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Section 1312 of the Business Corporation Law: The Dilemma of Legislative History and Judicial Interpretation

dictions but shows definite signs of moving toward strict liability for both. While the courts are naturally adverse to declaring liability where there is no fault, public policy would seem to require that the blaster, as also the manufacturer, processor, wholesaler, or retailer, should be strictly liable to whoever suffers damage unless the *absence* of negligence can be proven. This would furnish an incentive for the greatest possible care, would eliminate the need for a series of warranty actions, and place the burden for any damage where it may best be distrubuted to the general public.

SECTION 1312 OF THE BUSINESS CORPORATION LAW: THE DILEMMA OF LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

On April 24, 1961, the New York Business Corporation Law[1] was signed by Governor Rockefeller. Section 1312[2] of the new law dealing with actions brought by unauthorized foreign corporations considerably alters the superseded provisions of Section 218 of the General Corporation Law[3] which treated the same subject. This study shall attempt to point out changes made by the new provision and problems involved in its interpretation. Such difficulties may arise from the wording which becomes ambiguous in the light of the statute's legislative history and the traditional construction of similar provisions.

PRESENT AND FUTURE PROVISIONS CONTRASTED

Section 218

Under Section 218 of the General Corporation Law, a foreign corporation which has not qualified, cannot maintain an action to recover on a contract

1. N.Y. Bus. Corp. Law §§ 101-1401, eff. April 1, 1963. "[I]t was considered wise to defer the effective date of the new law until April 1, 1963 so as to leave time for the submission and consideration of amendments." Rohrlich, What's New in New York's New Business Corporation Law, N.Y.L.J., May 15, 1961, pt. 1, p. 4, col. 1.

2. N.Y. Bus. Corp. Law § 1312: "(a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation. (b) The failure of a foreign corporation to obtain authority to do business in this state shall not impair the validity of any contract or act of the foreign corporation or the right of any other party to the contract to maintain an action or special proceeding thereon, and shall not prevent the foreign corporation from defending any action or special proceeding in this state." N.Y. Sess. Laws 1961, ch. 855, eff. April 1, 1963.

3. N.Y. Gen. Corp. Law § 218: "A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. This prohibition shall also apply to any successor in title of such foreign corporation and to any person claiming such under successor of such foreign corporation or under either of them."

made within New York State.[4] This section, however, does not bar suits on contracts made outside the state,[5] nor does it bar tort actions.[6] Where the suit is disallowed, the contract is not considered illegal or void but merely unenforceable in the state courts.[7] The words of the statute, "unless before the

4. See In re Scheftel's Estate, 275 N.Y. 135, 9 N.E.2d 809 (1937); International Fuel & Iron Corp. v. Donner Steel Co., 242 N.Y. 234, 151 N.E. 214 (1926); American Case & Register Co. v. Griswold, 143 App. Div. 807, 128 N.Y. Supp. 206 (3d Dep't 1911), reversing 68 Misc. 379, 125 N.Y. Supp. 4 (Sup. Ct. 1910); Foreman & Clark Mfg. Co. v. Bartle, 125 Misc. 759, 211 N.Y. Supp. 602 (Sup. Ct. 1925); Schwartzwaelder Co. v. Silverman, 134 N.Y. Supp. 1114 (App. T. 1912); cf. Acorn Brass Mfg. Co. v. Rutenberg, 147 App. Div. 533, 132 N.Y. Supp. 600 (2d Dep't 1911); Eclipse Silk Mfg. Co. v. Hiller, 145 App. Div. 568, 129 N.Y. Supp. 879 (2d Dep't 1911); New York Architectural Terra-Cotta Co. v. Williams, 102 App. Div. 1, 92 N.Y. Supp. 808 (1st Dep't 1905), aff'd, 184 N.Y. 579, 77 N.E. 1192 (1906); International Textbook Co. v. Connelly, 67 Misc. 49, 124 N.Y. Supp. 603 (Monroe County Ct. 1910); American Broom & Brush Co. v. Addickes, 19 Misc. 36, 42 N.Y. Supp. 871 (App. T. 1896). See also Wood v. Ball, 190 N.Y. 217, 83 N.E. 21 (1907); Stephenson v. Wiltsee, 223 App. Div. 41, 227 N.Y. Supp. 230 (1st Dep't 1928); Meyers v. Spangenberg & McLean Co., 65 Misc. 475, 120 N.Y. Supp. 174 (App. T. 1909); Warner Instrument Co. v. Sweet, 65 Misc. 57, 119 N.Y. Supp. 166 (App. T. 1909); American Security Credit Co. v. Empire Properties Corp., 154 Misc. 191, 276 N.Y. Supp. 970 (N.Y.C. Munic. Ct. 1935); Hedges v. Busch, 141 Misc. 493, 252 N.Y. Supp. 693 (N.Y.C. Munic. Ct. 1931). For a further analysis of this problem see Comment, 22 Brooklyn L. Rev. 278 (1956).

5. See Bremer v. Ring, 146 App. Div. 724, 131 N.Y. Supp. 487 (1st Dep't 1911). See also Bertolf Bros. Inc. v. Leuthardt, 261 App. Div. 981, 26 N.Y.S.2d 114 (2d Dep't 1941) (memorandum decision); Batchelder & Lincoln Co. v. Knopf, 54 App. Div. 329, 66 N.Y. Supp. 513 (1st Dep't 1900); Shelby Steel Tube Co. v. Burgess Gun Co., 8 App. Div. 444, 40 N.Y. Supp. 871 (4th Dep't 1896); Novelty Mfg. Co. v. Connell, 88 Hun 254, 34 N.Y. Supp. 717 (4th Dep't 1895); Samuels v. Mott, 211 N.Y.S.2d 242 (Sup. Ct. 1960); National Merchandising Corp. v. Powers, 8 Misc. 2d 881, 168 N.Y.S.2d 507 (Sup. Ct. 1957); Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N.Y. Supp. 836 (Sup. Ct. 1904), aff'd, 98 App. Div. 623, 90 N.Y. Supp. 1089 (1st Dep't 1905) (memorandum decision); International Textbook Co. v. Connelly, supra note 4; Paraffine Paint Co. v. Tarbox, 114 N.Y. Supp. 54 (App. T. 1909); Sterling Mfg. Co. v. National Surety Co., 94 Misc. 604, 159 N.Y. Supp. 979 (N.Y.C. City Ct. 1916).

6. See Meisel Tire Co. v. Mar-Bel Trading Co., 155 Misc. 664, 280 N.Y. Supp. 335 (N.Y.C. Munic. Ct. 1935), where the court held this section only prohibits maintaining an action upon a contract and does not interdict an action purely ex delicto; cf. Hoevel Sandblast Mach. Co. v. Hoevel, 167 App. Div. 548, 153 N.Y. Supp. 35 (1st Dep't 1915) (unlawful use of name); Joseph Schlitz Brewing Co. v. Ester, 86 Hun 22, 33 N.Y. Supp. 143 (5th Dep't 1895), aff'd, 157 N.Y. 714, 53 N.E. 1126 (1899) (fraudulent conveyance); Dunkin' Donuts of America, Inc. v. Dunkin Donuts, Inc., 12 Misc. 2d 380, 176 N.Y.S.2d 915 (Sup. Ct. 1958), aff'd, 8 App. Div. 2d 228, 188 N.Y.S.2d 132 (3d Dep't 1959) (unlawful use of name); American Typefounders Co. v. Conner, 6 Misc. 391, 26 N.Y. Supp. 742 (C.P. 1894) (replevin).

7. Mahar v. Harrington Park Villa Sites, 204 N.Y. 231, 97 N.E. 587 (1912). See also Neuchatel Asphalte Co. v. The Mayor of New York, 155 N.Y. 373, 49 N.E. 1043 (1898), affirming 12 Misc. 26, 33 N.Y. Supp. 64 (C.P. 1895) where the court held: "This statute . . . was not to avoid contracts. . . . It provided no penalty, in the event of non-compliance, other than the suspension of civil remedies." 155 N.Y. at 377, 49 N.E. at 1043.

making of such contract it shall have obtained a certificate of authority. . . ," have been rigidly construed.[8] Therefore, qualification subsequent to the formation of a contract but prior to the commencement of an action does not render the contract enforceable.[9]

Section 1312

Section 1312 of the Business Corporation Law provides that an unlicensed foreign corporation doing business in New York "shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized. . . ."[10] The first notable change encountered in the new section is the fact that now, *all* actions will be suspended until qualification rather than merely those involving the enforcement of a contract. Whether this phrase will be interpreted to encompass actions other than contract actions, however, is questionable. Other statutes using similar terminology have not been so strictly construed[11] nor do past decisions in New York favor such a construction.[12]

The second and more important change is that the disability relating to enforcement of a contract has been significantly relaxed so as to be applicable only until the foreign corporation qualifies.[13] The new provision specifically changes the wording of the present statute from "unless before" to "unless and until" the corporation is authorized. All statutes relied upon in drafting the

8. See In re Scheftel's Estate, 275 N.Y. 135, 9 N.E.2d 809 (1937); International Fuel & Iron Corp. v. Donner Steel Co., 242 N.Y. 234, 151 N.E. 214 (1926); American Case & Register Co. v. Griswold, 143 App. Div. 807, 128 N.Y. Supp. 206 (3d Dep't 1911), reversing 68 Misc. 379, 125 N.Y. Supp. 4 (Sup. Ct. 1910); Foreman & Clark Mfg. Co. v. Bartle, 125 Misc. 759, 211 N.Y. Supp. 602 (Sup. Ct. 1925); Schwartzwaelder Co. v. Silverman, 134 N.Y. Supp. 1114 (App. T. 1912); American Security Credit Co. v. Empire Properties Corp., 154 Misc. 191, 276 N.Y. Supp. 970 (N.Y.C. Munic. Ct. 1935).

9. See Foreman & Clark Mfg. Co. v. Bartle, supra note 8; South Amboy Terra Cotta v. Poerschke, 45 Misc. 358, 90 N.Y. Supp. 333 (App. T. 1904); cf. David Lupton's Sons Co. v. Automobile Club, 225 U.S. 489 (1912); Mahar v. Harrington Park Villa Sites, 204 N.Y. 231, 97 N.E. 587 (1912).

10. N.Y. Bus. Corp. Law § 1312(a).

11. E.g., Land Dev. Corp. v. Cannaday, 74 Idaho 233, 258 P.2d 976 (1953); Dodgem Corp. v. D.D. Murphy Shows, 96 Ind. App. 325, 183 N.E. 699 (1932); Merchants Motor Freight v. State Highway Comm'n, 239 Iowa 888, 32 N.W.2d 773 (1948); Dunkin' Donuts of America, Inc. v. Dunkin Donuts, Inc., 12 Misc. 2d 380, 176 N.Y.S.2d 915 (Sup. Ct. 1958), aff'd, 8 App. Div. 2d 228, 188 N.Y.S.2d 132 (3d Dep't 1959); Crites v. Associated Frozen Food Packers, 183 Ore. 191, 191 P.2d 650 (1948); Portland Ass'n of Credit Men, Inc. v. Earley, 42 Wash. 2d 273, 254 P.2d 758 (1953).

12. See note 6 supra and accompanying text. However, the revised 1961 comment to section 1312 indicates a contrary result since it specifically provides that "the prohibition [of suits] is not limited to actions on contracts made in this state." Joint Legislative Committee to Study Revision of Corporation Laws, Revised Supplement to Fifth Interim Report, N.Y. Leg. Doc. No. 12 p. 79 (1961).

13. See Rohrlich, What's New in New York's New Business Corporation Law, N.Y.L.J., May 18, 1961, pt. 4, p. 4, col. 3.

new law,[14] the Governor's Memorandum of Approval[15] and the Report to the Joint Legislative Committee[16] indicate that the present restrictions upon unauthorized foreign corporations have been lifted so as to allow suits after qualification.

The Legislative History of Section 1312[17]

Contrary to this logic and apparent ease of formulation, the legislative history of section 1312 reveals both controversial and inconsistent accounts of its enactment. In making its original recommendations, the Joint Legislative Committee showed no desire to relax present restrictions on actions brought by unlicensed foreign corporations. It specifically stated that "authority obtained after the making of the contract but before action is commenced does not make the contract enforceable in the courts of this state. . . ."[18] Accordingly, the original bill provided that, "a foreign corporation . . . shall not maintain any action . . . in this state upon any contract made by it in this state, unless at the time of the making of the contract it was authorized to do business. . . ."[19] The legislature refused to accept the proposed law in this form and sent it back to the Joint Legislative Committee for revision. The second bill[20] presented to the lawmakers contained several major changes. Among the more significant of these was the almost complete rewording of section 1312(a).[21]

The new provision, according to the revised 1961 comment, prohibits the maintenance of any action by an unlicensed foreign corporation doing business in this state "until it has paid the state all back franchise taxes plus penalties and fees, and has received authority to do business in this state."[22] This

14. Cal. Corp. Code Ann. §§ 100-6804; Del. Code Ann. tit. 8, §§ 101-368. (1953) (Supp. 1960); D.C. Code Ann. §§ 29-901 to-958 (1951) (Supp. VIII, 1960); Md. Ann. Code art. 23, §§ 1-131. (1957) (Supp. 1961); Mass. Gen. Laws Ann. ch. 155, §§ 1-23, 45-56, ch. 156, §§ 1-55. (1959) (Supp. 1961); N.Y. Stock Corp. Law §§ 1-115; N.Y. Gen. Corp. Law §§ 1-232; N.C. Gen. Stat. §§ 55-1 to-175 (1960); Ohio Rev. Code Ann. §§ 1701.01-.99 (1954) (Supp. 1961); Pa. Stat. Ann. tit. 15, §§ 2852-1 to-1202 (1958) (Supp. 1960); Tex. Bus. Corp. Act. art. 1.01-11.01 (Vernon's 1956) (Supp. 1960); Va. Code Ann. §§ 13.1-1 to-135 (1956) (Supp. 1960).

15. Governor's Memorandum of Approval contained in N.Y. Bus. Corp. Law, p. 1, 3 (McKinney's 1961).

16. Explanatory Memorandum on Business Corporation Law (Senate Int. # 522, Pr. # 4061, Assembly Int. # 885, Pr. # 5310) contained in N.Y. Bus. Corp. Law, p. 11, 19 (McKinney's 1961).

17. For a complete list of documents pertaining to the legislative history of the entire Business Corporation Law see N.Y. Bus. Corp. Law, app., p. 168 (McKinney's 1961).

18. Joint Legislative Committee to Study Revision of Corporation Laws, Supplement to Fifth Interim Report, N.Y. Leg. Doc. No. 12 pp. 77-78 (1961). See also Joint Legislative Committee to Study Revision of Corporation Laws, Supplement to Fourth Interim Report, N.Y. Leg. Doc. No. 15 p. 80 (1960).

19. N.Y. Assembly Int. 522, Print 522, Jan. 4, 1961.

20. N.Y. Sen. Int. 522, Print 522, 4061, Jan. 4, 1961.

21. This section now reads as it was enacted, see note 2 supra.

22. See Joint Legislative Committee to Study Revision of Corporation Laws, Revised Supplement to Fifth Interim Report, N.Y. Leg. Doc. No. 12 p. 79 (1961).

change, an obvious liberalization of the previous bill,[23] was due in large part to the efforts of the New York State Bar Association and The Association of the Bar of The City of New York.[24] It represents the more modern thinking on the subject and is in keeping with the general tenor of the rest of the statute.

How will the new provision be construed? Where does it fit in the general scheme of legislation relating to this subject? What problems does it present and how should they be resolved? Decisions in other states dealing with the prototypes of the new New York statute are pertinent.

Failure to Qualify—Its Effects

Types of Statutes

Qualification statutes[25] fall into three major categories: those which prohibit the maintenance of any action; those which disallow suits involving contracts; and finally, those which pass on the validity of the contract itself. Each category in turn is divided into two important subdivisions: statutes imposing a permanent disability to sue and those which allow an action to be maintained upon qualification.

Restriction on Maintenance of Any Action

Some statutes[26] expressly provide that a foreign corporation which has failed

23. N.Y. Assembly Int. 522, Print 522, Jan. 4, 1961.

24. In a report on the proposed new law, both bar groups argued that there was no reason, from the standpoint of public interest, for penalizing foreign corporations in the fashion of the existing corporation laws. "It should be sufficient simply to provide that a foreign corporation transacting business in the state without qualifications shall not maintain an action . . . until it shall have filed a certificate of qualification." Joint Report of New York State Bar Association, Committee on Corporation Law and The Association of the Bar of The City of New York on Proposed New York Business Corporation Law, 1961 Senate Int. 522, Assembly Int. 885 at 34.

25. For a complete list of statutes, as of January 1, 1960, treating the subject of enforcement of contracts by unlicensed foreign corporations see Model Bus. Corp. Act. Ann. § 117 ¶ 6. For a thorough treatment of the fines and penalties involved and a schematic presentation of the effect on contracts, see Hornstein, Corporation Law and Practice §§ 290-296 (1st ed. 1959). See also Oleck, Modern Corporation Law §§ 771-820 (1st ed. 1959). The constitutionality of these statutes is now settled. See Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944). Insofar as such a statute imposes a condition precedent to the transaction of business in the state by a foreign corporation not within its jurisdiction, it does not violate the equal protection clause. Fire Ass'n of Philadelphia v. New York, 119 U.S. 110 (1886), affirming 92 N.Y. 311, 44 Am. Rep. 380 (1883). In this regard, however, the immunity of interstate commerce should be noted. Whether or not a particular statute is limited specifically to intrastate business, or to contracts executed within the state, it can extend no further. Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914).

26. See Alaska Comp. Laws Ann. § 36-2A-159 (Supp. 1960); Cal. Corp. Code Ann. § 6801; Colo. Rev. Stat. Ann. § 31-35-3 (Perm. Supp. 1960); Conn. Gen. Stat. § 33-412 (1960); D.C. Code Ann. § 29-934f (Supp. VIII, 1960); Fla. Stat. Ann. § 613.04 (1956); Ill. Ann. Stat. ch. 32, § 157.125 (Smith-Hurd 1954); Ind. Ann. Stat. § 25-314 (1960); Iowa Code Ann. § 496A.120 (1960); La. Rev. Stat. § 12:211 (1951); Me. Rev. Stat. Ann. ch. 53,

to comply with the state's requirements may not maintain any action on any claim whether arising out of contract or tort. Although it has been held that such provisions, being essentially penal in nature, should be rigidly construed,[27] many jurisdictions do not preclude the unlicensed corporation from suing on a cause of action which did not arise in connection with its noncompliance.[28] The prevailing law is to treat the contracts of the noncomplying corporation as merely unenforceable in the courts of that state,[29] at least until qualification.[30] As to the effect of this type of statute on the validity of the contract itself the decisions are in conflict.[31] But while there is some authority to the contrary,[32] the majority of jurisdictions favor an interpretation which holds such contracts to be valid.[33]

Restriction on Maintenance of Contract Actions

Statutes which bar the commencement or maintenance of actions on contracts made by unauthorized foreign corporations[34] have been construed in much the same manner as those applicable to *all* actions. Of course as the words of the provisions themselves indicate, suits on claims other than those *ex contractu* are

§ 128 (1954); Md. Ann. Code art. 23, § 91 (1957); Mass. Gen. Laws Ann. ch. 181, § 5 (1955); Minn. Stat. Ann. § 303.20 (1947); Miss. Code Ann. § 5319 (1957); Mo. Rev. Stat. § 351.635 (1952); Neb. Rev. Stat. § 21-1212 (Supp. 1959); N.H. Rev. Stat. Ann. § 300:8 (1955); N.C. Gen. Stat. § 55-154 (Supp. 1959); N.D. Century Code § 10-22-19 (1960); Ohio Rev. Code Ann. § 1703.29 (1954); Okla. Stat. Ann. tit. 18, § 1.201 (1953); Ore. Rev. Stat. § 57.745 (1955); Tex. Bus. Corp. Act. art. 8.18 (Vernon's 1956); Va. Code Ann. § 13.1-119 (1956); W.Va. Code Ann. § 3091 (1955) (Supp. 1960).

27. See, e.g., Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233 (5th Cir. 1953); Deveny v. Success Co., 228 S.W. 295 (Tex. Civ. App. 1921).

28. See note 11 supra.

29. E.g., Bothwell v. Buckbee, Mears Co., 275 U.S. 274 (1927); Tarr v. Western Loan & Sav. Co., 15 Idaho 741, 99 Pac. 1049 (1909); American Copying Co. v. Eureka Bazaar, 20 S.D. 526, 108 N.W. 15 (1906).

30. See, e.g., Woolfort v. Dixie Cotton Oil Co., 77 Ark. 203, 91 S.W. 306 (1905) ("sue"); International Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 92 Pac. 727 (1907) ("prosecute"); National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 82 N.E. 671 (1907) ("maintain").

31. Compare Newell Contracting Co. v. State Highway Comm'n, 195 Miss. 395, 15 So. 2d 700 (1943), with Bradford v. Indiana Harbor Belt R.R., 16 F.2d 836 (7th Cir. 1927).

32. See Barron G. Collier, Inc. v. American Cafeteria, 215 Mo. App. 182, 256 S.W. 118 (Kansas City Ct. App. 1923).

33. See Spokane Merchants' Ass'n v. Olmstead, 80 Idaho 166, 327 P.2d 385 (1958); Selph v. Illinois Pipe Line, 206 Ind. 490, 190 N.E. 191 (1934); Carlin v. Prudential Ins. Co. of America, 175 Okla. 398, 52 P.2d 721 (1935); Milton-Freewater & Hudson Bay Irr. Co. v. Skeen, 118 Ore. 487, 247 Pac. 756 (1926); cf. Salitan v. Carter, 332 S.W.2d 11 (Mo. 1960).

34. See Idaho Code Ann. § 30-504 (1948); N.Y. Gen. Corp. Law § 218; Pa. Stat. Ann. tit. 15, § 2852-1014 (1958); S.D. Code § 11.2103 (1939); Vt. Stat. Ann. tit. 11 § 764 (1958).

unaffected.[35] Although a number of courts have held that this type of statute renders a contract unenforceable by the corporation even though it subsequently complies with state requirements,[36] the majority of jurisdictions, in the absence of specific provisions to the contrary, have allowed the corporation to enforce the contract upon qualifying.[37] With respect to contracts made outside the state by an unlicensed foreign corporation there is a split of authority regarding enforcement.[38] This is not to say, however, that such a division of opinion exists as to validity of these contracts[39] for even contracts made within the state are generally considered valid.[40]

Contract Validity

Where statutes[41] explicitly state that all contracts made in the state by unlicensed foreign corporations shall be void or illegal, the courts are wont to give such provisions full effect.[42] This is also true of statutes[43] which merely state

35. E.g., Mojonnier Bros. Co. v. Detroit Milling Co., 233 Mich. 312, 206 N.W. 525 (1925) (replevin); Meisel Tire Co. v. Mar-Bel Trading Co., 155 Misc. 664, 280 N.Y. Supp. 335 (N.Y.C. Munic. Ct. 1935) (conversion); California Land & Constr. Co. v. Halloran, 82 Utah 267, 17 P.2d 209 (1932) (conversion).

36. See Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho 662, 93 Pac. 765 (1908); United Lead Co. v. J.W. Reedy Elevator Mfg. Co., 222 Ill. 199, 78 N.E. 567 (1906); Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 S.W. 31 (1909); Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S.W. 1020 (1905); American Copying Co. v. Eureka Bazaar, 20 S.D. 526, 108 N.W. 15 (1906).

37. See Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288 (4th Cir. 1906) (construing South Carolina statute); Woolfort v. Dixie Cotton Oil Co., 77 Ark. 203, 91 S.W. 306 (1905) (former Arkansas statute); Western Electrical Co. v. Pickett, 51 Colo. 415, 118 Pac. 988 (1911); Phenix Ins. Co. v. Pennsylvania Co., 134 Ind. 215, 33 N.E. 970 (1893); Boggs v. O. S. Kelly Mfg. Co., 76 Kan. 9, 90 Pac. 765 (1907); National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 82 N.E. 671 (1907). See also Annot., 75 A.L.R. 457 (1931).

38. Compare J. Walker Thompson Co. v. Whitehead, 185 Ill. 454, 56 N.E. 1106 (1900), with Bettilyon Home Builders Co. v. Philbrick, 31 Idaho 724, 175 Pac. 958 (1918) and Russek v. Wind, Ems & Co., 192 S.W. 584 (Tex. Civ. App. 1917).

39. See Sampson v. Vernon Law Book Co., 295 S.W.2d 429 (Tex. Civ. App. 1956); Ford, Bacon & Davis, Inc. v. Terminal Warehouse Co., 207 Wis. 467, 240 N.W. 796 (1932).

40. See, e.g., Transit Bus Sales v. Kalamazoo Coaches, Inc., 145 F.2d 804 (6th Cir. 1944); Moody v. Morris-Roberts Co., 38 Idaho 414, 226 Pac. 278 (1924); Heyl v. Beadel, 229 Iowa 210, 294 N.W. 335 (1940); Whitney v. Dudley, 40 N.Y.S.2d 838 (Sup. Ct.), aff'd, 266 App. Div. 1056, 45 N.Y.S.2d 725 (4th Dep't 1943); Knight Products v. Donnen-Fuel Co., 20 N.Y.S.2d 135 (Sup. Ct. 1940); List v. Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 151 N.E. 471 (1926).

41. See, e.g., Ariz. Rev. Stat. Ann. § 10-482 (1956); Ark Stat. Ann. § 64-1202 (1957); S.D. Code § 11.2103 (1939).

42. See, e.g., Royal Ins. Co. v. All States Theatres, 242 Ala. 417, 6 So. 2d 494 (1942); National Union Indem. Co. v. Bruce Bros., 44 Ariz. 454, 38 P.2d 648 (1934); First Nat'l Bank v. Parker, 57 Utah 290, 194 Pac. 661 (1920).

43. See Mich. Comp. Laws § 450.95 (1948). See also General Highways Sys. v. Dennis, 251 Mich. 152, 230 N.W. 906 (1930).

that such corporations are incapable of making a valid contract. On the other hand, provisions which state that such contracts shall be declared void at the option of the other interested parties render the agreement voidable.[44] Of course, any statute[45] which expressly provides that the noncompliance of the foreign corporation will in no way invalidate its contracts leaves such agreements thoroughly intact despite restrictions which may be imposed upon their enforceability.[46]

Where penalties are imposed upon noncomplying corporations, unless the statute specifically states their contracts are void, the validity of such agreements is dependent upon two separate theories. The majority of jurisdictions hold that it is not the province of the courts to declare such contracts invalid since if the legislature had intended them to be void it would have so provided.[47] Notwithstanding this reasoning, however, a number of courts have concluded that when foreign corporations are forbidden by law to do business in the state, not only are they subject to penalties, but every contract made in furtherance of the illegal business is void.[48]

Permanence of Disability to Sue

The problem of classifying these statutes according to the permanence of the disability to sue may be reduced to a consideration of the effects of subsequent compliance by a foreign corporation.[49] Generally, the right to enforce a contract will depend on whether the statute affects the validity of the contract or merely deals with its enforcement. If the contract is rendered void either by the express terms of the statute or by statutory construction it is incapable of being enforced and thus any qualification made subsequent to the making of the contract will be of no avail.[50] A contract, however, may be valid and yet still

44. E.g., Eastlick v. Hayward Lumber & Invest. Co., 33 Ariz. 242, 263 Pac. 936 (1928).

45. See Fla. Stat. Ann. § 613.04 (1956); Me. Rev. Stat. Ann. ch. 53, § 128 (1954); Md. Ann. Code art. 23, § 91 (1957); Mass. Gen. Laws Ann. ch. 181, § 5 (1955); Neb. Rev. Stat. § 21-1212 (Supp. 1959); N.H. Rev. Stat. Ann. § 300:8 (1955); Ohio Rev. Code Ann. § 1703.29 (1954); Pa. Stat. Ann. tit. 15, § 2852-1014 (1958); W.Va. Code Ann. § 3091 (1955) (Supp. 1960).

46. See, e.g., Walsh v. Hallstead, 140 Pa. Super. 13, 13 A.2d 95 (1940).

47. See, e.g., State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 31 S.W. 157 (1895); Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242 (1898); Williams v. Dearborn Truck Co., 218 Ky. 271, 291 S.W. 388 (1927); Thomas Cusack Co. v. Ford, 138 La. 1096, 71 So. 196 (1916); Rogers & Co. v. Simmons, 155 Mass. 259, 29 N.E. 580 (1892); Chase's Patent Elevator Co. v. Boston Tow-Boat Co., 152 Mass. 428, 28 N.E. 300 (1890); Warner-Quinlan Co. v. Smith, 134 v. Smith, 134 Misc. 649, 236 N.Y.S. 241 (Sup. Ct. 1929); Garratt Ford Co. v. Vermont Mfg. Co., 20 R.I. 187, 37 Atl. 948 (1897); Ober v. Stephens, 54 W.Va. 354, 46 S.E. 195 (1903). Toledo Tie & Lumber Co. v. Thomas, 33 W.Va. 566, 11 S.E. 37 (1890).

48. See, e.g., Dudley v. Collier, 87 Ala. 431, 6 So. 304 (1889); Ryerson & Son v. Shaw, 277 Ill. 524, 115 N.E. 650 (1917); Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S.W. 743 (1893).

49. See Annot., 75 A.L.R. 446 (1931).

50. E.g., Alabama W.R.R. Co. v. Talley-Bates Constr. Co., 162 Ala. 396, 50 So. 341

be unenforceable even after compliance with statutory requirements. Such is the case when the applicable provision prohibits the commencement or maintenance of actions, *ex contractu* or otherwise, unless the foreign corporation at the time of the making of the contract, or prior thereto, had complied with the local conditions of doing business.[51] On the other hand, where the statute does not render the agreement void but merely suspends the judicial remedy on it, subsequent authorization to do busines will enable the corporation to commence suit.[52] In this connection it should also be noted that some jurisdictions make a distinction between the words "maintain," "prosecute," or "sue" as used in such statutes, and "institute," "commence," or "begin"; it having been generally held that under the former the corporation is not precluded from starting an action.[53] Such is not the case, however, where the governing statutes render any business transactions before qualifying "illegal" or "unlawful." Here, as in those jurisdictions which specifically provide that authority acquired after the suit is instituted will not validate a contract,[54] subsequent compliance is of no moment.[55]

SECTION 1312—AN EVALUATION

Soon after the appointment and official organization of the Joint Legislative Committee to Study Revision of Corporation Laws, a Plan of Committee

(1909); Perkins Mfg. Co. v. Clinton Constr. Co., 211 Cal. 228, 295 Pac. 1 (1930); Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho 662, 93 Pac. 765 (1907); Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S.W. 1020 (1905); Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N.C. 116, 32 S.E. 404 (1899); Seidenbach's v. A. E. Little Co., 128 Okla. 65, 261 Pac. 175 (1927); Delaware River Quarry & Constr. Co. v. Bethlehem & Nazareth Passenger Ry., 204 Pa. 22, 53 Atl. 533 (1902); American Copying Co. v. Eureka Bazaar, 20 S.D. 526, 108 N.W. 15 (1906); Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S.W. 743 (1893); Interstate Constr. Co. v. Lakeview Canal Co., 31 Wyo. 191, 224 Pac. 850 (1924).

51. E.g., Republic Power & Serv. Co. v. Gus Blass Co., 165 Ark. 163, 263 S.W. 785 (1924); Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 143 S.W. 6 (1912); G. Heileman Brewing Co. v. Piemeisl, 85 Minn. 121, 88 N.W. 441 (1901); Mahar v. Harrington Park Villa Sites, 204 N.Y. 231, 97 N.E. 587 (1912); Bigelow v. Delaware Punch Co., 37 S.W.2d 353 (Tex. Civ. App. 1931).

52. See, e.g., Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S.W. 741 (1916); Hogue v. D. N. Morrison Constr. Co. of Va., 115 Fla. 293, 156 So. 377 (1934); Security Sav. & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N.E. 753 (1899); E. & G. Theatre Co. v. Greene, 216 Mass. 171, 103 N.E. 301 (1913); Wulfing v. Armstrong Cork Co., 250 Mo. 723, 157 S.W. 615 (1913); Lebanon Mill Co. v. Kuhn, 261 N.Y.S. 172, 145 Misc. 918 (N.Y.C. Munic. Ct. 1932); Milton-Freewater & Hudson Bay Irr. Co. v. Skeen, 118 Ore. 487, 247 Pac. 756 (1926); Garst v. Canfield, 44 R.I. 220, 116 Atl. 482 (1922); Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073 (1893).

53. See note 30 supra and accompanying text.

54. Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S.W. 741 (1916).

55. See Hayes v. West Va. Oil Gas & By-Products Co., 183 Ky. 622, 210 S.W. 174 (1919); Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 S.W. 31 (1909).

Operation was adopted.[56] It states "that the over-all aim of a revised business corporation statute shall be to furnish the finest available law from the viewpoint of corporations, labor, investors and the over-riding public interest."[57] Whether this objective has been achieved in relation to section 1312 is a matter of opinion, but at least it may be said that in seeking to attain this goal, the legislature has not made the intepretive task of the courts an easy one.

As previously noted, the first significant change apparent in examining this section is the fact that "any action or special proceeding"[58] is barred until the foreign corporation qualifies. This is what has been termed a maintenance of action provision and as such ordinarily entitles the foreign corporation to prosecute an action in the state court on a contract made by it in another state irrespective of whether it has complied with the statute of the forum.[59] Provisions of this type have also been interpreted as not disallowing the maintenance of tort actions[60] and other suits not connected with the prohibited business.[61] It should be noted, however, both with regard to contracts made outside the state[62] and to actions other than those *ex contractu*,[63] there is authority contrary to these views.

Which line of cases the New York courts will follow under the new statute is purely a matter of speculation. The latest legislative comment to section 1312 states, "The prohibition [of suits] is not limited to actions on contracts made in this state."[64] The question immediately raised is whether this explanation has been provided so as to make it clear that actions on contracts made outside the state are also denied, or, whether it simply refers to the inclusion within the prohibition of tort actions. Finally, there is the possibility that both types of action are restricted. If the statute is to be construed as denying the right of noncomplying corporations to enforce contracts made outside the state, whether performance be within or beyond the forum, a major new restriction has been created.[65] This would also be true of an interpretation which precludes an unauthorized corporation from maintaining an action for a tort or other claim

56. See Joint Legislative Committee to Study Revision of Corporation Laws, Interim Report N.Y. Leg. Doc. No. 17 pp. 12-13 (1957).

57. Id. at 13.

58. N.Y. Bus. Corp. Law § 1312(a).

59. See, e.g., Ford, Bacon & Davis, Inc. v. Terminal Warehouse Co., 207 Wis. 467, 240 N.W. 796 (1932). See also Annot., 81 A.L.R. 1134 (1931); cf. Standard Fashion Co. v. Cummings, 187 Mich. 196, 153 N.W. 814 (1915).

60. See, e.g., Good Roads Mach. Co. v. Broadway Bank, 267 S.W. 40 (Kan. City Ct. App. 1924) (conversion); Mansur & Tebbetts Implement Co. v. Beer, 19 Tex. Civ. App. 311, 45 S.W. 972 (Civ. App. 1898) (trespass to land).

61. See, e.g., Fidelity Metals Corp. v. Risley, 77 Cal. App. 2d 377, 175 P.2d 592 (Dist. Ct. App. 1946); United Shoe Mach. Co. v. Ramlose, 231 Mo. 508, 132 S.W. 1133 (1910); cf. note 11 supra and accompanying text.

62. See, e.g., J. Walter Thompson v. Whitehead, 185 Ill. 454, 56 N.E. 1106 (1900).

63. See note 27 supra and accompanying text.

64. Joint Legislative Committee to Study Revision of Corporation Laws, Revised Supplement to Fifth Interim Report N.Y. Leg. Doc. No. 12 p. 79 (1961).

65. See note 5 supra and accompanying text.

not connected with the prohibited business.[66] In any event it would seem that, through this comment, the framers of the new statute have sought to give a somewhat harsh connotation to section 1312, an idea which is foreign to the over-all purpose of the statute.

The second and more consequential change in the new statute is the fact that foreign corporations will no longer be permanently barred from maintaining suits on contracts made before qualifying. Under section 1312 such actions are prohibited only "unless and until such corporation has been authorized."[67] This type of provision merely has the effect of suspending the right to judicial enforcement of contracts until compliance with state requirements.[68] In view of this uniform statutory construction[69] and of the legislative intent as evidenced in the final explication of section 1312, namely "that no action may be maintained . . . until it [the corporation] . . . has received authority to do business. . . ,"[70] it is reasonable to conclude that the New York courts will allow litigation upon subsequent compliance.

A possible difficulty might arise with regard to the unfortunate use of the words "unless and until" instead of simply "until," the more widely accepted term for conveying the apparent intention of the authors of section 1312.[71] "Until"[72] by its nature connotes a mere deferment of the right involved while "unless"[73] implies that if a particular condition is not present, namely authorization, the right is nonexistent. The latter is the case under the present provisions of Section 218 of the General Corporation Law—a situation sought to be remedied by the new statute.

Paragraph (b) of section 1312 is probably the most lucid portion of the new provision. In effect it states what has become the law under Section 218 of the General Corporation Law and moreover what is generally held to be the majority theory under maintenance of action type statutes regarding the subjects treated. Although there have been some decisions to the contrary,[74] the weight of authority has always been that contracts made in a state by an unlicensed foreign corporation are not rendered void by the corporation's noncompliance.[75] Obviously, such a principle is true where the statute

66. See note 6 supra and accompanying text.

67. N.Y. Bus. Corp. Law § 1312(a).

68. See note 52 supra and accompanying text.

69. Ibid.

70. Joint Legislative Committee to Study Revision of Corporation Laws, Revised Supplement to Fifth Interim Report N.Y. Leg. Doc. No. 12 p. 79 (1961).

71. See ABA-ALI Model Bus. Corp. Act § 117 (1960); Joint Report of New York State Bar Association, Committee on Corporation Law and the Association of the Bar of The City of New York on Proposed New York Business Corporation Law 1961, Senate Int. 522, Assembly Int. 885 at 34; Joint Legislative Committee to Study Revision of Corporation Laws, Revised Supplement to Fifth Interim Report N.Y. Leg. Doc. No. 12 p. 79 (1961).

72. Cf. Black, Law Dictionary 1708 (4th ed. 1951).

73. Id. at 1706.

74. See, e.g., Barron G. Collier, Inc. v. American Cafeteria, 215 Mo. App. 182, 256 S.W. 118 (Kansas City Ct. App. 1923).

75. See, e.g., Spokane Merchants' Ass'n v. Olmstead, 80 Idaho 166, 327 P.2d 385

expressly provides that the corporation's contract or act is not invalidated.[76] Finally, with respect to the unauthorized corporation's ability to defend in litigation, contract or otherwise, the law has always been fairly well settled.[77] In the absence of a specific provision to the contrary, the statutes considered do not affect the right of enforcement of the other parties to the contract.[78] And in no instance has a statute merely prohibiting the maintenance of an action by an unlicensed corporation been held to preclude the unqualified corporation from defending in a suit brought against it.[79]

CONCLUSION

New York courts should have no difficulty in effectuating the legislative intent of section 1312(b) of the new corporation law. The liberal theory of interpretation is favored by decisions within the state and from the highest courts of other jurisdictions. Such is not the case, however, regarding section 1312(a).

Whether the slight ambiguity of "unless and until" will cause difficulties in construction is doubtful. It is probable that it will be regarded as another way of expressing the desire of the legislature to suspend the judicial remedy on contracts of noncomplying corporations, and not to deny it.

Difficulties may arise in the interpretation to be given to the words, "shall not maintain any action or special proceeding."[80] Here the judiciary will be presented with the problem of construing a section which, in virtue of its legislative history and the general construction given to such provisions, appears to be in harmony with the design of relaxing former restrictions on unlicensed foreign corporations. Yet when resort will be made to the final legislative explanations given to section 1312(a), an ambiguous and somewhat contrary intent will be revealed—the resolution of the dilemma being left entirely in the hands of the courts.

(1958); Selph v. Illinois Pipe Line, 206 Ind. 490, 190 N.E. 191 (1934); Carlin v. Prudential Ins. Co. of America, 175 Okla. 398, 52 P.2d 721 (1935); Milton-Freewater & Hudson Bay Irr. Co. v. Skeen, 118 Ore. 487, 247 Pac. 756 (1926); cf. Salitan v. Carter, 332 S.W.2d 11 (Mo. 1960). Under maintenance of contract actions statutes, see Whitney v. Dudley, 40 N.Y.S.2d 838 (Sup. Ct.), aff'd, 266 App. Div. 1056, 45 N.Y.S.2d 725 (4th Dep't 1943); Knight Products v. Donnen-Fuel Co., 20 N.Y.S.2d 135 (Sup. Ct. 1940).

76. E.g., Hogue v. D. N. Morrison Constr. Co., 115 Fla. 293, 156 So. 377 (1934).

77. See Frantz v. McBee Co., 77 So. 2d 796 (Fla. 1955); Gill v. S.H.B. Corp., 322 Mich. 700, 34 N.W.2d 526 (1948); Flakne v. Metropolitan Life Ins. Co., 198 Minn. 465, 270 N.W. 566 (1936); Whitney v. Dudley, 40 N.Y.S.2d 838 (Sup. Ct.), aff'd, 266 App. Div. 1056, 45 N.Y.S.2d 725 (4th Dep't 1943); Newcomb v. Blankenship, 256 S.W.2d 700 (Tex. Civ. App. 1953). However, a different result is possible when the statute so provides, see, e.g., DuMond v. Byron Jackson Co., 139 Ore. 57, 6 P.2d 1096 (1932).

78. See, e.g., Bradford v. Indiana Harbor Belt R.R., 16 F.2d 836 (7th Cir. 1927); Eastlick v. Hayward Lumber & Inv. Co., 33 Ariz. 242, 263 Pac. 936 (1928); Blum v. Krampner, 28 N.Y.S.2d 707 (Sup. Ct. 1941), aff'd, 261 App. Div. 989, 27 N.Y.S.2d 1000 (2d Dep't 1941); Cherokee Pub. Serv. Co. v. Harry Cragin Lumber Co., 174 Okla. 67, 49 P.2d 723 (1935).

79. See note 77 supra.

80. N.Y. Bus. Corp. Law § 1312(a).