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Pleading

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Claim Against Estate

In *Complete Auto Transit, Inc. v. Bass*[1] the Supreme Court considered for the first time the question of whether or not a counterclaim for damages against the estate could be asserted in an action by the executrix for wrongful death. Plaintiff brought suit against the executrix of the estate of the deceased for property damages resulting from a collision with decedent's automobile. The executrix pleaded in bar the fact that the plaintiff had not counterclaimed for such damages in the action brought by her in the Federal Court for the wrongful death of her husband resulting from the same collision; and also pleaded estoppel to maintain the action by reason of the settlement in the former suit. The lower court sustained plaintiff's motion to strike these allegations as irrelevant. The issue upon appeal was whether or not the plaintiff had the right to assert a cause of action for property damages by way of counterclaim in the action in the Federal Court. Noting that the issue was to be resolved in accordance with State Law, the Supreme Court answered in the negative. The rationale of the decision was that the executrix, in an action for wrongful death, acts as the representative of the statutory beneficiaries and not as the representative of the estate. The two claims — that of the executrix for wrongful death and the claim against the estate for property damages — are in no wise reciprocal. The executrix was held to function "under two separate and distinct trusteeships, having no relationship to each other beyond the fact that their origin is referable to the death of the same person." The defense of estoppel by reason of the former settlement was rejected by the court upon similar reasoning.

The result is manifestly sound and is in consonance with the reasoning of the court in *Bennett v. Spartanburg Railway, Gas & Electric Co.*,[2] which had established that an administrator could not join in the same complaint an action for

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1. 229 S. C. 607, 93 S. E. 2d 912 (1956).
2. 97 S. C. 27, 81 S. E. 189 (1914).

personal injuries sustained by decedent with an action for his wrongful death resulting from the same occurrence.

Theory of the Action

The jurisdiction of the court was dependent upon a proper construction of the complaint in *Bramlett v. Young*.[3] Action was brought in the Greenville County Court by the minority group of a local church against a group seceding from the parent church organization, to have themselves declared to constitute the church and entitled to the possession and control of the church property, to have the court construe and reform the deed conveying the church property to another corporation, and for an injunction against interference by the seceding group. Upon appeal from an adverse judgment, defendants for the first time questioned the jurisdiction of the Greenville County Court on the ground that the action was not equitable in nature but a legal action for the recovery of real property of the value of more than $5,000.00, thereby exceeding the jurisdictional limitations. To resolve this issue, it was necessary to determine the nature and theory of the action. After reviewing at length the various principles applicable to ascertaining the character of an action, the court applied the rule that "the theory pursued in the trial court with respect to the relief sought must be adhered to in the appellate court." The court observed that throughout the trial all of the parties by the pleadings and evidence treated the action as essentially equitable in nature and concluded that it was properly within the jurisdiction of the County Court.

Demurrer—Insufficiency

In *Spell v. Traxler*,[4] the Court reaffirmed the rule that in passing upon a demurrer the court is strictly limited to consideration of the pleadings under attack, all of the factual issues properly pleaded being deemed admitted for such purpose. In his complaint seeking to compel specific performance of a real estate contract, plaintiff pleaded Item 3 of the Will under which he claimed title but did not set forth the entire Will. Defendant contended that this Item negatived title in the plaintiff and demurred to the complaint for insufficiency. The order of the lower court overruling the demurrer was affirmed on appeal. The Supreme Court refused to construe

3. 229 S. C. 519, 93 S. E. 2d 873 (1956).
4. 229 S. C. 466, 93 S. E. 2d 601 (1956).

the language of the Will quoted in the complaint apart from the entire Will, recognizing that the testator's intention is to be gathered from the whole instrument and in accordance with settled principles of construction.

In *Huggins v. Gaffney Development Company*,[5] involving an action for damages on account of alleged obstruction of a public road, the court followed the established rule that in passing upon a demurrer the allegations of the complaint must be accepted as true and given a liberal construction. The facts alleged were held sufficient to reasonably warrant an inference that plaintiff sustained damages different in degree and kind from that suffered by the public generally and was, therefore, entitled to maintain the action.

The defendant's demurrer to the complaint was sustained in *Meetze v. The Associated Press*[6] which was an action for damages for alleged invasion of the right of privacy based upon the defendant's publication of the birth of a child to a twelve year old mother. The plaintiff contended that the trial court was in error in excluding from the appeal record the photostatic copy of a birth certificate of plaintiff's child. This contention was overruled and the court again affirmed the rule that in passing upon a demurrer, the court is confined to the facts appearing on the face of the complaint.

Demurrer—Misjoinder

In *Fleming v. Arkansas Fuel Oil Company*,[7] action was brought for damages for the wrongful death of plaintiff's intestate as the result of burns from an explosion of a kerosene cook stove. Joined as party defendants were the wholesalers and jobbers of kerosene who had handled the product prior to the sale to the retail dealer. The action was based principally upon violations of statutory duties prescribed in the Code, with implementing rules and regulations, applicable to wholesalers and jobbers of kerosene. One of the wholesalers demurred to the complaint upon the ground that it improperly united a cause of action against him for punitive damages which did not affect the other parties, and a cause of action for punitive damages against the other defendants jointly which did not affect him. This defendant also moved for a separate statement of the various causes of action. The

5. 229 S. C. 340, 93 S. E. 2d 883 (1956).
6. 230 S. C. 330, 95 S. E. 2d 606 (1956).
7. 231 S. C. 42, 97 S. E. 2d 76 (1957).

order of the trial judge overruling the demurrer and denying the motion was affirmed on appeal. The result was controlled by the application of the principle enunciated in *Cabe v. Ligon*,[8] that where different persons owe the same duty and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint, and both may be held liable, even in the absence of concert or collusion between them.

Judgment on Pleadings

The order of the trial judge granting judgment on the pleadings was affirmed on appeal, with certain modifications, in *Butler v. Schilletter*.[9] Suit was brought for specific performance of a real estate contract against the seller and his wife, the latter being joined as a party defendant on the theory that she had refused to renounce dower. The wife demurred, claiming that no cause of action was stated against her and that her dower interest could not be admeasured during her lifetime. The husband in his answer alleged that certain oral restrictions should have been incorporated in the contract and that he was willing to convey the property if the restrictions could be considered. The trial judge granted plaintiff's motion to strike these allegations as varying the terms of the written contract, ordered additional allegations stricken as sham and irrelevant and granted judgment on the pleadings. The wife's demurrer was overruled and the matter was referred to a Special Referee for the purpose of determining the wife's dower interest and any special damages suffered by the plaintiff. Upon appeal the Supreme Court adopted the opinion of the lower court but modified the decree to allow the wife to file an answer and to be heard on the question of her dower.

Sham and Frivolous Pleadings

The requirements for striking an answer as sham and frivolous were considered in *Blackwell v. United Insurance Company*,[10] in which suit was brought to recover the proceeds of a life insurance policy. In its answer the insurer pleaded certain policy provisions which it claimed exempted it from liability. The lower court sustained plaintiff's motion to strike the answer as sham and frivolous. In reversing this conclusion the Supreme Court noted that the striking of

8. 115 S. C. 376, 105 S. E. 739 (1921).
9. 230 S. C. 552, 96 S. E. 2d 661 (1957).
10. 229 S. C. 296, 92 S. E. 2d 702 (1956).

an answer or defense as sham is a drastic remedy and is available only when the pleading is good in form but false in fact and not pleaded in good faith, being a mere pretense. The motion was distinguished from one to strike for irrelevancy, the latter being in the nature of a demurrer.

Motions to Strike—Irrelevancy

In *Jackson v. Banks Construction Company*,[11] the trial court refused to strike an entire paragraph where it concluded that some of the allegations were germane to the issues, although striking the irrelevant portions. The defendant had pleaded as a defense to plaintiff's suit for damages due to personal injuries the fact that she had recovered $29,000.00 in a former action for personal injuries which included pain and suffering. Upon plaintiff's motion the trial court eliminated the allegations with reference to the former action and the amount recovered and defendant appealed. The Supreme Court held that defendant could show the nature and extent of the injuries received by plaintiff in the previous accident but the remaining allegations were properly stricken as irrelevant. Whether or not plaintiff was adequately compensated in the prior accident was deemed immaterial to the issues.

In *Olympic Radio and Television v. Baker*,[12] action was brought by the assignee of the seller for the balance due on the purchase price of three television sets. Defendant claimed that he had made payment of a portion of the balance due to the agent of the seller, after the assignment to the plaintiff of which he had notice. The lower court overruled plaintiff's motion to strike these allegations as sham and irrelevant. The Supreme Court held that the allegations could not be stricken as sham since there was no showing of their falsity. The defense was, however, stricken as irrelevant since there was no allegation that the purported agent of the seller was authorized to receive payment on behalf of the assignee and the plea of payment was, therefore, ineffectual.

The appeal in *Sparks v. Dew*[13] was from the order of the lower court in refusing to strike certain allegations of the complaint as irrelevant and redundant. The Supreme Court followed established precedent in holding that such an order

11. 229 S. C. 461, 93 S. E. 2d 604 (1956).
12. 230 S. C. 383, 95 S. E. 2d 636 (1956).
13. 230 S. C. 507, 96 S. E. 2d 488 (1957).

is not appealable, noting, however, that the appellant on trial would not be precluded from attempting to exclude testimony offered in support of the allegations.

Amendments

Greenville Community Hotel Corporation v. Alexander Smith[14] involved the propriety of the ruling permitting amendment of the complaint prior to trial. The action as originally brought was for damages for alleged breach of warranty in respect to certain carpeting purchased for use in plaintiff's hotel. The proposed amendment would have changed the date of purchase, the amount of carpeting purchased and the hotel for which it was purchased. In reversing the lower court, the Supreme Court construed the provisions of the Code permitting amendment before trial to correct a mistake and held that such power is limited to cases where (1) there is proof of a bona fide mistake in setting forth the cause of action and (2) the proposed amendment relates to the same transaction.[15] The amendment was held to violate these requirements since in effect it eliminated the original cause of action and substituted another unrelated cause in its stead.

In *Elrod v. Elrod*[16] the defendant in a divorce action sought unsuccessfully in the trial court to amend her answer and cross-complaint by alleging additional facts bearing upon the marital relation. The Supreme Court held that the circumstances did not justify a refusal to amend. Although recognizing that a motion of this kind is addressed to the sound discretion of the trial court, the Court held, nevertheless, that this does not give the trial judge an entirely free hand.

Sufficiency of Denial

The question of pleading raised in *Clanton's Auto Auction Sales v. Campbell*[17] was whether or not the defendant's denial "upon information and belief" was sufficient to put in issue the plaintiff's ownership of the vehicle for which he was seeking to recover damages sustained in a collision with defendant's automobile. On appeal from an adverse verdict, plaintiff contended that the issue of ownership was not properly raised by the answer. The Supreme Court held that ordinarily such a denial with respect to plaintiff's capacity

14. 230 S. C. 239, 95 S. E. 2d 262 (1956).
15. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-692.
16. 230 S. C. 109, 94 S. E. 2d 237 (1956).
17. 230 S. C. 65, 94 S. E. 2d 172 (1956).

to sue or to facts presumptively within the defendant's knowledge would not be sufficient to put such facts in issue; however, in this instance the language was sufficient to put plaintiff's ownership in issue since it was not a matter of public record or presumptively within the defendant's knowledge and hence did not require specific and unqualified denial. The court observed that plaintiff had failed to demur for supposed insufficiency and evidently considered the issue of ownership raised by offering evidence thereabout.

The court drew an interesting distinction between a denial "on information and belief" and a denial "of any knowledge or information sufficient to form a belief." The latter was held authorized under express statutory provisions;[18] the propriety of the former, although not expressly provided for, was recognized under the statute relating to the verification of pleadings.[19]

Default Judgment

The denial of a motion to vacate a default judgment was reversed in *Knight v. Martin*.[20] The action was for goods sold and delivered, upon an unverified complaint, to which was attached a sworn statement quoting "balance forward on car note mortgage—1941," and one additional item, with no further explanation or itemization. The court held that the statement did not meet the requirements of the statute providing that in an action for recovery of money, judgment may be given by default "if the demand is unliquidated and the plaintiff itemize his account, append thereto an affidavit that it is true and correct and that no part of the sum sued for has been paid by discount or otherwise and a copy thereof be served with the Summons and Complaint."[21]

New Parties

In *Carolina Housing and Mortgage Corporation v. Orange Hill A. M. E. Church*,[22] the lower court granted the plaintiff's motion to join as party to a foreclosure proceeding the original mortgagee who had assigned the note and mortgage, in view of the defendant's contention that the mortgage had been executed without authority. The Supreme Court held

18. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-652.
19. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-604.
20. 230 S. C. 460, 96 S. E. 2d 473 (1957).
21. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1531.
22. 230 S. C. 498, 97 S. E. 2d 28 (1957).

that the joinder of the assignor was a proper exercise of the trial judge's discretion so that a complete decree could be had between the parties, preventing further litigation and removing the necessity of a multiplicity of suits. The court observed that under applicable sections of the Negotiable Instruments Law the assignor warrants the genuineness of the instrument and that all prior parties have capacity to contract and this was held sufficient reason to require the assignor to be made a party.[23]

23. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 8-896.