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Pleading and Practice--Representative Capacity

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suits the situation at hand rather than implied contracts. Quasi contracts are in reality not contracts at all since they do not rest upon a meeting of intentions, expressed by words or by conduct, but are obligations created by a legal fiction in order to do justice. *Bicknell v. Garrett*, 1 Wash.2d 564, 96 P.2d 592 (1939). This legal fiction was invented by the common law courts in order to permit a recovery in an action of assumpsit in cases where there is in fact no contract, but the circumstances are such that under the law of natural justice there should be a recovery as though there had been a promise. *Clark v. People's Sav. & L. Ass'n*, 221 Ind. 168, 46 N.E.2d 681 (1943). The West Virginia court draws this distinction between implied contracts and quasi contracts in *Johnson v. Nat'l Bank*, 124 W. Va. 157, 19 S.E.2d 441 (1942).

There seems to be no theory under which *P* could recover the \$500 from *D*. At the time collections were made by *D* there was a valid outstanding obligation to *H* owing by *P*, and payment to the agent is without doubt payment to the principal. The only questionable payment made was that of *P* to *H* to secure the release of the trust deed upon *P*'s property, and this transaction in no way involved *D*. The court states that it was not here concerned with *P*'s right to recover from *H*. Admittedly the result of the court's decision is correct, and merely a secondary basis for so holding is questionable, though firmly substantiated under the doctrine of *stare decisis*. It is submitted that the court should overrule the precedents and abolish the unreasonable distinction between mistakes of law and of fact.

H. C. B., Jr.

PLEADING AND PRACTICE—REPRESENTATIVE CAPACITY.—*P* filed a declaration suing *Ds*, "as trustees of" a certain union. *Ds*, by a special plea, alleged that the process was served against them as individuals, so that to suffice, the action had to be against all the members of the union. The court cited *Milan v. Settle*, 127 W. Va. 270, 20 S.E.2d 269 (1944), indicating that the failure to use "as" showed a desire to sue *Ds* in individual capacity. Since "as" was present in this declaration and since the court found the action to be against *Ds* in their representative capacity, it would seem that the use of "as" denotes, to the court's satisfaction, the intent to sue one in his representative capacity. However, the court went on to hold that the capacity of a plaintiff or defendant in a suit is "to be determined from all the allegations of the pleading." *Marion v. Chandler*, 81 S.E.2d 89 (W. Va. 1954).

These two lines of reasoning seem contradictory since one can easily conceive of the situation where "as" could be used and the remainder of the pleadings indicate the desire to bind either the plaintiff or the defendant in his individual capacity. If this were the case the court would have to apply one or the other doctrine. They can only be consistently used together where, as in this case, "as" is used and the allegations go to prove an action against the party in his representative capacity.

Each line of reasoning has found support in prior decisions in our jurisdiction. These seem to lend themselves toward division into certain groups. The largest group examined shows a failure to use "as". In each of these situations the court has decided that the action was an individual one. However, various reasons were given for these decisions. In *Milan v. Settle, supra*, the court held that issuance of process against defendants "members" of a union to be solely against the individuals named as defendants, in their personal capacity, as distinguished from any representative capacity in connection with the union, and that the use of the name of the union was merely *descriptio personae*. At page 277 the court said, "The word 'as' is of importance in such cases, and the failure to use it in this instance indicates to us that the individual defendants were not intended to be sued in any representative capacity." In both *Hyman v. Swint*, 94 W. Va. 627, 119 S.E. 866 (1923), and *Donahue v. Rafferty*, 82 W. Va. 535, 96 S.E. 935 (1918), the court considered a deed conveying land to "Right Reverend P. J. Donahue, Bishop of Wheeling, W. Va." as vesting title in the bishop individually. In *Pinnell v. Hinkle*, 54 W. Va. 119, 46 S.E. 371 (1904), the court said, "A summons from a justice is against 'B. L. Hinkle, guardian for Joseph E. and Mary Friend, infants.' It is an action against Hinkle as an individual." In *Crim v. England*, 46 W. Va. 480, 35 S.E. 887 (1899), notes given by Bradford and Brown to satisfy a demand against the estate of one Trahern, and signed by Bradford and Brown, "Administrators of James Trahern, Deceased" failed to show the right of the payee to go against the estate. The phrase in quotations was held to be *descriptio personae*. In *State for Use of Merchant's Nat'l Bank v. Hudkins*, 34 W. Va. 370, 12 S.E. 495 (1890), the court said, "without the use of the particle 'as' simply placing his office in opposition (*sic*) to the name of the individual has been held to be merely *descriptio personae*." In *Fidelity Ins. Trust & Safe Deposit Co. v. Shenandoah Valley R.R.*, 33 W. Va. 761, 11 S.E. 58 (1890), an attachment against "William Milnes, Jr., president Shenandoah Valley Railroad Com-

pany garnishee" was held not to be a garnishment against the company but against Milnes personally. A negotiable note signed "J. B., Agent for Lewis County" was considered to be the note of J. B. and not that of the county in *Exchange Bank of Virginia v. County of Lewis*, 28 W. Va. 273 (1886). Finally, a bill of exchange signed "Chas. F. Hale, Pres." was held to be Hale's personal note in *Rand & Minsker v. Hale*, 3 W. Va. 495 (1869). These cases tend to show that mere failure to use "as" renders the process, note, etc., personal. However, the next two cases indicate that the court will look for more signs.

In *Drainer v. Travis*, 116 W. Va. 390, 180 S.E. 435 (1935), the court said, "The words 'executor of G. B. Travis estate', *without more*, are merely descriptive of the person of the defendant." (Italics supplied.) In *Thompson & Lively v. Mann*, 53 W. Va. 432, 44 S.E. 246 (1903), a judgment against "T. G. Mann, administrator of Sherman Clarkson, deceased", as shown in the caption was considered to be an individual judgment against Mann, "*it not appearing* that the recovery was to be levied on goods and chattels of Clarkson in the hands of Mann to be administered." (Italics supplied.) These cases leave open the questions raised by the italicized portions.

The next group of cases is akin to the preceding cases in that "as" was omitted in these also and the persons named were affected in their individual capacity. These differ, however, in a sense, because the court applies the second line of reasoning used in the instant case, *i.e.*, the determination of capacity is based on the sum total of the allegations. In *Scott v. Newell*, 69 W. Va. 118, 70 S.E. 1092 (1911), the court held that the words "Trustees of the First Presbyterian Church of Chester, W. Va." were not "of themselves, sufficient to determine the question whether they have been sued in their official capacity." The court felt that the words "may have been used only as *descriptio personae*." They went on to say, "The character of the declaration, its allegations, must determine the character in which a party sues, or is sued." They decided here that the parties were sued in their individual capacity. In *Hall v. McGregor*, 65 W. Va. 74, 64 S.E. 736 (1909), a judgment against Matilda McGregor, executrix of the last will and testament of David McGregor, deceased, was considered personal. The words after Matilda McGregor were thought to be descriptive. The court went on to state that "by reason of the very substance of the cause of action" the action was one against her in her individual capacity. In *Hanson v. Blake*, 63 W. Va. 560, 60 S.E. 589 (1908),

where there were proceedings against Blake, "administrator of Charles Lomadew, deceased," the court considered the action to be one against Blake individually. The words quoted were "rejected as mere surplusage." The court said however, that "were the declaration against the estate which defendant represents, and the promises declared upon those of the person he represents, then such words would be properly used as necessary to set forth the representative capacity in which defendant is sued."

In the following two cases a seemingly altogether different approach was utilized by the court. "As" was omitted but was necessary to fulfill the obligations of the process and so the court, itself, corrected the defect, treating it as a mere technicality. In *Haller v. Digman*, 113 W. Va. 240, 167 S.E. 593 (1933) a judgment against M. M. Haller "as" guardian was desired, though the "as" was omitted in the judgment of the lower court. The supreme court called the defect a formal one and said that it was correctable by the justice's court. In *Selvey's Ex'rs v. Armstrong's Adm'r*, 73 W. Va. 13, 79 S.E. 1020 (1913), the court refused to reverse the lower court which rendered a judgment lacking the phrase "to be levied on the goods and chattels of Adolphus Armstrong in his hands to be administered." The judgment was against Kunst, Armstrong's administrator. The court felt that this omission made the judgment a personal one but the court found the defect only formal and made the correction in its judgment.

In *Goff v. Lowe*, 101 W. Va. 57, 131 S.E. 870 (1926), the court used a similar approach. A declaration alleging that plaintiffs "doing business as the Roane Realty Company, complain," was held to be an averment alleging partnership although it was stated that the proper averment would be a direct statement that plaintiffs are partners.

The remaining cases examined on the proposition of determining capacity do not fit in any of the categories heretofore mentioned. However they are as much concerned with the problem as the others discussed.

Massey v. Payne, 109 W. Va. 529, 115 S.E. 658 (1930), would appear to be directly *contra* to the *Milan case*, *supra*, and hardly in accord with the others cited in the first group. However, it would seem to be in accord with the *Scott* and *Hall* cases. The court felt that the allegations in the declaration did not make a case against the defendants in their representative capacity, but that the substance and effect of the allegations were to charge them personally. Accordingly the words "as trustees under" were regarded

as merely *descriptio personae* and surplusage. Yet in *Thurmond v. Guyan Valley Coal Co.*, 85 W. Va. 501, 102 S.E. 221 (1920), plaintiffs sued "in their said capacity of executors of the last will and testament of W. D. Thurmond, deceased," and the court said that "the whole tenor of the declaration shows that plaintiffs are suing in a representative character." The fourth point of the syllabus says that "Whether the plaintiff has instituted an action in a representative or individual capacity, and whether words following his name are to be deemed descriptive of his person or of the character in which he sues, is to be determined from all the allegations of the pleading." This agrees in substance with the *Scott* and *Hall* cases, *supra*, but it appears that if the court had so desired it could have followed the reasoning in the *Milan* and *Hudkins* cases, *supra*, and arrived at the same result.

The last two cases to be discussed have been criticized in previous case comments. *Hardesty v. Fairmont Supply Co.*, 123 W. Va. 161, 14 S.E.2d 436 (1941), is analyzed in 48 W. VA. L.Q. 72 (1941), and *Hughes v. Charlton*, 104 W. Va. 640, 141 S.E. 1 (1927), is commented on in 34 W. VA. L.Q. 397 (1928). In the *Hardesty* case, the grantee of a deed was described as "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association." The court held that Miller's heirs took title on his death. In the *Charlton* case, *supra*, Charlton, "Trustee", contracted to buy the stock in a certain corporation. The court held that the use of the term "trustee" was not merely *descriptio personae* but was used advisedly and the vendors should have been put on notice that the vendee was contracting only as trustee, not individually. This case seems squarely contra to the first group of cases cited. The court was split three-two on this proposition and no authority was cited for the majority opinion. However, it came up on the equity side of the court. In effect, "as" was omitted and representative capacity found. This seems to be the only case so holding in West Virginia.

P. M. F.

PLEADING—WRONGFUL DEATH ACTION—IMPROPER TO INCLUDE CLAIM FOR PROPERTY DAMAGE.—*P*'s decedent instituted action to recover from *D* for personal injuries and for damage to his automobile sustained in a collision with *D*'s vehicle. He died pending trial from these injuries and *P*, decedent's administratrix, was allowed to revive the action in her name. Trial court instructed the jury that