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# Effect upon Its Contracts Made in Missouri of a Foreign Corporation's Failure to Obtain a License to Do Business Within the State

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# EFFECT UPON ITS CONTRACTS MADE IN MISSOURI OF A FOREIGN CORPORATION'S FAILURE TO OBTAIN A LICENSE TO DO BUSINESS WITHIN THE STATE

Practically all of the States have statutes regulating the admission of foreign corporations. The requirements for admission are almost uniform in all of the States, and provide for the filing by the corporation of Articles of Incorporation, Charter, etc., and the payment of a fixed sum as a fee for a license, which is issued by the State in which the foreign corporation seeks to engage in business. While the purpose of all these statutes is recognized by all of the courts to be the same, it has been impossible to give uniform construction and effect to these statutes, because they differ in detail, in so far as the penalty for violation is concerned. A great deal of confusion has arisen because of the further fact that some of the State courts, when confronted with a case involving these statutes, have paid no attention to well established rules laid down by the Federal courts concerning interstate commerce.

The questions involving these statutes that have been presented for decision in the State courts, are:

First. What constitutes the doing of business in violation of the statutes?

Second. Of what effect are contracts made in violation of the statutes?

Third. What rights has a foreign corporation in a State whose foreign corporation statutes it violates?

Fourth. Pleading and proof.

## WHAT CONSTITUTES THE DOING OF BUSINESS?

It is hardly possible to collect from the statutes a definition of what constitutes the doing of business within the meaning of such statutes. Many of the cases seem to indicate that the question of intent is a very material one, especially when the corporation is engaged in a large business which extends into States other than the one under whose laws it was incorporated. Much difficulty on this point will, however, be removed by bearing in mind that the statutes under consideration are very closely allied to the subject of interstate commerce, over which Congress has exclusive control under the Federal Constitution. It is, therefore, entirely immaterial whether or not such State statutes expressly exempt corporations engaged in interstate commerce, because any attempt on the part of a State to directly or

indirectly burden interstate commerce would be violative of the Constitution of the United States and of no effect. A corporation which is engaged in interstate commerce need not comply with the provisions of such State statutes. "To carry on interstate commerce is not a franchise or a privilege granted by a State. It is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States."[1] The power to regulate interstate commerce being exclusively vested in Congress, it would seem to follow that the decisions of the Federal courts are controlling on the question as to what constitutes interstate commerce, even though in parallel cases the State courts have held otherwise.

A direct statement of a Federal court to that effect may be found in In Re Monongahela Distilling Co.,[2] in which the Court says: "The question of what is interstate commerce is a Federal question, and the decision of the Supreme Court of Michigan in Neyens v. Worthing 150 Mich. 580, would not control, even if parallel." Other decisions,[3] though not directly decisive of that point, lead to the same conclusion.

The broad proposition as to what may be properly considerd interstate commerce, and which is accepted by all the authorities, was stated by Sanborn, in Butler Bros. Shoe Co. v. U. S. Rubber Co.,[4] as follows:

"Importation into one State from another is the indispensable element, is the test of interstate commerce, and every negotiation, contract, trade and dealing between citizens of different States which *contemplates* or *causes* such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

It will be noted that the contemplation or the intent to import goods from one State into another, is thus made the most important element in determining what constitutes interstate commerce. This definition has been upheld by the Federal courts in all of the subsequent cases, as will be seen from a consideration of a few of the more important ones.

In Dixie, etc., v. Stearns,[5] decided by the Circuit Court of Appeals, 7th circuit, plaintiff's main office was located at Cincinnati, in the State of Ohio. It also had warehouses all over the country, including one in Chicago, State of Illinois, the one in Chicago being advertised as

1. International Text Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed., 678; Same v. Gillespie, 229 Mo., 397.
2. 186 Fed. 220, l. c. 224.
3. International Text Book Co. v. Pigg, supra; Same v. Gillespie, supra.
4. 156 Fed. 1, l. c. 17; 84 C. C. A. 167, l. c. 183.
5. 185 Fed. 431; 107 C. C. A. 501.

a salesroom. The court held that a contract made by the Stearns Company at Cincinnati was not affected by State regulations, even though the order was filled from goods stored in the warehouse in Chicago, saying, "Neither, in our opinion, is the purchase and sale of goods at Cincinnati, in the State of Ohio, to be delivered to somebody in Illinois, from goods already deposited in a warehouse in Illinois for that purpose, doing business in Illinois within the meaning of the statute."

In Atlas v. Parkinson,[6] the Court in discussing a similar proposition said, "Even though it maintain a warehouse for the storage of its property pending sale and until the property loses its character as interstate commerce and becomes part of the general mass of property in the State, the local statute has no application."

The case which perhaps has gone the farthest in upholding interstate commerce is Tea Co. v. Evans.[7] In that case the Tea Company maintained a store in Portland, Oregon, which served as headquarters for salesmen taking orders for merchandise sold by the Tea Company, the orders to be filled by the Tea Company in the State of Washington and shipped to Portland, Oregon, where the orders were distributed from the storeroom. Occasionally there were sales over the counter in Portland, Ore., from goods stored away. The Court held that Tea Company was not doing an intrastate business in Portland, Ore., and did not have to take out a license as provided by the laws of the State.

The Supreme Court of Missouri has gone as far as any court, State or Federal, in sustaining the interstate commerce privilege, as will appear from the case of Security State Bank v. Simmons,[8] where it was held that a contract for soliciting orders for books to be imported into Missouri and delivered by agents of the foreign corporation directly to subscribers, is a transaction of interstate commerce.

In accord with the cases above cited are Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. Ed. 295; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565, and Davis v. Virginia, 236 U. S. 697, 59 L. Ed. 795.

## PLEADING AND PROOF.

While there is some conflict in the cases upon the question of pleading and burden of proof, in cases involving violation of the provisions of such sttautes, the greater weight of authority seems to be

6. 161 Fed. 223.
7. 216 Fed. 791.
8. 251 Mo. 2.

to the effect that a foreign corporation in bringing suit need not in its petition allege that it has complied with the requirements of the statute. "Incapacity to sue is a defense that must be made out by the defendant."[9]

This seems to be the settled rule in Missouri. Thus, in Parlin & Orendorff Co. v. Boatman,[10] the Court said: "It is not incumbent upon a foreign corporation in order to maintain an action brought by it to show that it has complied with the statute and obtained a certificate of authority to do business. Non-compliance with the law is a matter of defense to be pleaded in bar."

In Groneweg Co. v. Estes,[11] the Court said: "Moreover, a foreign corporation, when suing, need not alleged compliance with the laws of the State, non-compliance being matter of defense."

In United Shoe Machinery Co.[12] the Court said: "While we agree with the defendant that all constitutive facts must be set forth in the petition in order to state a cause of action, we are of the opinion that an averment of compliance with the laws was unnecessary and was a matter of defense."

And in Lynotype Co. v. Hays,[13] the Missouri decisions are summed up by the Springfield Court of Appeals as follows: "The law is well settled that the failure of foreign corporations doing business in this State to comply with the law with reference to obtaining a license, etc., is a matter of defense which must be affirmatively alleged by the party relying on it."

Non-compliance being a matter of defense which must be affirmatively pleaded by a party seeking to avail himself thereof, it follows that the burden of proof rests upon the party alleging it.[14] Although the cases are in conflict upon this point, the prevailing doctrine is as stated. In United Shoe Machinery Co. v. Ramlose,[15] the Court said: "While there is much conflict between the authorities, we understand the decisive weight of authority is to the effect that the burden of proof is upon the defendant to show non-compliance by the plaintiff with the laws of the State in which it sues."

## THE MISSOURI STATUTES.

The terms upon which foreign corporations may be admitted to

9. Dixie, etc., Co. v. Stearns, 185 Fed. 431, C. C. A. 501.
10. 84 Mo. App. 67.
11. 139 Mo. App. 36.
12. 210 Mo. 650.
13. 182 Mo. App. 113.
14. Dixie, etc., Co. v. Stearns, supra.
15. 210 Mo. 650.

do business in Missouri are set out in Sections 3037 to 3040, inclusive, of the Revised Statutes of Missouri, 1909, Section 3040 providing a penalty of $1,000.00 for the violation by a foreign corporation of these statutes; "in addition to which penalty no foreign corporation which has failed to comply with said sections can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort."

These statutes have been before the courts of Missouri a number of times for construction. Of great importance have been the decisions which have dealt with the effect of the statutes upon contracts made by foreign corporations which admittedly were violating these provisions.

The earliest of these cases is Williams v. Scullin,[16] in which the St. Louis Court of Appeals held that a contract made and to be performed in this State by a foreign corporation which had failed to comply with the Act was invalid. It was argued in that case that the statute was not intended to effect the validity of the contract, but only the remedy for the enforcement thereof. The Court refused to hold that was the effect of the statute but decided that it was the intent of of the Legislature to strike both at the validity of the contract and the remedy to enforce it. The question again came up before the St. Louis Court of Appeals in the case of Heating Company v. Gas Fixture Co.,[17] and the Court again held that the statute struck at both the contract and the remedy and that a contract made in this State by a foreign corporation in violation of the statutory provision was null and void, and no action could be maintained thereon. The Kansas City Court of Appeals adhered to this ruling in Blevins v. Fairley,[18] and further held that a subsequent compliance by such corporation with the statute would not relate back and make valid a contract that was invalid when it took place.

The matter first reached the Supreme Court of Missouri in the case of Carson-Rand Co. v. Stern, [19] a case upon which there has been a great deal of comment. Plaintiff in that case, according to the record, was a foreign corporation and commenced an action by attachment upon notes issued by the defendant to the plaintiff for goods sold and delivered. At the time of the transaction in question the plaintiff corporation had not complied with the statute, nor had it obtained a license to do business in this State. And it further ap-

16. 59 Mo. App. 30.
17. 60 Mo .App. 148.
18. 71 Mo. App. 259.
19. 129 Mo. 381.

pears from a criticism of a later case on the same subject by Judge Goode that the agreed statement of facts in the case contained, among other things, the agreement that plaintiff had for a long time conducted a lumber yard in St. Louis, and that the notes involved in the transaction were issued in St. Louis and made payable there. The evidence further showed that after the commencement of the suit by the plaintiff it did comply with the requirements of the statute. On appeal from an order sustaining a motion to dismiss Judge Barclay held that under the circumstances plaintiff could maintain its action, and reversed and remanded the case for further proceedings in the lower court. In discussing the provisions of the statute, Judge Barclay said: *"The statute does not, in express terms, forbid the bringing of a suit by such a company.* It declares that it cannot maintain an action, not having complied with the law. What was the paramount object of the enactment? Not to exclude such concerns from participation in the business done in Missouri, but to compel a compliance with certain conditions by them. Those conditions were imposed with a view, probably, to place foreign and domestic companies on a footing of equality in the field of commerce. The object of the law was rather to induce observance of those conditions than to deprive any foreign corporation of the right of action or other property. . . . What are we to understand by the word 'maintain' as used in the third section? As its structure suggests, it signifies, literally, 'to hold by the hand,' 'to uphold.' While in pleading it is defined to mean, 'to support' what has already been brought into existence. . . . No corporation, having failed to obey this law, can maintain an action. The corollary is *that, when it has complied, it may maintain the action."*

This decision was construed differently by the St. Louis Court of Appeals and the Kansas City Court of Appeals in cases involving the same question which later came before the respective courts. Thus, in Erhardt v. Robertson,[20] the Kansas City Court of Appeals adhered to the rulings laid down in Williams v. Scullin, Heating Co. v. Fixture Co., and Blevins v. Fairely, supra; saying: "Our attention has been called to the case of Carson-Rand Co. v. Stern, in which the Supreme Court held that though a foreign corporation had not complied with the statutes aforesaid when it began suit, yet if it did comply during the pendency of the action and before a motion to dismiss was acted upon, the motion should be overruled. As has been before stated, the statute declares that on and after the taking effect

20. 78 Mo. App. 404.

of the act no corporation failing to comply with it, 'can maintain any suit or action' upon any demand. That decision is based on the meaning to be given to the word 'maintain.' It is held not to have been used in the sense of 'begin.' And that, therefore, the statute would permit the action to be brought by the corporation, but that it could not be maintained except upon compliance with the law. The point decided by us in this case was not decided in that case. The question of invalidity of the contract was not discussed or referred to in that case. The only question decided was raised on a motion and involved only the right to remain in court. It did not determine how the questions which might be presented in the court should be decided."

The effect of the Carson-Rand decision as expressed by the Kansas City Court of Appeals in the above case, is directly opposed to that given it by Judge Goode, of the St. Louis Court of Appeals, in Lumber Co. v. Simms.[21] In this case, which involved the very same proposition as was presented to the Kansas City Court of Appeals in Ehrhardt v. Robertson, supra, Judge Goode holds that the effect of the Carson-Rand decision was to overrule the prior decisions of the Court of Appeals, and hold that the contract is valid, although no action could be maintained thereon until the corporation has complied with the law. This view is based upon the action of Judge Barclay in remanding the case for further proceedings. Thus, on p. 576, Judge Goode says, "Why a party should be entitled to begin an action on a void contract we are unable to see. A void undertaking affords no bases for the institution of an action or the rendering of a judgment. Neither do we see why the Supreme Court should remand a case of that kind with the ruling that the plaintiff might maintain the action, if the obligation to be enforced was void." Judge Goode, in discussing the statute, indicates that such a construction as given it by Judge Barclay is reasonable and just, and one supported by the authorities.

This view of Judge Goode is followed by Judge Bland in the case of Lumber Co. v. De Lisle,[22] where it was said: "The certificate of the Secretary of State authorizing the plaintiff to do business in this State was obtained by plaintiff before the trial of the cause. The defendant objected to the introduction of any testimony by the plaintiff, on the ground that the certificate of the Secretary of State was not issued until after the suit was commenced. This objection

21. 101 Mo. App. 569.
22. 107 Mo. App. 615.

was untenable under the ruling of the Supreme Court in the case of Carson-Rand Co. v. Stern, and was properly overruled."

Judge Bland, in the case of Lumber Co. v. Simms, requested that case to be certified to the Supreme Court as being in conflict with the decision of the Kansas City Court of Appeals in the Ehrhardt v. Robertson case, which was done. While it was pending in the Supreme Court, Judge Marshall handed down the decision of that court in the case of Tri-State Amusement Co. v. Amusement Co.[23] This case contains the first lengthy discussion of the question involved, and a review of the early decisions of the Missouri Court of Appeals and also of the Carson-Rand case. The Court upheld the decision of the Kansas City Court of Appeals and attempted to reconcile the Carson-Rand case with the other decisions of the Missouri Courts by holding that the validity of the contract made in violation of the statute was not involved and not decided in the Carson-Rand case. And, further, because *"presumably"* the contract in the Carson-Rand case was made in another State and was a valid contract according to the laws of the State in which it was made. "No point," says Judge Marshall, "was made, and, therefore, no adjudication was had, as to the validity of the contract. The only point urged and decided in the case was whether or not a foreign corporation could 'maintain' an action in this State without having complied with the laws of this State until after the action was instituted, but did so comply before the motion to dismiss the suit was filed." The Court then reviewed the statute with reference to the intention of the Legislature. "It is manifest," says the Court, "that it was the intention of the Legislature to place foreign corporations doing business in this State and deriving benefit from business done in this State with citizens of this State, upon an equality with domestic corporations authorized by the laws of this State, and likewise to require such foreign corporations to bear the same burdens that domestic corporations have to bear. . . . The statute strikes at the validity of transactions or contracts entered into in this State prior to the foreign corporation becoming locally incorporated. If the statute had stopped here (Section 1025), and made no other provision, or provided no other penalty, there would be no room for cavil, that it was the intention of the Legislature to make contracts invalid that were entered into by foreign corporations in this State before complying with the statute. . . . But the Legislature

23. 192 Mo. 404.

went farther and provided by Section 1026 a penalty or fine of $1,000.00 to be recovered by the State's officers from corporations that failed to comply with the act; and went further still and, in addition to the penalty, provided that no such corporation should be entitled to maintain any suit or action upon any demand, whether whether legal or equitable, where it had failed to comply with the statute. . . . The statute prevents foreign corporations from doing business in this State without first having complied with the law. Such a prohibition is as effective to make a contract entered into in this State void as if the statue had in terms declared such contracts to be void." This conclusion is reached because of what the Court holds to be a general rule of law that, where an act is prohibited or declared unlawful, it is unnecessary for the law to expressly declare the act done in violation of the statute to be void, which rule has been adhered to in Missouri ever since the case of Downing v. Ringer, 7 Mo. 586.

It follows as a logical conclusion, from the attempt of the Court to reconcile its decision with the Carson-Rand decision, that a contract made outside of the State of Missouri, and valid according to the laws of the State in which it was made, would be upheld and given effect in Missouri courts to which a foreign corporation, though violating the laws of this State with reference to doing business without a license, may resort, and this would be true even though performance of the contract took place in Missouri. It is also settled that a contract entered into in this State by a defaulting foreign corporation is altogether null and void and no action either at law or in equity can be maintained. This decision of course was followed in the Lumber Co. v. Simms,[24] which had been certified to the Supreme Court from the St. Louis Court of Appeals.

Judge Marshall's decision is subject to criticism because of his attempt to sustain the ruling in the Carson-Rand case upon insufficient and untenable grounds, and also because his conclusions are not supported by the reasons given for them. The opinion was severely criticized by the St. Louis Court of Appeals in the case of Manufacturing Co. v. Construction Co.,[25] wherein Judge Goode said: "Plaintiff's main proposition is that the bill of sale given by the Wendelkin Company to Charles H. Alexander is absolutely void because said company, a foreign corporation, was doing busi-

24. 197 Mo. 507.
25. 124 Mo. App. 349.

ness in Missouri without having complied with the statutes. This proposition was affirmed, so far as any right of the defaulting corporation is concerned, in the case of Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., decided by the Supreme Court, 192 Mo. 404. It was decided the other way in Carson-Rand Co. v. Stern, 129 Mo. 381. In the opinion in the Tri-State case, it is said the Carson-Rand case falls in the class of decisions construing contracts of foreign corporations made, not in Missouri, but in the home State of the corporation and valid there. The opinion in the Carson-Rand case does not state that the contract was a foreign one and the reasoning of the Court shows clearly that a domestic contract was in issue. Moreover, the agreed statement of facts on which the case was submitted contained, among other things, the agreement that plaintiff had for a long time conducted a lumber yard in St. Louis; that the notes in suit were made and executed in the City of St. Louis, were payable in St. Louis and that the sales of lumber for which the notes were given were made in St. Louis. The proposition relied on in that case, as shown by the briefs, was that this State does not recognize the rule of some other States, to-wit, that a foreign company refusing to comply with the laws of the State cannot make a valid contract therein. . . . The judgment was reversed and the cause remanded for further proceedings; *an order as entirely incompatible with the theory that the notes were void, as was the reasoning of the opinion.*"

It will be noted that the St. Louis Court of Appeals recognizes the rule that a contract entered into in another State and valid according to the laws of that State, will be upheld in Missouri, even though the corporation seeking the relief of our courts is in default as to the obtaining of a license. About this proposition there can be no doubt, because to hold such a contract void and non-enforcible would be violative of the constitution of the United States.

The view taken by Judge Goode of the Carson-Rand case was upheld by the California Court of Appeals in the case of Black v. Marble, 82 Pac. 1060. The subsequent decisions of the Missouri Courts have held that the Carson-Rand case, while not expressly overruled by Judge Marshall, was overruled in effect and have adhered to the decision of Judge Marshall holding that a contract made by a defaulting corporation is altogether null and void. Thus in Farrand Co. v.

Walker,[26] the Court says, "The contract was void because of plaintiff's failure to procure a license to do business in this State and so far as enforcement of a cause founded thereon is concerned, the courts of this State are closed to the plaintiff." And in Kelly Broom Co. v. Missouri Fidelity & Casualty Co.,[27] a case in which, after the transaction of intrastate business by the plaintiff, it did comply with the statute and procure a license, the Court held that such a compliance was ineffective and could not validate a contract entered into before compliance. "It was held in the Carson-Rand case," says the Court, "that a compliance with the statute before suit was instituted would authorize the corporation to maintain the suit, even though business had been done and a contract made before such compliance. But that case was in effect overruled in Tri-State Amusement Co. v. Amusement Co., 192 Mo. 404, and expressly disapproved in Zinc & Lead Co. v. Mining Co., 221 Mo. 7. We therefore hold that plaintiff, not having complied with the statute, should be denied the right to maintain this action." And in Wichita Film & Supply Co. v. Yale,[28] decided by the Springfield Court of Appeals in 1916, it is again held that the entering into a contract by a foreign corporation before compliance with the statute governing its admission to do business in the State, is an unlawful act and the contract is void.

The same ruling was followed in Park Davis Co. v. Mullett,[29] in which case suit was brought in Missouri for merchandise sold in this State by a foreign corporation, the reply in effect admitting that plaintiff was transacting business in Missouri in violation of the statute. The Court said, "It follows that its business was to that extent, at least, unlawful and contrary to State policy as declared by the statutes mentioned, and every contract into which it entered in furtherance of that business was void." The Court further held that a compliance by the plaintiff with the statute prior to the bringing of the action, but after the contract was entered into, would not put the corporation into any better position.

In Lewis Pub. Co. v. Rural Pub. Co.,[30] the Court holds that a foreign corporation doing business in this State without having obtained a license cannot maintain an action in any of the courts of this State for a tort. In that case plaintiff brought suit for damages sustained on account of defendants publishing libelous matter concern-

26. 169 Mo. App. 602.
27. 195 Mo. App. 305.
28. 194 Mo. App. 60.
29. 245 Mo. 168.
30. 181 S. W. 105 (Mo. App.)

ing it. One of the defenses was that plaintiff was a foreign corporatiotn doing business in violation of the statute governing such corporations and could not therefore maintain any suits. "This record," says the Court, " shows total failure on the part of the plaintiff to comply with such statutes in so far as such independent associations are concerned, and under the uniform ruling of this State it has been held that when such violation is shown in any case brought by such company in any court of this State, a recovery therein by it must be denied."

From decisions already cited and discussed and others hereinafter referred to, it is clear that the rule in Missouri is, as it ought to be, that a foreign corporation will be denied standing in our courts only when to permit it to prevail would give effect to a contract entered into in this State. No other rights are denied such corporation, and the fact that in doing business in the State it is violating the law, will not in any way interfere with its right to maintain, enforce and recover upon contracts or transactions which are valid because made in interstate commerce or because entered into in a State other than Missouri.

Thus in Roeder v. Robertson,[31] and United Shoe Machinery Co. v. Ramlose,[32] the Court held that a foreign corporation could maintain a replevin suit for property that had been sold to the defendant, where the corporation was not licensed to do business in this State. The plaintiffs in the cases referred to, admitting that the contract was void when entered into, claimed that no title could pass under a void contract, that therefore the title still remained in plaintiffs, and that if the statutes of Missouri were to be construed as prohibiting plaintiffs from maintaining the replevin suit, it would be violative of the Constitution of the United States, which guarantees the equal protection of the laws. The Supreme Court, however, held that the Legislature did not intend to prevent a foreign corporation from bringing suit in any of the courts of this State upon a demand not involving a contract entered into in this State, and in Roeder v. Robertson said: "If the corporation had parted with the possession of its property under the void contract, and is unable to recover the possession without litigation, then the courts of this State are open to it, and it stands before the law upon precisely the same footing that residents of this State do—no better, nor no worse."

The Court further points out, in Roeder v. Robertson, supra,

31. 202 Mo. 522.
32. 231 Mo. 508.

that "it was not the intention of the Legislature to prohibit the enforcement of valid contracts made by foreign corporations in their own States with citizens of this State."

It has also been held in Missouri that the foreign corporation cannot take advantage of its wrong and defeat a recovery by the other party for the value of the property received by it or services rendered to it under a contract made in violation of the statute.

Union Bank Note Co. v. Ajax, etc., Cement Co.[33]

Young v. Gauss.[34]

Although there has been no serious controversy about the Tri-State Amusement Co. case, it seems to the writer that a consideration of the cases, especially the Carson-Rand case, leads one to the conclusion that Judge Goode's decisions in Lumber Co. v. Sims, and Lumber Co. v. DeLisle, supra, contain the correct statement of the law. Judge Marshall in the Amusement Co. case holds the contract invalid on the ground that the general rule is that an act done in violation of a statute is void. This also is the view taken by the Kansas City Court of Appeals in Ehrhardt v. Robertson, supra. None of the decisions from other States cited in those opinions, it seem to us, are authority upon which reliance could be placed, because the statutes construed in those decisions were very much unlike the provisions of the Missouri statutes. It is undoubtedly true that the general rule of law is, as Judge Marshall states it, that when a statute prohibits the doing of an act and provides a penalty for violation thereof, and stops there, any transaction in violation of the statute would be void. The very fact, however, that the statutes of Missouri not only prohibit the doing of the act, but provide a fine in addition and also provide that no suit shall be maintained by the corporation, takes it out of the general rule and puts it in that class of decisions governed by the rule of law that the courts will not read penalties into a statute when the Legislature has itself provided a penalty and could, if it had so intended, have expressly provided that which the courts are asked to read into the statutes.

An examination of the decisions cited by the Court in Ehrhardt v. Robertson, supra, shows that the courts in those States were construing statutes which simply declared that the doing of business by foreign corporations without a license was unlawful. In none of those statutes did the Legislature attempt to set out the penalty. It seems, therefore, that the conclusion reached by Judge Marshall,

33. 155 Mo. App. 349.
34. 134 Mo. App. 166.

which has not been questioned in the later cases, that the fact that the statute goes on and provides a penalty, is proof of the fact that the Legislatures intended such contracts to be void, is wholly illogical and contrary to the established rule of law governing such cases. Such a construction is unreasonable, for if the Legislature had intended such to be the case it could have expressed its intention in a few clear and simple words.

The rule governing the construction of statutes which themselves provide the penalty for a violation, is well stated in the case of Blodgett v. Lanyon Zinc Co.,[35] which recognizes the rule announced in Downing v. Ringer, supra, but says: "The second rule is that where a contract or an act in performance of it is not malum in se, and its invalidity is not declared as a penalty for a violation of a statute, the Courts may not declare it, and thus affix a penalty not prescribed by the lawmaking power. . . . While the authorities upon this question are variant and conflicting in the State courts, the Federal courts have steadily adhered to the rule, which is sustained by the better reason and the more persuasive opinions in the courts of the States, that, *in the absence of an express provision of the statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes permitting it to do business in the State where the contracts are made and the acts are done are, nevertheless, valid and enforceable, because it is not the intent of the authors of such laws to strike down such agreements and acts when they are not evil in themselves.*"

In Fritts v. Palmer,[36] the Supreme Court of the United States distinctly held that a contract made by a foreign corporation with a citizen of another state, is not necessarily void because the corporation had not complied with the laws of such other State, and that as the invalidity of the contract was not expressly provided for by the statute itself, it was not the business of the courts to read such a penalty into the statute.

In Harris v. Runnels,[37] the same Court said: "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it."

35. 120 Fed. 893, l. c. 896-7, 58 C. C. A. 79, l. c. 82-3.
36. 132 U. S. 282, 33 L. Ed. 317.
37. 12 How. (U. S.) 80, 13 L. Ed. 901.

Following the cases last cited, the Circuit Court of Appeals, speaking through Sanborn, J., in Dunlop v. Mercer,[38] said: "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power."

In view of the foregoing Federal decisions which announce the exception under which the Missouri statute naturally falls; and in view of the fact that the reasoning of the Court in the Tri-State Amusement case is irreconcilable with that and the decision in the Carson-Rand case, which has never been overruled by the Supreme Court, it would seem that if the question were presented anew the Tri-State Amusement case would probably be overruled and effect given to the interpretation given to the statute by Judge Goode of the St. Louis Court of Appeals in the cases heretofore cited, and by Judge Barclay in the Carson-Rand case, because, in the first place, nothing is gained for the State by holding the contract invalid, since a corporation may indefinitely continue to violate the law, and its contracts will not be declared unlawful unless the other party thereto, being sued thereon, takes advantage of the non-compliance with the statute; in the second place, because the rule announced by Judge Goode is reasonable and just and serves the purpose of the Legislature quite as well, as the State may at any time, irrespective of any civil action by the corporation, enforce the pecuniary penalty against the corporation.

JOSEPH H. GRAND.

38. 156 Fed. 545, 86 C. C. A. 435.