

Milwaukee v. Railroad Commission, 162 Wis. 127 (1916).
Sec. 1797-12e, Stats. 1913, authorized the railroad commission to order alterations in railroad crossings, or the substitution of a crossing not at grade, where public safety required such alteration or substitution. The court, declaring this statute valid, says (at p. 129)—per Winslow, C. J.: "The time has gone by when it can be successfully claimed that such a law unlawfully delegates legislative power to an administrative body. The legislature has exercised the legislative function by declaring that unsafe crossings shall be made safe; it can properly delegate to an administrative board the power to ascertain the crossings which are in fact unsafe, and to prescribe the manner of making them safe. If this could not be done the police power would be unable to cope with many of the most serious problems of modern life."

The "securities division" law approaches an enactment without any primary standard set out therein as a guide for the commission.

This decision sustained sec. 1753-13, of Chap. 576 of the Laws of 1907, which read in part: "No public service corporation shall hereafter issue any stock, stock certificates, bonds or any other evidences of indebtedness payable in more than one year from date, until it shall have first obtained authority for such issue from the Railroad Commission. . . ."

The industrial commission's power in issuing orders under sec. 101.10, which provides only that places of employment shall be "safe"—is about as comprehensive as the Department of Markets' authority in sec. 99.14 (2). There is, indeed, one significant fact which makes the former delegation the more marked, namely, that a hearing is not a condition precedent to the issuance of the industrial commission's order and even a petition for hearing upon the order after its issuance may be denied by the commission (sec. 101.15).

The industrial commission's power in enforcing the workmen's compensation statute is a more drastic delegation than is sec. 99.14 (2) of the marketing law, for the reason that the industrial commission's find-
ings of fact are made conclusive, in the absence of fraud. The theory that the compensation statute is optional does not mitigate, in the least, the delegation of power. The idea that the statute is optional may mean that a private party, being deemed to consent to the conclusiveness of the findings, is not deprived of property without due process of law. The state constitution's inhibition upon the legislature, however, through the doctrine of the separation of governmental powers, is not affected by a private party's waiver of his personal rights under the statute. The industrial commission's power in this respect, however, was sustained in *Borgnis v. Falk*, 147 Wis. 327 (1911).

Mr. Chief Justice Winslow, in an exhaustive opinion, remarks (at pp. 358, 359):

"There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. . . . They perform very important duties in our scheme of government, but they are not legislatures of courts. The legislative branch of the government by statute determines the rights, duties and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the legislature can not remain in session and pass a new act upon every change in conditions, but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law, and when conditions have changed so as to call into activity other provisions. The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very great powers, and its conclusions may be given great dignity and force so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong."

A distinction is suggested between the Department of Markets in determining what method of competition is unfair and the industrial commission, for instance, in declaring what place of employment is "unsafe" or the railroad commission in deciding that a certain rate is or is not "reasonable." What place is safe and whether a particular rate is reasonable are regarded as questions of fact. Under the Federal Trade Commission Act, however, whether a method of competition is unfair is held to be a question of law.


The argument is, therefore, made that the Department of Markets is not merely finding facts—which is the ordinary judicial acceptation of the administrative function—but that it is applying law, which is the exercise of judicial power, and a void delegation. In answer it may be
said, however, that the railroad commission—in “finding” a rate—frequently applies some legal principles.

The most that can be said, if the unfairness of competition is an issue of law and not an economic or business question, is that the department’s conclusion of law is of no weight. Unlike the findings of fact, its conclusion of law is not even presumptively correct. Non sequitur, however, that the power to render it is void.

The delegation to the department being assumed to be proper, it follows that the statute may make violation of its order punishable by fine and imprisonment.


This case held that parties *could be held criminally liable for violations of an order of the Secretary of Agriculture* which was not specifically authorized but which was mentioned merely by the general provision that said Secretary “may make such rules and regulations and establish such service as will insure the objects” of the subject-matter of the statute.

The court says (at pp. 517, 518):

“It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. . . .

“From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under general provision ‘power to fill up details’ by the establishment of administrative rules and regulations, the violations of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress. . . .”

*Pierce v. Doolittle*, 130 Iowa 333, 336 (1906).

*State v. Atlantic Coast Line*, 56 Fla. 617, 640 (1908).

The Federal Trade Commission’s orders, it is true, are not self-enforcing, that is, violation of the order itself is not punishable. Application to the court must be made before the order becomes effective. This innovation, however, appears to be one of congressional policy and does not necessarily indicate a constitutional prohibition. Orders of Wisconsin commissions are—in general—self-executing, without the intervention of a court of law.

No question has ever been successfully raised as to the right to impose a penalty for violation of the order of the railroad commission or of the industrial commission, even though the statute merely in general language, without specification, defines the offense. *The very fact of delegation obviates the objection to the indefiniteness of the offense as described in the statute.* Indeed, a statute penalizing an undefined
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offense IS UNCONSTITUTIONAL, UNLESS IT provides for delegation of power to define the offense.


This case held that it was a denial of due process of law and a failure to inform the accused of the nature of the accusation, if a statute—the Lever Food Control Act—merely punished the exaction of an UNFAIR price or UNFAIR profit, without establishing in advance the definition of unfairness.—"The section forbids no specified or definite act."—Per Mr. Chief Justice White.

We are driven to the conclusion that, unless the state does provide for administrative definition of the term "unfair competition," the state is powerless to enact a valid statute prohibiting unfair competition, unless—in the statute itself—it specifies every state of facts to which it intends the prohibition to apply. This reduces to an absurdity—at least from a practical point of view—the argument that the definition of the term "unfair competition" can not be delegated to the department, subject to judicial review.


"This position tends to the conclusion that by the adoption of its constitution, which vested the whole legislative power in the senate and assembly and forbade its delegation, the state was shorn of some of its usual necessary powers of sovereignty and became impotent to exercise the power of regulation. . . . Such construction would make the mere implications of the constitution greater than the constitution itself and would lose sight of the main and paramount purpose of the creation of the state and the adoption of the constitution. . . . This is called by counsel the doctrine of expediency, but we think it the doctrine of common sense that forbids implications from an instrument which tend to render nugatory or to destroy that instrument."


The court, deciding in this case that the Iowa Railroad Commission Act is not valid, says (pp. 874, 875): "There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal constitution. So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force. . . .

"Justice will be more likely done if this power of fixing rates is vested in a body of continual sessions than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing conditions of circumstances. While, of course, the argument from inconvenience can not be pushed too far, yet
it is certainly a matter of inquiry whether in the increasing complexity of
our civilization, our social and business relations, the power of the legis-
lature to give increased extent to administrative functions must not be
recognized."

The legislature of Wisconsin has done the practicable thing, and is
within its constitutional powers, in delegating to an administrative de-
partment the authority, by order, to define unfair methods of competi-
tion. For the legislature to reject this alternative is to place itself in the
dilemma of either having to enumerate an immutable category of
offenses in the statute itself or letting its statute be destroyed upon the
rocks of the United States Supreme Court’s decision in the Cohen case,
if it simply prohibits “unfair methods of competition” without further
provision for specification of the wrong.

II.
THE POWER IN SECTION 99.14, SUBSECTION 3—TO ISSUE A SPECIAL
ORDER FORBIDDING A PARTICULAR PERSON TO CONTINUE A
METHOD OF COMPETITION WHICH THE DEPARTMENT
DETERMINES TO BE UNFAIR—is CONSTITUTIONAL

The same considerations which sustain, as constitutional, the power
to issue general orders forbidding unfair methods of competition are
a foundation for the power to restrain any particular individual or cor-
poration from pursuing a particular unfair method of competition.
The subject is within the scope of the police power, whether, for in-
stance, action may be against sixty oil jobbers, generally, to prevent an
undue hindrance of competition or against one named company,
specifically, to prevent an undue hindrance of competition.
The same procedural incidents, which constitute due process of law,
are applicable, except that—in an action which contemplates a special
order—a complaint and notice of hearing must be served upon the de-
fendant (instead of publication of notice of hearing) and, if an order is
issued, it must be similarly served (instead of being published).

There is no more denial of the equal protection of the laws in the
section authorizing special orders than in that which sanctions general
orders.
The delegation of power is no more extreme in relation to a special
than to a general order.
The railroad commission’s orders are always special orders, except
for a few general service orders. The industrial commission’s orders
are frequently special, save for its general safety orders, and all of its
awards under the workmen’s compensation act are necessarily special.
The securities division’s grant of permit is special, not general.
The Federal Trade Commission can issue only a special order. It has no power to enter a general order. It must proceed against each defendant, individually, and an order in one case—it is self-evident—does not bind other persons even similarly situated. The Federal Trade Commission Act, however, has been declared constitutional by the Supreme Court of the United States and several lower courts.

In *T. C. Hurst & Son v. Federal Trade Commission*, 268 Fed. 874 (1920), the commission's statute was sustained, although objections were made to it "because the order and proceedings sought to be enjoined discriminate between persons engaged in the same line of business, and take away the property of one . . . without molesting the other . . . the specific complaint being that the commission may not proceed against a particular person, firm or corporation, believed to be engaged in unfair competition but must in the same proceeding include all other persons similarly engaged."

**Standardization of Food Products, Compulsory Inspection, and Labeling Requirements**

Wisconsin has the most comprehensive law of any state in the country in relation to the standardizing and labeling of food products.

It would be tedious to set out the text of sections 99.10 to 99.12, inclusive, inasmuch as they cover one hundred thirty lines in the statutes. The provisions, necessarily intricate, are worked out in minute detail.

**Summary of the Law Relative to Standardization, Inspection and Labeling**

The statute creating the Wisconsin Department of Markets empowers that administrative department to establish standards for the grade of food products and farm products, and for containers therefor, to prescribe regulations governing the marks and tags thereon, and to require the official inspection thereof.

"Grade" is defined to include, "in the case of food products or farm products, grade according to quality, quantity, type, variety, size, weight, dimensions or shape of the product, and, in the case of receptacles, grade according to quality, type, size, weight, content, dimensions or shape of the receptacle."

"Food products" are defined to mean "all articles and commodities used for food, drink, confectionery or condiment."

"Farm products" are defined to mean "all products of agriculture, horticulture, dairying and of livestock, poultry or bee raising."

Marking or tagging may be prescribed so as to show "the name, address or serial number of the person producing or marketing the product..."
or receptacle, the grade of the product or receptacle, the quality, quantity, type, variety, size, weight, content, dimensions or shape of the receptacle."

As a means of enforcing the standard, the department may—by general order—require any product or receptacle to bear the official certificate of a licensed inspector, and, where necessary to secure the adequate enforcement of such an inspection order, the department may fix and cause to be collected a reasonable, uniform fee for certification.

Criminal penalty of a maximum of $500 fine or six months' imprisonment is provided for any person who markets a product or receptacle which is improperly labeled or which is not labeled at all, if labeling is required, or who fails to have it officially inspected where official inspection is required.

"Marketing" is defined to include, as applied to food products or farm products, "packing, storing, loading, offering or shipping to a point within the state, if any of these acts is for a commercial purpose, or selling"; and as applied to receptacles, is defined to mean "using such receptacles in the course of marketing food products or farm products."

The statute provides that no standard or regulation or inspection requirement under this statute, "which is repugnant to any requirement made mandatory under federal law, shall apply to products or receptacles which are being shipped from the state in interstate commerce."

The law further stipulates that no "standard shall apply to products or receptacles coming from outside the state but such products or receptacles may be required to be marked or tagged to indicate that they came from outside the state and to show any other fact regarding which marking or tagging may be required under this section; provided, that such products or receptacles, at the time when marking or tagging is required, have ceased to be in interstate commerce."

The law also states that no standard "for the grade of any food product or farm product shall affect the right of any person to dispose of such product without conforming to the standard, but such person may be required to mark or tag such product, in such manner as the department may direct, to indicate that it is not intended to be marketed as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required. . . ."

No standard or regulation or inspection requirement may be established except after public hearing and no standard is allowed to be effective until thirty days after its publication.

Judicial review of any standard, order or regulation is provided.
Analysis of the Law Relative to Standardization, Inspection and Labeling

First: The standards are not established by the legislature but, on the contrary, a discretion is committed to the administrative department to determine what the standard shall be. This policy results in convenience, elasticity and equity.

(a) As to convenience—If the Legislature established standards on cheese and a particular provision proved impractical, the condition could not be remedied until the next legislature convened two years later. With the administrative department, however, standards are established after public hearing and can be amended after public hearing within a week's or a month's time, if necessary, without waiting for the legislature.

(b) As to elasticity—It may be that a six per cent tolerance for defects in No. 1 potatoes is proper normally but that in a particular year a heavier or lighter tolerance is desirable. A legislature would be powerless to adjust this situation because it would not be in session but the Department of Markets being always in session can mold its requirements to meet crop conditions.

(c) As to equity—A legislature passes bills, or at least may pass them, without public hearing and without regard to the evidence, if any, which may be before it. The administrative department is required to hold a public hearing, to give the trade a chance to be heard, to listen to their views and the views of those representing the public and to be guided in some measure by the evidence before it, so that a reasonably fair and justifiable regulations is assured.

Second: The law authorizes the standardizing and labeling of ALL food products: Perhaps the broadest statutory authority in this regard in any state. A mere stating of this proposition is sufficient to indicate its stupendous scope.

Third: The law allows the standardizing and labeling as to the grade of both the product and the receptacle and grade is defined to mean—in the case of the product—grade as to quality, quantity, type, variety, size, weight, dimensions or shape of the product and—in the case of the receptacle—grade according to quality, type, size, weight, content, dimensions or shape of the receptacle.

This represents an extremely broad category of classifications and extends the standardization far beyond the matter of quality and into the factors noted.

Fourth: The law applies the regulations to all of the product packed in Wisconsin, not merely sold in Wisconsin but packed in Wisconsin, regardless of the place of its ultimate sale. This is not like the ordinary misbranding statute, which is confined to domestic sales.

Wisconsin produces seventy per cent of the cheese of the whole United States; it produces ninety-one of the so-called foreign types.
Ninety-five per cent of Wisconsin cheese goes outside of the state, yet each Wisconsin cheese has the grade stamp “Wisconsin Fancy,” “Wisconsin No. 1” or “Grade 2” imprinted under the paraffin.

Ninety per cent of Wisconsin potatoes—9,000,000 bushels, 4,000,000 sacks—leave the state each year with the grade tag sewed into the sack.

Wisconsin produces fifty per cent of the peas of the United States but the label on each can of peas packed in Wisconsin states the variety and size of the peas in the can (subject to one exemption).

There is no other state in the Union, to my knowledge, which has a general standardization statute of such intensity.

Fifth: There is one limitation upon the power of the state of Wisconsin in this regard: namely, that its regulations must not conflict with any federal regulations which have been made mandatory under federal law. The federal law is supreme and takes precedence, but it so happens that in this matter of standardization and compulsory labeling there is no federal law except as to a few products, principally grain. The federal Government has recommendations as to the appropriate grading of such commodities as peas but they are pure recommendations and their adoption is not required and, therefore, the Wisconsin regulations hold the field alone under such circumstances.

Sixth: The Wisconsin standardizing and branding statute is compulsory as a branding statute but voluntary as a grading statute.

(a) It is compulsory as a branding statute—that is, after the regulation is established there must be some designation placed upon the product or the container; in the case of honey, for instance, either Wisconsin Fancy, Wisconsin No. 1 or Ungraded. That is different from most misbranding statutes which penalize an untruthful branding but can not compel affirmatively a truthful branding.

(b) It is voluntary as a graduate statute—that is, every producer and shipper has the ungraded privilege, the right to either grade or to ship ungraded, provided that the products are properly labeled to show that they are ungraded, for instance, potatoes—Wisconsin Badger Brand, No. 1, No. 1 Small, No. 2 and Ungraded.

The Wisconsin standardization and labeling law, in short, though compelling the product to bear some brand, does not demand that the shipper’s product come up to a certain standard or else be contraband. In other words, a producer or dealer has a right to market his commodity as a lawful product even though it can not come up to the terms of the standard, but he must tag or label this product to show that it is below the standard. This is not as drastic as the former Pennsylvania law on oleomargarine or the Wisconsin law on filled milk, filled cheese or cheese exceeding thirty-eight per cent moisture, these statutes being absolutely prohibition statutes, forbidding the marketing of the product altogether, regardless of how it is labeled.
Seventh: The method of enforcement of the Wisconsin law on standardization is threefold:

(a) The first method of enforcement is criminal prosecution for mis-grading. This is satisfactory where the requirements for the standard are definite, such as in potatoes, namely, that the potatoes must be at least one and seven-eighths inches in diameter and show not more than six per cent defects of which not more than two per cent may be dry rot. These are specific requirements capable of mathematical determination and their enforcement can be assured through criminal action.

Criminal prosecution, however, is unsatisfactory where the requirements are indefinite, such as a cheese where, for instance, No. 1 cheese is said to have a "pleasing flavor" and Fancy cheese is required to have an "exceptionally fine and pleasing flavor." These things mean something to an expert, but they are not sufficiently concrete as a basis for criminal prosecution. It is elementary that a criminal penalty must be predicated upon a definition of the crime. A man cannot be fined or imprisoned for violation of such hazy and intangible requirements.

(b) The second method of enforcement is the withdrawal of the grade privilege; that is, where a man deliberately misgrades, his right to use the grades is revoked and he is required, thereafter, to ship his product ungraded. He is not forbidden to market his product altogether—he is not put out of business—but he has violated the grade privileges and the law says that thereafter he may be required to stop using those privileges which he has abused and be confined to marketing his product as ungraded. This is, in a measure, an unsatisfactory expedient because, in order to revoke the grade privileges, we must prove that the party intentionally misgraded and it is impracticable to prove this intent.

(c) The third method of enforcement in the Wisconsin standardization law and one which I recommend to any state as the best means of enforcing standards, is the system of compulsory inspection with revocation of the license to inspect.

The mechanics of the system are the following: We establish standards, then by general order we require the official inspection of the product and demand that it bear the certificate of a licensed inspector. Thereafter, the only obligation of a shipper or dealer is to have his product officially inspected, and we enforce the standards by revoking the license of any inspector who issues a false certificate, either intentionally or because of incompetence.

For instance, we standardized potatoes and by General Order No. 1 provided for their compulsory inspection. We actually licensed 337 potato inspectors. This does not mean, however, that the state treasury paid the salary of 337 inspectors. On the contrary, only a few supervisors were paid a salary, whereas practically all the inspectors were handled upon a fee basis.

Our system was to license the dealer himself to inspect his own potatoes. As a dealer he would pay the fee to the state for having his potatoes inspected. As an inspector he would get the fee back again. This may seem like stupid bookkeeping, but herein lies the enforcement.

Suppose there are two dealers, Mr. Jones and Mr. Smith, in a little
town and both are licensed as inspectors. Each dealer inspects his own potatoes and pays the fee to the state as a dealer and gets it back again as an inspector. But, some day Mr. Jones begins to misgrade and attach improper certificates. We revoke the license of Mr. Jones to inspect. Thereafter, Mr. Jones must submit to the inspection of Mr. Smith, and Mr. Jones continues to pay in the fee to the state but Mr. Smith gets it back.

The system of compulsory inspections upon a fee basis is, in my opinion, the most effective method of enforcing state standards for a food product.

**Delegation of Power in the Standardization Sections**

The standardization sections represent an acute delegation of power. Whether our Supreme Court will sustain them, in view of the Dowling and Burdge cases, is a question. Those cases held, respectively, that the legislature could not authorize the Insurance Commissioner to draw a standard form of insurance policy nor could the legislature empower the Board of Health to determine what diseases were contagious and check them (these being "legislative" functions).

Perhaps, however, our highest court has progressed since those decisions.

*Dowling v. Lancaster Ins. Co.*, 97 Wis. 50 (1897).
*State ex rel. v. Burdge*, 95 Wis. 390 (1896).

The Supreme Court of the United States has certainly sustained delegations of power which are tantamount to that in the standardization sections of the Wisconsin marketing law.


The United States Supreme Court, in this case, decided that Congress may delegate to an administrative official the power to establish standards of purity, quality and fitness for consumption of tea imported into this country and make it a criminal offense to import tea which did not conform to standards thus established.

The court says (at p. 495): "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

*In re Kollock*, 165 U. S. 256 (1899).

This decision sustained the act of Congress which provides that oleomargarine shall be "marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe."

The court says (at pp. 533, 537): "It is argued that the statute is invalid because it 'does not define what act done or omitted to be done
shall constitute a criminal offense' and delegate the power 'to determine
what acts shall be criminal' leaving the stamps, marks and brands to be
defined by the Commissioner. . . ."

"The criminal offense is fully and completely defined by the act and
the designation by the Commissioner of the particular marks and brands
to be used was a mere matter of detail. The regulation was in execution
of, or supplementary to, but not in conflict with the law itself, and was
specifically authorized thereby in effectuation of the legislation which
created the offense.

"We are of the opinion that leaving the matter of designation the
marks, brands and stamps to the Commissioner, with the approval of the
Secretary, involved no unconstitutional delegation of power."


This decision upheld the federal meat inspection statute which pro-
hibited the sale of any meat product "under any false or deceptive name"
and provided that "the Secretary of Agriculture shall, from time to time,
make such rules and regulations as are necessary for the efficient exec-
ution of the provisions of this Act."

**Compulsory Inspection and Interstate Commerce**

The most immediate question confronting the department—and a
delicate one—is in relation to compulsory inspection and interstate
commerce.

General Order No. 8 requires American cheese to bear the official
certificate of an inspector licensed under sec. 99.12. **NINETY-FIVE**
PER CENT OF WISCONSIN CHEESE GOES OUTSIDE OF
THE STATE.

The criminal complaint for noncompliance with General Order No.
8 charges that the defendant PACKED cheese without having it offi-
cially stamped.

The constitutional question is: Does the application of compulsory
inspection to the packing of cheese constitute an unconstitutional inter-
ference with interstate commerce, if such cheese are subsequently
shipped outside of the state and if it is customary for the parties whose
arrest is caused to ship the bulk of their cheese out of the state?

The following is the department's view of the matter.

I.

*The inspection requirement does not burden interstate commerce at
all, inasmuch as the inspection attaches to the product before it becomes
an article of interstate commerce."

The complaint in the action sets out the allegations which have been
used against parties charged with violating the inspection requirements.
It will be noted that the offense alleged, in each instance, is PACKING
the cheese without the inspection. It is submitted that the PACKING is
a local act, divorced from interstate commerce, and that, even though packing may constitute COMMERCE, it does not constitute INTERSTATE commerce.

_Gibbons v. Ogden, 9 Wheat. 1, 203 (1824)._ 

"The object of the inspection laws, is to improve the quality of articles produced by the labour of a country; to FIT THEM FOR EXPORTATION; or, it may be, for domestic use. THEY ACT UPON THE SUBJECT BEFORE IT BECOMES ON ARTICLE OF FOREIGN COMMERCE, OR COMMERCE AMONG STATES, AND PREPARE IT FOR THAT PURPOSE."

It is submitted that, even though it is customary for the packer to ship his cheese outside of the state and even though he may intend to so ship the particular cheese, in relation to which he is arrested, the packing nevertheless remains subject to the control of the state through inspection.

_Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 (1921)._ 

"And the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce."

_Merchants Exchange v. Missouri, 248 U. S. 365, 368 (1919)._ 

See _Hammer v. Dagenhart, 247 U. S. 251, 272 (1918)._ 


The applicability of the police power of the state to an article accustomed to or even designed for exportation is as comprehensive as that of the taxing power under the same circumstances.

_Kidd v. Pearson, 128 U. S. 1, 26 (1888)._ 

"The police power of a state is as broad and plenary as its taxing power; and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

Numerous authorities indicate that the taxing power of a state may be exercised against a commodity even though it is intended and, indeed, partially prepared for exportation from the state.

_Coe v. Errol, 116 U. S. 517, 524, 525, 526, 527, 528 (1885)._ 

"Are the products of a state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?"

"Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so exempt them from taxation? . . .

"Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind. . . . Such goods do not cease to be part of the general mass of property in the State, subject,
as such, to its jurisdiction, . . . until they have been shipped or entered with a common carrier for transportation. . . . The carrying of them . . . to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in transportation out of the state. Carrying it from the farm, or the forest to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of transportation; it is no part of the exportation itself."

*Diamond Match Co. v. Ontonagon, 188 U. S. 82, 96 (1902).*

It is submitted that, if the journey to the railroad depot—though with the intent to export—is not a part of interstate commerce, certainly the mere packing at the point of origin is not a part of such commerce.

*Bacon v. Illinois, 227 U. S. 504, 516 (1913).*

"The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. . . . He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."

*Turpin v. Burgess, 117 U. S. 504, 507 (1885).*

*Cornell v. Coyne, 192 U. S. 418, 427 (1903).*

These cases should be compared, however, with the latest decision of the United States Supreme Court in *William Lembe, as Attorney General of North Dakota v. Farmers' Grain Co. of Embden, North Dakota, 258 U.S. 50 (1922).*

II.

Assuming that the inspection requirement does constitute an interference with interstate commerce, such interference is recognized as within the power of the state, so long as there is no conflict with any federal regulations.

*Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 361 (1897).*

The Supreme Court of the United States, in this case calls attention to the fact that "clause two of section ten of article one (of the federal constitution) expressly recognizes the validity of state inspection laws" as to foreign commerce and the court adds that "we think the same principle must apply to interstate commerce."

"The principle decided in these cases is that a State or Territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress or is an attempt to regulate interstate commerce. In Patapasco Guano Co. v. North Carolina, 171 U. S. 345, it was directly recognized that the State might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce."

(P. 54)—"Inspection laws have for their object the improvement of quality and to protect the community against fraud or imposition in the character of the article received for sale OR TO BE EXPORTED."

The New Mexico inspection statute in the McLean case applied ONLY to shipment "BEYOND THE LIMITS" of New Mexico.


The court, commenting generally upon the scope of inspection laws, says: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of the package, mode of putting up, and marking the branding of various kinds, all these matters being supervised by a public official having authority to pass or not to pass the article. . . . QUALITY ALONE MAY BE THE SUBJECT OF INSPECTION, without other requirements, or the inspection may be made to extend to all of the above matters."

The Maryland inspection statute in the Turner case applied ONLY to tobacco which it was intended "TO CARRY OUT OF THE STATE."

It is submitted that—if it is constitutional to apply state inspection ONLY to products designed for interstate commerce—a fortiori, an inspection statute affecting interstate and intrastate business WITHOUT DISCRIMINATION must be valid.


Inspection is intended to determine the weight, condition, quantity and quality of merchandise to be sold within OR BEYOND THE STATE'S BORDERS."

See _Voight v. Wright_, 141 U. S. 62, 65 (1890).

"The purpose of the inspection laws has been TO PREPARE THE ARTICLES FOR EXPORTATION, in order to preserve the credit of the EXPORTS OF THE STATE in foreign markets, as well as to certify their genuineness and purity for the benefit of purchasers generally.


"They (the inspection laws) are confined to such particulars as, in the estimation of the legislature and according to the customs of the trade, are deemed necessary to fit the inspected article FOR THE MARKET,
by giving to the purchaser public assurance that the article is in that
condition, and OF THAT QUALITY, which makes it merchantable
and fit for consumption. They are not founded on the idea that the
things in respect to which inspection is required, are dangerous or
noxious in themselves."


"The court must presume that the Legislature in the enactment of
this law (which provided for standardization and inspection of naval
stores) had a beneficial purpose. This may have been to BUILD UP
OR INCREASE THE REPUTATION of the product, that it might
also benefit the people of the state, not only the producers, but those
at the ports of the state who deal in naval stores. . . . It follows that,
to determine the grade and the degree of purity, it may provide for
inspection."

Clintsman v. Northrop, 8 Cow. (N. Y.) 45, 46 (1827).

"The object of these laws (inspection laws) is to protect the com-
community, so far as they apply to domestic sales, from fraud and imposi-
tions; AND IN RELATION TO ARTICLES DESIGNED FOR
EXPORTATION, TO PRESERVE THE CHARACTER AND
REPUTATION OF THE STATE IN FOREIGN MARKETS."

The principle of the inspection laws: namely, the right of the state to
protect the reputation of its products—is carried to great length in a
comparatively recent decision of the United States Supreme Court,
Sligh v. Kirkwood, 237 U.S. 52 (1914), in which the court says (pp.
61, 62), in sustaining a state statute which provided, not a mere inspec-
tion, but rather an absolute PROHIBITION against the exportation
of the commodity:

"The protection of the State's reputation in foreign markets, with the
consequent beneficial effect upon a great home industry, may have been
within the legislative intent, and it certainly could not be said that this
legislation has no reasonable relation to the accomplishment of that
purpose."

The right of the state to protect the reputation of its dairy products
constitutes one of the grounds for the decision just rendered by the
Supreme Court of Wisconsin in the "filled milk" case.

State ex rel. Emery v. Carnation Milk Products Co., 178 Wis. 147
(1922).

In short, the compulsory inspection power is sustained—even con-
ceding its effect on interstate commerce—upon the basis of protecting
the reputation of and market for Wisconsin products.

Intrinsically, of course, the reason why products are required to be
truthfully and accurately labeled is to protect the consumer against
misrepresentation and this is the basis which sustains the dairy and food
statutes and labeling regulations as to consumers situated within the
state. But this is not a sufficient basis to legalize a regulation applying to products, ninety-five per cent of which are sold to consumers of other states. As a matter of law, Wisconsin holds no legal duty to consumers outside of Wisconsin and has no legal right to impose burdens on the trade in Wisconsin for the sake of the out-of-the-state consumer. But Wisconsin has the right to protect the reputation of its products on the markets of the country wherever those products may be sold and to safeguard the products of its soil and its industry against misrepresentation by demanding the accurate and truthful labeling thereof, so as to reflect credit rather than discredit to Wisconsin producers and distributors. It is upon this basis that we apply the Wisconsin regulations to all Wisconsin potatoes, all Wisconsin cheese, all Wisconsin peas, even though the overwhelming bulk of these products goes outside of the state.

In *Sligh v. Kirkwood*, *supra*, the state of Florida passed a statute prohibiting the shipment in interstate commerce of citrus fruits in an immature condition, it being proven that consumption of the fruits in such condition was unhealthful. But the lawyers opposed to this bill argued—"What difference does it make to the state of Florida if the people in Maine and New Hampshire get sick? Florida may have a moral duty to safeguard the health of these people but it has no legal duty and, as a matter of law, it is none of Florida's business if people in Maine and New Hampshire get sick." And the court said, "Correct, except that if people in Maine and New Hampshire get sick from eating Florida fruit, they will stop eating Florida fruit; and the state has the right to protect the market for one of its greatest products." And, so here, Wisconsin—to protect the reputation and the standing of Wisconsin's products throughout the country—may establish standards for them and require their official state inspection.