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Right of a Corporation to Send Goods on Consignment into a State in Which It Has No Permit to Do Business

RIGHT OF A CORPORATION TO SEND GOODS ON CONSIGNMENT INTO A STATE IN WHICH IT HAS NO PERMIT TO DO BUSINESS

The conflicting decisions as to the right of a corporation sending goods on consignment for sale into a state in which it has no permit to do business to invoke the protection of the constitution against state interference, are based on two well established principles:

1. A state may exclude a foreign corporation from doing business within its limits or may grant such corporation a license to do business upon such terms and conditions as it thinks proper to impose.[1]

2. Every corporation empowered to engage in interstate commerce by the state in which it is created may carry on interstate commerce in every state of the union free from every prohibition and condition imposed by the latter.[2]

In order to determine which rule to apply, the logical inquiry would seem to be whether the facts of the case present a transaction of commerce between the states or a transaction wholly within one state. As the question always arises, however, in the application of a state statute requiring foreign corporations doing business within the state to comply with certain regulations and depriving such corporation of all rights and privileges to do business in the state or to bring any action in any court of the state until they comply with the state regulations, the courts are inclined to regard the question as to whether or not the foreign corporation is doing business within the state as decisive,[3] or to consider the test of interstate commerce and the test of doing business in the state as interchangeable.

In the case of Commonwealth v. Parlin & Orendorff, 118 Ky. 168, the court, upon finding that the contract between the parties constituted an agency and was not a selling by owners as wholesalers to alleged agents as retailers. Held, that the corporation had an established place of business in Kentucky, and was therefore subject to the state statute regulating foreign corporations. The right of a foreign corporation to make sales through traveling salesmen or by

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[1]Paul v. Virginia, 8 Wall. 168.

[2]Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; Cooper Mnfg. Co. v. Fergusen, 113 U. S. 727.

[3]Bertha Zinc and Mineral Co. v. Clute, 7 Misc. (N. Y.) 123; People ex rel Collier v. Roberts, 25 App. Div. (N. Y.) 13.

correspondence, or otherwise than through an agent at an established place for conducting such business, without interference on the part of the state is conceded.[4] In such cases the corporation has no established place of business in the state and the transactions belong wholly to interstate commerce. But here the employment of a resident agent to whom goods are shipped on consignment is regarded as equivalent to establishing a place of business within the state and carrying on business thereat. The reasoning of the court seems to be that, having determined that the transaction amounted to doing business within the state, the question as to its being interstate commerce could no longer arise.

Similar reasoning supports the decision in Thomas Mfg. Co. v. Knapp, 101 Minn. 432, where an Ohio corporation was not permitted to maintain a suit in Minnesota because of failure to comply with regulations imposed by statute on foreign corporations doing business within the state. The interstate commerce clause of the constitution was held not to apply in cases where a foreign corporation maintains a resident agent in the state whose business it is to solicit orders for and deliver the goods of the corporation to the purchaser. In the words of the court: "A distinction must be made between acts of a foreign corporation shipping its goods to a commission merchant or other agent within a state to be sold by him and the proceeds accounted for to the corporation, the title of the goods to remain in the corporation until paid for, and the case where a local commission merchant solicits orders for the goods of a foreign corporation and forwards them directly to the corporation—in the former case the corporation has established an agency and is doing business in the state."

The case of Butler Bros. Shoe Co. v. U. S. Rubber Co., 132 Fed. 398, is cited to support the decision in Thomas v. Knapp, *supra*. The Federal court, however, in reviewing the Butler case, reversed its decision[5] and decided that the contract of a foreign corporation to send goods on consignment to an agent in a state where it has no permit to do business was a transaction of interstate commerce and could not be controlled by state statutes. The contract upon which the suit was brought by the United States Rubber Co., a foreign corporation, provided that the corporation would ship shoes and rubber goods from its factories in Eastern states to the shoe company in Colorado; that the latter would make such advances to

[4]Stewart v. People of State of Mich., 232 U. S. 665.
[5]Butler Brothers Shoe Co. v. U. S. Rubber Co., 156 Fed. 1.

the corporation as it requested and would conduct the business and pay all the expenses of selling the goods for the factorage on commission, which consisted in the difference between the prices agreed upon by the parties to the contract and the selling prices to the purchasers from the factor. The suit was defended on the ground that the foreign corporation had not complied with the local statute, which contained, among other requirements, the payment of a tax. In regard to the contention that the rubber goods ceased to be articles of interstate commerce and became part of the mass of property in the state upon their delivery to the assignee, the court says: "The soundness of this contention is not conceded. But, if it were, neither that concession nor the numerous authorities upon the taxation of property in the state would be either decisive or persuasive here, for the question is not whether or not the goods were taxable within the state, but whether or not the state could lawfully prohibit their importation and annul all contracts therefor."

The important question in the view of this court is whether the contracts between the foreign corporation and resident agent are transaction of interstate commerce. That the contract in question did not evidence the sales of the goods is not decisive. "All sales of sound articles of commerce which necessitate transportation from one state to another are interstate commerce, but all interstate commerce is not sales of goods. Importation from one state to another is the indispensible element, the test of interstate commerce, and every negotiation, trade or dealing between citizens of different states which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

Applying this test to the factorage contract, it is perceived that they clearly constitute interstate commerce, for their chief purpose and effect were the importation of sound articles of commerce into the state of Colorado from other states. Having determined that the contracts for the assignment of goods by a foreign corporation to an agent in Colorado were transactions of interstate commerce it was not necessary to consider whether the foreign corporation by making such contracts might be said to carry on business in the state of Colorado. The court maintained, however, that the foreign corporation was not doing business in Colorado. The goods when delivered to the commission agent were entirely in his possession and

control, and the disposal and sale of them were the business of the factor and not of the foreign corporation.[6]

While the decision of the Federal court in Atlas Engine Co. v. Parkinson, 161 Fed. 223, is practically in harmony with the decision in Butler Bros. v. U. S. Rubber Co., *supra,* it was there held that the foreign corporation was doing business in the state and were the question of interstate commerce not involved, it would not be permitted to maintain a suit upon a contract with the local agent until it fulfilled the requirements of the local statutes respecting foreign corporations doing business within the state. But as it was held that the contract provided for carrying on commerce between the states and clearly related to interstate commerce, the provisions of the state statute could not apply.

The weight of authority is undoubtedly on the side of the Federal and state decisions which hold that the foreign corporation which sends goods on consignment to an agent in another state, is engaged in importing goods from one state to another and that such transactions relate to interstate commerce. These decisions, however, only cover the cases in which the contract is made with an actual factor, who provides for the storage of goods and defrays all expenses connected with the disposal of them and whose profits are in the form of commissions. When the contract between the foreign corporation and the local agent provides for the establishment of a local branch to be maintained by the corporation through the local agent, it cannot be regarded as an interstate commerce transaction.[7] In such a case the corporation is carrying on a local business in the state and is subject to the control of the state.

C. B.

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[6]Allen v. Tysur-Jones, 91 Texas 22.
[7]Farrand Co. v. Walker, 169 Mo. App. 602.