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Pleading--Parties--Name of Corporation--Amendment

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PLEADING.—PARTIES.—NAME OF CORPORATION.—AMENDMENT.—A suit was brought by "The Kingman Mills, a branch of the Kansas Flour Mills, a body corporate." Defendant demurred to the declaration for want of parties. *Held*, the misdescription of the plaintiff is not demurrable, and amendment of the declaration pursuant to section 14 of chapter 125 of the Code should be allowed. By way of dissent two judges say that the action should be dismissed for want of a plaintiff. *Kingman Mills* v. *Furner*, 109 S. E. 600. (W. Va. 1921).

Obviously section 14 of chapter 125 of the Code is a piece of constructive legislation applicable only to cases where, at common law, a plea in abatement would lie for a misnomer of a party to a suit. In a true misnomer one purports to be acting as plaintiff or defendant, yet is named inaccurately and erroneously because of a mistake in records or syllables either by omission, or interposition, or interpolation. *Illinois Mfg. Co.* v. *Starbird*, 10 N. H. 123, 34 Am. Dec. 145. Is the principal case one of misnomer—an inaccurate and erroneous description remedial at common law by a plea in abatement and under the Code by motion to amend? Is there a misdescription analogous to the numerous cases illustrative of misnomer? The declaration clearly describes, and purports to set forth the Kingman Mills as plaintiff. The words immediately following constitute an explanatory modifier in the nature of surplus descriptive matter which would not materially affect the pleading if omitted entirely. To hold otherwise is to deprive words of their true meaning and to tear them from their context to make something which is not. *Mason* v. *Farmers' Bank*, 12 Leigh (Va.) 84. Concerning the suggestion of the majority of the court regarding transposition of the words so as "to more correctly state its name", suffice it to say that where the meaning of words is clear, there is neither necessity nor propriety in making transpositions to meet the exigencies of the case. *Mason* v. *Farmers' Bank, supra.* Several of the cases cited by the majority, including the partnership cases, are undoubtedly cases of true misnomer to which the statute applies, and are not in point. Likewise, the case of *Steamboat Pembinam etc.* v. *Wilson*, 11 Iowa 479, is no authority for the position of the majority because it holds that an owner must sue in *his own* name upon an obligation running to a non-entity, and no one will deny that the Kansas Flour Mills, a corporation, can sue in *its own* name upon an obligation to its branch. In view of these facts that there is no misnomer; that the cases relied on are

not analogous; and that the plain meaning of words should not be distorted, it is submitted that the only plaintiff which the declaration purports to set out is the Kingman Mills, and since these words cannot fairly be said to import either a natural person or an artificial person having legal capacity, there is no plaintiff and consequently the proceeding is a nullity from its inception. *Western etc. R. Co.* v. *Dalton Marble Works,* 122 Ga. 774, 50 S. E. 978; *Mexican Mill* v. *Yellow Jacket Silver Min. Co.,* 4 Nev. 40, 44, 97 Am. Dec. 510.

—M. H. M.

PROCESS—THE VERITY RULE—CONCLUSIVENESS OF OFFICER'S RETURN.—The defendant sued the plaintiff in an action of debt. Process was returned as served on the plaintiff, but in fact service was made on a third party. Judgment was rendered against the plaintiff by default. The plaintiff brought a bill in equity to vacate the judgment. The lower court sustained the defendant's demurrer. *Held,* that an officer's return is only *prima facie* evidence of service where a defendant has no notice of pendency of the action in any manner or form. Reversed. *Nuttalburg Smokeless Fuel Co.* v. *First Nat. Bank of Harrisville,* 109 S. E. 766 (W. Va. 1921.)

Formerly West Virginia followed the common law rule that as between the parties, except in cases of fraud and collusion, a sheriff's return of process is conclusive evidence of service as to matters properly returnable by the officer. *Milling Co.* v. *Read,* 76 W. Va. 568, 85 S. E. 726; *Bowyer* v. *Knapp,* 15 W. Va. 277. The court will not set aside a return by a sheriff. *Goubot* v. *De Crouy,* 3 Tyr. 906, 149 Eng. Reprint 611. Were the law otherwise, titles might be attacked many years after they were acquired. *Miedreich* v. *Lauenstein,* 232 U. S. 236. This rule seems to have been based on the necessity of securing the rights of the parties and of giving validity and effect to acts of ministerial officers. Whether or not this would be accomplished by making returns *prima facie* evidence is a matter for legislation and not for the courts. *Tillman* v. *Davis,* 28 Ga. 494, 73 Am. Dec. 786. In the principal case the court points out that the rule arose when the sheriff was the king's representative and partook of the king's fiction that he could do no wrong. No such fiction exists here and our present method of selecting officers is no index of security or infallibility. Under the common