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CONTRACTS-ILLEGALITY-EFFECT OF VIOLATION OF ASSUMED NAME STATUTE

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CONTRACTS—ILLEGALITY—EFFECT OF VIOLATION OF ASSUMED NAME STATUTE—Plaintiff, doing business under an assumed name, brought an action against defendant to recover a balance due for merchandise sold and delivered. The uncontradicted evidence showed that at the time of the transactions plaintiff had not registered under the Illinois Registration Act of 1941,¹ although he had registered prior to the bringing of this action. Judgment was entered for plaintiff, and defendant appealed. *Held*, reversed. A person doing business under an assumed name may not enforce contracts entered into prior to registering under the Business Registration Act. *Franks v. Coronet Novelty Co.*, (Ct. App. Ill. 1950) 93 N.E. (2d) 157.

Assumed name statutes generally fall into two categories:² those prohibiting the enforcement of contracts made under a fictitious name until the required certificate has been filed,³ and those that merely provide for a prescribed punishment of fine or imprisonment for failure to file.⁴ The Illinois statute falls into the second group.⁵ But on the basis of an earlier decision, *Mickelson v. Kolb*,⁶ the court holds such contracts unenforceable, because the language of the statute makes it criminal to do business without compliance. This result obtains although the statute does not expressly deal with enforceability, and although the plaintiff has registered before bringing action. In the past, a few states having similar penal statutes followed the rule of the principal case.⁷ The great

¹ Ill. Rev. Stat. (Smith-Hurd, 1949) c. 96, §§4-8.

² For classification and discussion of these statutes, see 45 A.L.R. 198 (1926); 59 A.L.R. 455 (1929).

³ Ariz. Code (1939) §58-202; Cal. Gen. Laws (Deering, 1941) §4468; Mont. Rev. Code Ann. (1935) c. 158, §8020; N.D. Rev. Code (1943) tit. 45-0229; Ohio Gen. Code (Page, 1938) §8104; Okla. Stat. Ann. (1941) tit. 54, §83; Wash. Rev. Stat. Ann. (Remington, 1931) c. 2, §9980.

⁴ Ala. Code (1940) tit. 14, §230; Ark. Stat. (1947) tit. 70, §405; Conn. Gen. Stat. (1949) vol. 3, §6728; Ga. Code (1933) tit. 106, §303, as amended by Ga. Laws, 1937, p. 805; Ind. Stat. Ann. (Burns, 1933) §50-203; Iowa Code (1946) c. 547.4; Ky. Rev. Stat. (1948) §365.990; La. Gen. Stat. (Dart, 1939) §6507; Me. Rev. Stat. (1944) c. 167, §8; Mass. Ann. Laws (1946) tit. 110, §5; Mo. Rev. Stat. Ann. (1939) art. 3, §15469; N.C. Gen. Stat. (1943) c. 59, §88; N.J. Rev. Stat. (1937) tit. 56:1-4; 39 N.Y. Consol. Laws (McKinney, 1943) §§440(6) and 440-b(5); R.I. Gen. Laws (1938) c. 386, §4; Texas Penal Code Ann. (Vernon, 1948) tit. 14, c. 7, art. 1070; Utah Code Ann. (1943) tit. 58, c. 2; W.Va. Code Ann. (1943) §4658. A third category consists of those statutes that combine the provisions of the other two: Colo. Stat. Ann. (1935) c. 165, §22; Idaho Code (1948) tit. 53-506-7; Mich. Stat. Ann. (1936) §19.827; Minn. Stat. Ann. (1945) §333.13; Nev. Comp. Laws (1929) §4456-7; Ore. Comp. Laws Ann. (1939) c. 5, §§43-506-7; Pa. Stat. Ann. (Purdon, 1949) tit. 54, §§28.4, 28.12; S.D. Code (1939) c. 49, §§49.0802, 49.9901; Vt. Stat. (1947) c. 270, §§6114-9; Va. Code (1942) c. 185, §4722(3).

⁵ Section 4 provides, "No person or persons shall hereafter conduct or transact business in this State under an assumed name . . . unless such person or persons shall file . . . a certificate setting forth the name under which the said business is, or is to be, conducted or transacted. . . ." Section 8 makes violation a misdemeanor and provides for a penalty in the form of fine or imprisonment, or both, not to exceed \$100 or thirty days.

⁶ 337 Ill. App. 493, 86 N.E. (2d) 152 (1949), discussed in 44 ILL. L. REV. 720 (1949).

⁷ *Horning v. McGill*, 188 Ind. 332, 116 N.E. 303 (1917); *Talbot v. Smith*, 211 Ky. 239, 277 S.W. 257 (1925); *Cashin v. Pliter*, 168 Mich. 386, 134 N.W. 482 (1912); *Williamson Real Estate Co. v. Sasser*, 179 N.C. 497, 103 S.E. 73 (1920); *Swords v. Owen*, 2 Jones & S. (N.Y.) 277 (1872).

majority, however, held that a failure to comply with the statute did not affect the enforceability of the contract.⁸ Today, Illinois appears to be the last state with the penal type statute to follow this construction.⁹ The Kentucky court was the latest to abandon the rule, its statutory provisions¹⁰ being identical with those of Illinois. That court holds that the object of the statute is to protect the public by giving it information as to the person with whom it deals and affording creditors protection against fraud and deceit. "But this object is certainly not furthered by permitting the statute to be used as an instrument of fraud whereby one may obtain the goods, property, or service of another and then refuse to pay him for it solely because the latter has failed to file the certificate referred to in the statute."¹¹ Thus the purpose of the statute is frustrated by a contrary result.¹² The Kentucky court also holds such statutes to be in derogation of the common law; they should be strictly construed so as to exclude cases clearly not within their bounds.¹³ The fact that the legislature has omitted to state specifically that failure to comply will result in the invalidity of the contract seems to indicate that such a penalty is not to be imposed.¹⁴ Even in those states where the statutes in force forbid suit without compliance, it is the rule either by statute or decision, whether or not a penalty is also provided, that a contract made before filing the certificate may be enforced after such filing,¹⁵ although the filing takes place after commencement of the suit.¹⁶ It appears, therefore, that the court in the principal case has selected an unjustifiable position in turning away from all current authority in its interpretation.

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⁸ *Sagal v. Fylar*, 89 Conn. 293, 93 A. 1027 (1915); *Humphrey v. City Nat. Bank*, 190 Ind. 293, 130 N.E. 273 (1921); *Toelke v. Toelke*, 153 La. 697, 96 S. 536 (1923); *Bassen v. Monckton*, 308 Mo. 641, 274 S.W. 404 (1925); *Rutkowski v. Bozza*, 77 N.J.L. 724, 73 A. 502 (1909); *Fawcett v. Andrews*, 203 App. Div. 591, 197 N.Y.S. 208 (1922).

⁹ 45 A.L.R. 198 at 216 (1920); 59 A.L.R. 455 (1929) and cases cited therein.

¹⁰ Ky. Rev. Stat. (1948) §§365.010 and 365.990.

¹¹ *Hayes v. Providence Citizens' Bank & T. Co.*, 218 Ky. 128 at 132, 290 S.W. 1028 (1927).

¹² *Sagal v. Fylar*, supra note 8 at 298, holding that the purpose of the statute "obviously was not to provide a means by which persons having received a benefit from another should be able to retain it without compensation and to repudiate any agreement for compensation." That the purpose of these statutes is protection of the creditor, see *Sagal v. Fylar*, id.; *Wolfe v. Joubert*, 45 La. Ann. 1100, 13 S. 806 (1893); *Gay v. Siebold*, 97 N.Y. 472 (1884). But cf. *Cashin v. Pliter*, supra note 7.

¹³ *Hayes v. Providence Citizens' Bank & T. Co.*, supra note 11, at 133. In accord with this decision, see *Sinclair Ref. Co. v. Smith*, (5th Cir. 1926) 13 F. (2d) 68; *Humphrey v. City Nat. Bank*, supra note 8; *Sinnot v. German-American Bank*, 164 N.Y. 386, 58 N.E. 286 (1900); *Price v. Edwards*, 178 N.C. 493, 101 S.E. 333 (1919).

¹⁴ *Kusnetsky v. Security Insurance Co.*, 313 Mo. 143, 281 S.W. 47 (1926); *Way v. Pacific Lumber Co.*, 74 Wash. 332, 133 P. 595 (1913).

¹⁵ See 45 C.J. 376 at 379 (1928). In *Canonica v. St. George*, 64 Mont. 200, 208 P. 607 (1922), it was held that a failure to file a certificate does not invalidate the contract, but operates only upon the remedy, and then only until the requirements have been met.

¹⁶ *Rudneck v. Southern California Metal & Rubber Co.*, 184 Cal. 274, 193 P. 775 (1920); *Peterson v. Morris*, 119 Wash. 335, 205 P. 408 (1922).