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Principal and Agent--Creation of the Agency Relationship

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However upon the facts of this case its result is clearly justifiable. In suing separately upon two distinct causes of action the judgment on the first operates as an estoppel only as to points and questions actually litigated and determined.[13] It is believed that since the plaintiff placed all its items of damages before the jury where each was contested in the first action that they may be considered within the above rule, as points or questions litigated. Therefore the plaintiff would be estopped to use them in this second action.

M. E. L.
E. W. E.

PRINCIPAL AND AGENT — CREATION OF THE AGENCY RELATION. — Judgment was taken against *C*, constable, and *S*, accommodation surety on *C*'s constable bond. *C*'s mother, *M*, paid the judgment with money borrowed from *S*, giving her promissory note secured by deed of trust. *M* brings suit against *S* on the theory that she is equitable assignee of the judgment. *S*, in his answer, alleged that when *M* paid the judgment it was with the intention "of paying the same on behalf of her son, for the purpose of saving . . . [*S*] . . . blameless on account of his gratuitous undertaking." *M* demurred to the answer. Demurrer overruled. On certificate before Supreme Court of Appeals, ruling affirmed. *Held,* that where a judgment

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express or implied . . . ." § 8602: "The causes of action so united must affect all the parties to the action, and not require different places of trial." N. C. Code (1935) § 507. Same as above. OKLA. COMP. STAT. (Bunn, 1921) § 266. Same as above. OHIO GEN. CODE (Page & Adams, 1910) §§ 11306, 11307. Same as above. TEX. COMP. STAT. (1928) art. 1989. "In suits brought by the state . . . against any officer . . . or depository . . . giving more than one official bond, the sureties on each and all such bonds may be joined as defendants in the same suit whenever it is difficult to determine when the default sued for occurred and which set of sureties on such bonds is liable therefor."

These cases with the exception of Powell v. Powell, 48 Cal. 234 (1874), and Siebern v. Meyer, 11 Ohio Dec. 344 (1886), permit such joinder without reference to any statutory provisions whatsoever. Furthermore, none of these cases involve injunction bonds. Two of the cases cited, Allen v. State, 61 Ind. 268, 28 Am. Rep. 673 (1878), and Lewis v. Gambs, 6 Mo. App. 138 (1878), are not even in point, the former involving suit on only one bond and the latter being a statutory proceeding for administration of an estate and not a suit on the bonds.

[13] (1917) 15 R. C. L. 450. See Hudson v. Iguano Land & Mining Co., 71 W. Va. 402, 408, 76 S. E. 797 (1912); Pomeroy National Bank v. Huntington National Bank, 72 W. Va. 534, 537, 79 S. E. 662 (1913); Cromwell v. County of Sac, 94 U. S. 351, 353, 24 L. Ed. 195 (1876); Southern Pac. R. Co. v. United States, 168 U. S. 1, 48, 42 L. Ed. 355 (1897).

is paid by a stranger it "is extinguished or not according to intention of party paying". *Hughes v. McElwee.*[1].

As the hearing arose on demurrer to the answer, the only facts properly before the court are those found in that answer,[2] which are admitted as true by *M* for the purpose of the ruling.[3]

After deciding the case by an apparently correct rule of law, the majority opinion says in dictum, "Although a stranger to the action in covenant, she was, in view of the allegations of the answer, acting as an agent for her son, in paying off the debts."[4] In a principal and agent relationship, the principal must manifest his intention that the agent shall act for him[5] and the agent must intend[6] to accept authority from the principal.[7] Authority must be shown by written[8] or spoken words[9] or may be inferred from the conduct of the principal which would reasonably lead to the belief the principal desires that the agent act on his account.[10] The facts appearing in the answer would seem to show no manifestation of intention by *C* that *M* act as his agent.[11]

In a dissenting opinion it is said that substance and not form will be regarded. "Thus the plaintiff was not actually a borrower

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[1] 185 S. E. 688 (W. Va. 1936).

[2] BURKS, PLEADING & PRACTICE (3d ed. 1924) § 191; Brooks v. Metropolitan Life Ins. Co., 70 N. J. L. 36, 56 Atl. 168 (1903).

[3] BURKS, *op. cit. supra* n. 2, § 196; Van Dyke v. Norfolk S. R. Co., 112 Va. 836, 72 S. E. 659 (1917).

[4] 185 S. E. 688, 689 (W. Va. 1936).

[5] In Berry v. W. Va. & P. R. Co., 44 W. Va. 538, 544, 30 S. E. 143, 145 (1898), the court quotes with approval MECHEM, AGENCY (2d ed. 1914) 177, to the effect that the authority depends upon the intention of the principal whether express or implied. Connell v. McLaughlin, 28 Ore. 230, 42 Pac. 218 (1895); RESTATEMENT, AGENCY (1933) § 1. For the purposes of this comment in regard to the creation of an agency relationship the term "manifestation of consent" as used in the Restatement of Agency is deemed to convey the same meaning as "manifestation of intention" and "express and implied intention".

[6] RESTATEMENT, AGENCY (1933) § 1. Central Trust Co. of New York v. Bridges, 57 Fed. 753, 6 C. C. A. 539 (1893).

[7] In Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 334, 69 S. E. 845 (1910), the court said, "To create the relationship of principal and broker there must be a contract of employment, express or implied." The court has, however, seemed to disregard the rule of this case. *Cf.* Ronconi v. Cook, 107 W. Va. 684, 155 S. E. 4 (1929).

[8] RESTATEMENT, AGENCY (1933) § 26. Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 S. E. 845 (1910).

[9] Piercy, Ex'r v. Hedrick, 2 W. Va. 458 (1868). RESTATEMENT, AGENCY (1933) § 26.

[10] RESTATEMENT, AGENCY (1933) § 26. Ronconi v. Cook, 107 W. Va. 684, 155 S. E. 4 (1929); Perkins v. Friedberg, 90 W. Va. 185, 110 S. E. 618 (1922).

[11] In Cunningham v. Irwin, 182 Mich. 629, 148 N. W. 786 (1914), the court held that where, upon request, a father, being a stranger to the debt, paid his son's debt, he was not, in that payment, the son's agent.

from the defendant, but merely his bailee or agent.'"[12] Unless the court had knowledge of circumstances not brought out in the answer set forth in the opinion, it is difficult to reconcile this position with the facts as given. The fact that *S* required a note secured by deed of trust from *M* before advancing the money to pay up the judgment would seem to lead to the conclusion that there was no intention that an agency relationship should exist.

J. G. McC.

SALES — IMPLIED WARRANTY OF CANNED FOOD. — In a recent West Virginia case, *P* sued *D* to recover damages sustained as a result of drinking cocoa made from the contents of a can containing a putrified mouse. The cocoa had been packed and sealed by a reputable manufacturer, and was purchased by *P* from *D*, a grocer. Judgment for plaintiff. On appeal, reversed. *Held*, that the retailer who sells food stuffs in sealed containers packed by a reputable manufacturer does not impliedly warrant that they are fit for human consumption. *Pennington v. Cranberry Fuel Co.*[1]

The decisions are by no means in accord on the question of the retailer's implied warranty of the wholesomeness of canned foods. In cases decided under the Uniform Sales Act, the warranty is commonly implied,[2] while in other cases it is generally denied.[3] Liability under the Sales Act is predicated upon the fact that there is a "reliance upon the seller's skill or judgment".[4] Accordingly,

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[12] 185 S. E. 688, 689 (W. Va. 1936).

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[1] 186 S. E. 610 (W. Va. 1936).

[2] Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932), 90 A. L. R. 1260 (1934); Griffin v. James Butler Grocery Co., 108 N. J. L. 92, 156 Atl. 636 (1931); Gimenez v. A. & P. Co., 264 N. Y. 390, 191 N. E. 27 (1934); Ward v. A. & P. Co., 231 Mass. 90, 120 N. E. 225 (1918), 5 A. L. R. 242 (1920). It is interesting to note that the annotation to this case states that canned foods is an exception to the rule of implied warranty of food. An annotation and collection of cases in (1934) 90 A. L. R. 1269 shows what a profound effect this case has had on the law. When that annotation was written in 1934, the tendency was toward implying the warranty.

[3] Linker v. Quaker Oats Co., 11 F. Supp. 794 (N. D. Okla. 1935); Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925); Trafton v. Davis, 110 Me. 318, 325, 86 Atl. 179 (1913); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933). An exception is the Illinois court. Although the Sales Act is in force in Illinois, the court does not apply it, placing the liability on the ground of protecting the public health.

[4] Section 15(1) of the Act reads, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."