sufficiency of evidence to be a basis for annulment of a judgment.[30] In both cases the defendant is given an opportunity to contest the evidence brought. The requirement that evidence in executory proceedings be in authentic form is apparently a safeguard to assure the judge that the plaintiff is entitled to bring the action and to protect against enforcement of fabricated claims in defraud of the debtor's rights. Thus where failure to comply strictly with the requirement is not accompanied by fraud on the court or the debtor, there seems little reason to allow a subsequent annulment on such grounds.

If carried to its logical extreme, the trend set by the application of the *Viley* dictum in *Doherty* and *Tapp* may lead to a widespread practice of annulling judicial sales on minor formal irregularities some time after the sale is completed. Such a result would appear to be undesirable in prolonging litigation[31] and adversely affecting the stability of judicial sales and land titles.[32] This danger seems to outweigh whatever public interest there may be in protecting a debtor who has negligently failed to protect himself. It is submitted that in a suit brought by the debtor insufficient authentic evidence and other such minor formal irregularities should be grounds for annulling executory proceedings only when accompanied by fraud or lack of notice to the debtor which excuses his failure to appeal from or enjoin the sale.

George A. Kimball, Jr.

CONSTITUTIONAL LAW — COMMERCE CLAUSE — RESERVATION OF LOCAL MILK MARKETS

Plaintiff, a Florida milk distributor, challenged orders of the Florida Milk Commission which regulated sales between

30. That insufficiency of evidence is not ground for annulling a judgment was held in Emuy v. Farr, 125 La. 825, 51 So. 1003 (1910).
31. This was one of the reasons given by Judge LeBlanc for his judgment in the district court for defendant in the instant case. 158 So. 2d at 232.
32. Although in the instant case an automobile was involved, in *Doherty* a sale of real estate was annulled. Even in a situation like *Doherty*, where the property at the time of the action in nullity remains in the hands of the mortgagee-adjudicatee who is charged with knowledge of the defect in the executory proceedings, annulment of the sale could do substantial damage to the purchaser if he has put improvements on the property or is using it for business purposes. In absence of fraud on his part it seems an unreasonable penalty to require him to give up the property merely because of a formal irregularity in the executory proceedings.

producers and distributors, alleging that they violated the commerce clause of the United States Constitution. Pursuant to its statutory authority, the Commission had devised a three-pronged regulatory scheme which allocated the higher-priced beverage milk sales[1] to producers in the Pensacola Milk Marketing Area;[2] milk purchased from other states was thus relegated to the less remunerative nonbeverage utilizations.[3] A three-judge district court held the regulatory scheme to be a reasonable exercise of the state's police power.[4] The United States Supreme Court unanimously reversed. *Held,* a state regulatory scheme which pre-empts a local market for its producers is an unconstitutional burden on interstate commerce which cannot be justified as an economic measure to protect the welfare of local dairy farmers or as a health measure to insure an ade-

1. Subject to minor adjustments for butterfat content, the price paid producers for milk of substantially the same quality is determined by the form in which the milk is ultimately consumed. Since milk consumed in the fluid form commands a substantially higher price than identical milk sold in manufactured forms, such as butter, cheese, ice cream, and so forth, the distributor is willing to pay the producer a higher price for the milk which the distributor will sell in the fluid form. See Polar Ice Cream & Creamery Co. v. Andrews, 84 Sup. Ct. 378, 380 & nn. 2-3 (1964).

2. First, the Commission set minimum prices to be paid producers in the marketing area; beverage milk (Class I) drew a substantially higher minimum price than milk destined for other utilizations (Classes II, III, and IV). Second, the Commission established a system for allocating the top-priced sales to the Pensacola producers first. During three months each year — the base fixing period — an earned base was determined for each Pensacola producer which represented the ratio of the milk delivered to a distributor by the Pensacola producer to the total milk supplied by all Pensacola producers to that distributor. Since only Pensacola producers were included in determining the earned base, the total of the earned bases for Pensacola producers equalled 100%. A producer's earned base was then applied to the distributor's Class I requirements to determine the number of gallons for which that producer must be paid the Class I price. This procedure was then employed for Classes II, III, and IV respectively, until the producer's deliveries to that distributor were exhausted. Should the deliveries by a producer be insufficient to utilize his quota of Class I sales, the excess was prorated to the other Pensacola producers. Thus the Pensacola producers were assured the Class I price for their milk unless their supply exceeded the distributor's Class I requirements, in which event they had top priority on each succeeding class. This effectively precluded competition with milk from other states, relegating it to the less remunerative utilizations not exhausted by Pensacola producers. Third, the obvious loophole in this scheme was plugged by the statutory prohibition against termination or modification without just cause of a distributor-producer relationship established by a continuous course of dealings; that the Commission's minimum prices were burdensome or that the milk was available elsewhere at lower prices was not just cause.

3. Polar had purchased approximately 30% of its requirements in Florida; the remaining 70% came from Alabama, Mississippi, Wisconsin, Minnesota, Missouri, Virginia, and Illinois. Before the Commission's orders, Polar had paid the minimum Class I price of 61 cents per gallon to Pensacola producers for a specified quantity of their milk and 35.5 cents per gallon for any amount over that quantity. The price of milk from other states varied, but as surplus milk at distress prices it could be purchased for as low as 30 cents per gallon.

4. 208 F. Supp. 899 (N.D. Fla. 1962).

quate local supply of milk.[5] *Polar Ice Cream & Creamery Co. v. Andrews*, 84 Sup. Ct. 378 (1964).[6]

The dairy industry is fraught with the dangers of destructive competition.[7] Whether a state may exercise its police power to alleviate this evil when such action necessarily involves some transgression into the realm of interstate commerce has been a reoccurring problem since the early thirties. Although authority over interstate commerce has been committed to Congress by the commerce clause,[8] there are areas where in the absence of

5. The instant case involved two other very interesting points. Polar sold a substantial quantity of milk to United States military bases; it contested the application of the Florida producer prices to this milk on the ground that such price-fixing was inconsistent with federal procurement regulations. The court held that Paul v. United States, 371 U.S. 245 (1963) had declared only distributor price-fixing in conflict with the procurement regulations, and had not reached the producer price question. The court again refused to reach this issue, finding that it was not clear on the record whether the minimum price schedule for Florida producers was applicable to this military milk.

In the other point, Polar challenged a provision of the Florida Milk Control Act which imposed a tax of 15/100 of 1 cent on each gallon of milk distributed by a Florida distributor "for the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor." FLA. STAT. § 501.09(4) (1961). Polar claimed that imposing this tax on milk distributed to military bases violated the principles laid down in James v. Dravo Contracting Co., 302 U.S. 134 (1937), and Standard Oil Co. v. California, 291 U.S. 242 (1934), that the state had no interest to tax in the facilities of the United States or upon the activities conducted within these facilities. The court sustained the Florida tax, finding it incident to the activity of processing or bottling milk in a Florida plant and not upon work performed on or the sale or delivery in a federal enclave.

6. Polar's victory in the instant case may only be a moral one. The Florida courts have upheld the revocation of Polar's license issued by the Milk Commission on the grounds that Polar's president demonstrated a "persistent purpose not to respond to the authority vested in the Florida Milk Commission . . . [and] has arrogantly followed this course with full knowledge of the potential consequences upon his business enterprise." Polar Ice Cream & Creamery Co. v. Andrews, 155 So. 2d 716, 718 (Fla. App. 1963). After the revocation was upheld and Polar's license had expired by its terms, the Commission obtained an injunction restraining Polar from continuing to operate as a milk distributor. At this time Polar has appealed but has been denied supersedeas. Polar Ice Cream & Creamery Co. v. Andrews, 159 So. 2d 672 (Fla. App. 1964).

7. See, *e.g.*, Nebbia v. New York, 291 U.S. 502, 516 (1934). The dangers of destructive competition are greatly heightened by its tendency to interfere with the rigid sanitary requirements of the dairy industry.

8. U.S. CONST. art. I, § 8: "The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . . ." See also U.S. CONST. art. I, § 10: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. . . ."

In Wickard v. Filburn, 317 U.S. 111 (1942), the Supreme Court, in holding that market quotas under the Agricultural Adjustment Act applied to appellee's 23-acre wheat crop, defined the vast source of congressional power contained in the commerce clause. "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125. (Emphasis added.) This statement concurrent federal legislation the state may act to remedy a problem primarily of local concern provided such action does not substantially impede the free flow of interstate commerce.[9] In the series of cases discussed below the Supreme Court has severely restricted the scope of permissible state action against destructive competition in the dairy industry.[10]

Baldwin v. G. A. F. Seelig, Inc.,[11] was the first assault based on the commerce clause[12] against a state milk regulation aimed

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laid to rest any contention that production, manufacturing, and mining activities were not within the ambit of the commerce clause because they were local activities and could only indirectly affect commerce.

9. "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, and Cooley v. Port Wardens, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." Southern Pacific Co. v. Arizona, 325 U.S. 761, 766 (1945).

"But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Id.* at 767.

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Id.* at 769.

"There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." *Id.* at 770.

10. The Court has not been tolerant with attempts at economic isolation in other areas of commerce. See Toomer v. Witsell, 334 U.S. 385 (1948) (South Carolina not permitted to require owners of shrimp boats fishing off its shores to dock at a South Carolina port to unload, and stamp their catch with a tax stamp before shipping out-of-state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana not permitted to require that heads and hulls of shrimp be removed from shrimp taken in Louisiana waters before shipment to other states); Buck v. Kuykendall, 267 U.S. 307 (1925) (Washington not permitted to require common carriers to be licensed in order to control competition on the highways); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (West Virginia not permitted to require that West Virginia natural gas be used to satisfy local needs before any sold in other states). See also Johnson v. Haydel, 278 U.S. 16 (1928); Oklahoma v. Kansas Nat. Gas Co., 221 U.S. 229 (1911). *But see* Sligh v. Kirkwood, 237 U.S. 52 (1915); Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Geer v. Connecticut, 161 U.S. 519 (1896).

11. 294 U.S. 511 (1935).

12. In an earlier decision, the Supreme Court had sustained a New York wholesale and retail price-fixing regulation against due process and equal protection attacks. Nebbia v. New York, 291 U.S. 502 (1934). See also Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934). *But see* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936).

at destructive competition. New York prohibited the sale of milk obtained from other states unless the producer had been paid the minimum price set for New York producers. Although such regulation unquestionably would be necessary for totally effective producer price regulation without a concomitant decrease in local sales, it also undoubtedly imposed an economic barrier against competitive interstate milk sales.[13] The court found that such power over interstate commerce had expressly been denied the states and given to Congress for the chief purpose of preventing such economic barriers.[14] Acknowledging that nice distinctions had been drawn between direct and indirect burdens on interstate commerce, the court found them inapposite where the avowed purpose of the regulation was to suppress competition from other states.[15]

In *Milk Control Board v. Eisenberg Farm Products*,[16] however, the court partially reinstated the nice distinction by holding that one purchasing milk in Pennsylvania for distribution in other states could be required to be licensed and to pay minimum prices to local producers; such regulation was directed at local conditions and does not violate the commerce clause merely because it "incidentally or indirectly involves or burdens interstate commerce."[17]

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13. Mr. Justice Cardozo, delivering the opinion of the court, found that the New York regulation "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." 294 U.S. at 521. Out-of-state milk was actually placed at a competitive disadvantage due to the increment in cost from transportation expenses.

14. Citing several noted research sources, the court recognized that "a chief occasion of the commerce clause was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" *Id.* at 522.

15. *Ibid.*

16. 306 U.S. 346 (1939). In the interim between *Baldwin* and *Eisenberg* the Supreme Court upheld a Virginia statute authorizing a commission to establish minimum and maximum wholesale and retail prices. Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937). The Supreme Court found that the regulations did not apply to milk produced out of the state and sold in Virginia to its distributors until the milk was resold in Virginia; and in that case, they applied only to the resale price. Therefore there was no burden on interstate commerce.

17. *Id.* at 351. Mr. Justice McReynolds and Mr. Justice Butler dissented, concluding that the regulations constituted an unconstitutional burden. Although Eisenberg sold his milk in New York City, the Court relied to some degree on the overall small fraction of Pennsylvania milk shipped out of state. This in conjunction with a finding that buying of milk is an "essentially local" activity, was held to justify "the conclusion that the effect on the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress." *Id.* at 352-53. Some cases have relied heavily on the relative size of the interstate business to strike down a state statute. See, *e.g.*, Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922). However, Parker v. Brown, 317 U.S. 341 (1943), made it abundantly clear that the state may regulate

Any relaxation of *Baldwin's* rigid approach which glimmered under *Eisenberg* was extinguished by *H. P. Hood & Sons v. DuMond.*[18] The New York Commissioner of Agriculture and Markets had denied Hood, a Boston distributor, a license to establish an additional processing plant in the Greenwich area because it would tend toward destructive competition by increasing the cost of handling at other plants in the area and by depriving local markets of the supply necessary during the short seasons. The majority, resting firmly on the sweeping language of *Baldwin,* held that the commerce clause prohibited any economic restraints on interstate commerce for local economic advantage.[19] The dissent of four Justices evidenced a sharp schism in the approach of the members of the court toward state economic regulation.[20] Mr. Justice Frankfurter disagreed that regulation of interstate commerce to prevent destructive competition was per se unconstitutional; he suggested that the case be remanded for additional evidence to determine whether the impending danger of destructive competition was so great and the burden on interstate commerce so slight that the commissioner's ruling fell within the area where in the absence of federal regulation it is more important to protect local interests than to leave interstate commerce completely unfettered.[21] Mr. Justice Black's dissent further denounced the majority position as a displacement of this firmly established balancing-of-interests principle with a previously rejected mechanistic formula born out of unwarranted fears of balkanization or bureaucracy.[22] The commerce clause does not immunize local phases of interstate commerce from state laws against destructive competition unless under the circumstances the necessity for a free flow of commerce outweighs the state's interest.

"local" activities (processing and packing of raisins) regardless of relative amount of the object regulated ultimately destined for interstate commerce (95%).

18. 336 U.S. 525 (1949).

19. Mr. Justice Jackson, writing for the majority, referred to *Baldwin* as "an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage." *Id.* at 535. On the other hand, the court approved the *Eisenberg* decision as an "incidental" burden. *Id.* at 530.

20. Mr. Justice Frankfurter wrote a dissenting opinion concurred in by Mr. Justice Rutledge. Mr. Justice Black wrote a separate dissenting opinion concurred in by Mr. Justice Murphy.

21. "I cannot agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes." 336 U.S. at 564.

22. Mr. Justice Black had reference to the liberality with which the court had applied the *Cooley* doctrine despite cries for restraint from some members of the court. He cited Duckworth v. Arkansas, 314 U. S. 390 (1941) for particular emphasis. *Id.* at 554.

In *Baldwin* where the state in effect reached beyond its bounds to set producer prices in other states, he felt the balance clearly weighed against the regulation, but in *Hood* where the local interest was so compelling and the burden on commerce so slight, he would sustain regulation.[23]

Two years later in *Dean Milk Co. v. Madison*,[24] the majority held that an alleged health ordinance, which discriminated against interstate commerce by requiring all milk sold in Madison to be pasteurized in inspected plants within five miles of the city, could not stand when reasonable nondiscriminatory alternatives were available. Although they assumed the ordinance had a legitimate health purpose and therefore did not treat it as a direct economic regulation, the majority held that the *Baldwin* conception of the commerce clause precluded any nonessential economic isolation.[25] Mr. Justice Black's dissent evidenced an even more tenacious adherence to the balancing-of-interests principle when economic barriers were erected for protection of health.[26]

In the wake of this sharp division of the court in *Hood* and *Dean*, the instant case follows with an express and unanimous endorsement of the principles of the *Baldwin* case. The court, quoting extensively from *Baldwin*, emphasized that the commerce clause envisioned a federal free trade area devoid of economic barriers and reprisals among the states, and that any attempt to reserve local markets for local producers or to protect local producers from out-of-state competition was inimical to this concept whether it be an economic measure to protect the welfare of local producers or a health measure to assure an

23. *Id.* at 557.

24. 240 U.S. 349 (1951).

25. "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives . . . are available. [Citing *Baldwin* and Minnesota v. Barber, 136 U.S. 313 (1890).] A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Id.* at 354.

26. Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Minton concurred, attacked the "premises, reasoning, and judgment" of the Court. They asserted that the ordinance did not exclude wholesome milk from other states, that it was not a discriminatory burden on interstate commerce, and that no alternative was suggested which "beyond a reasonable doubt" would not lower the Madison health standards below those under the present ordinance. *Id.* at 357-60.

adequate local milk supply.[27] The court expressly approved the *Dean* and *Hood* cases and distinguished *Eisenberg* as involving an indirect burden on interstate commerce incidental to an essentially local activity.[28]

The unanimity in the instant case appears to mark an abandonment of the minority position favoring a broad application of the balancing-of-interests principle in the area of economic regulation.[29] Perhaps the Florida regulatory scheme was so flagrantly insupportable even under balancing-of-interests criteria that it did not merit a concurring reaffirmation of that principle. However, in view of the court's endorsement of the *Hood* and *Dean* cases, it appears that the court has crystallized its position. Under the commerce clause a state may not reserve local markets for local producers or protect local producers from out-of-state competition; this power is exclusively within the federal domain. On the other hand, nondiscriminatory economic regulation, aimed at neither reserving local markets nor protecting local producers from out-of-state competition, falls within the province of the state's police power when such regulation is incident to a local activity.[30]

27. Quoting from *Baldwin*, the Court said: " 'Let such an exception be admitted and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not division.' " 84 Sup. Ct. at 386.

28. The Court further found no basis for an assertion that Congress had acquiesced in or consented to this kind of state regulation. In Lehigh Valley Cooperatives Farmers, Inc. v. United States, 370 U. S. 76 (1962), the Court held that the Secretary of Agriculture under the Agricultural Marketing Agreement Act had expressly been denied the power to erect similar regional trade barriers in the milk industry. The Court in *Polar* expressed doubt that Congress, in denying the power to the Secretary of Agriculture, had intended to grant it to the states. The Florida regulations also discriminated against Florida milk outside the Pensacola Milk Marketing area. It is well settled that such discrimination within the state is immaterial to the determination whether the regulation burdens interstate commerce. Dean Milk Co. v. Madison, 340 U. S. 349, 354 & n. 4; Brimmer v. Rebman, 138 U. S. 78, 82-83 (1891).

29. It should be noted that the only member of the court who dissented in both *Hood* and *Dean* was Mr. Justice Black. Mr. Justice Rutledge and Mr. Justice Murphy who dissented in *Hood* were no longer on the Court when *Dean* was rendered. Mr. Justice Douglas who dissented in *Dean* had not become a member of the Court when *Hood* was decided. Mr. Justice Frankfurter, who dissented in *Hood*, sided with the majority in *Dean*, while Mr. Justice Minton made the reverse switch. The change of position made by these last two Justices illustrates the difficulty of the decision which the Court must make between the interests of the state and the nation as a whole, particularly where the health factor is strongly involved as in *Dean*.

30. The state's power to fix minimum and maximum wholesale or retail milk