

1953

Mud Control Laboratories, Inc. v. Theron S. Covey : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MUD CONTROL LABORATORIES,
INC., A Corporation,

Plaintiff and Appellant,

vs.

THERON S. COVEY, et al,

Defendant and Respondent.

FILED
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Supreme Court, U.S.
Case No.

8025

APPELLANTS' BRIEF

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STATEMENT OF FACTS

The plaintiff and appellant in this action is an Oklahoma corporation engaged in the business of selling certain chemicals and materials generally referred to in the oil well drilling trade as "drilling mud." These chemicals and materials are mixed

with water at the drill site and forced into the drill hole through the drill pipe. They seal off the formation walls and carry the drill cuttings up from the bottom of the hole (R 110 & 111). The use and control of this mud and its chemical consistence is a specialized occupation.

The defendants and respondents are one M. E. Baird and a group of people referred to in the course of the trial of this case and in this brief as "the Coveys." They, and some other people not involved in this appeal, were co-owners of a leasehold on which the Bertie Slauch No. 1 well was drilled (R 238).

On January 5th, 1949, the Coveys made an agreement which they denominated "Joint Operating Agreement" with M. E. Baird and H. L. Robbins, a partnership, for the purpose of getting the drilling of the Bertie Slauch No. 1 well under way, and the well was drilled pursuant thereto (R239). It was a dry hole. The trial court found the Coveys to have been mining partners of Baird and Robbins in this venture and, as such, jointly responsible for the unpaid expenses of drilling said oil well. Since the facts relative to that proposition are not within the scope of this appeal, no further detail will be indulged in in that regard. They are the subject of the Cross-Appeal of the Coveys on file herein.

Between March 7, 1949, and July 27, 1949, Mud

Control Laboratories, Inc., sold and delivered to M. E. Baird and H. L. Robbins drilling chemicals and mud of the fair and reasonable value of \$7,458.10, and between July 27, 1949 and July 29, 1949, sold and delivered further drilling chemicals and mud of a fair and reasonable value of \$765.54. No payment was made for these goods and the suit below was for the purpose of obtaining that payment (R 240).

During the period prior to July 27, 1949, the appellant had not qualified to do business in the State of Utah, but on July 27, 1949, did so (R 240 & 241). The Court below held that the appellant was entitled to be paid by the respondents for the materials sold and delivered *after* it qualified to do business in the State of Utah, but was not entitled to be paid for the goods sold and delivered *prior* to qualification, for the reason that the appellant was a foreign corporation doing business in the State of Utah without qualifying so to do and, under the provisions of Section 16-8-3, Utah Code Annotated, 1953, its contracts would be void. (R 242).

The chemicals involved in this action were manufactured in the United States and several foreign countries, and packaged by the manufacturer (R 114 & 115). Sodium bicarbonate was packaged in a multi-wall, special paper bag containing 100 lbs. of chemicals and sewn shut. Caustic soda was packed in 400 lb. drums sealed so as to be air-tight because it solidifies upon contact with air. Tanna-thin was

packed in a 40 lb. multi-wall, sewn bag. Barium carbonate was packed in an 80 lb. multi-wall sewn bag. Quebracho was packed in a 100 lb. "very strong" multi-wall bag, wired shut and sewn. (See R 115 & 116). It sold at about \$27.00 a hundred lbs. and was packaged in the manner described to avoid any wastage or loss (R 116). No product handled by the plaintiff was purchased, imported or sold in a package containing less than 40 lbs. or more than 400 lbs.

The chemicals were customarily sold by appellant directly to the consumers, who are in most instances, and were in this case, persons drilling oil wells. Generally the sales and deliveries were made to the oil well drilling consumers in large loads, i.e., loads of such a size that the purchases made by the defendant here would be considered "small loads" (R. 131). The purchases involved here were in quantities varying from 400 lbs. to 25,600 lbs. and averaging just over 2,500 lbs. each (See Exhibit "B").

Appellant is one of four major mud companies who control the industry, handling the same products so far as material and quality is concerned, packed in the same sized bags, differing only in color, and sold at virtually the same price by each of them (R 147). The price varied from day to day (R 124) but not from company to company.

The chemicals concerned herein were packaged by their manufacturers, and shipped in their self-same packages to Craig, Colorado, where, still in their original packages, they were trucked by an interstate common carrier, Watson Truck Lines, across the Utah state line to Vernal, Utah, (R 114 & 116) where they were placed on the property of one L. N. Liscombe pending sale and covered with tarpaulins (R 241).

The appellant had in its employ one S. J. Putman, who was a sales engineer. Mr. Putman took up residence in Vernal, Utah, in the fall of 1948 for the purpose of furthering the sales of his employer's products and his duties were to establish customer relations, to sell chemicals and mud, and to supervise and instruct in the use of those products in the drilling of oil wells. He contacted Baird and Robbins and arranged to sell them the drilling mud needed for the drilling of the Bertie Slauch No. 1 well. Whenever drilling mud was needed on said well, one of the tool-pushers or roughnecks went to the Liscombe premises and stacked whatever goods were needed on his truck. A delivery ticket was made out either by Mr. Liscombe or Mr. Putman and the goods were taken to the site of the well where they were used. The goods were sold in the same packages in which they had originally been placed by their manufacturer and in which they had been shipped into the State of Utah and stored at the Liscombe premises.

None of the packages were part of or contained in any larger package or shipping case and all of the packages were of appropriate size, material and shape for direct use from the package by the well-drilling consumers (R 242). The Liscombe property was separately owned by L. N. Liscombe who was paid by the plaintiff on the basis of the quantity of goods placed upon his premises and sold therefrom. During the time material to this action, no products were stored on or were delivered from the Liscombe premises excepting the products of the plaintiff (R 242).

In every instance, the sale of the drilling mud and chemicals involved in this action to said Baird and Robbins was the first sale or use thereof after its importation into the State of Utah.

It was the contention of the appellant that its sales were sales in interstate commerce and, as such, exempt from the provisions of Sections 16-8-1, and 16-8-3 U. C. A., This contention was rejected by the court below and judgment was entered in appellant's favor for the value of the goods sold after appellant qualified in Utah, to-wit, \$765.54 plus interest. In its appeal, appellant claims to be entitled to the judgment awarded and, in addition thereto, a further judgment in the amount of \$7,458.10 plus interest from July 27th, 1949, \$7,458.10 being the price of the goods sold before appellant qualified to do business in Utah.

STATEMENT OF POINTS**I**

Sales of goods in interstate commerce are exempt from the provisions of Section 16-8-1 and 16-8-3, U. C. A., 1953.

II

All of the sales concerned in this action are sales in interstate commerce under the original package doctrine.

ARGUMENT**Point I**

*Sales of Goods in Interstate Commerce are
Exempt From the Provisions of Sections
16-8-1 and 16-8-3, U. C. A. 1953.*

Section 16-8-1, U. C. A., 1953, requires every foreign corporation, before doing any business within Utah, to file with the County Clerk of the County in which its principal place of business is situated, and with the Secretary of State, (1) copies of its Articles of Incorporation, Amendments, and By-Laws, duly certified, (2) an acceptance of the provisions of the Constitution of Utah and a designation of some person residing in said County as process agent, (3) a statement setting forth the business it proposes to

transact in Utah and the amount and proportion of its stock represented by property located or to be acquired in Utah. Further, the corporation must pay certain filing fees. Section 16-8-3, U. C. A. 1953, provides, among other things, that anyone failing to comply with the provisions of Section 16-8-1, *supra*, may not maintain any action in any courts of this state and that every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such corporation within this state shall be wholly void on behalf of such corporation.

Article I, Section 8, of the Constitution of the United States provides as follows:

“The Congress shall have power * * *:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *.”

The respondents contended, and the court below held, that the provisions of Section 16-8-3, U. C. A., 1953, barred the appellant from collecting for any goods sold prior to the time appellant qualified to do business in Utah. This prevented appellant from getting judgment for \$7,458.10 for which respondents would otherwise have been held liable. It is the position of appellant that the court below erred in this holding for the reason that the sales involved in this case were sales in interstate commerce and, as such, exempt from the operation of the statutes requiring qualification to do business.

That sales in interstate commerce are exempt from the operation of these particular statutes has been established in the State of Utah by the decision of this court in the case of *Advance-Rumely Thresher Co. vs. Stohl*, 75 Utah 124, 283 P. 731. We quote from page 132 of Vol. 75, Utah Reports:

“The transaction involved in this case being an interstate one, the plaintiff is entitled to maintain its action notwithstanding it has never complied with the laws of this state with respect to foreign corporations doing business within the state. *Sioux Remedy Company vs. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193.”

This case properly followed the clear rule of the Supreme Court of the United States in a case in which this precise point was decided. In the case of *Sioux Remedy Co. vs. Cope*, cited above by the Utah Supreme Court, in an unanimous opinion delivered by Mr. Justice Van Devanter, it was held that a South Dakota statute requiring foreign corporations to qualify to do business in South Dakota before bringing suit to recover the purchase price of goods sold to residents of that state was unconstitutional as a violation of the commerce clause when applied to sales in interstate commerce. The holding of the Supreme Court is succinctly digested in the headnotes of thoe case as follows:

“(1) The right of a foreign corporation to demand and enforce payment of goods sold

in interstate commerce, if not a part of such commerce, is so directly connected with it, and is so essential to its existence and continuance, that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden on interstate commerce.

(2) Interstate commerce is unconstitutionally burdened by the provisions of S. D. Rev. Codes, 1903, Section 883, 885, under which, as construed by the highest state court, the right of a foreign corporation to enforce payment in a South Dakota court of the purchase price of merchandise which the corporation has lawfully sold within the state in interstate commerce is conditioned upon compliance with the requirements of those sections that a foreign corporation, before it can sue in the local courts, must first appoint a resident agent upon whom process may be served in any action against it, and must file a copy of such appointment, and a copy of its charter, and pay the incidental filing and recording fees."

In the case of *Furst v. Brewster*, 282 U. S. 493, 75 L. ed. 478, in a unanimous opinion written by Mr. Chief Justice Hughes it was held that the statute of the State of Arkansas requiring every foreign corporation doing business in that state to file a copy of its charter, duly certified, and a statement of its assets and liabilities and designate a process agent in that state under penalty of being unable to make any enforceable contract in the state of Arkansas, was

unconstitutional when applied to sales of goods in interstate commerce. The reason again was a conflict with the commerce clause of the Constitution of the United States.

In view of the clear holdings of the Supreme Court of the United States and of the fact that the Supreme Court of the State of Utah has specifically followed the ruling of that court, it appears that there can be no questioning the proposition that, as applied to sales in interstate commerce, the provisions of Section 16-8-1 and 16-8-3, U. C. A. 1953, are unconstitutional and hence void.

Point II

All of the Sales Concerned in the Action are Sales in Interstate Commerce Under the Original Package Doctrine.

As pointed out above, sales in interstate commerce are exempt from the operation of our statutes relative to the qualification of a foreign corporation to do business in the State of Utah. If the sales involved in this action are sales in interstate commerce, they necessarily partake of that immunity and judgment should be entered for the full amount of the goods sold and delivered by appellant to respondents. This would add a judgment for the sum of \$7,458.10 plus interest from July 27, 1949, to the judgment

below. Judgment below was for \$765.54 and interest.

All the sales involved in this action were sales in interstate commerce by virtue of the fact that they were sales of goods in the original unbroken packages in which they were imported into the state, were sales by the importer of those goods, and were the first sales made after the importation.

The *original package doctrine* is a rule which states that, so long as goods which have been imported from a foreign country or from a foreign state remain in the original unbroken package in which they were imported into the state and are unsold, they are free from control or regulation by the state into which they were imported, and that this protection extends also to the first sale of those goods. This doctrine came into the law in the case of *Brown v. Maryland*, 12 Wheat 419, 6 L. ed. 678, in an opinion written by Mr. Chief Justice Marshall.

In that case Maryland had a statute requiring "all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package * * *" to obtain a license at a cost of \$50.00 before selling the same. Brown imported a package of dry goods and sold it without obtaining a license. It was held that, when applied to the sale of goods in the original package in which imported, the statute was unconstitutional for the reason that it was repugnant

to that provision of the constitution of the United States which declares, that “no state shall, without the consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;” and to that which declares that *Congress* shall have the power “to regulate commerce with foreign nations, among the several states and with the Indian tribes.”

When a case came up involving the importing of goods into a state from a sister state instead of from a foreign country, the Supreme Court adopted the original package doctrine of *Brown v. Maryland* as the standard for use in determining when commerce ended and the control of the commerce clause ceased. The leading case in this regard is *Leisy v. Hardin*, 135 U.S. 100, 34 L. ed. 128, 10 S. C. 681. In that case 122 quarter barrels of beer, 171 one-eighth barrels of beer and 11 cases of beer were seized by the City Marshal of Keokuk under a state statute prohibiting the sale of intoxicating liquors. It was held that the state could not prohibit the importation of that beer, from abroad or from a sister state; or, when imported, prohibit its sale by the importer so long as it remained in the casks in which it was imported. The holdings of interest in the present case are summarized by the Supreme Court in the headnotes as follows:

“1. A citizen of one State has the right to import beer into another State, and the right to sell it there in its original packages.

2. As to such sale, the State has no power to interfere by seizure, or any other action, to prevent the importation and sale by a foreign or non-resident importer.

3. *The right of transportation of an article of commerce from one State to another includes the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.*

4. It is only after the importation is completed and the property imported is mingled with and becomes a part of the general property of the State *by a sale by the importer*, that State regulations can act upon it.

5. The power vested in Congress to regulate commerce among the states cannot be stopped at the external boundary of a state, but is capable of authorizing the disposition within the State of the article imported." (Italics ours.)

Under the authorities, the application of the "original package" doctrine has been different in relation to tax cases than in relation to non-tax cases. The reason for the distinction is the decision that, so long as any goods partake of the protection and benefits of the laws of a state, they must pay their fair share of the tax burdens pertaining thereto. So long as the tax is non-discriminatory, it applies as well to articles in their original packages as to articles not in their original packages. This exception, however, applies only to imports from a sister state and does

not apply to imports from a foreign country. This proposition is well stated in the case of *City of Winchester vs. Lohrey Packing Company*, 237 S.W. 2d, 868, at page 869 as follows:

“The city is correct in its contention that one engaged in interstate commerce is not exempt from local taxation. The United States Supreme Court has said many times, ‘interstate commerce must pay its way’, and that it is not the purpose of the commerce clause, ‘to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the costs of doing business’.”

For the above reason, tax cases do not constitute authority under the “original package” doctrine when applied to non-tax situations.

The Supreme Court of the United States has uniformly held in non-tax cases involving the “original package” doctrine that the freedom from state regulation furnished by the commerce clause extends not only to the transportation of the goods into the state, but also to the sale of those goods by the importer. The reason for this is that, if the State had the right to regulate the sale of goods imported in interstate commerce, it would have the right to effectively control that commerce by prohibiting or otherwise limiting the sale of such goods. To control the sale of goods imported in interstate commerce is to

effectively control the commerce itself, and this would be a violation of the commerce clause.

One of the leading cases on this point is *Dahnke-Walker Milling Company vs. C. T. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106. This, too, is a case involving a statute requiring a foreign corporation to qualify to do business in a state. The plaintiff was a Tennessee corporation that sent an agent into Kentucky where he purchased a crop of wheat. The contract was entered into in the state of Kentucky, the wheat was paid for in the state of Kentucky, was delivered in the state of Kentucky to railroad cars on which it was to be shipped to the plaintiff in Tennessee. The defendant failed to deliver the balance of the wheat agreed on under this contract, the plaintiff sued for damages, and the Supreme Court of Kentucky held that the plaintiff was barred from suing by virtue of its failure to comply with the requirement to qualify to do business in the state of Kentucky. The U. S. Supreme Court reversed that decision, Justice Van Devanter delivering the opinion, and saying:

“The commerce clause of the Constitution, Art. 1, sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the later. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component

parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. *Brown vs. Maryland*, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688, 689; *American Steel & Wire Company vs. Speed*, 192 U. S. 500, 519 48, L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Express Company vs. Iowa*, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton vs. Missouri*, 91 U. S. 275, 23 L. ed. 347, 349: " 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." In *Kidd vs. Pearson*, 128 U. S. 1, 220, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In *United States vs. E. C. Knight Company*, 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, "contracts to buy, sell, or exchange goods to be transported among the several states" were declared "part of the interstate trade or commerce." And in *Addyston Pipe & Steel Company vs. United States*, 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96, the Court referred to the prior decisions as estab-

lishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." In no case has the Court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last.

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. *Crutcher vs. Kentucky*, 141 U. S. 47, 57, 35 L. ed. 649, 652, Sup. Ct. Rep. 851; *Western Union Telegraph Company vs. Kansas*, 26 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; *International Textbook Company vs. Pigg*, 217 U. S. 91, 112, 54 L. ed. 678, 687, 27 L. R. A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Sioux Remedy Co. vs. Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57. * * *

"For these reasons, we are of the opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the

state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

The doctrine of the *Bondurant* case above is affirmed by the Supreme Court of the United States in the most recent decision of that court relating directly to the original package doctrine. That case is *Wallace vs. Currin*, 95 Fed. 2d 856, affirmed 58 S. C. 379; 306 U. S. 1, 83 L. ed. 441. See particularly the quotation of the Circuit Court in 95 Fed. 2d, at page 862, setting forth the above rule verbatim.

A case very similar to the case at bar is *Talbot vs. Smith, et al*, 277 S. W. 257. In that case the goods concerned were aluminum sets which were in their original package, and were at rest in the State of Kentucky, awaiting sale. Thereafter they were sold, still in their original packages, by agents of the plaintiff company, under a contract with a local merchant who guaranteed payment for the sets. When the plaintiff company sought to collect from the local merchant, the merchant pleaded that the plaintiff had failed to file a certificate of doing business under an assumed name, and thus was barred from recovery. The plaintiff pleaded that it was, in making and carrying out the contracts of sale, engaged in interstate commerce.

The court held for the plaintiff, saying:

"In a case like this, the decisions of the Supreme Court of the United States are controlling. The rule adopted by that court is that, where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, while they are in the original packages. In applying this rule, no distinction is made between buying and selling, or between buying for transportation to another state and transporting for sale in another state. On the contrary, the rule is that, if the transportation is incidental to the buying or selling, it is immaterial whether it comes first or last. *Dahnke-Walker Milling Company vs. Bondurant*. The evidence discloses that the goods were shipped from another state in fulfillment of a contract which appellant made with appellees, and for the purpose of sale in this state in accordance with terms of the contract. Soon after the goods reached Bowling Green, and while they were in the original packages, they were sold and delivered to purchasers pursuant to orders taken by the crew of salesmen. In other words, the case is one where the goods were transported for the purpose of sale, and the sales were made after the goods reached their destination, and while they were in the original packages. That being true, the entire transaction was one of interstate commerce. It follows that Section 199 b1, Kentucky Statutes, is inoperative. * * *

The most recent original package case cited in the digests is *Pace Manufacturing Company vs. Milliken*, 70 F. Supp. 740. In that case the sheriff seized

a shipment of 25 slot machines while in their original packages. They were held to be in interstate commerce and free from state regulation, even police regulation because "at the time of seizure the goods were in the original unbroken packages in possession of the Railway Express Agency."

The rule is again stated by the Supreme Court in the case of *Department of Public Utilities vs. Arkansas Louisiana Gas Company*, 108 S.W. 2d 586, 194 Ark. 354, aff. 58 S. Ct. 770, 304 U. S. 61, 82 L. ed. 1149, as follows:

"The general rule is that as long as an article imported remains in the hands of an importer in the original and unbroken package in which it is imported, it is protected by the commerce clause of the Constitution from interference of state laws, and that it is only when the original package has been sold by the importer * * * that it becomes subject to state legislation."

Are the goods in the principal case in their "original packages" within the meaning of the doctrine?

In the argument below counsel for the respondent argued, and the court appeared to rule in favor of, the following propositions:

1. That a package which is sold to the ultimate consumer and is of a size suitable for use by such

ultimate consumer is not an original package within the meaning of the doctrine.

2. That a package which is sold at retail by the importer cannot be an original package within the meaning of the doctrine, for the doctrine is restricted solely to sales to wholesalers by the persons importing them into this state.

3. That only packages consisting of an aggregate of smaller packages are within the scope of the meaning of the phrase "original package," and that, therefore, a package filled with a substance which is the same throughout and is not divided into smaller packages is not within the scope of the doctrine.

These propositions have been fought out with some bitterness by the Supreme Court of the United States in a series of cases beginning with *Schollenberger vs. Pennsylvania*, 18 S. C. 757, 171 U. S. 1, 43 L. ed. 49, continuing through *Austin vs. Tennessee*, 21 S. C. 132, 179 U. S. 343, 45 L. ed. 244, *Cook vs. Marshall County*, 25 S. C. 233, 96 U. S. 261, 49 L. ed. 471 and concluded in *Kirmeyer vs. Kansas*, 35 S. C. 419, 236 U. S. 568, 58 L. ed. 721. The *Schollenberger* case, the *Austin* case and the *Cook* case all contain long discussions of the original package doctrine and the size and type of packages to which it applies.

In the *Schollenberger* case it was held that a 10 lb. tub of oleomargarine and a 40 lb. tub of oleomar-

garine sold to the ultimate consumer by one who had imported them from a sister state were original packages within the meaning of the doctrine and as such were protected from the provisions of a statute prohibiting the sale of oleomargarine. This case clearly shows that no distinction is to be made between sales at retail and wholesale, sales to the ultimate consumer and not to the ultimate consumer, and sales of goods which are the same throughout the entire package and those which are divided into smaller packages contained in a larger shipping package. In this case the entire Supreme Court was in accord as to what constituted an original package but there was a dissent by Mr. Justice Gray and Mr. Justice Harlan on the question of whether oleomargarine was a deleterious substance and subject to being excluded from a state by state law under the police powers. Of particular note is the following language at page 56 of vol. 49, L. ed.:

“The question is whether a package intended and used for the supply of the retail trade is an ‘original package’ within the protection of the interstate commerce cases. * * *

At page 58 the court continues:

“We are not aware of any such distinction as is attempted to be made by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to

here determine. We do say that a sale of a 10 pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within this State. * * *

"The importer had the right to sell, not only personally, but he had the right to employ an agent to sell for him. Otherwise, his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different states in the union. Having the right to sell through his agent, a sale thus effected is valid.

"The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages."

It should be noted that the special findings referred to in this case (49 L. ed. at page 56) were:

"That the package in which the oleomargarine was sold * * * was of such form, size, and weight as is used by producers or shippers for the purpose of securing both the convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce and the said form, size, and weight were adopted in

good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant."

Some two years later in the case of *Austin vs. Tennessee*, supra, the exact same Justices were called upon to decide whether the protection of the commerce clause under the original package doctrine should be extended to small packages containing ten cigarettes which were stacked by the manufacturer on warehouse floor, picked up by the express company in baskets, carried in those baskets to the purchaser and dumped out at the purchaser's place of business by the express company in contravention of a Tennessee statute providing that no one could bring cigarettes into the state for the purpose of selling, giving away or otherwise disposing of them.

The two holdings of importance in this latter case were, first, that a prohibition against the importation of cigarettes is a legitimate exercise of police powers by a state, and, second, that small paper packages of cigarettes, three inches in length and one and one-half inches in width containing ten cigarettes were not original packages within the meaning of the doctrine and within its protection from interference by state laws, but, if there was any original package, it was the basket in which they were transported. On both these questions there was a serious split in the Court,

the majority opinion being written by Mr. Justice Brown and concurred in by three other Justices, Mr. Justice White concurring specially, and the Chief Justice and three other Justices dissenting in a long and spirited dissent. The first holding is not germane to the case before us at this time and we shall refer only to those portions of the case dealing with the second proposition. After a review of the history of the original package doctrine, the majority opinion summarized its holdings as follows, on pages 232 and 233, Vol. 45, L. ed.:

“The real question in this case is whether the size of the package in which the importation as actually made is to govern, or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. By taking the words ‘original package’ in their literal sense, a number of so-called original package manufacturing have been started through the coun-

try, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the state with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and a bona fide package of a particular size. *Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state,* and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several state, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties.* * * (Italics ours).

“There could hardly be stronger evidence of fraud than is shown by the facts of this case,

which we quote from the opinion of the court:

“The defendant purchased from the American Tobacco Company, at its factory, in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant’s purchase the American Tobacco Company piled upon the floor of its warehouse in Durham, North Carolina, the number of boxes or packages sold, and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by express to the defendant’s place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted.’

“And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge to which this court ought not to lend its countenance. If there be any original package at all in this case we think it is the basket, and not the paper box.”

Mr. Justice White, whose position determined the matter in a court otherwise split four to four, concurring said:

"I do not understand that anything in the opinion of the court impairs the doctrine protecting original packages from interference by the police or any other power of the state, as announced by so many opinions of this court, especially as expounded in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, and *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, and the authorities which are cited in the opinions of the court in both of these cases. If I thought either the opinion of the court just announced or the conclusion which it reaches had the effect of weakening the doctrine upheld by the authorities to which I had just referred, I should be unable to concur. Indeed, as I understand the case as now decided, all the questions adverted to are merged in the solution of the one decisive issue, which is, Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudications of the court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket. Thus associated in their ship-

ment, they could not, under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package."

In the dissenting opinion written by Mr. Justice Brewer and concurred in by the Chief Justice, Mr. Justice Shiras and Mr. Justice Peckham appears the following language:

"Recently in *Schollenberger vs. Pennsylvania*, *supra*, we held that an importer had a right to import oleomargarine in 10 pound packages, and sell it in such a package at retail to a consumer. Apparently the dividing line as to the size of packages must be somewhere between that of a 10 pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from state to state in 10 pound packages?"

Because of the conflict and the split in the Court, the particular cigarette company involved commenced to ship its small boxes of cigarettes loose, that is, the packages of ten cigarettes each were piled on the floor of the warehouse, were picked up by the express company by shovelling them into some sort of wagon or carrier, placing them in the express car loose and delivering them in the same manner. The question of whether that placed them within the original package doctrine came up for decision and was decided some five years later by a court composed of the same Chief Justice, six of the same Associate

Justices and Justices Oliver Wendell Holmes and William R. Day, in the case of *Cook v. Marshall County*, supra. There the Court reaffirmed the proposition that their holding in the Austin case was based on the fact that the method of shipping was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the State, was fraudulent in its purpose and procedure, and was not a usual method of interstate shipment." The following language of the majority opinion found in 49 L. ed. at pages 474-475, is significant:

"The term 'original package' is not defined by any statute and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown v. Maryland*. to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that, in the changed and changing conditions of commerce between the states, packages in which these shipments may be made from one state to another may be smaller than those 'bales, hogsheads, barrels, or tierces,' to which the term was originally applied by Chief Justice Marshall, but *whatever the form or size employed, there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the states.* (Italics ours.)

"In *Leisy v. Hardin*, 135 U. S. 100, 34 L.

ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Schollenberger v. Pennsylvania*, oleomargarine transported and sold in packages of 10 pounds weight was recognized as bona fide, but it was expressly found by the jury in that case that the package was an original package, as required by the act of Congress, and was of such 'form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant.' While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one state to another as a separate importation could be considered as an original package."

In that case, Mr. Justice White affirmed his

concurrence and the Chief Justice, Mr. Justice Brewer and Mr. Justice Peckham dissented.

This case clearly established as the test the questions:

1. *Is the transaction a bona fide one? and*
2. *Have the usual methods of interstate shipment been departed from for the purpose of evading the police laws of the state?*

Ten years later, before a court consisting of Chief Justice White, Justices McKenna, Holmes, and Day, as the only remaining Justices of the court which decided the Cook case, there arose in the case of *Kirmeyer vs. Kansas*, supra, the question of whether a dealer in intoxicating liquor who had his warehouse at Stillings, Missouri, just across the river from Leavenworth, Kansas, and sold liquor to the "family trade" for private use via mail and telephone orders by setting aside cases, kegs or casks in his warehouse in Stillings, tagging them with the names of the purchasers and sending them daily over the bridge in his own wagons to the residences of the purchasers in Leavenworth, Kansas, was protected from interference in his occupation by the original package doctrine. It was held that he *was so protected* even though his trade was a *retail trade* and, even though a barrel or a cask of liquor or beer contains goods which are the same throughout and are not broken

up into smaller packages. In the following language of the court is of substantial interest:

“Improper application was given to what was said in *Austin vs. Tennessee* and *Cook vs. Marshall County*, *supra*. The point for decision in them was whether the packages containing cigarettes shipped into the state were ‘original’ ones within the constitutional import of the term, as theretofore defined. Looking at all the circumstances this court concluded they were not. The general use of like packages was unknown and impractical in transactions between manufacturers and wholesale dealers residing in different states, and the plan pursued was plainly a mere device designed to defeat the policy of the state where the goods were received,—not a bona fide commercial arrangement. Here no such question is presented.”

What then is the result when these rules and distinctions laid down by the highest court of the land are applied to the case now before us? In the principal case there is no evidence whatever of any fraudulent purpose, intent or design on the part of appellant. Respondents have never contended that the transaction was not bona fide or that the method of shipping adopted by appellant was designed to evade regulations passed under the police powers of the state. Surely no one believes that the importation of oil well drilling chemicals into this state endangers the health, welfare or morals of our citizens. These importations are beneficial, making possible

the development of our great oil reserves. This leaves us then with a question of whether the packages used here are such packages as are ordinarily used in the trade, i.e., whether they are packages comparable to the packages of cigarettes or to the 10 lb. tub of oleomargarine.

According to the testimony of Mr. Putman (R 147), four major mud companies generally control the industry and all handle the same products so far as material and quality is concerned and in all instances each chemical is packed in the same size bags or casks, differing as between companies only in color. Further, those packages are packaged "all over the world" by their manufacturers in the same packages in which they were imported into this state and sold (R 114 & 115). These facts clearly show that the packages concerned in this case are the usual packages in the trade, are packages as they are packaged pursuant to a bona fide commercial arrangement and in accordance with the manner in which this particular kind of goods have been and still are brought into this country from foreign countries and into this state from both foreign countries and foreign states.

That one of the important chemicals involved is ruined if it comes into contact with air, is packed in drums which are air tight, and contain 400 lbs. of material appears to us to demonstrate conclusively

that the method of packaging was adopted to safeguard the chemical during its transportation so that no break would occur in the airtight seal required for it to remain in a usable state. That this package is used by the ultimate consumer results not from any intention to design it for use in a retail trade, rather it results from the fact that the ultimate consumers in this instance use the product involved herein in tremendous quantities, in such quantities in fact that a 400 lb. drum is a convenient and usable unit. The strong bags in which the other chemicals are packed, the fact that some of them are sewed up with wire bands so as to avoid any loss of their expensive contents, further illustrates the proposition that these packages are designed for safety and convenience in transportation. To have them be of a size that is convenient for use by a single man at the well drilling site is an incidental, though desirable, feature. The *Schollenberger* case, *supra*, and the *Kirmeyer* case, *supra*, conclusively established that the fact that a package is usable by the ultimate consumer in the form in which it is imported does not per se take that package outside the scope of the original package doctrine.

Of additional importance is the fact that the chemicals involved in this case are generally purchased by the ultimate consumer from the importer in lots of more than a ton. (See statement on page 4, *supra*, and Exhibit "B".) It is more in the nature of

an industrial trade than what we generally consider to be retail trade.

In light of the principles laid down by the Supreme Court of the United States in the *Schollenberger*, *Austin*, *Cook*, and *Kirmeyer* cases, supra, the goods imported and sold by appellant to respondents were clearly in their "original packages" within the meaning of the doctrine that establishes that, until sold or broken, they are protected under the commerce clause from regulation or control by the individual states.

Counsel for respondents suggested below that the original package doctrine is no longer the law. This proposition is refuted by the holding in *Pace Manufacturing Co. vs. Milliken*, supra, a recent case. That it was still a living doctrine in April of 1948 is pointed out by the Supreme Court of Pennsylvania in *Commonwealth vs. Bayuk Cigars*, 359 Pa. 202; 58 A. 2d 445, 447 as follows:

"Both grounds of constitutional invalidity, so reckoned with by the learned court below, fundamentally stem from the fictional situation legally supplied by the 'original package' idea, first developed by Chief Justice Marshall in *Brown v. Maryland*, 1827, 12 Wheat U. S. 419, 6 L. ed. 678, and ever since scrupulously observed by the courts of this country. * * *

(Italics ours).

CONCLUSION

For the reason that the statute requiring the appellant foreign corporation to qualify to do business in Utah is repugnant to the commerce clause of the Constitution of the United States when applied to transactions in commerce between the states, and that, under the original package doctrine, all the sales concerned herein are sales of goods still in commerce between the states, appellant respectfully requests this honorable court to modify the judgment entered below by adding to it the sum of \$7,458.10, with interest at the rate of 6 per cent per year from July 27, 1949, to date, and costs of this appeal.

Respectfully submitted,

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