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Pleading

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PLEADING

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Conclusions

Patterson v. Capital Health & Life Ins. Co.[1] involved the familiar problem of whether or not the use of such terms as "willfully, wantonly and fraudulently," without alleging any facts from which pleader drew such conclusions, were sufficient to support a claim for punitive damages against defendant whose conduct in cancelling the policy in question was described only by use of such adverbs. The court logically held that no cause of action was stated for punitive damages and, further, that proper procedure for raising such question was that followed below, *viz.* motion to strike.[2]

Conclusions, Sham

Scott v. Meek[3] involved an action for damages growing out of an automobile collision. Defendant pleaded both general denial and contributory negligence, and filed a counterclaim for personal injuries and property damage as well. Complainant moved to strike counterclaim as sham because defendant had executed in writing a full release of such claims, which recited: "The payment of such sum — is not an admission of liability." On hearing motion to strike, the procedure followed in proof of sham was that recently approved in *Town of Bennettsville v. Bledsoe*,[4] as well as the applicable section of the Code,[5] *viz.* by affidavit of complainant's witness to which was attached defendant's release. Despite this and the fact that defendant offered no evidence to controvert the release, the trial court refused to strike the counterclaim. On appeal, this ruling was reversed upon the ground that "where the showing in support of the motion to strike is susceptible of no reasonable inference other than that the pleading under attack is in fact sham, the motion to strike should be granted."

Demurrer — Declaratory Judgment

Dantzler v. Callison[6] involved the propriety of sustaining of demurrer for no cause of action by trial court in an action wherein

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1. 228 S.C. 297, 89 S.E. 2d 723 (1955).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-606.
3. 228 S.C. 29, 88 S.E. 2d 768 (1955).
4. 226 S.C. 214, 84 S.E. 2d 554 (1954).
5. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-654.
6. 227 S.C. 317, 88 S.E. 2d 64 (1955).

complainant sought a declaratory judgment under applicable provisions of the Code.[7] Upon appeal the order below was reversed for the reason that the complaint stated a "justiciable controversy", as found by the reviewing court. As to the facts, complainants, who were neuropathic licensed physicians, sought a declaratory judgment, construing and interpreting statutes applicable to them in respect of prescribing certain medicines, and as to which defendant, the Attorney General of South Carolina, had, by opinion, denied them the right. The reviewing court, in reversing the court below, reasoned that, in passing upon such demurrer, the court is not concerned with whether complainant is right in the controversy, but only whether he is entitled to a declaration of his rights. In this decision the court followed its recent decision in *Foster v. Foster*,[8] which, in turn, followed the view of the Oregon Supreme Court in *Cabell v. City of Cottage Grove*,[9] and other cases in accord, holding:

> it is error for a trial court, upon a demurrer in a declaratory judgment suit, to render a decree upon the merits, but rather, if a complaint states a justiciable controversy, the demurrer should be overruled, and, upon the filing of the answer, a decree entered containing a declaration of rights.

Demurrer — Failure to Plead Consideration

Gainey v. Coker's Pedigreed Seed Co.[10] involved an action by employee against employer for breach of contract, permanent in nature or for a term of years. Defendant demurred to complaint for no cause of action in that the only consideration alleged for said contract was forbearance by complainant to press a claim he had against defendant under the Workmen's Compensation Act. The court below overruled the demurrer but, on appeal, this was reversed. The reviewing court reasoned that such a contract, unsupported by any consideration other than the mutual promises of the parties, is terminable at the will of either, unless there be an independent consideration furnished. The promise of forbearance of complainant to press claim, under applicable sections of the Code,[11] which gave him an exclusive remedy in the circumstances, failed to provide the necessary independent consideration. The court reasoned further that it is against public policy for parties to make contracts in evasion or avoidance of such remedy.

7. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-2001, *et. seq.*
8. 226 S.C. 130, 83 S.E. 2d 752 (1954).
9. 170 Ore. 256, 130 P. 2d 1013 (1942).
10. 227 S.C. 200, 87 S.E. 2d 486 (1955).
11. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 72-121.

This case is consonant in reasoning and result with the earlier one of *Rabon v. State Finance Corporation*,[12] where the only consideration pleaded by complainant for contract, for breach of which an action for damages was brought, was *his* own promise to pay what he already owed defendant, defendant on its part agreeing to forbear to sue. Here demurrer for no cause of action was sustained in that in law the consideration pleaded was no consideration at all.

Joinder of Defendants

Dobson v. American Indemnity Co.[13] involved the propriety of joinder, as defendant, of insurer with common carrier as action by third person for damages due to negligence of the latter, and of reference in complaint to amount of insurance carried by latter — here $50,000. Such insurance, it was alleged, was on file with the State Insurance Commission and was required of a carrier, to which, as here, a class "E" Certificate had been issued. Insurer moved to strike statement of amount of policy[14] as being in excess of that required by Commission's Rules 56 and 57,[15] which limited insurance requirements to $5,000 and $1,000 respectively. Motion was granted and, on appeal, this was affirmed. An applicable section of the Code[16] allows joinder of principal and surety in cases generally where, as here, an indemnity bond is required by law. But another section of the Code[17] provides for liability insurance in this precise situation "in such amount as the Commission may determine." Rules 56 and 57 of the Commission have fixed such insurance at limits of $5,000 and $1,000 — so reasoned the reviewing court — and even though the common carrier has, as here, obtained and filed insurance coverage in excess of those requirements, it was proper to strike reference to the amount of such policy actually filed. The court stated cogently:

> Statute and rule doubly became parts of the contract of insurance, and, in this case, effectually reduced the amount of it for purposes of the statute, and, therefore, for purposes of this action.

Joinder of Defendants

Johns v. Castles[18] involved the single question of whether or not

12. 203 S.C. 183, 26 S.E. 2d 501 (1943).
13. 227 S.C. 307, 87 S.E. 2d 69 (1955).
14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-606.
15. CODE OF LAWS OF SOUTH CAROLINA, 1952 Vol. 7, pp. 804-806.
16. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-702.
17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 58-1481.
18. 229 S.C. 51, 91 S.E. 2d 721 (1956).

the defendant in a tort action may bring in plaintiff's employer as joint tortfeasor for purposes of counterclaim. The trial court ruled in the affirmative and was, on appeal, sustained, upon authority of *Brown v. Quinn.*[19] The rationale of the decision is that respondent (plaintiff in counterclaim) might have initially sued employer and employee as joint tortfeasors, a right and election which is solely his, and that he is not deprived of such right and election merely because he asserts it by way of counterclaim, as to which he stands as plaintiff.

Judicial Notice

Schumacher v. Chapin[20] is a case in which the sole pleading question raised is whether, in a proceeding to be declared a legitimate heir by virtue of a purported ceremonial marriage of the parents under applicable Code section,[21] which was answered merely by a general denial, the court could properly "notice" the effective date of the applicable statute, or whether such effective date must be specially pleaded. The court below took judicial notice of such date and was, on appeal, affirmed. This decision is consonant with earlier decisions in this and other jurisdictions.

> The public statutes of a state are judicially noticed by the courts of that state . . . including the date it went into effect or was published.[22]

> Facts of which the court will take judicial notice need not be alleged, and the courts will read a pleading as if it contained a statement of such facts . . .[23]

Motion to Make More Definite

In *Ellen v. King*[24] complainant sued a building contractor and surety upon his payment and construction bond for faulty construction of a building and non-compliance with construction contract. Such resulted in extensive damage to complainant due to flooding of his building, requiring an extensive outlay in rectifying the faulty construction, it was alleged. The complaint was framed in nine paragraphs, of which paragraph five alone had seventeen sub-paragraphs. A copy of the detailed construction contract and specifications was attached to complaint as an exhibit and referred to therein.

19. 220 S.C. 426, 68 S.E. 2d 326 (1951).
20. 228 S.C. 77, 88 S.E. 2d 874 (1955).
21. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 20-6.1.
22. 23 C. J. Evidence, Sec. 1947, p. 128; State v. Sartor, 2 Strob. 60 (S.C. 1847); Winn v. Harby, 166 S.C. 99, 164 S.E. 434 (1931).
23. 49 C. J. Pleading, § 11, p. 36; Uxbridge v. Poppenheim, 135 S.C. 26, 133 S.E. 461 (1926).
24. 227 S.C. 481, 88 S.E. 2d 598 (1955).

Defendant moved to make the complaint more definite and certain[25] in twenty-eight different respects, attacking altogether the last five paragraphs of the complaint.

The trial court granted the motion as to one objection only, and reserved his decision as to the others until time of the trial, and after hearing the evidence, expressly allowed defendants to renew their motion as of that time. Upon appeal such ruling was held not to be erroneous in that the granting, or not, of such motion is within the sound discretion of the trial court. Such ruling, it was urged, will be upheld unless abuse of discretion be shown, especially where, as here, appellants fail to specify "which of the many aspects of the motion were erroneously denied, or in what respect error was committed as to any of them."

The result of this case seems entirely sound. As early as the case of *Long v. Hunter*,[26] it was held that such motion should specify in what particulars the complaint is to be amended.

New Matter

Lee v. Southern Railway Co.[27] involved an action by landowner for injunction and damages against a railroad company for so constructing its track as to cause overflowing of complainant's fields and injury to his crops. Defenses were general denial and ownership of right-of-way, the latter falling short of the requirements of a counterclaim, but constituting a plea of avoidance and of "new matter."[28] Complainant did not reply but, upon the trial, offered evidence showing adverse possession and estoppel in order to overcome defendant's plea of right-of-way. The trial court rejected such evidence and, upon appeal, the Supreme Court held this to have been reversible error under the applicable Code section.[29] Although neither cited nor discussed, the language of another section of the Code[30] seems peculiarly applicable:

> But the allegation of new matter in the answer not relating to a counterclaim . . . is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

Since, under the above facts, defendant's plea of "New Matter" was "deemed controverted", complainant's evidence, in support of such contention, was erroneously excluded.

25. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-606.
26. 48 S.C. 179, 26 S.E. 228 (1897).
27. 228 S.C. 244, 89 S.E. 2d 431 (1955).
28. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-661.
29. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-661.
30. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-608.