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FOREIGN CORPORATIONS IN WISCONSIN

By Clifton Williams, City Attorney of Milwaukee.

HISTORY OF LEGISLATION IN WISCONSIN ON FOREIGN CORPORATIONS.

The law of Wisconsin on foreign corporations must be divided into two periods, the first being the period prior to 1897, when section 1770b of the statutes was passed excluding all foreign business corporations except those engaged in religious and charitable work or insurance from the state unless they complied with the provisions of this law. This excluding is brought about by rendering contracts and transactions of business in this state, other than interstate commerce, void, unless there is a compliance with the statute.

Prior to 1897 foreign insurance companies had been excluded, as early as 1858, unless they filed with the Secretary of State a certificate showing that they had Fifty Thousand Dollars capital, and the agents had to procure a certificate showing the right to do business in this state.1

In the Revised Statutes of 1849 we find a provision2 to the effect that a foreign corporation, created by the laws of any other state or country, may prosecute in the courts of this state in the same manner as corporations created under the laws of this state, upon giving security for the payment of costs of the suit in the same manner that non-residents are required by law to do. Practically the same provision is found in the Revised Statutes of 1858.3

The revisors of 1878 created section 3207 of the statutes out of the laws of 1849 and 1858 above referred to, and extended the provisions permitting any foreign corporation to sue or to be sued here to a corporation created under the laws of the United States, and omitted from the provision the requirement for security of costs, that being provided for in the chapter on costs and fees.4 As changed by the revisors of 1878, section 3207 of the statutes still exists today, being limited to the actions brought by or against foreign corporations in the courts of this state.

1. Section 7, Chapter 72, Revised Statutes 1858.
2. Section 1, Chapter 113, Revised Statutes 1849.
3. Section 11, Chapter 148, Revised Statutes 1858.
4. Revisor's Notes 1878, page 231.
In 1880 the legislature provided that transportation companies, domestic or foreign, should deposit, in the office of the Clerk of the Circuit Court in each county in which they operated, a statement appointing an attorney for the purpose of service of process in such counties. This was changed in 1881 so that the nomination of attorneys for the purpose of service of process was filed merely in the office of Secretary of State. In 1883 the legislature provided that private foreign corporations carrying on business in this state must, at the request of resident creditors within sixty days after such request, and annually thereafter, file in the office of Secretary of State a statement showing the capital stock now subscribed, etc.

These provisions, and the insurance laws above referred to, may be said to be forerunners of section 1770b which was enacted in 1897, and extended to practically all private business corporations.

**DECISIONS AS TO INSURANCE COMPANIES PRIOR TO PASSAGE OF SECTION 1770b.**

As already noted herein, insurance companies were practically the only companies separately treated as foreign corporations in Wisconsin prior to the enactment of section 1770b in 1897. At a very early date our Supreme Court held:

"Whether these foreign insurance companies shall do business in this state, or whether they shall be prohibited, is a matter which concerns the state and affects the public welfare. They may be permitted or prohibited; and if permitted, the sovereign power may impose such restrictions and conditions as it sees fit, which can, in general, only be enforced by operating upon their agents and managers within the territory."

Although the early insurance statute merely prohibited the company from engaging in business in this state until it complied therewith, our court held that the contracts made, even in the absence of a provision in the statute to that effect, would be void. That is, it was held by our court that the provision that the company should not transact business in this state until it possessed the requisite amount of capital was such a prohibition as would

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6. Chapter 189, Laws 1881.
7. Chapter 229, Laws 1883.
render contracts made in this state "absolutely void" because they were "positively prohibited".

In another one of these early insurance cases\(^{10}\) our Supreme Court held:

"Considering that the foreign corporation has no power to do any corporate act in this state except by the assent, express or implied, of the legislature, and that it derives its whole power and authority to do so from the latter, it necessarily follows that the legislature has the same power and all the power and control over it that it has over a corporation of its own creation."

Another one of these early insurance cases held that a foreign insurance company having loaned money in Wisconsin and taken a mortgage on land here to secure the loan could bring an action in this state without having complied with the insurance law then in existence, as a condition precedent to the right to do business in Wisconsin. It was held that without complying with said statute the insurance company could sue in Wisconsin to foreclose the mortgage, no reference whatever being made in the decision to the statute which had its origin in 1849, as above pointed out, and continues today in the provisions of section 3207, which would permit such a foreign company to sue here.

The language of the court in this case was:

"And if it ever were a doubtful question whether corporations of one state could maintain suits in another state, it is no longer so. Such suits are now supported by judicial decisions in all the states."\(^{11}\)

When the question came up again as to whether or not an unlicensed insurance company could be sued in this state, the Supreme Court held that even if it were doing business here in violation of law it could be sued here, although unlicensed, and no reference was made to the statute permitting suits.\(^{12}\)

It was also held that the receiver of a foreign insurance company would be subject to these provisions of the law.\(^{13}\)

Other than these insurance cases there is but one foreign corporation case in Wisconsin of any moment prior to the passage of section 177ob of the statutes, which marks the beginning of

\(^{10}\) Morse, et al. vs. Home Insurance Co., 30 Wis. 496, 505.

\(^{11}\) Charter Oak Insurance Co. vs. Sawyer, 44 Wis. 387, 388.

\(^{12}\) The State vs. United States Mutual Accident Assn., 67 Wis. 624.

\(^{13}\) Wyman vs. Kimberly-Clark Co., 93 Wis. 552.
the second division of the law on foreign corporations in Wisconsin. This case is the case of Larson vs. Aultman & Taylor Co., 86 Wis., 281, which holds that a foreign corporation, as far as the statute of limitations is concerned, is a person "out of this state" within the meaning of section 4231, and would not be permitted to set up the statute of limitations against the cause of action arising here. There is some question whether or not this case has not been practically overruled by the more recent case of State ex rel. Wisconsin Trust Co. vs. Leuch, 156 Wis. 121, where it was held that a corporation organized in Pennsylvania, having a large store in Milwaukee, was a corporation "in this state" within the provisions of subdivision 19 of section 1038 of the statutes which provides that stock in any corporation "in this state" which is required to pay taxes upon its property shall be exempt from taxation.

DECISIONS ON THE LAW OF FOREIGN CORPORATIONS AFTER THE PASSAGE OF SECTION 1770b OF THE STATUTES.

Under this division of the law, after the passage of section 1770b, the Wisconsin law is divisible mainly into two parts:

First. What is "transacting business" in this state; and

Second. What is not "transacting business" in this state.

Under the second subdivision there will be found a large collection of cases deciding that because transactions partake of the nature of interstate commerce, they do not come within the provisions of section 1770b and are classified as cases where the corporation is not "transacting business" within this state.

Section 1770b when first up for consideration was held to be a valid law.14 The leading case of Paul vs. Virginia, 8 Wall. 168, and other United States Supreme Court authorities were relied upon in coming to the conclusion that the statute is valid, and the language of the Supreme Court of the United States was repeated to the effect that the state has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it, and it was held that the statute was valid however harsh its provisions might be. The court points out that the words "wholly void" within the statute are to be construed just as they read and that they mean just what they say.15

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WHAT IS "TRANSACTING BUSINESS" IN THIS STATE.

The first contract made in Wisconsin by a foreign corporation and held void under section 1770b of the statutes was a paving contract made by a foreign corporation with the city of Milwaukee, and the foreign corporation confessedly had not complied with the statute.\(^{16}\) The action was by a taxpayer to enjoin the payment by city officers of money which would have been paid out under a void contract, and it was held that the right of a taxpayer to enjoin the payment by city officers of money which the city does not owe being most thoroughly established, will be applied to the situation where the foreign corporation has not complied with section 1770b of the statutes.\(^{17}\)

In an earlier case, however, the Supreme Court had refused to permit a counterclaim by the foreign corporation,\(^{18}\) and at an earlier date an abutting property owner had attempted to escape a special assessment on the theory that the contract was void because of the provisions of the statute (section 1776b), but it was held that since the work had been fully performed and since the contract was only void in favor of the foreign corporation and could be enforced against it, that the plaintiff was at all times perfectly assured of the performance of the work and the benefits which result therefrom, and for these reasons the injunction was denied.\(^{19}\)

Manufacturing lumber within this state comes within the provisions of the statute, and the foreign corporation will not be permitted to counterclaim for anything growing out of such transaction, but will be permitted to use any defense that may be gleaned therefrom in defending an action started against the foreign corporation.\(^{20}\)

A deed in Wisconsin to a Minnesota corporation for lands situated in Wisconsin is wholly void,—the court refusing to follow the decision in other states that a conveyance is voidable merely at the election of the state.\(^{21}\) Since this decision was rendered in 1911, several curative acts have been passed.\(^{22}\)

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17. Allen vs. Milwaukee, 128 Wis. 678, 687.
18. Ashland Lbr. Co. vs. Detroit Salt Co., 114 Wis. 66.

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Selling pianos in this state from a salesroom to which they had been shipped by a foreign corporation is transacting business within this state and comes within the provisions of the statute, the rule being as follows:

"Where goods are shipped by a resident of another state to his commission agent in this state, not in response to an order from a purchaser, but to be held by such agent as the whole or part of his stock of commission goods in this state and thereafter to be sold and delivered from said stock in this state by this commission agent, this last sale and delivery is not a transaction of interstate commerce."  

Because the sale of chattels, such as pianos, by a foreign corporation through a commission agent in this state is void, a replevin would be decided in favor of the purchaser.

Attempts by a foreign corporation, not authorized to do business under section 1770b, to sell shares of stock in Wisconsin amounting to what is, in fact, a fractional interest in the corporation, is transacting business within this state, and the contract is rendered void by the statute, there being no interstate commerce in the transaction.

Selling a road machine to a town board, which road machine had arrived in the state in the morning of the day when the sale was made in the evening, is void under section 1770b because the corporation was not licensed, — the road machine ceasing to be an object of interstate commerce, having arrived in the state on the morning prior to the sale.

A Pennsylvania corporation, not licensed to do business in this state, undertook to sell a flour mill which had been theretofore shipped by it to a city in this state to other parties, and it was held that the sale of the mill already in this state was not interstate commerce, but that it was a contract relating to property within this state, and void under section 1770b.
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WHAT IS NOT "TRANSACTING BUSINESS" IN THIS STATE.

Soon after the passage of section 1770b of the statutes it was held that passively continuing to hold a previously existing and valid lien or title does not come within the prohibitions of the statute. It was also held that the starting of the action to foreclose a lien to secure two trust deeds, and the prosecution of the said suit in this state, said lien having been procured prior to the passage of the law, was not transacting business in the forbidden sense.

There are a few cases where it has been held that the very nature of the transaction was not doing business in Wisconsin, but in the major portion of the cases where it has been held that the statute was not applicable, the statute was suspended because the transaction was held to involve interstate commerce. These latter cases will be treated under Section 6 on what is interstate commerce.

A New York corporation, not licensed to do business in Wisconsin, entered into a contract by correspondence to sell some mining stock to a resident of this state. The stock was delivered and the defendant refused to pay, relying upon the statute to make the contract void. It was held, however, that the contractual assent of the plaintiff and its acts in the performance of the contract having been wholly within the state of New York, merely sending into this state to deliver the muniment of title or to collect the money due from the performance and execution of the contract in New York, is not transacting business in this state within the meaning of the statute. Such a transaction does not come within the words, "affecting the personal liability thereof", in the statute. This phrase must be held to exclude all unilateral contracts, like bills and notes, and all contracts duly executed outside of this state on which there remains as obligation only payment, or payment and delivery, to be made in this state.

Sending a note into this state by an unlicensed foreign corporation to a bank for collection, with instructions to return the

28. Chicago Title & Trust Co. vs. Bashford, 120 Wis. 281, 285.
29. Chicago Title & Trust Co. vs. Bashford, 120 Wis. 281, 285.
30. Catlin & Powell Co. vs. Schuppert, 130 Wis. 642.
31. Catlin & Powell Co. vs. Schuppert, 130 Wis. 642, 649. (For a case where it is held that sales of stock of a corporation in Wisconsin did affect its liability, see Southwestern Slate Co. vs. Stephens, 139 Wis. 616.)
same if not paid by a certain date, does not come within the statute.\textsuperscript{32}

Suing in Wisconsin by a foreign corporation on a transitory cause of action not clearly shown to have been made or to be performed within this state, or that it relates to property within this state, does not as a matter of law show violation of the statute.\textsuperscript{33}

\textbf{WHAT IS INTERSTATE COMMERCE.}

The very recent case of \textit{Phoenix Nursery Co. vs. Trostel}, 164 N. W. 995, (decided by Wisconsin Supreme Court Nov. 11, 1917), has thrown many former Wisconsin decisions on this phase of the subject into the discard, but prior to analyzing that case, let us get the history before us.

As well recognized as is the doctrine that cases which involve interstate commerce are not and cannot be held to be doing business within this state, and hence void under section 1770b, the first case on the subject was decided by the Supreme Court of Wisconsin in 1905,\textsuperscript{34} although the subject was hinted at in the original case which held the statute valid.\textsuperscript{35}

In this first and leading case in Wisconsin holding that interstate transactions are not under the statute, the plaintiff was an Illinois corporation engaged in the business of selling sponges at the city of Chicago, and had not complied with the statute. Its traveling salesman residing in Milwaukee called upon the defendant and made a tentative sale of sponges in Milwaukee, the defendant reserving the privilege of accepting one and rejecting one of two bales of sponges tentatively ordered. The goods were consigned to plaintiff's agent and not to the defendant. They were opened at a hotel and examined by the plaintiff's agent. Upon the defendant indicating his inability to come and examine the sponges, plaintiff's agent selected the best bale at Milwaukee and had them transferred to the defendant's place of business, where they were examined and apparently found to be all right. This shows an opening of the original package within the State of Wisconsin, but it was held that this opening of the bales so as to permit an inspection of the contents for the purpose of

\begin{itemize}
  \item \textit{W. H. Kiblinger Co. vs. Sauk Bank}, 131 Wis. 595.
  \item \textit{American Food Prod. Co. vs. American Mill. Co.}, 151 Wis. 385, 396.
  \item \textit{Greek-American Sponge Co. vs. Richardson Drug Co.}, 124 Wis. 469.
  \item \textit{Ashland Lbr. Co. vs. Detroit Salt Co.}, 114 Wis. 66, 79.
\end{itemize}
selecting the best bale can in no sense be construed a dealing
with the bales as merchandise in the market, and that they were
not taken out of the process of transportation and did not become
a part of the mass of property in this state, wherefore the trans-
action was an interstate commerce transaction and exempt from
the provisions of section 177ob of the statutes, and the plaintiff
was not precluded from enforcing it, although it had failed to
comply with the provisions of the law.36

In arriving at this conclusion, a great many decisions of the
United States Supreme Court are cited, but the earlier case of
Ashland Lbr. Co. vs. Detroit Salt Co., 114 Wis. 66, where the
subject was referred to, was not even cited.

In 1907 our Supreme Court held that a transaction whereby
a Pennsylvania corporation entered into a contract with a resi-
dent of this state for a correspondence course of education, was
not interstate commerce,37 but this decision was reversed by the
Supreme Court of the United States.38

A Wisconsin agent of a Chicago house took order for goods
in Wisconsin upon an order sheet addressed to the plaintiff in
Chicago, which directed the plaintiff, an unlicensed Illinois cor-
poration, to ship to the agent, at a station named in Wisconsin,
the goods, referring to the local orders by number but not by
the name of the local purchaser. The goods were wrapped in
packages at Chicago, put in larger packages, and shipped to the
Wisconsin agent, where the larger packages were opened and
the smaller packages were delivered to the Wisconsin purchasers.
This was held to involve a physical transfer of merchandise from
the possession and title of an owner in Illinois to the possession
and ownership of purchasers in Wisconsin, and was therefore
interstate, and finally held to be interstate commerce because the
act of soliciting orders or making contracts for the sale of goods
situated in one state and which by the terms of the order or con-
tract are to reach the hands of a purchaser in another state con-
stitute transactions which are inherent parts of the commerce
consisting of the whole transaction.39 It was in this case, at the

36. Greek-American Sponge Co. vs. Richardson Drug Co., 124 Wis.
469.
37. International Textbook Co. vs. Peterson, 133 Wis. 302.
38. International Textbook Co. vs. Peterson, 218 U. S. 664; 54 L.
ed. 1201.
39. Loverin & Browne Co. vs. Travis, 135 Wis. 322.
late date of 1908, that the statute was held constitutional,\textsuperscript{40} although it had been held valid in an earlier case.\textsuperscript{41}

Where a traveling salesman procures an order in Wisconsin for goods to be manufactured and shipped from Illinois, which contract was approved at the home office of the foreign corporation in Chicago, although the contract was to furnish the goods f.o.b. cars Waukesha, Wisconsin, the transfer of the products from the possession and ownership of the plaintiff in Illinois to the possession and control of a contractor, who was to build them into a building in Wisconsin, constituted interstate commerce, and the transaction was not under the statute.\textsuperscript{42}

Where a traveling salesman for an unlicensed foreign corporation takes an order for goods on a bill which, however, on its face does not show that the plaintiff is a foreign corporation, but an invoice accompanied the shipment showing that the order had been filled by a foreign corporation, and the defendant accepted the goods and placed them on his shelves for sale, it was held that since the transaction involved a physical transfer of merchandise from the possession and title of an owner in one state to the possession and ownership of a purchaser in another state, it constituted interstate commerce, and the collection could be made regardless of section 1770b.\textsuperscript{43}

Where goods have been shipped by an unlicensed foreign corporation to a Wisconsin merchant, and an indebtedness has been accumulated in favor of the foreign corporation, the foreign corporation may come into this state and take a mortgage to secure the unpaid balance and foreclose the mortgage without being subject to the provisions of the statute, because the taking of security by mortgage for the payment of an interstate commerce debt is necessarily included within the scope of the term "interstate commerce."\textsuperscript{44}

An Indiana corporation, unlicensed to do business in this state, sold a dry-cleaning establishment to a Wisconsin cleaner and agreed to install the same in Wisconsin at a definite price, agreeing further to correct any defects due to imperfect machinery or workmanship which may develop within three years. It was held to be a valid interstate commerce transaction.\textsuperscript{45}

\textsuperscript{40} Loverin & Browne Co. vs. Travis, 135 Wis. 322, 328.
\textsuperscript{41} Ashland Lbr. Co. vs. Detroit Salt Co., 114 Wis. 66.
\textsuperscript{42} U. S. Gypsum Co. vs. Gleason et al, 135 Wis. 539, 547.
\textsuperscript{43} Ady vs. Barnett, 142 Wis. 18.
\textsuperscript{44} F. A. Patrick & Co. vs. Deschamp, 145 Wis. 224.
\textsuperscript{45} S. F. Bowser & Co. vs. Schwartz, 152 Wis. 408.
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A traveling salesman for a Missouri corporation made a contract in writing in Wisconsin for the sale of a large quantity of sewer pipe. The sewer pipe was then located in St. Louis, Missouri, and the shipment was to be made to the defendant in Wisconsin. It was held to be an interstate commerce transaction, and the provisions of section 1770b of the statutes inapplicable. 46

A Minnesota corporation, unlicensed to do business in Wisconsin, made a contract with a Wisconsin concern for the sale of machinery, which contract provided that it was not to be binding upon the plaintiff until countersigned by one of its officers at St. Paul, Minnesota. It was held that such a contract, providing that the corporation was to furnish property f.o.b. this state, also for the filling of orders for goods by such corporation, and subsequent taking of securities therefor, are matters of interstate commerce and so not within the statute. 47

About the time the above fabric in our Wisconsin law was completed on the subject of what is interstate commerce, the Supreme Court of the United States, in Browning vs. Waycross, 203 U. S. 16, 35 Sup. Ct. 587, 58 L. Ed. 828, held that where a foreign non-licensed corporation contracted to sell and install lightning rods to be shipped into the state, “the affixing of lightning rods to the house was the carrying on of a business of a strictly local character peculiarly within the exclusive control of state authorities,” and that “such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated.”

This decision of the United States Supreme Court forced the Supreme Court of Wisconsin, in the case of Phoenix Nursery Co. vs. Trostel, referred to in the opening of this article and decided November 14, 1917, to what amounts practically to a changing of these Wisconsin decisions on the proposition. In this case the action was brought to recover the cost of certain shrubs and trees and the planting thereof. The plaintiff was a foreign corporation domiciled at Bloomington, Illinois, and had no office or place of business in Wisconsin. It had never complied with Section 1770b but it entered into a written contract

46. St. Louis Clay Prod. Co. vs. Christopher, 152 Wis. 603.
47. Chas. A. Stickney Co. vs. Lynch, 163 Wis. 353.
with the defendant, a Wisconsin resident, whereby it agreed to sell him certain shrubs and trees then in its nursery at Bloomington, Illinois, at a specified price, and also to plant the same upon defendant's premises in Milwaukee. A controversy brought about a lawsuit in which the defendant put in the defense that the plaintiff corporation had not complied with the provisions of section 177ob.

In the decision the above cases, wherein the placing of machinery or the installing of a dry cleaning outfit and the other transactions had been held not to take away the interstate character of the transaction, were forced into the discard, of course, because of the decision of the United States Supreme Court, and the defendant prevailed, and the complaint was ordered dismissed on the theory that "the planting of a shrub or tree is not an act involving such peculiar skill or complexity as to require the services of the grower to do it." The transaction partakes of state character, is not interstate, and the vendor must in such case comply with section 177ob. Suppose, however, that the contract on its face had specifically stated that the trees were in Bloomington, Illinois, and were to be brought by the vendor to Wisconsin and planted on defendant's premises. Would the transaction under those circumstances be interstate, or would it be a state transaction because the mere planting was to take place in Wisconsin, and would the vendor have to comply with section 177ob? This is a question that the future will, more or less, have to clear up.

In conclusion it might be said that a foreign corporation doing business in Wisconsin must comply with section 177ob, unless the corporation is engaged in interstate commerce in the performance of the transaction involved, and whether or not a transaction is interstate in character is the one serious question still involved in considerable doubt, as above outlined,—depending always upon the decisions of the Supreme Court of the United States.