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Pleading

Isadore S. Bernstein

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ISADORE S. BERNSTEIN*

Demurrer

In *Clarke v. City of Greer*[1] demurrer was interposed to the complaint on grounds of misjoinder and overruled by the lower court. Two causes of action were separately stated, the first against the municipality for actual damages for an alleged wrongful taking of plaintiff's property, and the second against the contractor for an alleged trespass in constructing sewer lines, for which actual and punitive damages were sought. The Supreme Court reversed, noting that Section 10-701[2] permits a plaintiff to unite in the same complaint several causes of action when they arise out of the same transactions but such causes must "affect all the parites to the action." The Court concluded that there was no basis for a common or joint liability against the two defendants. The action against the municipality was brought under the constitutional provision based upon an alleged taking of private property for public use without just compensation.[3] That against the second defendant was solely a common law action in tort for an alleged willful trespass. Since punitive damages were not recoverable against the city, the joinder was held improper under the authority of *Piper v. American Fidelity & Casualty Co.*[4]

In *Roper v. South Carolina Tax Commission*[5] the rule was applied that in passing upon a demurrer the court is limited to a consideration of the pleadings under attack, all of the factual allegations properly pleaded being deemed admitted. Suit was brought to recover the amount of tax paid under protest, it being alleged that the plaintiff received a stock dividend in the form of preferred stock in the corporation in which plaintiff owned all of the shares of common stock. This was not reported as income and the tax was later paid under protest upon assessment by the Tax Commission. Demurrer

*Attorney at Law, Columbia, S. C.

1. 231 S. C. 327, 98 S. E. 2d 751 (1957).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952.
3. S. C. CONST. Art. I § 17.
4. 157 S. C. 106, 154 S. E. 106 (1930).
5. 231 S. C. 587, 99 S. E. 2d 377 (1957).

was interposed on the ground that the complaint failed to state a cause of action for the reason that the stock dividend which plaintiff admittedly received by way of preferred stock constituted income under the state act. This view was upheld by the Court and since the pertinent facts appeared on the face of the complaint, the demurrer was sustained.

Taylor v. Wall[6] clarifies the procedure to be followed where defendant contends the action is brought in the wrong county. Defendant, a resident of McCormick County, was sued in Aiken County for breach of a contract for work on plaintiff's lot in that county. He demurred on the ground that the court had no jurisdiction of his person. The order of the lower court overruling the demurrer was affirmed on appeal for the reasons that the complaint contained no allegation as to residence and the claimed jurisdictional defect did not appear on the face thereof. The Court reiterated the often stated rule that in passing upon demurrer, the court is limited to the allegations of the complaint, which must be accepted as true, and cannot consider facts not alleged therein. The opinion noted that the question should properly have been raised by a motion for change of venue, in which case the court would have jurisdiction to transfer the cause to a proper county. A failure to take proper steps to change the venue would constitute a waiver of the jurisdictional objections.

In *Clifton v. Darlington Finance Co.*[7] defendant attempted to raise the issue of res judicata by demurrer to the complaint and simultaneously moved to strike the complaint as "sham and frivolous" by reason of a former judgment. The facts pertaining to the former action which the defendant contended barred the present action did not appear on the face of the complaint. The Supreme Court held that the demurrer and motions were properly overruled, again noting that the court is limited to the allegations of the complaint, which must be accepted as true, and cannot accept facts not alleged. The defense of res judicata, an affirmative defense, must be pleaded, and since the facts did not appear on the face of the complaint, it could not be raised by demurrer. Serious doubt was expressed in the opinion as to whether a complaint could be stricken as sham, but it was held in any event that the defense of res judicata could not be raised in this manner.

6. 231 S. C. 683, 100 S. E. 2d 400 (1957).
7. 231 S. C. 672, 100 S. E. 2d 404 (1957).

Wallace v. Timmons[8] raised interesting questions on demurrer in an action against an executrix for an accouning for trust funds. The complaint alleged that the deceased was an agent of an insolvent insurance company and at the time of his death had funds in his possession belonging to the company. Suit was commenced by the receiver more than seven years after his death. The trial court sustained the demurrer on three grounds, only two of which were considered by the Supreme Court, to wit: (1) that the claim was barred by Sections 19-473 and 19-474,[9] providing for time in which claims must be filed, and (2) that it was barred by laches in view of the lapse of time. As to the first ground, the Supreme Court held that the foregoing sections did not apply since they have reference to claims of creditors and debts of the testator payable from the estate. Since the complaint alleged a trust relationship and that the monies constituted a trust fund, the fund did not become a part of the estate.

Although not pleaded as a ground for demurrer, the Court considered the subject of laches. Notwithstanding the long delay in commencing the action, the Supreme Court held that lapse of time is only one of the elements to be considered and that consideration must be given to whether or not the delay has caused prejudice to the defendant. The Court concluded that this question should be determined at the trial and that the trial court was not warranted in invoking the doctrine of laches on its own motion.

In *McClain v. Altman*[10] the defendants demurred to the complaint in a libel action on grounds of insufficiency, contending that they did not publish the libel and that it did not appear that they were responsible for the publication. The order of the trial judge overruling the demurrer was affirmed on appeal. The Court held that for purposes of demurrer it is axiomatic that all allegations of the complaint must be taken as true. The allegations in the complaint that defendants combined and conspired in printing or allowing to be printed the alleged libelous placards, which could only have been intended for publication, thereby contributing to the chain of circumstances culminating in the libel, were held sufficient to state a cause of action.

8. 232 S. C. 311, 101 S. E. 2d 844 (1958).
9. CODE OF LAWS OF SOUTH CAROLINA, 1952.
10. 231 S. C. 251, 98 S. E. 2d 263 (1957).

In *Roberts v. Fore*[11] the Supreme Court reiterated the established rule that punitive damages are not recoverable for breach of contract in the absence of proof that the breach was accomplished with fraudulent intention and accompanied by a fraudulent act. The action was based on the alleged refusal of the defendant to enter into a contract with plaintiff for the purchase of a lot of land, following defendant's offer to sell by mail and subsequent arrangements by plaintiff to purchase. In affirming the action of the lower court sustaining defendant's demurrer, the Supreme Court held that the complaint was lacking in the essential allegation that a fraudulent act accompanied the alleged breach of contract.

Franks v. Anthony[12] was an action for a partnership accounting by one partner against another. Joined as parties defendants were two persons who had established an escrow fund out of which their indebtedness to the partnership was to be paid and who were alleged to claim some interest in the fund, the amount of which was unknown to the plaintiff, and also the trustees in whose hands the funds had been placed. Both the claimants and the trustees demurred on the grounds of misjoinder, the former contending that no amount of indebtedness was alleged, nor any contract whereby indebtedness resulted; the latter on the theory that they were not involved in the accounting between the partners and had no dealings with the partnership. The lower court sustained both demurrers but the Supreme Court reversed, reiterating that a complaint is not demurrable if it contains allegations entitling the plaintiff to any relief. With respect to the claimants against the fund, the Court concluded that the allegations that they had made a claim against the fund, that plaintiff was without knowledge as to the amount, and that they should be required to account therefor, were sufficient to withstand attack by demurrer. The trustees were held to be proper parties since the relief sought included instructions by the court as to their duties with respect to the distribution of the escrow fund. This conclusion was warranted from the allegations of the complaint that the parties intended to place the fund and the trustees under the equitable jurisdiction of the court and that by accepting the fund they necessarily accepted the conditions of the agreement.

11. 231 S. C. 311, 98 S. E. 2d 766 (1957).
12. 231 S. C. 191, 97 S. E. 2d 891 (1957).

Motion to Strike

Crook v. State Farm Mutual Automobile Ins. Co.[13] was an action against the liability carrier to recover the amount of a judgment obtained against the insured, who had died during the pendency of the former action, for damages arising out of an automobile collision. The insurer pleaded non-liability by reason of certain policy violations by the decedent and moved to require the administrator of the estate to be joined as a party defendant so as to bind the estate for any judgment obtained in the action. Upon plaintiff's motion the trial judge ordered stricken the allegations of the answer as to policy violations as irrelevant, immaterial and redundant and refused to require the administrator to be made a party to the action. The Supreme Court reversed, recognizing that the allegations ordered stricken had a substantial relation to the controversy in that they put in issue the question of whether or not the insured had violated the terms of the insurance contract. The Court applied the rule that it is proper in an answer to allege facts which constitute a defense to plaintiff's cause of action. The action of the lower court in refusing to make the administrator a party defendant was affirmed, since the administrator was not a necessary party to the determination of the insurer's liability under its policy contract.

Default Judgment

In *Simons v. Flowers*[14] it was argued that the circuit judge abused his discretion in refusing to open a judgment obtained by default and to permit defendant to answer. In his affidavit defendant's attorney stated that he had placed a call to plaintiff's counsel to request an extension of time but had not completed the call and mistakenly assumed that such an extension had been granted. His motion to reopen the judgment was predicated on the fact that he himself had erred and not his client. The Supreme Court affirmed, holding that discretionary power to permit an answer after default under the statute[15] is vested in the trial court and that the appellate court is confined to correction of errors at law in such cases. Such error exists only when the circuit court is controlled by an error of law or where the order, based upon factual and not legal considerations, is without adequate evidentiary sup-

13. 231 S. C. 257, 98 S. E. 2d 427 (1957).
14. 231 S. C. 545, 99 S. E. 2d 391 (1957).
15. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-609.

port. Numerous authorities were cited to the effect that a failure to answer due to counsel's own neglect or mistake is not sufficient ground for reopening a default judgment and the Court found no abuse of discretion on the part of the trial judge.

Consolidation

In *McKinney v. Greenville Ice & Fuel Co.*[16] the defendant appealed from the order of the lower court denying its motion to consolidate two actions for damages arising out of an automobile collision which had been brought against it. The two actions arose from the same alleged tortious act and were brought separately. In affirming, the Supreme Court held that only where the parties are identical, and the causes of action such as may have been united in the same complaint, may the trial judge in his discretion order consolidation over objection of either party. Where the parties are not the same, several causes may, by consent, but not otherwise, be tried together for convenience. The two actions were held to be separate, not joint, and could not have been joined in the same complaint under the applicable Code section.[17]

Amendments

In *Doss v. Douglass Construction Co.*[18] separate actions were brought by husband and wife for personal injuries arising out of a collision with a truck owned by defendant corporation, naming the corporation as the sole defendant. Prior to the expiration of twenty days and before answer by defendant, the summons and complaint were amended to include the driver as a party defendant and the amended pleadings were served upon both defendants. The corporation served motions to dismiss the amended pleadings and both defendants moved for a change of venue, which motions were denied by the trial court. The Supreme Court affirmed and held that the plaintiffs had a right to amend as a matter of course prior to the expiration of time for answer and this extended to the inclusion of a new party defendant.

Charleston & Western Carolina Railway Co. v. Joyce[19] dealt with the question of the propriety of the order of the lower court in refusing to allow an amendment to the answer. The

16. 232 S. C. 257, 101 S. E. 2d 659 (1958).
17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-701.
18. 232 S. C. 261, 101 S. E. 2d 661 (1958).
19. 231 S. C. 493, 99 S. E. 2d 187 (1957).

action was brought under the Declaratory Judgment Act[19a] to have the court construe an option and a deed whereby plaintiff acquired a strip of land for the construction of new tracks, and to determine the rights of the parties with respect to the old crossties. Defendant filed two counterclaims which were, however, ordered stricken upon motion, without prejudice to defendant's right to assert them after the court had construed the instruments. When the case came on for trial, the defendant moved to amend the answer on affidavit of counsel that certain factual allegations in the counterclaims were eliminated from the answer. The lower court refused to allow the amendment for the reason that the allegations were largely a restatement of the counterclaims which had been stricken. This was affirmed on appeal, the Court noting that an allowance of an amendment under the statute[20] is addressed to the sound discretion of the trial judge and no abuse thereof was charged in defendant's exceptions. Two additional reasons were given to support the Court's conclusion: (1) the proposed amendments were substantially a restatement of the counterclaims which had been stricken by order from which no appeal was taken and which became the law of the case, and (2) the amendment sought to review the negotiations between the parties prior to the signing of the option and deed, which were inadmissable under the parol evidence rule.

The question of pleading decided in *Simonds v. Simonds*[21] related to the propriety of the refusal of the trial judge to permit the defendant to file a supplemental answer to the complaint. This action for divorce by a wife against husband had twice previously been appealed to the Supreme Court and had been remanded for the purpose of permitting the trial court to pass upon whether or not the wife was entitled to attorney's fees and separate maintenance. At the hearing the husband attempted to file a supplemental answer and this was refused for the reason that no new material facts had developed since the filing of the original answer. In affirming, the Supreme Court noted that the denial of a motion to file a supplemental answer is ordinarily within the discretion of the trial court and will not be reversed except for abuse of discretion or unless the action is controlled by an error of law.

19a. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-2001—10-2014.
20. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-692.
21. 232 S. C. 185, 101 S. E. 2d 494 (1957).

Under the applicable Code section[22] such a pleading is in the nature of an amendment and a motion to file the same will not be granted unless it is in the interests of justice; likewise the movant must make a showing of facts material to the cause occurring since the former pleading. Since the facts alleged in the proposed supplemental answer had previously been encompassed in the original pleadings, the Supreme Court held that the refusal to allow the amendment did not deprive defendant of any substantial rights.

Concrete Mix, Inc. v. James[23] was an action for goods sold and delivered to the defendants, who, it was alleged, were partners. One of the defendants defaulted and the other filed a general denial by way of answer but did not deny the partnership specifically. At the conclusion of the plaintiff's case on trial, this defendant moved to amend his answer by denying the partnership but this was refused. In affirming, the Supreme Court ruled that a specific denial of a partnership is necessary to make an issue thereabout, a general denial not being sufficient for this purpose. The Court held further that it was not an abuse of the trial court's discretion to deny defendant's motion to amend his answer by denying the partnership since, if allowed, this would have substantially changed the defense.

Bailes v. Southern Railway Co.[24] was an action for damages arising out of the alleged wrongful death of decedent who was killed when struck by defendant's train. One of the grounds for appeal was that plaintiff had failed to allege that the intestate was on the track as a licensee. During the trial of the action, plaintiff proffered testimony to show that deceased was a licensee and not a trespasser. This evidence was excluded on objection on the ground that plaintiff had failed to so plead. Later on, however, the trial judge changed his ruling and stated that plaintiff did not have to plead affirmatively that deceased was a licensee, this being an issue for the jury to determine from all the facts and circumstances. Plaintiff was allowed an opportunity to offer additional testimony along this line but did not do so. Without deciding the correctness of the trial judge's ruling, the Court held that no prejudice could have resulted therefrom to appellant since no further evidence was presented.

22. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-610.
23. 231 S. C. 416, 98 S. E. 2d 841 (1957).
24. 231 S. C. 474, 99 S. E. 2d 195 (1957).

New Parties

Singleton v. Singleton[25] was an action brought by one of the heirs of the intestate against the administrator for an accounting of all his acts and doings as such administrator. The lower court granted the defendant's motion to bring in as parties to this action the other heirs at law of the intestate upon the ground that they were necessary to a complete determination of the cause, and ordered plaintiff to amend the summons and complaint and take necessary steps to bring them in, either as parties plaintiff or defendant. The Supreme Court affirmed under applicable Code sections[26] and held that the trial judge in the exercise of his discretion properly joined all of the heirs at law as parties, thereby preventing future litigation and the necessity of a multiplicity of suits. Plaintiff could not be prejudiced thereby since one decree could determine the rights of all interested parties. It was further held that the trial judge could properly require the plaintiff to take the necessary steps to make the heirs parties either as plaintiffs or defendants.

Theory of Action

Barnwell Production Credit Ass'n v. Hartzog[27] involved a construction of the complaint to determine whether the action was equitable or legal in nature. Suit was brought as the result of defendant's alleged default in the payment of certain promissory notes secured by real estate and chattel mortgages. In his answer defendant pleaded fraud and deceit and interposed a counterclaim based upon alleged false representations of the plaintiff. The trial judge denied defendant's motion to transfer the cause to Calendar 1 for trial by jury and granted plaintiff's motion for a general order of reference, from which an appeal was taken. In resolving the issue in favor of plaintiff, the Supreme Court applied the rule that a pleading is to be construed liberally in favor of the pleader and that the character of the action must be determined by the allegations of the complaint. The Court concluded that the complaint, taken as a whole, set forth a cause of action for foreclosure of a chattel mortgage in equity and not an action in claim and delivery. The issues raised by defendant's counterclaim could also be tried on the equity side of the court and did not entitle

25. 232 S. C. 441, 102 S. E. 2d 747 (1958).
26. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-202, 203, 204, 219.
27. 231 S. C. 340, 98 S. E. 2d 835 (1957).

defendant to trial by jury as a matter of right. The doctrine of election of remedies was held inapplicable, since neither party contended that the complaint sought inconsistent remedies, the issue being rather one of construction.

Betterments

Reaves v. Stone[28] involved the interesting question of allowance for betterments where one is dispossessed of real estate. It appeared that defendants' predecessor in title had purchased at a tax sale lands which were owned by his brother at the time of his death. The plaintiffs who sought possession were some of the children of the deceased who had acquired the interests of the other heirs. Defendants conceded the invalidity of the tax sale and deed because of certain defects in the proceedings and plaintiffs were held entitled to possession. The trial court made an allowance to defendants for betterments but offset it by charging against them rental for the use of the premises. Upon appeal defendants contended that they were entitled to additional allowances for betterments and that they should not have been charged with the rental. In resolving this issue against their contention, the Court cited the betterments statute, which provides that a person in possession is entitled to betterments "if it be shown that the defendant actually believed he was taking a good title in fee simple thereto at the time of the alleged taking thereof."[29] This requirement not having been met in the pleadings or proof, the Court concluded that the defendants were not entitled to betterments in any amount and that the rental was properly charged against them.

On petition for rehearing defendants contended that their rights were governed by Code section 65-2782 relating to a dispossessed purchaser at a tax sale. Since the case had been tried under the betterments statute, the Court would not consider the new theory on appeal.

28. 231 S. C. 628, 99 S. E. 2d 729 (1957).
29. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-407.