South Carolina Law Review

Volume 8 | Issue 1 Article 17

Fall 1955

Pleading

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PLEADING

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There were no statutory changes in the subject of Pleading during 1955. The Supreme Court had for consideration during the period under review over a third more cases involving pleading questions than were dealt with in the Survey of a year ago. Most of these cases were of the usual or routine type, only a few of these being in any sense unique or requiring the decision of points of first impression.

Actions and Parties

Williams v. United Insurance Co.[1] involved an action for damages, on a health insurance policy. The complaint alleged issuance of a policy to complainant by defendant's predecessor, which assumed latter's obligations; payment of premiums by complainant to defendant's agent for four and one-half years; advice to complainant by defendant's agent that the predecessor had gone out of business and destruction by said agent of complainant's premium receipt book; complainant's lack of education, and even of knowledge of agent's name, or of what to do under the circumstances; of payment of premiums weekly by complainant to defendant's agent up to the time of destruction of the receipt book (a period of four and one-half years) and readiness to pay thereafter, and complainant's subsequent illness, medical expenses, etc., was held, on demurrer, to state a cause of action. The result here seems entirely logical. Complainant's cause of action here was of a nature requiring a statement of facts in considerable detail in order to make admissible the pertinent evidence. Proof of the alleged facts should undeniably warrant recovery.

Gardner v. Mutual Benefit Health & c. Assn.[2] is somewhat analogous to the *Williams* case, *supra.* Here there was an action for actual and punitive damages by a policy-holder against an insurance company. It alleged false representations of latter's agent, whereby complainant was induced to discontinue a similar policy with another insurance company (as being less advantageous than the policy issued by defendant, which was untrue in fact), and for false and fraudulent entries by said agent on questionnaire of the answers given by complainant to questions propounded by agent in regard to medical history of

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1. 86 S.E. 2d 486 (S.C. 1955).
2. 226 S.C. 219, 84 S.E. 2d 637 (1954).

complainant's wife (now deceased), because of which defendant denied liability for payment to complainant of substantial claims for medical and hospital expenses incurred as the result of prolonged illness of complainant's wife. Defendant moved to strike ten out of the twenty-three paragraphs of the complaint, in which agent's alleged fraud and misconduct, as stated above, were averred. The trial court overruled the motion and, on appeal, was affirmed. The reviewing court stating:

> The allegations of complaint . . . state a cause of action for fraud and deceit in that false representations were made by [said] agent to respondent, which led to cancellation [by latter] of an insurance policy then in force with [another company] and such allegations relative to policy with the defendant company may be relevant upon the question of damages . . .

Here the allegations of the complaint which were objected to were pertinent and necessary in order to state the kind of cause of action involved. The court, therefore, very properly refused to strike them as being "irrelevant and redundant" under Code of Laws of South Carolina, 1952 § 10-606.

Harmon v. Aughtry,[3] involved an action for damages for breach by defendant of a contract to make a will in favor of complainant's wife, or in favor of complainant should his wife predecease him, and for an equitable lien in the sum of $6,000 on certain real estate of defendant, in consideration of complainant's advance of $6,000 to defendant to pay off the then existing mortgage upon said property. It was alleged that defendant failed to execute said will as agreed and that complainant was entitled to rescission of the agreement. Upon defendant's motion, complainant was put to an election as between the causes of action so stated, and complainant elected to proceed for damages for breach of contract. Thereafter defendant demurred to the remaining cause as stating no cause of action. The demurrer was sustained and, on appeal, this was affirmed, upon the ground that the contract alleged in the complaint could be performed at any time during defendant's life-time; that defendant had not repudiated it; that complainant was not entitled to treat it as rescinded by mere failure, so far, of defendant to make a will, and to recover the $6,000 advanced. In short, that the action was premature. The view of the court here is amply sustained by the authorities that averment of breach of contract by defendant is essential to the statement of a cause of action therefor, and that so long as time for its performance

3. .... S.E. 2d .... (S.C. 1955).

by defendant has not expired it cannot be said to have been breached, and, more particularly, that "A will [as agreed to] — may be made at any time during the life of the promisor." The latter statement accords with the general authorities on the subject and with the earlier South Carolina case of *Ex parte Hineline*.[4]

Stephens v. Hendricks.[5] Here there was an action by an automobile owner against a delinquent tax-collector to recover possession of complainant's automobile, seized by latter as the property of one who owned a parking lot on which complainant's car was found. The lot-owner being delinquent as to taxes. Defendant demurred to complaint as stating no cause of action in that the complaint failed to aver payment of taxes under protest as prerequisite to bringing a suit for relief therefor.[6] A demurrer was sustained by the trial court, and, on appeal, this was reversed, as above cited statute was inapplicable to the owner of a car against whom no taxes were levied. Another question raised in this case, more properly classified under the caption "defenses", was that the complainant did not anticipate the defense that he had not complied with the applicable bailment statute,[7] and avoidance of such defense. But, said the court, complainant is not bound in his complaint to anticipate defenses. Such is the general rule and the view previously taken in South Carolina. *A. M. Law & Co. v. Cleveland*.[8]

In *Hall v. Walters, et al.*,[9] there was an action by a non-union workman against six named executives and members of Textile Union, Local No. 254, for damages, actual and punitive, for conspiracy preventing complainant from working during a strike, using threats and the like, thus depriving complainant of his right to work. Defendants demurred for no cause of action, under CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-642 (6), in that (1) the alleged acts were not actionable and (2) the strike was not unlawful. A demurrer was overruled by the trial court. Verdict and judgment were entered for the complainant for $1,000 actual, and $25,000 punitive damages. On appeal, an order overruling the demurrer was sustained. The court cited Sections 10-215, 10-429, and 10-1516,[10] as to suits against unincorporated associations, service of process therein, and the per-

4. 166 S.C. 352, 164 S.E. 887 (1932).
5. 226 S.C. 79, 83 S.E. 2d 634 (1954).
6. Under CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 65-1464 through 65-1467.
7. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308.
8. 172 S.C. 200, 173 S.E. 638 (1934).
9. .... S.E. 2d .... (S.C. 1955).
10. CODE OF LAWS OF SOUTH CAROLINA, 1952.

sons and property bound by judgments against such associations. While this appears to be a case of first impression in South Carolina in a factual situation of this kind, the authorities cited by the court from other jurisdictions amply support the view that the complaint stated a cause of action.

In *Turner, et al. v. Byars, et al.*,[11] questions were raised both as to parties and proper defenses. Here the action was for partition of land to which occupant, under claim of right, was named as one of the defendants. The latter, by demurrer,[12] purported to raise the question of defect of parties, in that some of the heirs at law of the deceased owner of land in question were not named as parties. The overruling of the demurrer by the trial court was affirmed on appeal on the ground that the defect, not appearing upon face of the complaint, could only be taken by the answer,[13] and, further, that the complaint stated a cause of action against appellant in that it was alleged that he "now occupies the house on the above described land and makes some claim thereto."[14] The court cites an abundance of well-reasoned South Carolina authority for both propositions.

Trawick v. One International Pickup.[15] In an attachment proceeding against an offending motor vehicle by one who suffered personal injuries and property damage as a result of the alleged negligent operation thereof it was held that the court below did not err in allowing the true owner of the vehicle to intervene in the proceedings,[16] she being a proper, though not a necessary party, in that she had an interest in the subject-matter of the controversy, but that it *was* error for the trial court to require complainant to amend his pleadings so as to state a cause of action *in personam* against said intervenor. The order of intervention here was held to be within the trial court's discretion, yet one who so intervenes should not be allowed to dictate to the complainant as to whether the action so brought shall be *in rem, in personam,* or both, as the complainant may elect to bring it in the form he chooses. The record in this case is incomplete, says the court, and possibly this accounts for the fact, or furnishes the reason why, it would not have been to complainant's advantage to have had the intervenor as a defendant.

11. 226 S.C. 289, 85 S.E. 2d 100 (1954).
12. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-642 (4).
13. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-642 (4), 10-645.
14. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-203.
15. 225 S.C. 321, 82 S.E. 2d 275 (1954).
16. Under CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-203 and 10-219.

Defenses

In *Thomas & Howard Co. v. Fowler,*[17] to an action by a mortgagee in claim and delivery for possession of a stock of goods covered by the mortgage, the trial court sustained demurrers to mortgagor's answer and counterclaim, alleging in substance that the mortgagee's agent, as part of a general fraudulent scheme to induce the mortgagor to execute the note and mortgage, falsely promised, with no intention of fulfilling it, that he would not record the mortgage. Further that the mortgage was recorded, as result of which the mortgagor could not obtain further credit and was damaged as a result thereof. On review the trial court's order sustaining the demurrers was reversed as the answer was held to state a good defense, and a counterclaim is not subject to demurrer if it contains any allegations which entitle the pleader to relief. Here the reviewing court held that the counterclaim stated a cause of action for fraudulent breach of contract, and, as such, a demurrer thereto could not be properly sustained.[18] Certainly there is a well-established line of South Carolina cases to the effect that a demurrer should not be sustained to an original complaint or to a counterclaim if it states *any cause of action* entitling the pleader to relief.

Gause v. Jones.[19] A policyholder brought an action against an insurance company and its agent for alleged fraud on the part of the agent in selling him a hospital and surgical policy upon which the insurance company denied liability upon the ground that the insured failed to state in his application a previous history of stomach ulcers. The agent filed a counterclaim for alleged libel against him by the complainant by reason of a letter written to his principal by the insured's attorney "some time after" the alleged fraud of the agent, asserting facts as to the fraud and misrepresentation by the agent. Complainant demurred to the counterclaim on the ground that the cause of action pleaded therein does not arise out of the same state of facts, nor is it similar to the cause of action alleged in complaint. The overruling of the demurrer by the trial court was affirmed on appeal. The true test of the propriety of a counterclaim as such,[20] said the reviewing court, is whether the acts complained of therein are so connected with those upon which the complaint is founded that it can be said that the counterclaim is based upon a denial of the issues raised in the complaint. Such was the fact here. Further,

17. 225 S.C. 347, 82 S.E. 2d 454 (1954).
18. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-642 (6).
19. 85 S.E. 2d 402 (S.C. 1955).
20. Under CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-703 and 10-705.

that "the same transaction", as used in Section 10-703, and the "same state of facts," as used in Section 10-705,[21] are substantially equivalent. The view of the court here follows the earlier case of *Aetna Life Ins. Co. v. Lourie*.[22] Although the question was not raised as such, the holding in *Griffin v. Scott*,[23] that a counterclaim may be pleaded by one of several defendants, was necessarily followed.[24]

Trials and Hearings

In *Bush v. Aiken Electric Coop. Inc.*[25] complainant, alleged to be a minor, sued defendant for personal injuries under the "attractive nuisance" doctrine. Defendant was an electric cooperative organized under the laws of South Carolina.[26] A demurrer by the defendant raised the question as to whether it was a "charitable corporation," and, as such, exempt from liability in tort actions. Its motion, under Section 10-606,[27] raised the question as to whether the complainant should be required to make his complaint more definite and certain by stating his precise age. The trial court overruled both the demurrer and motion, and, on appeal, was sustained as to both. The mere fact that defendant was a "non-profit" enterprise did not make it a charitable organization, and the act in question does not exempt it from tort liability. As to the motion to make more definite and certain, defendant (appellant) admitted before the trial court that it had knowledge of complainant's age, and, moreover, this fact was a matter of record in Edgefield County. The court casts serious doubt upon the appealability, before final judgment, of a trial court's order on this motion.[28]

The court here, as to the ruling upon the motion, follows the logical view stated in previous South Carolina cases, as laid down in 49 C.J. § 738, that:

> A pleading will not be ordered to be made more definite and certain . . . where it appears that the moving party already has, or can obtain, sufficient knowledge . . . , or is in a position of knowing the facts superior to the position of the pleader, or where the facts sought are peculiarly within the knowledge of the moving party.

21. CODE OF LAWS OF SOUTH CAROLINA, 1952.
22. 201 S.C. 478, 23 S.E. 2d 741 (1942).
23. 203 S.C. 430, 27 S.E. 2d 570 (1943).
24. See CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-1503, 10-1508.
25. 85 S.E. 2d 716 (S.C. 1955).
26. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 12-1001 through 12-1083.
27. CODE OF LAWS OF SOUTH CAROLINA, 1952.
28. See Thomas and Howard Co. v. Fowler, note 45 *infra*.

In *Wildhagen, et al. v. Ayers,*[29] an action for damages for unlawful distraint of personal property, complainant, upon the trial court's order to do so, failed to amend his complaint so as to make it more definite and certain. The trial court thereafter entered an order "impliedly" refusing complainant's motion for an order of voluntary nonsuit, without prejudice, and expressly striking the complaint. On appeal the latter order was reversed because the defendant made no showing of prejudice to him beyond the probability of having to defend another action. Circuit Court Rules 29, 30 and 59 require the trial court to exercise judicial discretion based upon some good reason under the circumstances, which was lacking in this instance. Authorities cited by the court from this and other jurisdictions amply sustain the view here taken.

Town of Bennettsville v. Bledsoe, et al.[30] This was an action for money had and received, based upon a mutual mistake of fact, whereby the sum sued for was overpaid defendant by the plaintiff under a construction contract. The defense that the amount overpaid was uncertain and defendant's books were then being audited to determine the amount was stricken by trial court as "sham",[31] upon filing of an affidavit by the complainant's officer, attaching thereto a written acknowledgment by the defendant that the amount sued for was correct. On appeal this order was affirmed, the reviewing court observing that, while the provisions of the above Code Section[32] are employed infrequently, still South Carolina authority is ample for its strict application where the sham is obvious. A leading case in point cited by the court is that of *Ocean Forest Hotel v. Woodside.*[33] The view taken by the court here seems entirely sound, and, while it is not discussed, the procedure in raising the question of "sham" by affidavit has been followed by this court since the early case of *Tharin v. Seabrook.*[34]

St. Paul-Mercury Indemnity Co. v. Dondalson,[35] in the main, involved the substantive law of bankruptcy, and, in small part, the question of a "sham" defense. Here there was an action by a surety against his principal for payments made by the complainant to the State of California, under bond conditioned to pay all amounts due said State by the defendant under its sales and use tax statutes, to-

29. 225 S.C. 384, 82 S.E. 2d 609 (1954).
30. 226 S.C. 214, 84 S.E. 2d 554 (1954).
31. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-654.
32. See note 31 *supra.*
33. 184 S.C. 428, 192 S.E. 413 (1937).
34. 6 S.C. 113 (1874).
35. 225 S.C. 476, 83 S.E. 2d 159 (1954).

gether with interest and attorney's fees. Defendant filed a plea of bankruptcy, admitting that the complainant was not listed as a creditor therein, but averring that it had actual notice thereof. The trial judge, upon motion, and treating the answer as "sham", entered judgment for the complainant on the pleadings for the full sum sued for. On appeal this ruling was reversed in small part, the court holding that, although a claim for taxes due the United States and a State are not dischargeable in bankruptcy (and here complainant was treated as succeeding to the rights of California under this protection), complainant was entitled to recover only the amount of taxes it paid to the State of California, with interest up to but not beyond the filing of the petition in bankruptcy. As to attorney's fees and other expenses incurred by complainant in paying the claim to the State, these would be contractual obligations, and barred by defendant's discharge in bankruptcy, if, upon trial, it be proved that complainant had actual notice of defendant's petition in bankruptcy and failed to file its claim. In short, the trial court erred in striking the whole of the answer as "sham" where, in part, it raised a valid issue which should be tried on the facts. The court's view in this regard appears to be unassailable. Indeed, while the precise question of substance is an original one in this jurisdiction, the court quite logically adopted the view of the considerable weight of authority elsewhere in interpreting the applicable section of the Bankruptcy Act.[36]

S. C. Mental Health Commission v. May, Admr.[37] Here the court had for consideration the sole question of whether or not a claim of the State Mental Health Commission and its predecessor against the estate of a deceased (an inmate of the State Hospital from 1911 until his death in 1952) was barred by the statute of limitations[38] in whole or in part. The trial court had held that only so much of the claim was recoverable as accrued after the establishment of the complainant commission under the Mental Health Act of 1952,[39] but, in reversing the trial court as to this ruling, the reviewing court held that Section 10-1043[40] had no application, where, as here, a special statute[41] required the Board to present its claim for support of the deceased inmate to his personal representative "upon the death" of the latter [deceased], and, further, that rights accruing to the predecessor Commission were not destroyed, by the adoption of the

36. 11 U.S.C.A. § 35 (a) (3).
37. 226 S.C. 108, 83 S.E. 2d 713 (1954).
38. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-143.
39. 48 STATUTES AT LARGE 2042 (1952).
40. CODE OF LAWS OF SOUTH CAROLINA, 1952.
41. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 32-975.

1952 Act, but passed to the new Board under that act. Without direct authority in point from this jurisdiction the court cites cases from others. Particularly in point is the case of *State ex. rel. Milligan v. Ritter's Estate.*[42]

Dobson v. Randolph & American Indemnity Co.[43] Complainant sued a public carrier for $50,000 damages for personal injuries received in a collision. The carrier had been issued a "Class E" certificate upon which indemnity insurance, in total sum of $50,000, was required. The American Indemnity Co., which issued its policy to the carrier in said amount and which was named as co-defendant in the action, moved to strike from the complaint the allegation that there was $50,000 indemnity insurance. This motion was granted by the trial court, and, on appeal, this order was reversed, two of the justices dissenting. The majority reasoned that since the laws of South Carolina[44] provide that the Public Service Commission shall require liability insurance, "in such amount as the Commission may determine," and since the Commission, acting under its Rules 57 and 58, provided for $50,000 indemnity insurance, as a prerequisite of a "Class E" certificate, that the fact that such policy would be properly admissible in evidence, made it proper to plead the amount of same. The dissenting view was that while the commission fixed the overall liability insurance at $50,000, it also, under other rules, provided for a limitation of $5,000 liability for the bodily injury or death of one person, and $1,000 for property damage. Logically the view of the dissent seems correct. Since the indemnity company may be sued as a co-defendant here, and, assuming that it is proper to allege the amount of its policy of indemnity, the complainant should not be allowed to plead it as being $50,000 for personal injuries to a single individual, where the Commission, which it had the right to do, has seen fit to limit it to $5,000. This would appear to be misleading to the jury and prejudicial to the indemnity company.

Appeal and Error

Thomas & Howard Co. v. Fowler et al.[45] Here there was an action in which the defendants counterclaimed upon the ground that the complainant fraudulently induced defendants to execute a chattel mortgage, recording same in violation of an agreement not to do so, thereby causing other wholesalers to refuse to grant defendants

42. 221 Ind. 456, 48 N.E. 2d 993, 998 (1943).
43. .... S.E. 2d .... (S.C. 1955).
44. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 58-1451.
45. 85 S.E. 2d 278 (S.C. 1955).

further credit. Complainant moved to make the counterclaim more definite and certain[46] by naming such wholesalers. The trial court so ordered. Defendants' appeal from such order was dismissed on the ground that such order was not appealable. The reviewing court reasoned that the grant of such an order was within the trial court's discretion, and, that, since it did not involve the merits, it was not appealable before final judgment, especially where, as here, the information elicited was within defendants' sole possession.[47] This case seems entirely sound under the numerous South Carolina authorities cited by the court.[48]

46. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-606.
47. 81 S.C. 354, 62 S.E. 404 (1908).
48. See note 17 *supra* for the first appeal of this case.