



1915

The Foreign Corporation, Its Rights and Liabilities in Kentucky

Ryland C. Murick

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Business Organizations Law Commons](#), and the [State and Local Government Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Murick, Ryland C. (1915) "The Foreign Corporation, Its Rights and Liabilities in Kentucky," *Kentucky Law Journal*: Vol. 3 : Iss. 4 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol3/iss4/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Congress passed during the Civil War, of stock in two Michigan corporations.

The stock in question was owned by a Virginian who had at various times since July, 1862 acted as an officer both in the army and navy of the Confederacy.

The majority of the United States Supreme Court, in an opinion delivered by Justice Strong, joined in sustaining the decisions of the District and Circuit Courts in favor of the condemnation of the stock.

The majority decision held that in the Civil War "the United States had belligerent as well as sovereign rights." From this it resulted that the United States had "a right to confiscate the property of public enemies wherever found, and also a right to punish offences against her sovereignty."

It was also decided that 'rebels' were to be regarded and treated as public enemies and also their aiders and abettors, even though not resident in the enemy's territory.

The power of Congress to determine what property of public enemies should be confiscated was sustained. The decision was by no means unanimous, as Justice Field, Clifford and Davis dissented from the opinion of the majority of the court.

As was said at the beginning of this discussion, the principles declared and the rules laid down in the cases treated in the course of this paper are recognized throughout the civilized world.

In the not impossible, perhaps probable, event of a war in the near future, growing out of the violation of the rights of American vessels on the high seas, or the flagrant disregard of the Monroe Doctrine, we shall doubtless see the able decisions of the United States Supreme Court, rendered during and since the war of 1812, and the stormy period of the Civil War, followed and affirmed in a number of subsequent cases involving the rights and liabilities of *Alien Enemies by Operation of Law*.

THE FOREIGN CORPORATION, ITS RIGHTS AND LIABILITIES IN KENTUCKY.

(BY RYLAND C. MUSICK, OF THE JACKSON, KENTUCKY BAR.)

Any foreign corporation, except Insurance Companies, or agent of employe of such corporation, who shall transact, carry on or conduct any business in Kentucky for such foreign corporation and such foreign cor-

poration, which shall cause an agent or employe to carry on, transact or conduct any business in Kentucky before having designated an agent in Kentucky upon whom process in any judicial action commenced in this state may be served together with some known place of business, (the agent's residence or office sufficient), in Kentucky and before filing with the Secretary of State a statement setting out the name and location of said agent, shall be severally guilty of a misdemeanor and fined not less than One Hundred (\$100.00) Dollars nor more than One Thousand (\$1,000.00) Dollars for each offense.

A foreign corporation desiring to begin the transaction of business in Kentucky or to engage in business enterprises in Kentucky must before beginning such business or any act connected with such business, select and appoint a suitable agent in the state upon whom any process in any action, civil or criminal, may be served. Such agent should be a person capable of gathering information and acting for such corporation after the service of such process, until the corporation might assume control of their own interests in such litigation. Having selected an agent, his office or residence may be designated as a known place of business within the state or should a foreign corporation have a warehouse, store, or other place of transacting business, such location may be designated, but in any event, the agent must reside at such place of business. Before beginning business a statement by such corporation by its president or secretary, setting forth the name of the selected agent and place of business, must be filed with the Secretary of State, at Frankfort, Kentucky. Any change of agent or place of business requires the filing of a new statement, setting out such changes. The first question arising in the mind of a corporation manager or superintendent is what constitutes, "Carrying on any business," in Kentucky. Does selling a saw mill, at the Indiana factory and setting it up in Kentucky come within the statute? Does selling fruit trees from a catalogue or price list carried by an agent and delivering the trees at purchasers' railway station, come within the clause. "Carrying on any business in Kentucky," the drummer taking orders for a New York tailor, exhibiting samples and taking measures; or a salesman for a North Carolina furniture factory, who goes to Lexington, Jackson, Louisville or other Kentucky city and there exhibits lithographed pictures of store fixtures and measures the building for counters and cases; does the lightning-rod man from Chicago, who sells rods and contracts (for the purchaser price) to install the rods; or an oil company engaged in refining oil at Fort Wayne, Indiana, and receiving its crude material through a pipe line extending through Kentucky from Tennessee. Are these people engaged in business, under the law, in Kentucky? Does the Douglas Shoe Company, selling through

a drummer, upon a signed order from the Jackson or Covington merchant, come within the statute?

The second confronting the management of the foreign corporation, is the results of doing business in Kentucky without complying with the law or the consequences of such violations. What are the rights of the corporation until the law is complied with? Can the foreign corporation enforce its contract made in Kentucky? Can it recover for the destruction of its property? The remaining questions are questions of advisability of designating an agent, the character of agent and the expense attached to such agency.

TO WHOM STATUTE APPLIES.

We might have easily referred above to any number of different classes of business and brought in to this discussion the question as to whether such classes of business came within the rule or have described the multiplicity of acts that would bring a foreign corporation within the rule, but such a discussion would carry our article far beyond the length, which present space affords. In Kentucky, like many other states, the rule in late years is being most rigidly construed and it should be because of the protection that must be afforded to the person doing business with the corporation or its agent. Law-suits are always the possible outgrowth of contractual relations, and that the person dealing with a foreign corporation may be afforded the protection of the courts, these corporations must be brought under the jurisdiction of the courts in the states where the transaction occurred, out of which the litigation has developed. A company who appoints an agent to sell goods, supplying them with the goods and retaining the title to themselves, places the corporation within the rule. Likewise the milling company that sells through a traveling salesman and agrees to set up in Kentucky the machinery sold, comes under the statute. The doing of any business in the state, such as setting up or delivering the material sold, puts the corporation within the statute. The firm who sends to a merchant a stock of hats, shoes, machinery, furniture or any goods, allowing the merchant to dispose of same on consignment, the title remains in the non-resident corporation and the merchant becomes its agent in the disposition of the goods and the company is doing business in the state within the statute. The non-resident corporation that contracts with a Kentuckian, municipality or even with the state to construct a bridge, a railroad, pike road or a structure of any nature and enters upon such work within the state, engages in business in the state. See *Oliver Company vs. Louisville Realty Co.*, 161 S. W. 570; *Orr's Admr. vs. Orr*, 163 S. W. 757; *Milburn Wagon Co. vs. Commonwealth of Kentucky*, 104 S. W. 325.

It must be remembered that no corporation has a legal existence

outside of the state that created it and the exercise by it of any power in another state rests with that state alone. *Lathrop vs. The Commercial Bank*, 38 Ky. 114; *Commonwealth vs. Milton*, 51 Ky. 212; and the right of the state to impose the requirements of an agent and a known resident within its boundry upon any and all foreign corporations is within its powers and clearly constitutional, except that it may not impose restrictions that interfere or regulate interstate commerce. *Commonwealth vs. Redd Phosphate Co.* 67 S. W. 45.

Such cases as above referred to have been repeatedly passed upon by the state courts and the federal courts. Thus we may reason out the decisions of the courts upon cases of similar nature. We must of course bear in mind interstate commerce and in doing so it is not safe for the non-resident corporation to rely upon the belief that the business done by it is exempt under the interstate commerce clause, but in every case where there is a question the statute should be complied with. A non-resident corporation selling goods subject to approval of purchaser after examination have in some instances been declared by able lawyers to be a local sale and if such sale is to be held to have been made in Kentucky, the seller would not have the right to institute an action to enforce the contract, because it had not complied with the statute at the time of making the sale. Where the sale is construed to have taken place in Kentucky, the seller must appoint a resident agent upon whom process may be served before the sale, in order for the contract to be enforceable.

A single sale where the sale took place in Kentucky, negotiated by a special agent of a foreign corporation renders the selling agent, the agent, of the non-resident seller for the service of a summons in a suit concerning that transaction, notwithstanding, no agent as provided by statute has been appointed.

And not only is the above true, but if the sale takes place in another state and there is anything done in Kentucky, in connection with or in consumation of the contract of sale, such as the installation of the thing sold or the trying on and fitting of a garment sold under an order or the delivery and collection for an enlarged picture, (upon an order through an agent), by the agent of the seller and any and all similar acts takes the case out from under the commerce clause usually relied upon and places the seller under the statute of the state. *Browning vs Waycross*, U. S. Sup. Ct. advance opinions No. 12, page 578, May 15, 1914.

The above construction may be considered as being rather far fetched, but we must accept the decisions as being the law until they have been annulled or modified by later decisions. The U. S. Supreme Court in the case of the *International Harvester Co. vs. Commonwealth of Kentucky*, upheld the Kentucky courts in a unanimous opinion upon a state

of facts that only showed that notes payable at Kentucky Banks taken in settlement of purchases made on orders filled outside of the state in connection with the fact that the agents were continually soliciting business in Kentucky put the Harvester Company in reach of the statute. Under that decision it is quite clear that a non-resident corporation having agents in Kentucky engaged in continually soliciting business and collecting bills by receiving notes or checks payable in Kentucky, is engaged in business in the state within the meaning of the statute.

There are several features here noticeable. The goods if sold and collected for by the agent, but shipped direct to the purchaser by the non-resident constitutes doing business in Kentucky. Also the goods furnished by a non-resident to their agent, who sells, delivers and collects makes the non-resident liable under the statute or if the agent takes the orders from samples or pictures and afterwards delivers and collects, he puts the non-resident under the statute and service of process upon him is service upon the non-resident for the purpose of an indictment or a suit growing out of a sale made by him.

In any instance where the non-resident has a regular place of business where its goods and wares are displayed within the state, puts such non-resident within the rule and even the establishment of a temporary place of business within the state puts it under the statute.

EFFECT OF FAILURE.

The corporation that engages in any business in Kentucky without first having complied with the statute becomes liable criminally as stated in the beginning. It loses its right of action upon any contract made in the state before complying with the statute and it can not enforce the collection of its accounts and cannot maintain an action in the courts on any obligation due or contract made with it before it complied with the statute.

Its contracts are enforceable against it, however, and even though no agent has been designated the service of process upon the agent, making the sale or contract is sufficient or upon an agent in charge of its affairs at its local office, if it has one, or in charge of the work being done.

It may also be here noted that the agent making the contract or the sale of the property or concerning the property of the non-resident corporation may become individually liable on such contract.

AGENT AND EXPENSE.

The advisability of appointing an agent before commencing business in Kentucky can very readily be seen from the above statements and

court rulings and such is not only true where the corporation is certain that they come within the rule, but is quite advisable where the business done is of such a nature that a question arises whether the conduct of such business or the doing of things contemplated come within the rule. The expense to such an agency is very small and safety and security made certain. A single contract or act that might place the corporation within the rule would be safeguarded by compliance with the law while that single contract might be absolutely annulled by failure to comply with the statute.

The agency fees would average from ten dollars to fifty dollars per annum with such additional pay as the circumstances or business afterward developing would demand. This retainer would cover, "known office or place of business," being the agents office. The other incidental expense would be so small as to be trival.

o

ABSTRACTS OF CASES DECIDED BY THE KENTUCKY COURT OF APPEALS.

NATIONAL BENEFIT ASSOCIATION V. CLAY, INSURANCE COMMISSIONER.

Decided January 28, 1915. Appeal from Franklin Circuit Court.

When a foreign assessment association has fully complied with the requirements of Section 680 of the Kentucky Statutes, and is in a sound condition, and there is nothing in its charter or by-laws or method of doing business that is obnoxious to the laws of this State, the Commissioner of Insurance is not authorized to refuse it a certificate to do business in this State. Under Section 202 of the Constitution a foreign corporation will not be allowed to transact business in this State on more favorable conditions than like domestic corporations, but it is not necessary hat a foreign corporation seeking authority to do business in this State should be incorporated or organized according to the forms prescribed for the incorporation or organization of domestic corporations. Under this section when a foreign corporation comes into this State, no matter how it was incorporated or organized in another State, it cannot do business in this State under more favorable conditions than like domestic corporations. Under Sections 752 and 753 of the Kentucky Statutes the Commissioner of Insurance has ample power to protect the people of the State against foreign companies that are not in a sound condition or that fail or refuse to comply with the laws of this State, and when a foreign corporaion is admitted to do business in this State this privilege