

**Pure Food Law, Construed. Milk, What Constitutes Adulterated. Milk, Not Tuberculin Tested, Shipped in From Other States. Butter and Cheese Made From Milk not Tuberculin Tested.**

Milk which conforms to the National Pure Food Act, but which does not meet the requirements of our law, may be shipped into this state from other states, but cannot be disposed of in this state except in the original unbroken packages.

Butter, cheese, or other milk products cannot be sold or offered for sale in this state unless made from milk, the sale of which is not prohibited by the Pure Food Act.

May 25, 1912.

Dr. T. D. Tuttle,  
Sec'y State Board of Health,  
Helena, Montana.

Dear Sir:

I am in receipt of your letter of April 25th, stating that in certain adjoining states dairy regulations are equal to the regulations of this state, with the exception that the tuberculin test of dairy cattle is not required, and requesting my official opinion, First, as to whether or not milk shipped into this state from dairies in another state where the cows have not been tuberculin tested may be sold for human consumption in this state; and Second, can such milk be used for making butter for sale in this state.

In reply to your first question I will say that under the provisions of Sec. 3 of Chap. 130, Session Laws 1911, "No person.....shall sell, exchange or deliver, expose or offer for sale or exchange adulterated milk, or milk.....from sick or diseased cows, etc." By the provisions of Sec. 6 of this Act, the State Veterinarian is required to tuberculin test all cattle used in and about all dairies in this state at least once a year, and all persons conducting a dairy in this state are required to have each cow added to the dairy tuberculin tested; "and any person, firm or corporation using any cow in his dairy, or keeping any cow on his dairy premises, which has not been tuberculin

tested and found free from tuberculosis shall be guilty of a misdemeanor and shall be deemed guilty of selling milk from diseased cows. For the purpose of this Act any person shall be deemed as conducting a dairy who offers for sale any milk or cream, or who sells milk or cream to any butter factory, creamery or other place where milk or milk products are manufactured or sold."

It is apparent from these two sections that a person selling, or offering for sale, milk in this state from cows which have not been tuberculin tested is deemed guilty of selling milk from diseased cows, which is prohibited. In other words, the milk under such circumstances falls below the standard fixed by the legislature.

It is within the power of the Legislature to fix an arbitrary test or standard to determine the purity of food products.

People v. Worden Crocery Co., 118 Mich. 604;

Commonwealth v. Evans, 132 Mass. 11;

People v. Cipperly, 101 N. Y., 634; 44 Sup. Ct. Rep. 324;

People v. Kibler, 106 N. Y. 321;

Thornton on Pure Food and Drugs, Sec. 30.

Section 17 of the Act above referred to provides that "No rules or regulations shall be promulgated by the State Board of Health under the provisions of this Act which do not conform to the rules and regulations promulgated or to be hereafter promulgated by the National Government under the Food and Drug Act of Congress of June 30, 1906; and no article of food or drugs shall be deemed to be adulterated, misbranded or otherwise subject to the provisions of this Act when such article of food or drugs conforms to the rules and regulations of the United States Government under any national act or acts."

The Act of Congress of June 30, 1906, (Vol. 34 U. S. St. at L., p. 768) does not provide for the tuberculin testing of dairy cattle, or prevent the sale of milk from dairy cattle which have not been tuberculin tested. "The object of this Act of Congress is to keep adulterated articles out of the channels of inter-state commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages." It does not regulate the sale or disposition of foods or drugs within a state.

Hipolite Egg Co. v. U. S., 220 U. S. 45;

United States v. Five Boxes Assafoetida, 181 Fed. 561.

It cannot be held that Sec. 17 of our Act above referred to nullifies the preceding specific provisions of the Act requiring the tuberculin testing of dairy cattle, and prohibiting the sale of milk from such cattle. The meaning of this section is that the Act, or any rule or regulation of the Board made pursuant to its provisions, shall not be construed as conflicting with the regulations or Acts of the National Government relating to food and drugs.

In the exercise of its police powers, a state may enact such legislation as it may deem proper, even in regard to recognized articles of inter-state commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be neces-

sary to prevent the introduction or sale of an adulterated or impure article within the limits of the State.

Schollenberger v. Pennsylvania, 171 U. S. 1; .

Smith v. St. Louis Etc. Ry. Co., 181 U. S. 248;

Crossman v. Lurman, 192 U. S. 189;

See, Minnesota v. Barber, 136 U. S. 313. o

And a state may, for the protection of the public health, restrain the sale of recognized articles of commerce, after they have been taken from the original packages.

Borden's Condensed Milk Co. v. Moutdair (N. J.) 80 Atl. 30.

Austin v. Tennessee, 179 U. S. 343;

Thornton on Pure Foods and Drugs, Secs. 89-90.

As the Congress of the United States has passed legislation regulating inter-state commerce in foods, this State cannot prevent the importation of any article of food which conforms to and complies with the statutes of Congress or the rules and regulations made in pursuance thereof; but this state can, under the Act above referred to, prevent the sale of any article of food in this state, which does not conform to its laws, after the same has been taken from the original package.

You are therefore advised that milk which conforms to the National Pure Food Act, but which does not meet the requirements of our law, may be shipped into this State from other states, but cannot be disposed of in this State, except in the original unbroken packages.

In answer to your second question I will say that Sec. 4 of Chap. 100, Session Laws 1911, above referred to, provides that no butter, cheese or other milk product shall be sold or offered for sale in this state unless made from milk, the sale of which is not prohibited by the Act. As has been heretofore stated, in answer to your first question, the sale of milk from cows which have not been tuberculin tested is prohibited. Under this Section, you can prevent the sale of butter in this state made from milk shipped in from another state, which does not comply with the provisions of our Pure Food Act, for the reasons stated in answer to your first question.

Yours very truly,

ALBERT J. GALEN,  
Attorney General.