

KRUGER, a German subject, first officer of the steamship "Lothar Bohlen" of Hamburg, Plaintiff in

Error, v. **J. J. W. JOHNS, Sr.**, Defendant in Error.

ARGUED JANUARY 13, 1913. DECIDED JANUARY 16, 1913.

Toliver, C. J., McCants-Stewart and Johnson., JJ.

1. A plea of misnomer should be raised in the pleadings and a neglect to do so will be considered as a waiver, which will debar a party from raising such plea at any subsequent stage of the proceedings.
2. Where in prosecuting an appeal or petitioning for a writ of error, a party makes use of the name by which he was sued in the original action, this court will refuse to entertain a plea of misnomer unless the records show that such pleas were properly raised in the court below.
3. In civil causes, if a sufficient description is given, the misnomer is immaterial.
4. A surety has no authority to prosecute an appeal, sue out a writ of error or sign instruments in behalf of his principal unless such authority can be implied from the circumstances of the case.
5. Where an action in *personam* is brought in admiralty against a person employed on a foreign ship, the agent of the company which owns such ship may intervene in behalf of the libellee by complying with such conditions as the court may impose.

Mr. Justice Johnson delivered the opinion of the court :

Libel for Damages for an Injury to the Domestic Relations—Motion to Dismiss. When this case was called for hearing, counsel for defendant in error tendered a motion to dismiss same, for the following reasons : (1) because the assignment of errors does not show the Christian name of the alleged plaintiff in error although such name is necessary and required by law; (2) the

case is not brought by the libellee, in the court below, but by his surety ; there is, therefore, a nonjoinder of parties which is fatal to the action.

After a careful consideration of the motion and the briefs of counsel for both parties, the court has arrived at the following conclusions : (1) a plea of misnomer should be raised in the pleadings and a neglect to do so will be considered as a waiver, which will debar a party from raising such plea at any subsequent stage of the proceedings, either in the court below or in the appellate court. Where, in prosecuting an appeal, or petitioning for a writ of error, a party makes use of the name by which he was sued in the original action, this court will refuse to entertain a plea of misnomer, unless the records show that such plea was properly raised in the court below. On inspecting the records in this case, we find that the libellee in the court below was sued and appeared by the name attached to the assignment of errors and that no objections were raised to his so appearing, by the libellee. We must here observe, that in civil actions, if a sufficient description is given, the misnomer is immaterial.

(2) Coming to the second point in the motion we are of the opinion that a surety has, ordinarily, no legal authority to prosecute an appeal, sue out a writ of error, or sign instruments in behalf of his principal unless given such authority which may be implied from the circumstances of the case. In the case *Manheimer, agent for the Belgian, Trading Company, v. Fuller* (1 Lib. L. R. 211) it is held that the signing of an instrument for another can only be binding when done by authority expressed or implied.

Where however, an action in *personam* is brought, in admiralty against a person employed on a foreign ship, whose duties may require him to be out of the jurisdiction of the court, before the proceedings are concluded either in the court below, or in this court, the agent of the company owning said ship, may be permitted to intervene in behalf of such person, by giving security indemnifying the libellant, and by complying with such other conditions as may be imposed by the court.

The assignment of errors in this case is signed for libellee in the court below by his surety Wilhelm Lerche, agent for A. Woermann, and, it has been made apparent to the court that A. Woermann is agent of the Line which owns the "Lothar Bohlen." In the case *Dennis v. The Republic of Liberia* (1 Lib. L. R.

323) the court observed that suits brought in admiralty will not be dismissed on account of legal technicalities, and where necessary amendments to pleadings will be allowed, upon application, up to the stage of trial, and sometimes will be allowed in the appellate court.

The motion is therefore denied and it is ordered that the case be heard on its merits.

C. B. Dunbar and *C. A. Minor*, for plaintiff in error. *Arthur Barclay*, for defendant in error.