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Pleading

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PLEADING

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There were no statutory changes in the subject of Pleading in 1954. But few cases in that field have been decided by the Supreme Court during the last twelve months, most of which were of the usual or routine type, only a few of them being in any sense unique or involving the decision of points of first impression.

Process and Service

In *Corley v. Wells*[1] the question was raised whether or not the county court erred in sustaining a ruling of the master in equity ordering that judgment be vacated and defendant be allowed time to answer in circumstances when the trial court refused to permit plaintiff to supplement affidavit of service of process, without determining whether or not such supplement would result in *substantial* injury to defendants. On appeal by plaintiff, reversed and remanded under § 10-409, "At any time in its discretion and upon such terms as it deems just the court *may* allow any process or proof of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom such process issued."

The above is a case of first impression in construing § 10-409, wherein the word "may" is held to mean "must," so that, in the circumstances called for the trial court must exercise discretion in allowing or disallowing amendment to process, considering whether or not "material prejudice would result to the substantial rights" of the adversary in making such order.

Actions and Parties

Babb v. Paul Revere Life Insurance Company,[2] involved complaint by named beneficiary of "non-cancellable" income policy issued to insured, now deceased, where, during lifetime of insured, and while he was allegedly insane, defendants induced him, in consideration of payment to him of $638, to surrender

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1. 224 S.C. 198, 78 S.E. 2d 186 (1953).
2. 224 S.C. 1, 77 S.E. 2d 267 (1953).

policy, upon allegedly fraudulent misrepresentations that the insurance contract was void. The complaint was framed in two causes; (1) in equity for reinstatement, and (2) in tort for fraud and conspiracy. The trial court, on motion, required election and plaintiff elected to proceed in tort. A demurrer for no cause of action was filed by defendant, in that, upon death of insured no right of action survived, and, therefore, that no right of action remained in the beneficiary. The demurrer was overruled and this order, on appeal, was sustained. The beneficiary had only an inchoate interest in the policy during lifetime of insured, where the right to change the beneficiary had been reserved, but this ripened into a vested interest upon the death of the insured without change of beneficiary, and the latter could thereafter maintain an action in tort for wrongful cancellation, despite the fact that the right of the insured to bring such action expired with his death. Dissent by Oxner, J., on ground that "when policy ceased to be of force and effect [admitted by respondent] plaintiff's rights therein ceased. Result [of majority view] is that a cause . . . which accrued to insured during life-time but which did not survive can now be brought by plaintiff [beneficiary] individually, who admittedly had no right in such cause of action at the time it arose." § 10-642 (6) was not cited, nor is there any mention in either dissenting or majority view as to tender of the $638 by the plaintiff as a prerequisite to bringing suit at law.

In *Collopy v. Citizens Bank of Darlington*[3] the Court had for consideration the proper construction of a complaint for damages alleging that defendant bank, in which plaintiff's funds were deposited in a trade name, had (though notified of plaintiff's ownership) paid the same over to one Hall, plaintiff's agent, who had absconded. The complaint alleged negligence, wilfulness and wantonness on part of defendant, and sought punitive damages—all appropriate to a tort action. The defendant moved to strike such allegations and prayer as being inappropriate to an action for breach of contract. The trial court denied the motion and, on appeal by defendant, was reversed. Wilful violation of contract does not entail upon defaulting obligor liability for punitive damages. Doubt as to construction of complaint as for breach of contract or in tort should be resolved in favor of former. Words of recrimination

3. 223 S.C. 493, 77 S.E. 2d 215 (1953).

will not convert contract action into one in tort. The proper construction of complaint here is that wilful acts of defendant were violations of obligations growing out of deposit contract. This was not an action for fraudulent breach of contract, as no fraudulent collusion was alleged, nor that defendant profited by transaction. In actions for mere breach of contract motives of wrongdoer are immaterial in considering amount of damages, which are those naturally and proximately resulting from the wrongful act. (§ 10-606 is applicable but is not cited by the Court.)

Defense

In *Bailey v. Seymore*[4] the Court had for consideration a complaint for personal injuries to a minor who was alleged to have been "prevailed upon" (by defendant's truck-driver) to go on a trip with him from South Carolina to Georgia, during which the injuries allegedly occurred. Defendant moved to have the complaint made more definite and certain (obviously under § 10-606, although it is not cited), so as to show whether plaintiff was a non-paying guest or not, within the terms of the South Carolina "guest statute" under which there is no liability for injuries to a non-paying guest, "unless such accident shall have been intentional on the part of such . . . operator . . . or caused by his heedlessness, etc." The refusal of the trial court to grant such motion was held on appeal to be reversible error.

Bowen v. Bricklayers, Masons & Plasterers Internat'l. Union of America,[5] as to procedure might well be compared with the *Bailey* case, *supra.* Here there was an action for damages brought by a worker against a labor union and its officers, based upon an alleged conspiracy by defendants which caused the ousting and discharge of plaintiff from lucrative employment. Defendants demurred (obviously under § 10-642 (1), although it is not cited) in that the court was without jurisdiction, which was vested exclusively in the National Labor Relations Board under the Taft-Hartley Act. The overruling of demurrer by the trial court was sustained on appeal, with leave to defendants to amend their answer by asserting therein the bases of their contentions which they attempted to do by demurrer. The complaint here failed to make clear whether or not the wrong complained of was actionable within

4. 224 S.C. 162, 77 S.E. 2d 803 (1953).
5. 80 S.E. 2d 343 (S.C. 1954).

the jurisdiction of the state court or exclusively within that of the National Labor Relations Board. The result of the case seems entirely sound. The question here involved might more readily have been raised by defendants' timely motion to make more definite and certain.

In considering the use of demurrers to test the sufficiency of a cause of action or defense, the case of *Bryant v. Bryant*[6] should logically be dealt with next. There plaintiff filed a complaint for divorce to which defendant asserted two defenses. Plaintiff thereupon demurred to only paragraphs 4, 5 and 6 of defendant's "first defense," which asserted in substance that the marriage in question was void and illegal. The trial court overruled the demurrer and this was sustained on appeal, under 1942 Code, § 471 (now § 10-661): ". . . the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense." Under this provision a demurrer may not be addressed to only a portion of a sole defense. A demurrer may be addressed only to a whole complaint or to the whole of one of its causes.[7] The same is true of a demurrer to an answer.

Smith v. Traxler[8] was an action for damages by lessee of premises with an option to buy against lessor. Defendant demurred on the ground of no cause of action (§ 10-642 (6), not cited) in that the complaint failed to show compliance with the Statute of Frauds, and the trial court overruled the same. Later, after some excusable delay, defendant offered an amendment, in effect pleading the Statute of Frauds. The trial court disallowed the amendment on the ground that the ruling on the demurrer—viz., that an action for fraud was stated and that the Statute of Frauds is no defense to an action for fraud, had, until reversed, become the law of the case. This ruling was assigned as error and, on appeal, was reversed. The appellate court viewed the complaint as stating more than one cause of action, although not separately stated, and that the ruling of the trial court on demurrer was limited to the sole question of whether or not the Statute of Frauds is applicable to a cause of action for damages for fraud. It was not binding as to the other causes of action, said the court, and, indeed, although fraud might be alleged there might be a

6. 223 S.C. 489, 76 S.E. 2d 927 (1953).
7. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-642.
8. 224 S.C. 290, 78 S.E. 2d 630 (1953).

failure of proof of the same, in which event a plea of the Statute of Frauds might well be appropriate. Amendments are favored where the adversary is not surprised thereby, and while "amendments by the Court", under § 10-692, are addressed to the sound discretion of the trial court, the ruling in question was not based upon this exercise of discretion, but was rested solely upon a legal ground which proved to be erroneous.

Trials and Hearings

In *Truesdale v. Jones*,[9] the complaint sought to have the annexation of additional territory by a town declared void for failure to comply with applicable statutes. The complaint alleged, "A petition was submitted to the [town] council by a majority of the freeholders of the territory it was proposed to annex." On the trial of the case complainant sought to introduce evidence to show that such was not true, that is, in derogation of his own allegations. Upon objections to such evidence by defendants the same was disallowed by the trial court. On appeal by complainant the rejection of such evidence was sustained, the reviewing court very properly holding that the pleader was judicially bound by his own admissions.

Town of Myrtle Beach v. Suber,[10] like the *Truesdale* case, *supra*, is one involving the principle that a party once taking "a stand" is disallowed from reversing himself. Here there was an action by the town against a former member of its Board of Commissioners of Public Works for an accounting for the value of certain lumber from four large cypress water tanks which he had used and for delivery of the unused portion of said lumber. The tanks in question were transferred by the United States to the town on condition that they were not to be resold without written approval of the Civil Aeronautics Authority. The town in turn transferred to the Board of Commissioners the management of its water works system, of which the court found these tanks to have become a part. The tanks being for a long time unused and suffering deterioration, the members of the Board, in turn, transferred them to defendant (one of their number) as an individual, for a total consideration of $265, but without the consent of the

9. 224 S.C. 237, 78 S.E. 2d 274 (1953).
10. 81 S.E. 2d 352 (S.C. 1954).

Civil Aeronautics Authority. By act of March 12, 1952, the Board of Commissioners of Public Works was abolished and its duties and functions were revested in the Mayor and Council of the town. Shortly thereafter the town commenced this action. Upon plaintiff's motion the Court ordered a reference in which the plaintiff—the town—participated. But the results of the reference were findings unfavorable to plaintiff, and these were affirmed by the circuit judge. The plaintiff now complains, on appeal, that the circuit judge erred in granting a reference, hearings upon which were held without the prior determination of the plaintiff's right to an accounting. In sustaining the decree below the reviewing court pointed out that the right to an accounting was determined upon a preliminary ruling of the circuit judge to the effect that the complaint stated a cause of action for accounting. Moreover appellant participated without objection or reservation in the reference or general accounting. Here it appears that appellant invoked and participated in that very procedure of which it now complains.

Patrick v. Wolowek[11] involved a nuisance action for unliquidated damages begun August 14, 1951, in which, on December 11, 1951, the trial judge entered a default judgment for $1,000, without aid of a jury. Under this judgment the sheriff sold plaintiff's home to the highest bidder for $5,700, making a deed thereto to the purchaser. Out of the funds so received respondent's judgment was satisfied, an outstanding mortgage on the property was paid off, and the balance was tendered to plaintiffs (appellants) who refused to accept same. On January 24, 1953, plaintiffs commenced this action to set aside default judgment of December 11, 1951; to have execution issued thereon quashed; the sale thereunder set aside; and the deed to the purchaser cancelled. The plaintiffs, urging mental incapacity as reason for their failure to answer, and contending principally that § 586 of the 1942 Code[12] was applicable as of December 11, 1951, under which the trial judge acted in entering default judgment, did not permit such judgment to be entered in tort action for unliquidated damages, without aid of a jury. Plaintiff's motion was disallowed by trial judge, and, on appeal, this was reversed. The reviewing court held that § 586, of the 1942 Code was applicable; that under it no

11. 81 S.E. 2d 717 (S.C. 1954).
12. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-1531 and 10-1532, as amended in 1953; 48 STAT. 137.

default judgment in a tort action for unliquidated damages could properly be entered without employment of a jury; that therefore, the judgment of December 11, 1951, was void and should be set aside; and that §§ 10-1531 and 10-1532 as amended in 1953 are inapplicable.

Peters v. Double Cola Bottling Co.[13] involved an action for personal injuries against both manufacturer and retailer of a bottled beverage, allegedly containing worms and other deleterious substances, which, when consumed by complainant, caused illness, etc. The manufacturer was a corporation of Richland County, while the retailer, its codefendant (nephew of complainant) resided in Dorchester County, where the action was brought. The corporate defendant moved for a change of venue under § 10-303, viz.: ". . . If there be more than one defendant then the action may be tried in any county in which one or more of the defendants resides at the time of the commencement of the action . . .", contending that the retailer was not named defendant in good faith, but merely to fix the venue in Dorchester County. The trial court overruled this motion and, on appeal, this was affirmed. The reviewing court reasoned that whether the naming of a retailer was in good or bad faith was a question to be determined by the trial judge, and, upon a review of the record, it was unwilling to say that such finding was not supported thereby. The appellate court also held that it was proper for the trial court to take judicial notice of the applicable "pure food" statutes, even though not pleaded, since complaint stated a cause of action thereunder as well as at common law.

Appeal and Error

In *Honeywell v. Dominick, et al.*[14] a bill was filed in two causes: (1) for declaratory judgment as to validity of conveyance by executors—trustees of a plantation (a part of the estate) to one of their number individually, and (2) for specific performance of contract of sale of same by latter transferee to one Janney, who alone appealed from decree of court ordering him to comply with his contract to purchase, although all remaindermen and beneficiaries were named as defendants thereto. The decree below was affirmed. Even though the declaratory judgment statutes were improperly invoked here

13. 224 S.C. 437, 79 S.E. 2d 710 (1954).
14. 223 S.C. 365, 76 S.E. 2d 59 (1953).

(a matter which the reviewing Court found it unnecessary to consider), still the case proceeded and was tried on the cause of specific performance, which was clearly within the plenary jurisdiction of equity, where all necessary and proper parties were named and represented.