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Pleadings-Construction of Complaint and of a Plea in Abatement

PLEADINGS—CONSTRUCTION OF COMPLAINT AND OF A PLEA IN ABATEMENT. —In two recent Indiana cases the question of the construction of the pleading has been involved. In an action by a Massachusetts corporation against a Missouri corporation upon a note signed in St. Louis payable in Massachusetts, the defendant filed a plea in abatement questioning the jurisdiction of the court; although, property of the defendant had been attached under Burns' Ann. St. 1926, Section 981. From a judgment abating the action the plaintiff appealed. *Held,* that the trial court had jurisdiction and that a plea in abatement is a dilatory plea, construed without any intendments in its favor.[1]

In another recent case, an action for an injunction, the several defendants filed joint and several demurrers. The trial court sustained the demurrers as to all the defendants, and the plaintiff, having refused to plead further, appealed. *Held,* in reversing the judgment as to all the defendants except one; the trial court said that such words as "dangerous, hazardous, perilous, and unsafe" are conclusions of fact, and may be considered in determining the sufficiency of a complaint as against a demurrer for want of facts; while, such words as "wrongfully, unlawfully, arbitrarily, void, illegal, etc.," are legal conclusions and cannot be considered in determining the sufficiency of the complaint as against a demurrer.[2]

The common law rule was that pleadings were to be construed against the pleader.[3] However, a more liberal rule is to be preferred, one that will give effect to all the material allegations whenever reasonably possible.[4] Thus the liberal rule of construction which our code of civil procedure attempts to establish seems to be highly desirable. The statute says, "In the construction of a pleading, for the purpose of determining its

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[18] 11 Cal. L. R. 238.

[19] See note 8 and note 12, *supra.*

[20] 11 Cal. L. R. 221, 237.

[1] *Dodgem Corporation v. D. D. Murphy Shows, Inc.,* Appellate Court of Indiana, Dec. 23, 1932, 183 N. E. 699.

[2] *Regester v. Lincoln Oil Refining Co., et al.,* Appellate Court of Indiana, Jan. 4, 1932, 183 N. E. 693.

[3] *Burrows v. Yount* (1843), 6 Blackford 458.

[4] *Flint, etc. Manufacturing Co. v. Beckett* (1906), 167 Ind. 491, 79 N. E. 505.

effect, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite that the precise nature of the charge or defense is not apparent, the court may require the pleadings to be made definite and certain by amendment".[5] This rule of liberal construction of the pleadings has not always been applied.[6] Thus what would seem to be the correct rule in Indiana is that pleadings are construed against the pleader only when that is necessary to do substantial justice between the parties, but that at all other times a liberal construction should be given the pleadings.[7] It can be seen that there has been some limitation placed upon the statute as construed by the courts, for they have not applied it as literally and liberally as they might have done. Whether or not a more liberal construction of the statute would have been more desirable is a debatable question and one which is unnecessary to attempt to answer here.

Thus in the Dodgem Case *supra*, the court was following the rule as laid down by the cases when it stated that the plea in abatement must be strictly construed with no intendments in its favor.[8] This was the common law rule; but in view of the statute upon construction it is very hard to logically sustain this position, since a plea in abatement is a pleading to abate the action, and the statute says that in the construction of a pleading its allegations must be liberally construed. However, no Indiana case has been found where the court has suggested that the statute upon liberal construction should be applied to a plea in abatement.

In ruling upon a demurrer for want of facts the test has been that "a demurrer admits the truth of all facts well pleaded, but it does not admit conclusions of law, nor all conclusions which may be drawn from such facts by the pleader."[9] This seems to have been the test that the court had in mind in the Regester Case, *supra*, when it made the distinction between conclusions of law which were not considered in determining the sufficiency of the complaint to state a cause of action and the conclusions of fact which were admitted as true as facts well pleaded. Another statute says "Hereafter, in any pleadings * * * where the sufficiency of the same can, may be or is called in question * * * all conclusions stated therein shall be considered and held to be the allegations of all the facts required to sustain said conclusions when the same is necessary to the sufficiency of such pleadings".[10] Upon reading the statute literally, it is very difficult to see any logical reason for making the distinction between the rule as applied to conclusions of fact and conclusions of law.

[5] Burns' Ann. St. 1926, Sec. 403.

[6] *Myers v. Henderson* (1932), 181 N.E. 729; *State ex rel. Mackenzie v. Casteel* (1886), 110 Ind. 174, 11 N. E. 214; *Davis v. Overman* (1916), 184 Ind. 647, 112 N. E. 243; *Seymour Water Co. v. Lebline* (1924), 195 Ind. 481, 114 N. E. 30; *State ex rel. Miller v. Peterson* (1905), 36 Ind. App. 269, 95 N. E. 602; *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 100 N. E. 393.

[7] *Dickesheets v. Kaufman* (1867), 28 Ind. 251; *Smith v. Borden* (1903), 160 Ind. 233, 66 N. E. 498; *Domestic Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675; *Heritage v. State* (1909), 43 Ind. App. 595, 81 N. E. 114; *Lautenschlager v. Walgsmotl* (1923), 80 Ind. App. 198, 137 N. E. 781.

[8] *National etc. Co. v. Wolfe* (1914), 59 Ind. App. 418, 106 N. E. 390; *Callahan Co. v. Wall, etc. Co.* (1909), 44 Ind. App. 372, 89 N. E. 418.

[9] *Morton v. The City of Aurora* (1932), 182 N. E. 259.

[10] Burns' Ann. St. 1926, Sec. 360.

One author writing upon the subject shortly after the above statute was enacted says, "It was formerly the rule that conclusions stated in a plea were not admitted to be true. But this rule has been changed by the statute * * *".[11] Undoubtedly it would be very desirable to have the courts construe the statute in question so that "all conclusions" would be admitted, without making any distinction between the kinds of conclusions. It must have been the purpose of the statute to have all conclusions considered when necessary to the sufficiency of the complaint when ruling upon demurrer. But it seems that a conclusion of fact is really nothing more than an operative fact, and if so, Section 360 as construed adds nothing to the general statute upon liberal construction which was enacted long before section 360 was amended. C. A. R.

REAL PROPERTY—TENANCY IN COMMON—LIFE INTEREST—JUDICIAL SALE —PARTITION.—The appellants, tenants in common with appellees' decedent, holder of a life interest, in a partition proceeding, prayed for a sale of realty, alleging its indivisibility. Appellees' decedent, prior to her death, admitted its indivisibilty and asked that the present value of her life estate be determned upon the sale of the realty. On June 24, 1925 the court ordered the realty to be sold. One piece of property was sold in November 1925; the other, a farm, was not sold until September 1928. Appellees' decedent filed a petition December 6, 1928, asking the court to determine the present value of her life estate in one-third of the net proceeds of the sale of the realty and for an order directing the commissioners to pay her the amount determined. Appellees' decedent died December 7, 1928. Appellees then filed a similar petition. Appellants filed an answer setting out the death of the appellees' decedent and asserting that her interest, even after the confirmation of the sale, was still realty and terminated at her death. The principal question is—When realty, held by tenants in common, is petitioned to be sold on a partition proceeding does the conversion of the realty into personalty take place on the confirmation of the sale or when the proceeds of such sale are actually distributed? *Held*, that the conversion of the realty into personalty is effected on the confirmation of the sale.[1]

Although it seems that the question as to the time of conversion of realty into personalty in a partition proceeding has never been decided in this jurisdiction before the instant case,[2] yet it has been held that a surviving second wife, without issue, is entitled, on a sale of land in such proceeding, to one-third of the proceeds of such sale, reduced to a sum equal to the present value of her life estate.[3]

An examination of the authorities reveals conflicting views, as to just when the conversion of realty into personalty is effected on a sale in a partition proceeding. It has been held in England and in some of our jurisdictions that an absolute order of sale within the jurisdiction of the

[11] Watson's Revision of Works Practice and Forms, Watson, B. F., vol. 1, Sec. 543.

[1] *Buschbaum v. Hale*, Appellate Court of Indiana, July 27, 1932, 182 N. E. 93.

[2] *Supra*, note 1.

[3] *Swain v. Hardin* (1878), 64 Ind. 85; *Russell v. Russell* (1874), 48 Ind. 456; *Coquillard v. Coquillard* (1916), 62 Ind. App. 426, 113 N. E. 481.