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Pleadings-Construction-Plaintiff Must Allege Compliance with Statute

PLEADINGS—CONSTRUCTION—PLAINTIFF MUST ALLEGE COMPLIANCE WITH STATUTE—This was an action of tort for fraud of an alleged agent in respect to duty arising out of contract. Plaintiff alleged that he was engaged in real estate business in Mississippi and a non-resident of Indiana; that

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[8] *Akridge v. Noble* (1902), 114 Ga. 949, 41 S. E. 78.

[9] *Palmer v. Humiston* (1913), 87 Ohio St. 401, 101 N. E. 283; *Harris v. Fall* (1910), 177 Fed. 79; *Akridge v. Noble* (1902), 114 Ga. 949, 41 S. E. 78; *McCormick v. Jones* (1929), 152 Wash. 508, 278 Pac. 181; *Gillette v. Tucker* (1902), 67 Ohio St. 106, 65 N. E. 865.

[10] *Spears v. McKinnon* (1924), 168 Ark. 357, 270 S. W. 524; *Barnett's Adm'r v. Brand* (1915), 165 Ky. 616, 177 S. W. 461; *Davis v. Kerr* (1913), 239 Pa. 551, 86 Atl. 1007; *Palmer v. Humiston* (1913), 87 Ohio St. 401, 101 N. E. 283. See 21 R. C. L. 388.

[11] *Sargent Paint Co. v. Petrovitz* (1919), 71 Ind. App. 367, 124 N. E. 883, 885.

[12] Discussed in 3 Ind. L. J. 474.

[13] *Blackburn v. Baker* (1929), 237 N. Y. S. 611; *Guell v. Tenny* (1928), 262 Mass. 54, 159 N. E. 451.

[14] *Ault v. Hall* (1928), 119 Ohio St. 422, 164 N. E. 518; *Walker Hospital v. Pulley* (1920), 74 Ind. App. 659, 664, 127 N. E. 559.

[15] *McCormick v. Jones* (1929), 152 Wash. 508, 278 Pac. 181.

prior to August 16, 1921, certain Mississippi and Louisiana real estate was placed in his hands to buy, sell, or exchange for other real estate which he, plaintiff, might find to be desirable; that plaintiff "engaged the services of defendant Myers"; thereafter, by negotiations "a deal was consummated" whereby one Hiatt was to transfer certain Indiana real estate to plaintiff in exchange for the Mississippi and Louisiana real estate; that defendant Myers breached his employment, and carried on negotiations direct; that plaintiff would have made $100,000, but was deprived of that profit by the wrongful act of the defendant, *Held*, on demurrer, that the allegation that the plaintiff was a non-resident was that he was a "foreign person" within the meaning of the statute forbidding "foreign persons" to negotiate exchange of Indiana real estate unless duly licensed; that a contract made without first complying with the law, by being duly licensed, was void; that damages for fraud cannot be based on void contracts.[1] The complaint was to be construed against the plaintiff.

The common law rule was that pleadings were to be construed against the pleader.[2] This rule was in line with the general rule of construction applicable to written instruments. The pleader chose the words he used, and if ambiguous he should not gain an advantage; but should be bound by the strict meaning of the words selected. However, a more liberal rule is to be preferred, one that will give effect to all the material allegations whenever reasonably possible.[3] This common law rule has been changed by statute[4] which says: "In the construction of a pleading, for purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Pleadings are to be liberally construed as to form, but this does not dispense with the necessity of properly pleading facts which constitute the cause of action.[5] The test to be applied to a complaint on ruling upon demurrer is, "For purpose of testing the sufficiency of the complaint to state a cause of action, 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."[6] It has often been stated that the demurrer admits the truth of all facts well pleaded and all reasonable inferences. Thus, the Code adopts a rule of liberal construction of the pleadings, but this has not always been applied. The courts have had a tendency to follow the common law rules of construction and often in cases of ambiguity have construed the pleadings against the pleader.[7] The correct rule seems to be that plead-

[1] *Meyers v. Henderson*, Supreme Court of Indiana, June 30, 1932, 181 N. E. 729.

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

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

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

[5] *Belt Railroad Co. v. Mann* (1886), 107 Ind. 89, 7 N. E. 893.

[6] *Morten v. City of Aurora*, Appellate Court of Indiana, July 27, 1932, 182 N. E. 259.

[7] *State ex rel. Mackenzie v. Casteel* (1886), 110 Ind. 174, 11 N. E. 214; *Cincinnati, etc., R. Co. v. Smock* (1892), 133 Ind. 411, 33 N. E. 168; *Plessinger v. Baker* (1915), 183 Ind. 507, 109 N. E. 43; *Davis v. Overman* (1916), 184 Ind. 647, 112 N. E. 243; *Seymour Water Co. v. Lebline* (1924), 195 Ind. 481, 144 N. E. 30; *Merrill v. Pepperdine* (1893), 9 Ind. App. 416, 36 N. E. 921; *Hentz v. Muller* (1893), 19 Ind. App. 240, 49 N. E. 293; *Cleveland, etc., R. Co. v. Stewart* (1900), 24 Ind. App. 374, 56 N. E. 917; *State ex rel. Miller v. Petersen* (1905), 36 Ind. App. 269, 95 N. E. 602; *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 100 N. E. 383.

ings 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.[8]

Assuming that the question of the pleadings was properly decided there is still a question present under our statute requiring non-resident brokers to procure a license. There is a presumption of legality and it is a matter of defense upon the party desiring to take advantage of the illegality of a contract to plead and prove it. This, the almost universal rule, is generally followed in Indiana as announced in *Hogston v. Bell*,[9] which says: "It being presumed that the contract sued on as set forth in the complaint was for a valuable consideration and without fraud, the burden is on defendants to impeach it and show by preponderance of evidence that it was fraudulent or contrary to public policy." According to this line of reasoning, the majority view on the question of the proof of a broker's license is that the proof of license in the first instance is not necessary, a license being presumed.[10] In an action for his commission by a broker, who is unlicensed, it is a matter of affirmative defense that must be set up by answer the same as unfaithfulness or dual employment, which are waived if not pleaded.[11] This idea of making the lack of license a defense to be pleaded and proven by the one wishing to take advantage of it, fits in with the general rules of pleading; but it is not the rule in Indiana.

Many states have permitted a recovery of a broker's commission, by an unlicensed broker, where the statute of that state is for the express purpose of raising revenue;[12] even where the statute or city ordinance provides that "It shall be unlawful for any person, firm, or corporation by principal or agent to carry on, conduct or maintain, or follow any occupation or business, * * * without having complied with all the provisions of this ordinance."[13] Again, it has been held that a statute requiring a broker to take out a license is not prohibitory, but merely fixes a penalty, and that an unlicensed broker is not precluded from recovering his commission.[14] These questions do not arise under our Indiana statute[15] requiring non-resident brokers to procure a license, because by the nature of our statute it shows that it is not for the sole purpose of raising revenue but rather to regulate business for the protection of the residents of the state.

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[8] *Dickesheets v. Kaufman* (1867), 28 Ind. 251; *Stone v. State* (1881), 75 Ind. 235; *Polson v. Polson* (1895), 140 Ind. 300, 39 N. E. 498; *Smith v. Borden* (1903), 160 Ind. 223, 66 N. E. 498; *Kahle v. Crown Oil Co.* (1913), 180 Ind. 131, 100 N. E. 681; *Domestic Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Midland R. Co. v. Gascho* (1893), 7 Ind. App. 407, 34 N. E. 643; *Grass v. Ft. Wayne Trust Co.* (1908), 42 Ind. App. 395, 81 N. E. 514; *Heritage v. State* (1909), 43 Ind. App. 595, 81 N. E. 114; *Lautenschlager v. Walgsmotl* (1923), 80 Ind. App. 198, 137 N. E. 781.

[9] (1916) 185 Ind. 536, 112 N. E. 883.

[10] *Munson v. Fenno* (1889), 87 Ill. App. 655.

[11] *Sullivan v. Durante* (1910), 83 Kans. 799, 109 Pac. 777.

[12] *Coates v. Locust Point Co.* (1905), 102 Md. 291, 5 A. & E. Ann. Cas. p. 895; *Ruckman v. Bergholz* (1874), 37 N. J. L. 437; *Fairly v. Wappoo Mills* (1895), 44 S. Car. 227, 22 S. E. 108.

[13] *Hughes v. Snell* (1911), 28 Okla. 828, 115 Pac. 1105.

[14] *Tooker v. Duckworth* (1904), 107 Mo. App. 231, 80 S. W. Rep. 963.

[15] Burns' Ann. St. 1926, Sec. 9783, 9790.

The majority view has been that where a statute requires a person or firm to procure a broker's license, a contract made by a person in such a business without the procuring of a license is void and no recovery can be had thereon.[16] This majority view that a contract is void when the requirements of the statute requiring the license is not met has been followed in Indiana. Indeed, it has been so extended that the contract has been declared void; even though the statute does not specifically so state, but places some regulation upon entering or engaging in the business.[17] In these cases the complaint was insufficient unless the plaintiff had alleged the performance of all the requirements of the statute. Thus, it may be said that in Indiana, where a business, profession or acts have been made the subject of legislation and penalties have been fixed for failure to comply with the statute, the one who asserts a right based on such business, profession, or act must affirmatively allege compliance with the statute as a condition precedent to his right.

C. A. R.

TAXATION—INHERITANCE TAX—INTANGIBLE PROPERTY—DUE PROCESS OF LAW—Included in the estate of deceased, a subject of Great Britain, and resident of Cuba, not engaged in business in the United States, were bonds and certificates of stock of foreign governments and corporations, bonds of domestic corporations and a domestic municipality, and a deposit with a domestic banking concern. The Commissioner of Internal Revenue included these in the gross estate of deceased subject to Federal estate tax under the Revenue Act of 1924. The Board of Tax Appeals decided the Act did not apply to such intangibles,[1] and the Circuit Court of Appeals affirmed this decision.[2] The Supreme Court granted certiorari and *held*, first, that the Act was intended to include such property, and second, that the due process clause of the Fifth Amendment did not make the tax invalid because of lack of jurisdiction; judgment of lower courts reversed.[3]

Under the due process clause of the Fourteenth Amendment, the Supreme Court decided in *Farmers' Loan & Trust Co. v. Minnesota*[4] that negotiable bonds and certificates of indebtedness issued by State or municipal governments, some registered, and others negotiable, are rightly regarded as if ordinary choses in action, and a death duty can be placed on them only by the State of the domicile of the owner. *Baldwin v. Missouri*[5] extended this rule to include bank deposits, Federal coupon bonds and promissory notes; *Beidler v. South Carolina Tax Commission*[6] extended

[16] *Kirk v. Rich* (1910), 156 Ill. App. 483; *Sprager v. Reilly* (1907), 34 Pa. Super. Ct. 332; *Pile v. Carpenter* (1907), 118 Tenn. 288, 99 S. W. 360.

[17] *Becker v. Peru Trust Co.* (1912), Ind. App. 184, 97 N. E. 23; *Sandage v. Studebaker Bros. Mfg. Co.* (1895), 142 Ind. 148, 41 N. E. 380; *Horning v. McGill* (1919), 188 Ind. 332, 116 N. E. 303; *Wells v. Indianapolis Co.* (1928), 88 Ind. App. 231, 161 N. E. 687.

[1] 22 B. T. A. 71.

[2] 60 Fed. (2nd) 690.

[3] *Burnet, Commis. of Internal Revenue, v. Brooks*, March 13, 1933, 53 Sp. Ct. 457.

[4] 280 U. S. 204, 50 Sp. Ct. 98 (1930).

[5] 281 U. S. 586, 50 Sp. Ct. 436 (1930).

[6] 282 U. S. 1, 51 Sp. Ct. 54 (1931).