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PLEADING

ISADORE S. BERNSTEIN*

Judgment on Pleadings

The nature and effect of a motion for judgment on the pleadings was fully treated in *Walter J. Klein Co. v. Kneece.*[1] The plaintiff, a judgment creditor, brought action for the purpose of setting aside a conveyance of real estate by the debtor to his wife as having been made in violation of the Statute of Elizabeth.[2] It was alleged that the transfer was without consideration and was made with intent to hinder, delay, and defraud plaintiff of its claim. Defendant's answer denied the allegations charging intent to defraud and plead affirmatively the defenses of the six year statute of limitations and laches. In its reply filed pursuant to defendant's demand, plaintiff denied the applicability of the statute of limitations and by affidavit asserted that it had no knowledge of the transfer and conveyance until June 1960, shortly before the commencement of the action. Defendant's motion for judgment on the pleadings was overruled by the trial judge, who held that the defense of the statute of limitations could only be determined by a trial on the merits of the factual issues presented.

The opinion of the Supreme Court reversing the trial judge discusses fully the law applicable to the granting of a motion for judgment on the pleadings as enunciated in the recent case of *Wooten v. Standard Life and Cas. Ins. Co.*[3]

> A motion for judgment on the pleadings is in the nature of a general demurrer. It is appropriate, where the pleading is fatally deficient in substance, that is where the complaint fails to state a good cause of action in favor of the plaintiff and against the defendant. Being in the nature of a demurrer, a motion for judgment on the pleadings raises an issue of law only. Where the plaintiff's pleadings are attacked, the motion should be sustained only where they are so defective that the court is author-

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1. 239 S. C. 478, 123 S. E. 2d 870 (1962).
2. CODE OF LAWS OF SOUTH CAROLINA § 57-301 (1952).
3. 239 S. C. 243, 122 S. E. 2d 637 (1961).

> ized, taking all the facts to be admitted, in concluding that no cause of action is stated entitling the plaintiff to relief. However, if there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper; but it has been held that a judgment on the pleadings is allowable, not for lack of proof but for lack of an issue; hence, it is proper where the pleadings entitle the party to judgment without proof, as where they disclose all of the facts, or where the pleadings present no issue of fact or where the pleadings, under the circumstances, present an immaterial issue.

The Court concluded that there were no factual issues in dispute respecting the accrual of the action so as to start the running of the statute of limitations. The Court noted that a *nulla bona* return was made by the sheriff, and this fact, combined with plaintiff's knowledge that the defendant previously owned real estate as asserted in its affidavit, was sufficient as a matter of law to put plaintiff on notice that that the real estate had been conveyed; the cause of action having accrued at that time and being more than six years prior to its commencement, it was hence barred by the statute.

In *Wooten v. Standard Life and Cas. Life Ins. Co.*,[4] an action was brought by the beneficiary of a life insurance policy to recover the proceeds of the policy. The answer admitted the issuance of the policy and the company's refusal to pay but denied that proof of death and other required documents had been furnished. The six year statute of limitations was plead by way of affirmative defense, based upon defendant's contention that the action accrued upon death of the insured on May 30, 1953; and the answer further alleged a forfeiture under terms of the policy by reason of the failure to file proof of death within 60 days. Defendant filed a motion for judgment on the pleadings based upon its plea of the statute of limitations, and in the alternative to require plaintiff to reply to the affirmative defense. The reply pursuant to the order of the court asserted that plaintiff was under physical and mental disability and incapable of handling his affairs at the date of insured's death, which disability continued to the date of the reply. He alleged that notice of death was given to the insurer in August 1953 and that the

4. *Id.*

claim was not rejected until June 1959. Upon the order of the court directing Plaintiff to make his reply more definite and certain by alleging the cause of his disability, he stated that it was due to constant intoxication. Defendant then moved for judgment on the pleadings on the ground that voluntary intoxication would not be a sufficient disability to toll the statute of limitations. The trial judge overruled the motion and held that the cause of action did not accrue until the rejection of plaintiff's claim in June 1959.

Upon appeal by defendant, the Supreme Court concluded that there were material issues of fact raised by the pleadings which justified denial of the motion. Since the record did not contain the policy in question, the notice given by plaintiff, nor the defendant's letter rejecting the claim, the Court held that the issues respecting the running of the statute of limitations could only be determined upon trial of the action. The order of the trial judge concluding that the status of the parties became fixed upon rejection of the claim was modified so that all of the issues raised by the pleadings could be determined upon trial on the merits.

News and Courier Co. v. Delaney[5] was an action to recover the balance due on an advertising account. Defendant's answer admitted that the advertisements were published as alleged and that statements were submitted, but denied that anything was due to plaintiff "by reason of the matters hereinafter alleged." Defendant then interposed a counterclaim in which he sought to recover damages resulting from the alleged publication in plaintiff's newspaper of libelous matter concerning him. Plaintiff's demurrer to the counterclaim was sustained and the same was dismissed upon the ground that the subject thereof was an alleged tort which did not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim and was not connected with the subject of the action. After failure of the defendant to perfect his appeal from this order, plaintiff moved for judgment on the pleadings. The final appeal was from the order granting plaintiff's motion.

The Supreme Court noted that the only defenses alleged were contained in the allegations of the counterclaim and after these were stricken there was no issue left for the Court to pass upon. The judgment of the lower court was sustained

5. 238 S. C. 210, 119 S. E. 2d 742 (1961).

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upon the sustaining ground urged by plaintiff that the answer was sham, irrelevant and frivolous under the applicable statutes.[6] The Court acted in accordance with the rule permitting it to affirm on any grounds appearing in the record.[7]

Demurrer

In *Skinner and Ruddock, Inc. v. London Guar. and Acc. Co.*,[8] suit was brought against both the insurer and its agent upon a policy of insurance issued to indemnify plaintiff against loss it might incur in the course of certain construction, and upon a rider to said policy issued by the agent to include loss resulting from certain demolition operations carried on by the plaintiff. The complaint alleged that the plaintiff had incurred losses arising from these demolition operations and had adjusted the same upon the agent's authorization; and that the insurer had denied liability on the ground that the agent was not authorized to issue the endorsement covering the demolition work nor to adjust the loss. A demurrer was interposed solely by the agent, a partnership, upon the ground that the complaint failed to state a cause of action against it.

In affirming the order of the lower court overruling the demurrer, the Supreme Court followed the settled rule that in consideration of a demurrer, the factual allegations are to be considered as true and, together with relevant inferences reasonably deducible therefrom, are to be liberally construed in plaintiff's favor. The Court concluded that the complaint properly stated a cause of action against the agent based upon the factual allegations that it had acted without authority in issuing the endorsement to the policy and adjusting the loss, in application of the principle that where an agent makes a contract in the name of his principal without authority and does not bind the principal, he may be held personally liable on the contract. The Court noted that the question as to whether or not an action against the insurance company on the contract could be properly joined with an action against the agent based upon its alleged unauthorized acts was not before it for decision; neither did the defendant's demurrer

6. CODE OF LAWS OF SOUTH CAROLINA § 10-654, § 10-1505 (1952).
7. Rule 4, Sec. 8, Supreme Court Rules.
8. 239 S. C. 614, 124 S. E. 2d 178 (1962).

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raise the question of the sufficiency of the allegations to state a cause of action against the co-defendant.[9]

Hollifield v. Keller[10] involved two separate actions which were heard together on appeal, one commenced in the circuit court by the wife against the City of Columbia and certain individual defendants as alleged joint tort feasors for injuries resulting from an accident due to formation of ice on a city street; and an action by the husband brought in the county court based upon the same alleged delicts and seeking recovery for loss of consortium by reason of the wife's injuries. The City of Columbia made similar motions in both actions to strike from the complaint the allegations characterizing the acts of the defendants as "wilful and wanton;"[11] and in the wife's case, the word "painful" and to describe her injuries. An additional motion in the husband's action was made to strike the allegations relating to the wife's injuries and the claim for loss of consortium. Identical demurrers were filed in both actions on the grounds of improper joinder in that the causes of action affected the various defendants differently, both of which were overruled by the respective courts.

The Supreme Court upheld the rulings of the lower courts with respect to the demurrers. The complaint was analyzed as stating only one cause of action against all of the defendants as joint tort feasors, in that the individual defendants were charged with negligently permitting water from their premises to flow into the street and the city was charged with permitting it to remain and become frozen; all of the defendants were thus held subject to suit in the same action.

With respect to the motions to strike the language "wilful and wanton", the Supreme Court held that these should have been granted, reversing the county court in its ruling to the contrary. The Court noted that the complaint sought the recovery of actual damages only, and since punitive damages are not recoverable in an action against a municipality, the allegations stated should have been stricken as irrelevant.[12]

9. It would seem to the writer that the defendant's position would have been stronger had it demurred on the ground of misjoinder, since the two causes of action appear to be mutually exclusive and do not affect "all the parties" to the action, the latter being a pre-requisite for joinder under CODE OF LAWS OF SOUTH CAROLINA § 10-701 (1952).

10. 238 S. C. 584, 121 S. E. 2d 213 (1961).

11. The husband's action also included the word "reckless."

12. The Court seems to have departed from the rule that the prayer for relief is generally not considered as part of the complaint in determining the nature of the action. Speizman v. Guill 202 S. C. 498, 25 S. E. 2d 731;

The refusal of the circuit judge to strike the word "painful" was affirmed, the decision being that pain and suffering connected with a physical injury are proper elements of damage in an action against a municipality under Code of Laws of South Carolina § 47-70 (1952).

As to the motion to strike from the husband's complaint the alegations respecting his claim for loss of services and his right of consortium, the Court held that this should have been granted. The statute was strictly construed as being in derogation of the common law and was held not to embrace within its terms by specific language an action against a municipality for loss of consortium in favor of the husband.

The suficiency of the allegations of the complaint to state a cause of action was challenged by demurrer in *Coletrain v. Coletrain.*[13] Plaintiff sued her husband and the insurer of a taxicab to recover for injuries she sustained while alighting from the cab by reason of her husband's negligence in closing the door on her hand. The question on appeal as stated in the majority opinion was whether or not the husband became an additional insured under the omnibus clause of the liability policy so as to bind the insurer where he was using the taxicab with the admitted permission of the insured owner. The Court concluded that the demurrer was properly overruled, since the policy provisions did not confine the use of the automobile to any part thereof or restrict its use to driving or operating the same; and the use to which it was being put required the opening and closing of its doors. The Court noted that the allegations of the complaint must be accepted as true in consideration of the demurrer. The dissenting opinion, however, questioned whether or not permission to open and close the doors of a public taxicab could, as a matter of law and without being expressly alleged, be presumed to have been given by the owner to a passenger.

The order overruling defendant's demurrer to the complaint was affirmed on appeal in *Lorick v. Davis Furn. Co.*[14] The

State v. Broad River Power Co. 177 S. C. 240, 181 S. E. 41. Ordinarily, the allegations of "willfulness" characterizing the commission of a tort are sufficient to give rise to a cause of action for punitive damages. Pickett v. So. Ry. Co. 69 S. C. 445, 48 S. E. 466; Brasington v. So. Bound Ry. Co. 62 S. C. 325, 40 S. E. 665. In the view of the writer, the same result might have been reached by sustaining the demurrers for misjoinder upon the authority of Clarke v. City of Greer 231 S. C. 327, 98 S. E. 2d 751 and Piper v. Am. Fid. & Cas. Co. 157 S. C. 106, 154 S. E. 106, however, permitting plaintiff to remove the objectionable language by amendment.

13. 238 S. C. 555, 121 S. E. 2d 89 (1961).
14. 238 S. C. 229, 119 S. E. 2d 732 (1961).

complaint alleged that the plaintiff, a diamond merchant, parted with possession of a diamond ring to defendant's wife in expectation of sale, and that the return of the ring was refused until plaintiff should return certain articles of furniture purchased from defendant on which there was a balance due, thereby forcing plaintiff to return the furniture in order to recover possession of the ring. It was alleged that defendant's representations were false and were part of a fraudulent scheme to repossess the furniture. The demurrer questioned the sufficiency of the complaint to state a cause of action on the grounds that it appeared upon the face thereof that (1) defendant was entitled to immediate possession of the furniture by reason of default, (2) that plaintiff had no right to possession of the ring but only an action on account for the agreed price, and (3) that the parties had mutually agreed for the return to each of the respective items. On appeal defendant urged that the complaint was insufficient to state a cause of action in fraud and deceit. The Supreme Court held that this issue was not raised by the grounds stated and that the demurrer as drawn was properly overruled by the trial judge.

Oxman v. Sherman[15] was an action to enforce by injunction certain restrictive covenants contained in the agreement between the parties whereby the defendant was employed as an agent to solicit insurance for the firm which plaintiff represented as state manager. The complaint alleged a violation of three covenants, namely, (1) that defendant while soliciting applications for the company, and for one year thereafter, would not be connected in this state with any other insurance company engaged in a similar business, (2) that he would not induce any employees of the plaintiff to terminate such employment, and (3) that he would not induce any policy holder to terminate his insurance with the company. The demurrer by which the defendant tested the validity of the covenants was overruled by the trial judge. On appeal the Supreme Court held that the first covenant was unenforceable since the time limitation of one year after defendant ceased soliciting applications had long since expired by reason of the promotion of defendant to unit manager. The Court noted further that defendant worked only in two counties and the extension of the covenant to the entire

15. 239 S. C. 218, 122 S. E. 2d 559 (1961).

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state rendered it unenforceable. The allegations of the complaint, being accepted as true and liberally construed as is the rule on demurrer, were held to state a proper cause of action with respect to the other covenants challenged, which were adjudged to be reasonable and enforceable. The order of the trial judge overruling the demurrer was modified only with respect to the ruling as to the first covenant.

Collins v. Collins[16] was an action for divorce by the wife against her husband and for custody and support of their minor child. The questions of pleading involved were raised by two trustees of an irrevocable *inter vivos* trust in favor of the husband, who were joined as defendants. One of the trustees, a non-resident, was served by mail out of the state. He appeared specially and moved to quash the attempted service upon him as ineffectual to confer jurisdiction upon the court. The resident trustee demurred on the grounds that (1) the provisions of the trust instrument set forth in the complaint showed that the husband had no right to demand any part of the principal or interest of the trust, the right to make payments being vested in the sole discretion of the trustee, (2) the complaint failed to allege that the trust property was within the courts jurisdiction, and (3) there was a defect of parties in that the non-resident trustee was not subject to the court's jurisdiction. The case proceeded to trial on the merits with neither of the trustees participating. In the final decree the trial judge overruled the demurrer and ordered that, in default by the husband in making any of the payments directed to be made by him, the trustees should make the same out of the trust estate. The motion to quash was not expressly passed upon.

The Supreme Court held that it was error not to allow the resident trustee to answer the complaint after his demurrer was overruled since there was no suggestion that it was interposed in bad faith. It was also held to be error not to permit the non-resident defendant to appear generally or to answer to the merits after the jurisdictional objections were overruled.[17] The Court further held that the motion to quash should have been granted since the action was in personam and the non-resident trustee was not served within the jurisdiction; it was not an in rem action against the trust assets nor were they within the courts jurisdiction.

16. 239 S. C. 170, 122 S. E. 2d 1 (1961).
17. CODE OF LAWS OF SOUTH CAROLINA § 10-644, § 10-648 (1952).

As to the demurrer, the Court held that it should have been sustained on the first ground, since the complaint showed on its face that by the express provisions of the trust instrument the husband would have no right to compel payment of any part of the fund until he reached 28 years and there was no allegation that he had reached the required age.

Gordon v. Fid. and Cas. Ins. Co. of N. Y.[18] was an action in fraud and deceit based upon the medical coverage provisions of a liability policy issued by the defendant. The complaint alleged that plaintiff, a soldier, sustained an injury which required his hospitalization and treatment in the government hospital at Fort Jackson, and sought to recover the reasonable value thereof, although it was agreed that plaintiff incurred no expense for such hospitalization. The alleged fraud was that the company's agent had represented to him that the medical coverage clause would be effective if he were confined to an army hospital, even though no expense would be incurred by him as required by the terms of the policy. Fraud was further alleged in that the agent failed to disclose to him that the policy would not cover medical and hospital treatment at a government hospital, which he was under a duty to disclose. The defendant demurred on the ground that it affirmatively appeared from the complaint (1) that plaintiff had not incurred any medical expense and there was hence no liability under the terms of the policy and (2) that plaintiff had ample opportunity prior to his hospitalization to discover the coverage of the policy. The trial judge overruled the demurrer.

In reversing, the Supreme Court reiterated the rule that in passing upon a demurrer the court is limited to a consideration of the pleadings under attack, all of the factual allegations thereof properly pleaded being deemed admitted; the allegation of fraud and deceit, being merely a conclusion of the pleader, is not admitted by demurrer. The medical coverage provision of the policy was held to be free from ambiguity and to cover only medical expense actually incurred. There was no actionable fraud for the reason that plaintiff had failed to take advantage of the opportunity given him to learn the contents of the policy as to medical coverage. Furthermore, there was no allegation of a relationship of

18. 238 S. C. 438, 120 S. E. 2d 509 (1961).

trust and confidence which would have placed the duty of disclosure upon defendant's agent.

Counterclaim — Partnership Accounting

The order of the trial judge sustaining demurrers to several defenses and counterclaims interposed by the plaintiff and striking certain allegations from the answer was reversed on appeal in *Few v. Few*,[19] an action for an accounting between partners. The complaint, seeking actual and punitive damages, alleged that defendant had breached a contract with plaintiff, under the terms of which they were to engage in raising and selling cattle as partners, and had failed to account to the plaintiff for his share of the profits and for other sums due. The answer contained several defenses and counterclaims, the first of which alleged that defendant had spent thousands of dollars for improvements, fertilizer, ect., for which he was entitled to reimbursement; by his second defense, defendant counterclaimed for his share of the money spent for improvements on a farm which both parties owned as tenants in common; by the third defense and counterclaim, defendant sought an accounting for items of farm equipment in plaintiff's possession; the fourth defense and counterclaim sought an accounting for sales of cattle by the plaintiff; and the fifth counterclaim sought an accounting for crops planted upon jointly owned lands and for horses and cows furnished by defendant. The plaintiff demurred to the second defense and counterclaim on the ground that an action to recover for improvements could only be had in a partition action, and to the third and fifth counterclaims on the ground that there was no allegation of a demand for an accounting and a refusal, and that defendant's remedy was by claim and delivery. Plaintiff also moved to strike from the first defense the allegation as to the expenditures for improvements and fertilizers on the ground that the cost thereof could only be recovered in a suit for partition.

The Supreme Court characterized the action as one for breach of contract rather than in tort and held that the use of the words "fraudulent", "flagrant" and "wilful" would not change the essence of the action. Since the counterclaim for improvements arose out of the contract or transaction set forth as the foundation of the plaintiff's claim,

19. 239 S. C. 321, 122 S. E. 2d 829 (1961).

it was held to be properly interposed and defendant would not be limited to an action in partition. As to the third and fifth counterclaims, it was held that no demand for an accounting would be required since a fiduciary relationship existed between the partners; the defendant could not be restricted to an action in claim and delivery, such action not being available to partners where neither party owns the property separately; and the defendant could properly seek an accounting for the crops grown upon the lands jointly owned. The order striking from the first defense the allegations as to improvements made by the defendant was likewise reversed.

Counterclaim — Wrongful Death Action

No question of pleading was involved directly in *Ellison v. Simmons.*[20] The Supreme Court, however, had occasion to comment upon the rule respecting the right of a defendant to file a counterclaim for personal injuries against the executors, in an action for wrongful death brought on behalf of the statutory beneficiaries of the deceased. The defendant in the action did not file a counterclaim but attempted to offer evidence that he had entered a separate suit against the estate for personal injuries and for property damages, which upon objection was excluded. The trial judge refused to charge defendant's request that in a wrongful death action, he was not permitted by law to interpose a counterclaim but was required to bring a separate action for damages claimed. The Supreme Court reiterated the rule that defendant had no cause of action for damages to his person or property against the executors as representatives of the benficiaries in an action for wrongful death, and could not assert such action by way of counterclaim so as to diminish plaintiff's recovery; hence, evidence of the pendency of defendant's independent action was not admissible. It was likewise held proper for the trial judge to refuse to charge the jury that defendant could not interpose a counterclaim in the action but must proceed by a separate action, since such charge was not responsive to any issue raised by the pleadings.

Amendment to Answer

The question presented on appeal in *Alamance Industries v. Chesterfield Hosiery Mills*[21] was whether the trial judge erred

20. 238 S. C. 364, 120 S. E. 2d 209 (1961).
21. 239 S. C. 287, 122 S. E. 2d 648 (1961).

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in refusing to allow defendant to amend its answer by pleading a separate defense and counterclaim for fraud and deceit. The action was commenced in November 1959, in which the plaintiff sought to recover the amount allegedly due under the terms of a written patent license agreement, and the original answer, filed February 1960, denied the indebtedness due. Approximately eight months later, and within 5 days of the commencement of the term of court at which the case was to be tried, defendant served notice that it would move to amend its answer. Defendant simultaneously served the proposed amendment, which added a counterclaim for damages based upon alleged fraudulent representations made to a former president of the defendant corporation, who had sold his stock to defendant's president prior to the commencement of the action. The Supreme Court found no abuse of discretion in the refusal of the trial judge to permit the amendment since it appeared that the defendant could have discovered the facts long before the amendment was proposed. The Court noted that the power to permit an amendment under Code of Laws of South Carolina § 10-692 (1952), although not unlimited, is nevertheless broad and its exercise by the lower court will rarely be disturbed; it does not follow, however, that every proposed amendment before trial must be allowed.

Making More Definite and Certain

In *Johnston v. Williams*[22] an action for damages and for a mandatory injunction was brought against defendant for obstructing the flow of water across his lands, causing plaintiff's lands to be flooded. The question of pleading raised on appeal was defendant's contention that the issue as to whether or not the drainway was a natural water course was improperly considered, since the complaint did not so allege, and only the obstruction of surface waters was involved. The Court overruled this contention, since defendant had made no motion or objection to the lack of such allegations in the complaint and testimony was introduced without objection, to sustain plaintiff's position. The Court noted that if the defendant desired to have the complaint state the character of the waterway which was obstructed, he should have moved to make the complaint more definite and certain in this par-

22. 238 S. C. 623, 121 S. E. 2d 223 (1961).

ticular. Since he had failed to do so and the testimony was introduced without objection, this became an issue in the case.

Motion to Strike

The question of pleading raised in *Margolis v. Telech*[23] was the propriety of the ruling of the trial judge in striking certain allegations from the defendant's answer. The complaint stated an action for malicious prosecution resulting from the prosecution of the plaintiff by the defendant on a charge of grand larcency by reason of the removal of a certain ring from defendant's home. Upon call of the case for trial, the trial judge, upon plaintiff's motion, ordered stricken from defendant's answer as irrelevant and immaterial allegations relative to the proceedings before the grand jury in its deliberations on the indictment against the plaintiff. The defendant sought to show that he had charged the plaintiff in the warrant sworn out before the magistrate with the offense of grand larcency only, and that the indictment as presented to the grand jury also charged her with the more serious crime of house breaking. He alleged that he consented to the return of the indictment, which included both offenses, as a "no bill" at the suggestion of members of the grand jury, and he did not wish to prosecute the plaintiff, his wife's sister, for house breaking out of respect to his wife's memory.

The Supreme Court noted that an inquiry as to deliberations of the grand jury to determine why a "no bill" was returned is prohibited by the rule of secrecy respecting the deliberations of that body. Since the testimony to support the foregoing allegations as to what took place in the grand jury room would be inadmissible, the allegations were held to be properly stricken from the answer.

Lancaster v. Sweat[24] points up the distinction between a motion to strike a defense as irrelevant and redundant, and a motion to strike a defense as sham. The action was brought to recover for damages to plaintiff's dwelling caused by the negligence of defendant in the operation of an automobile. Defendant's second defense alleged that plaintiff was not the real party in interest for the reason that he had been fully paid for the loss by an insurance company. Plaintiff's motion

23. 239 S. C. 232, 122 S. E. 2d 417 (1961).
24. 239 S. C. 120, 121 S. E. 2d 444 (1961).

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to strike this defense was treated as one for irrelevancy and redundancy, his principal ground being that the damages alleged were not the same as those covered in the loan receipt from the insurance company. At the hearing of the motion the loan receipt was exhibited and considered by the court without objection and the language was ordered stricken. On appeal this procedure was regarded as erroneous. The Court held that the motion, being one for irrelevancy, is in the nature of a demurrer, the question being whether or not the matter sought to be stricken constitutes a defense to the cause of action alleged; in the determination of such motion, only the pleadings are considered. By way of distinction, the Court noted that a sham answer is good in form but false in fact and not pleaded in good faith; a motion to strike as sham presents a question of fact to be determined by the court upon affidavits or in such manner as the court may direct. Considered in light of the pleadings only, the allegations sought to be stricken were held to be neither irrelevant nor redundant.

Reply to New Matter

The appeal in *Plummer v. Ind. Life and Acc. Ins. Co.*[25] was from an order refusing defendant's motion pursuant to Code of Laws of South Carolina § 10-661 (1952) to require plaintiff to reply to a plea of accord and satisfaction set up in the answer. Suit was brought by the widow as the beneficiary of an insurance policy on the life of her husband for an alleged fraudulent breach thereof. The pertinent allegations of the complaint were that the insured died as the result of an accident, that the company paid the natural death benefit but refused to pay the additional accidental death benefit, and that the company's agent fraudulently induced her to sign an instrument purporting to be a general release of liability under all policies issued by the company, including the policy in question. It was alleged that the company's agent, knowing that the plaintiff was an illiterate Negro with no knowledge of insurance, failed to read or explain the contents of the release to her and suppressed its nature and effect.

Defendant by answer denied that insured died as a result of an accident and alleged that the company paid to plaintiff the natural death benefits under five different policies, and

25. 238 S. C. 313, 120 S. E. 2d 108 (1961).

that the release executed by plaintiff included the five specific policies as well as all others issued by defendant on the life of the insured. The defendant further alleged that the settlement was fair and reasonable, and was explained to the beneficiary; and pleaded the release as a bar unless plaintiff proved fraud in its execution and returned the consideration.

The Supreme Court noted that the statute under which defendant's motion was filed leaves the granting of the same to the discretion of the court. Ordinarily the plaintiff is required to reply to an answer where the defendant sets up a release so that the defendant can determine the nature of the attack plaintiff will make upon the release. Since the plaintiff had referred to the release in her complaint and alleged that it was fraudulently procured, the court held that the defendant had notice of plaintiff's attack thereupon and there was no abuse of discretion in the refusal to require plaintiff to reply.