

5849

1. MILK DEALERS LAW, OHIO—MILK DEALER'S LICENSE REQUIRED FOR OPERATION OF MILK RECEIVING STATION IN OHIO — MILK ACQUIRED FROM OHIO PRODUCERS — RECEIVED, WEIGHED, SAMPLED AND MINGLED.
2. OWNER AND OPERATOR, MILK RECEIVING STATION, WHO IS OUT OF STATE MILK DEALER—MILK ENTERS INTERSTATE COMMERCE—SUCH OWNER AND OPERATOR NOT RELIEVED FROM OPERATION OF LAW.

SYLLABUS:

1. A milk dealer's license is required for the operation of a milk receiving station in Ohio at which milk acquired from Ohio producers is received, weighed, sampled and mingled.

2. The fact that such milk receiving station is owned and operated by an out of state milk dealer and that the milk so acquired enters interstate commerce, does not relieve such owner and operator from the operation of the Ohio Milk Dealers Law.

Columbus, Ohio, February 27, 1943.

Hon. John T. Brown, Director, Department of Agriculture,  
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, as follows:

"I hereby submit the following questions relative to licensing dealers in milk and cream as provided in Sections 1080 to 1080-24, General Code of Ohio for your consideration and formal opinion.

1. Should a license be required for operation of a milk receiving station in Ohio where that station is owned and operated by an out-of-State corporation, the milk received being from Ohio producers, some of whom are members of an out-of-State co-operative organization of producers? The milk received at the Ohio plant is weighed, sampled and mingled, therefore losing its identity before it is transported out of Ohio for sale. Payment for said milk is made directly to producers from the home office of the buyer, the corporation in a neighboring state. The milk is transported from the farm to the receiving station and from the receiving station to the plant out of state in company owned trucks.

2. In addition there are several receiving stations in Ohio operating under conditions as indicated above and processing a portion of the milk received at the Ohio plant. Does this fact alter requirements for a license for these receiving stations?"

Subsequent to the receipt of the above letter, you further informed me that the co-operative organization of producers to which you refer was incorporated both in the State of Ohio and in the State of the residence of the so-called dealer; that many of the members of that co-operative organization are Ohio farmers; that said co-operative organization entered into a contract with said dealer to sell to it the milk of its member producers; that said contract was made in said foreign state; that the dealer paid a percentage of the purchase price for the milk to the co-operative organization and, at the direction of said organization, paid the remainder directly to the producers and that said payments were made from the office of said dealer in the foreign state.

The basis for licensing a milk dealer in Ohio is Section 1080-1 of the General Code, which provides:

"No dealer as hereinabove defined shall engage in the busi-

ness of handling milk or cream or continue in such business after this act shall become effective unless he shall be licensed as hereinafter provided to engage in such business."

"Dealer" as that term is used in the above section, is defined in Section 1080, General Code:

"When used in this act the following terms shall have the meanings herein stated: \* \* \*

'Dealer' shall include every person except a producer-distributor, producing two-thirds of the milk he sells, who handles milk or cream except where such milk or cream is disposed of in the same container in which it is received and without removal from such container and without processing in any way except by necessary refrigeration."

Since the facts which you present do not come within either of the exceptions stated in said definition, such out of state corporation is a "dealer" if it "handles milk or cream."

"Handling" is defined in said Section 1080, General Code as follows:

"'Handling' shall mean the purchase, receipt on consignment or agency contract, or acquiring of milk or cream from the producer or producers thereof or organizations of producers for the purpose of bottling, selling, processing, jobbing, or distributing the same."

Although the contract for the purchase of the milk of the Ohio producers was entered into in a foreign state, the delivery of that milk to the buyer is made in Ohio, who then mingles it with other milk at the Ohio receiving station. Certainly the buyer "acquires" such milk in Ohio within the meaning of that term as used in said Section 1080, General Code.

"Acquire" is defined in 1 Corpus Juris, 908 as follows:

"ACQUIRE. To obtain; to procure, to get as one's own; to earn; to get or gain by some lawful title; to make one's own according to some rule of law. In its primary use to get as owner. In its broader sense to obtain in any manner; to gain by any means. \* \* \*"

That the General Assembly intended the word "acquire", as the same appears in the above section, to be given its broadest meaning, is indicated by the following terms which appear throughout the Act: "milk or cream *delivered to or purchased by* dealers from producers"; "the name of each

producer from whom milk or cream is received"; "all milk or cream *received*"; "each dealer shall file with the Director a statement setting forth the price or prices paid for milk or cream *delivered* to him by producers"; "In order to provide assurance that milk or cream *delivered* to him by producers will be paid for, each dealer \* \* \*." (Emphasis mine.) See Section 1080-4 and Sections 1080-13 to 1080-16, inclusive, of the General Code.

Furthermore, Section 8399, General Code provides in part:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property and goods is to pass to the buyer: \* \* \*"

Rule 4 (1) When there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in goods thereupon passes to the buyer."

It is patent that the milk sold in the transaction outlined in your letter is ascertained and unconditionally appropriated to the contract when it is delivered to the buyer who then mingles it with other milk.

It is, therefore, my opinion that a milk dealer's license should be required for the operation of a milk receiving station in Ohio, at which milk acquired from producers is received, weighed, sampled and mingled.

Your inquiry also involves the consideration of the power of the State to enact regulatory measures which may affect interstate commerce. The Ohio Milk Dealers Law is a police regulation of the State, having for its purpose the elimination of the evil effects on the milk industry and the citizens of Ohio which flow from certain trade practices, by preventing inaccuracy or dishonesty in weighing, sampling and testing milk and to throw around these transactions the safeguards necessary to insure the milk producers against loss by reason of the financial irresponsibility of the buyer.

The Supreme Court of the United States has often pointed out that the commerce clause of the constitution of the United States in conferring on Congress the power to regulate interstate commerce, did not wholly withdraw from the individual states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though such regulation affects interstate commerce.

In the case of *California v. Thompson*, 313 U. S., 109, 113, it is stated:

"Ever since *Wilson v. Black Creek Marsh Co.*, 2 Pet. (U.S.) 245, 7 L. ed. 412, and *Cooley v. Port Wardens*, 12 How. (U.S.) 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress."

This case involved a California statute requiring a bond and license of transportation agents who negotiated for the transportation of passengers over the public highways of that state. The purpose of the law was to safeguard the members of the public desiring to secure transportation by motor vehicle, who were unable to protect themselves from fraud and over-reaching by those who engaged in a business subject to those abuses. The court held, as appears on Page 114:

"Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations applicable to articles of interstate commerce designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce."

It should be pointed out here that Congress has not yet undertaken to regulate the transaction which you describe. Again, on Page 115 of said opinion the court states:

"Fraudulent or unconscionable conduct of those so engaged, which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation."

To the same effect is the decision in the so-called *Minnesota Rate Cases*, 230 U. S., 352, in which it was stated:

"Said inspection laws and statutes designed to safeguard inhabitants of a state from fraud and imposition, are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the state and held for sale in the original imported package."

It, therefore, follows that prevention of fraud and dishonesty in connection with the milk industry is within the power of the state even though it may incidentally affect interstate commerce.

This opinion should be distinguished from Opinion No. 4739 rendered January 27, 1942, in which I stated:

“You are advised therefore that the provisions of the Ohio law can afford no protection to those producers who sell milk and cream to dealers outside the state.”

The distinguishing feature is that the transaction dealt with in that opinion took place outside the State of Ohio where the laws in Ohio can have no effect, whereas, in the case which you now present, the transaction to be regulated takes place within this state.

In addition to the conditions already discussed, you state in your second question that some dealers are processing in Ohio a portion of the milk received at the Ohio plant. This, of course, would not alter the requirement that such plant be licensed under the provision of the Ohio Milk Dealers Law. Any processing other than necessary refrigeration, obviously places such dealer within the terms of the definition of “dealer” quoted earlier. The General Assembly has seen fit to provide only two exceptions (other than the producer-distributor producing two-thirds of the milk he sells), namely, where the milk or cream is disposed of in the same container in which received without removal therefrom and without any processing except necessary refrigeration. If the milk received at the particular receiving station, toward which your first inquiry is directed, were transported out of Ohio in the same containers in which received and without removal from such containers and without processing except necessary refrigeration, my conclusion would have to be that the owner and operator of that receiving station was not a dealer within the definition of the Ohio Milk Dealers Law. Your recital of facts clearly indicating a contrary situation, I am necessarily impelled to the conclusion herein reached.

In specific answer to your inquiry, it is therefore my opinion that:

1. A milk dealer's license is required for the operation of a milk receiving station in Ohio at which milk acquired from Ohio producers is received, weighed, sampled and mingled.
2. The fact that such milk receiving station is owned and operated by an out of state milk dealer and that the milk so acquired enters interstate commerce, does not relieve such owner and operator from the operation of the Ohio Milk Dealers Law.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.