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# Pleading

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## *Recoupment*

*The Mullins Hospital v. Squires*[1] involved a novel application of the common law defense of recoupment, as distinguished from set-off or counterclaim, in an action brought by a governmental agency immune from liability for tort. The hospital sued the administrator to recover for services rendered decedent during her confinement for a considerable period of time. The answer contained two defenses: (1) a denial that defendant had sufficient knowledge or information to form a belief as to plaintiff's corporate capacity and a denial of the obligation, and (2) an affirmative defense charging that decedent was injured soon after her admission to the hospital and that plaintiff neglected to provide care for her injury, thereby prolonging her hospitalization. Plaintiff demurred to the entire answer and in the alternative to the affirmative defense upon the ground that neither stated facts sufficient to constitute a defense for the reason that there was in neither a sufficient denial of the allegation of plaintiff's governmental status. Defendant thereupon moved for leave to file an amended answer and counterclaim so as to plead an action in tort for decedent's injuries. The trial judge overruled the demurrer and granted the motion.

Upon appeal the Supreme Court held that the demurrer was properly overruled as to the first defense since the facts alleged were sufficient to put in issue the question of defendant's obligation to plaintiff for services rendered. As to the allowance of the proposed counterclaim the Supreme Court held that this was error in view of the well settled common law exemption accorded governmental agencies in tort for the negligence of their agents, which in this State is applicable without regard to whether the services are governmental or proprietary.

The Court considered, however, the novel question of whether or not the negligence of a governmental agency may

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1. 233 S. C. 186, 104 S. E. 2d 161 (1958).

be pleaded by way of affirmative defense. The facts alleged were construed as designed to diminish plaintiff's claim by reason of its negligent failure to perform its contractual obligations. This was recognized as the common law defense of recoupment which, as distinguished from a counterclaim, may result only in reduction of plaintiff's claim and not in an affirmative money judgment; and unlike set-off, must grow out of the same transaction which gave rise to plaintiff's cause of action. The Court concluded that the rule of governmental immunity could not be invoked to bar this plea since the rule is essentially defensive and was not intended to eliminate the defendant's right to diminish the claim sued upon.

*Election of Remedies*

In *White v. Livingston*[2] the doctrine of election of remedies was successfully invoked to bar the plaintiff's claim. Action was brought to have the deed from plaintiff to defendant declared to be an equitable mortgage and for an accounting of rents and profits. Defendant by answer plead as a bar the judgment in a prior action between the parties, wherein plaintiff had sought unsuccessfully to have the same deed set aside upon the theory that its execution had been procured through fraudulent representations that the instrument was a mortgage. Plaintiff's reply filed pursuant to order of the court admitted the existence of the prior judgment and incorporated the same.

Defendant moved for judgment on the pleadings, contending that plaintiff was estopped by reason of the former judgment from relitigating the issue of the validity of the deed. The trial judge construed the motion to be in the nature of a general demurrer, and, applying the doctrine of election of remedies, granted judgment for the defendant. His order, affirmed and adopted as the judgment of the Supreme Court, proceeded on the theory that one may not allege a certain state of facts and invoke a certain remedy and later bring an action alleging an entirely different and repugnant state of facts, invoking a different remedy. This was distinguished from the rule permitting the choice of a second remedy appropriate to the same state of facts where the original remedy is improper. The plaintiff, having claimed in the former action that he was deceived into signing the deed, could not now

2. 234 S. C. 74, 106 S. E. 2d 892 (1959).

proceed on the inconsistent theory of a violation by the defendant of an agreement to reconvey, which would presume that the deed was knowingly executed. The invocation of the first remedy based upon a certain state of facts was an election which barred the second remedy on an entirely different set of facts.

*Pleading Waiver*

The question of pleading presented on appeal in *Brown v. State Farm Mutual Automobile Liability Insurance Company*[3] was whether or not evidence was properly admitted tending to show waiver by the insurance company of the policy requirements respecting the giving of notice to the insurer of the happening of an accident, in the absence of a plea of waiver by plaintiff. Suit was brought to recover the amount of a judgment obtained against the insured under a liability policy issued by the defendant, the defense being that the insured had failed to comply with policy requirements with respect to the giving of notice and had failed to cooperate. The trial court over objection admitted evidence tending to show waiver of the policy conditions respecting written notice of the accident and evidence of oral notice. The Supreme Court held that the evidence was properly admitted under the allegation that the insured "fully complied with and performed all of the terms and conditions" in the policy. This was held to be in accordance with the requirements of the CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-673, which provides that in pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all conditions on his part. The Court noted that the answer set up affirmatively the failure to give written notice and the defendant could have required plaintiff to reply thereto had it so desired under pertinent sections of the Code.[4] Since plaintiff could not reply as a matter of right under applicable provisions of the Code, the new matter would be deemed controverted.[5]

3. 233 S. C. 376, 104 S. E. 2d 673 (1958).
4. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-661.
5. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-608.

*Judgment on the Pleadings*

The appeal in *United States Casualty Company v. Hiers, et al.*[6] was from the order of the trial judge granting judgment on the pleadings in favor of plaintiff. The complaint alleged that defendants, as insurance agents, had failed through their negligence to refund to the insured the premium paid upon a certain policy issued by plaintiff and thereby effect the cancellation of said policy, as a result of which plaintiff was required to pay a judgment obtained against it under the terms of the policy, including costs and expenses. Defendants in their answer denied negligence resulting in loss, alleged that the loss sustained was due to plaintiff's wrongful cancellation and further plead as a defense the sole negligence and contributory negligence of plaintiff in wrongfully cancelling the policy. The order of the trial judge was affirmed on appeal under the authority of the pertinent Code sections permitting the striking out of answers and defenses that are sham and irrelevant[7] and frivolous.[8] The Court's review of the facts indicated that all of the relevant facts, including the agents' collection of the premium and failure to refund the same upon request, had been established in the former action and no issues of fact were raised by the answer.

*Payment*

*Crane Company v. Continental Casualty Company*[9] was an action against the surety on a contractor's bond, seeking payment for materials and equipment allegedly furnished to a subcontractor and used in the erection of the project covered in the contract. From an adverse judgment defendant appealed, alleging error in the refusal of the trial judge to submit to the jury the issue of payment. The allegation in the complaint of non-payment was denied by a general denial in the answer. The Supreme Court held that the question of whether or not plaintiff's allegation of non-payment was put in issue by defendant's denial need not be decided, since the plaintiff's testimony of non-payment was uncontradicted and no evidence of payment was offered by defendant.

6. 233 S. C. 333, 104 S. E. 2d 561 (1958).
7. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-654.
8. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1505.
9. 234 S. C. 44, 106 S. E. 2d 674 (1959).

*Motion to Strike*

*Blackmon v. United Insurance Company*[10] involved an appeal from the order of the trial judge refusing to strike allegations of the complaint for the recovery of punitive damages and construing the complaint as setting forth a cause of action for fraudulent breach of contract accompanied by a fraudulent act. The pertinent allegations were that defendant's agents had represented to plaintiff that if she would surrender the policy, receipt books and other documents, she would be paid the face amount of the policy as beneficiary; that she did so, relying upon said representations, and defendant fraudulently retained them and refused to pay the proceeds of the policy. The Supreme Court held that the trial judge correctly construed the action as one for fraudulent breach of contract, accompanied by a fraudulent act and that the retention of the policy and receipt book obtained from the beneficiary by fraudulent representations was a fraudulent act within the meaning of the rule. The allegations appropriate to recovery of punitive damages were properly stated and the trial judge was correct in refusing the motion to strike. The Court noted that refusal of such a motion is not appealable under settled authority.[11]

*Set-Off and Counterclaim*

In *Brock v. Mason, et al.*[12] the Supreme Court affirmed the order of the trial judge sustaining plaintiff's demurrer to the defense of set-off as alleged in the answer. It appeared that plaintiff was a subcontractor on a school project in Cherokee County and brought action against the general contractors and their surety to recover for work alleged to have been done. The surety pleaded by way of defense and set-off a claim arising out of the construction of a bank building in Spartanburg in which the principals were the same. The Court found that at the time of the commencement of the suit, no action had accrued to the surety on the former project, since the ultimate amount of its liability had not been established. The attempted set-off, not being such that the surety

10. 233 S. C. 424, 105 S. E. 2d 521 (1958).
11. Sparks v. Dew, 230 S. C. 507, 96 S. E. 2d 488 (1957); Winchester v. United Insurance Co., 231 S. C. 288, 98 S. E. 2d 530 (1957).
12. 233 S. C. 40, 103 S. E. 2d 423 (1958).

could maintain a separate action therefor, was held properly subject to demurrer.

*Illegitimacy*

*Sanders v. Sanders*[13] involved an appeal by a mother from the order of the circuit judge awarding the custody of minor children equally to both parents, after adjudging the marriage to be null and void by reason of the invalidity of a divorce decree dissolving the wife's former marriage. The mother contended that the trial court should have adjudged the children born of the later marriage to be illegitimate, thereby barring the husband from any right to their custody. This contention was disposed of adversely to appellant by the Court's conclusion that the issue of legitimacy was not raised under the pleadings since illegitimacy was not alleged in either the complaint or the answer and the allegation of legitimacy by virtue of the CODE OF LAWS OF SOUTH CAROLINA, 1952 § 20-6.1 was a mere conclusion of the pleader; and that the determination of the question was not essential to the trial court's disposition of the issue of custody. The Court noted that an adjudication of legitimacy vel non would have been improper because the pleadings raised no issue thereabout; and unnecessary, since the welfare of the children was the primary concern of the court.

*Demurrer*

*Timmons v. The News and Press, Inc.*[14] was an action for libel wherein the trial court sustained a demurrer to the complaint on the ground that the newspaper article complained of was not libelous per se nor was it so by innuendo. In reversing, the Supreme Court applied the established rule that the allegations of the complaint must be taken as true for the purpose of consideration of a demurrer on the ground that it does not state a cause of action. The Court recognized that words not actionable by their plain meaning cannot be made so by innuendo, but where words used are capable of different meanings the jury must ascertain the sense in which they were published and decide which meaning was conveyed to the readers. The facts alleged in the complaint were held to state a proper cause of action within the purview of the rule.

13. 232 S. C. 625, 103 S. E. 2d 281 (1958).
14. 232 S. C. 639, 103 S. E. 2d 277 (1958).

In *Thomason v. Hellams*[15] action was brought to construe a will, under the terms of which the testator devised all of his real estate to his wife for her life but empowered her to sell the same if it became necessary for her support and comfort; and provided that the remainder at her death would go to his nephew. In his complaint the nephew sought to impress the proceeds with a trust in his favor and asked that he be allowed the opportunity to purchase the property at a price for which she agreed to sell to others. The trial court's sustention of a demurrer to the complaint was affirmed on appeal, the Court noting that the facts alleged in the complaint must be taken as true on demurrer. The Court concluded that the plaintiff's prayer that the proceeds of sale be kept apart, the remainder to become his property, was premature, there having been no sale and no proceeds; and his prayer to enjoin the sale if he were not given opportunity to purchase was unsupported by authority and contrary to the terms of the will, which attached no such condition to the wife's power of sale.

*Stewart v. Martin, et al.*[16] involved a novel action growing out of an automobile collision. The complaint alleged that the defendants wrongfully and maliciously removed and secreted the damage feasant vehicle, as a result of which the Sheriff was unable to attach the same, with resulting damages to plaintiff. Demurrer was interposed on the ground that the complaint failed to state a cause of action since it did not appear that there had been any adjudication that the alleged damages to the plaintiff's automobile were caused by the negligent operation of the hidden vehicle. The circuit judge construed the complaint as an action for conversion and sustained the demurrer on the theory that such an action could not be maintained until the plaintiff's lien was judicially determined. In reversing, the Supreme Court reiterated the rule that in passing on a demurrer, the allegations of the complaint must be construed as true. The Court held that the action could be properly maintained on the theory upon which it was brought, noting that this form of action was entirely distinct from an action for damages against the offending automobile and was not dependent upon obtaining a prior judgment.

15. 233 S. C. 11, 103 S. E. 2d 324 (1958).
16. 232 S. C. 483, 102 S. E. 2d 886 (1958).

In *Alderman v. Biven, et al.*[17] action was brought to rescind a release signed by plaintiff for damages to his truck on the theory that it had been executed under a mutual mistake of fact, and to recover additional damages alleged to have been sustained. The complaint stated that plaintiff had accepted the sum of Thirty Five ($35.00) Dollars in settlement of damages to the engine of his truck which were due to defendants' failure to provide anti-freeze, and had executed a release of all claims based upon the representation of a garage man that this was the extent of the damages. This it was alleged had been done under a "mutual mistake" of fact. Defendants' demurrer was sustained by the trial judge on the ground that the allegations of mutual mistake of fact were merely conclusions of fact not admitted by demurrer and that the facts alleged showed that the mistake was unilateral on the part of the plaintiff. In affirming, the Supreme Court reiterated the established rule that a demurrer admits the facts alleged in the complaint but does not admit the inferences drawn by plaintiff from such facts; and that the allegation of a "mutual mistake" of fact constituted only a conclusion not admitted by demurrer. The Court concluded from the facts alleged that the mistake was unilateral only since it resulted from the failure of the plaintiff's own agent to discover the full extent of the damages to the truck. In the absence of any charge that the release was obtained by fraud, deceit, misrepresentation or imposition in any form, the facts alleged were held insufficient to state a cause of action for rescission.

In *Turbeville v. Gordon, et al.*[18] the plaintiff sought to hold the defendant as well as "all persons unknown claiming an interest in the premises" personally liable for the balance due on the construction of a house on land owned by the defendant. The pertinent facts alleged were that the house had been constructed at the instance of defendant's daughter and son-in-law and that she had agreed to execute a note and mortgage to secure the payment of the balance due, which was, however, to be paid by her daughter and son-in-law, and that they had subsequently refused to do so. The daughter vacated the premises after her husband's death and the property was thereafter rented by defendant. The trial court sustained the demurrer interposed on behalf of the unknown heirs but held

17. 233 S. C. 545, 106 S. E. 2d 385 (1958).
18. 233 S. C. 75, 103 S. E. 2d 521 (1958).

that the complaint stated a good cause of action against the mother. In seeking to reverse, she argued that she had made no contract with plaintiff nor authorized construction of the house and that the complaint clearly showed that the house was constructed at the instance of the daughter and son-in-law, who would pay for the same. The Supreme Court applied the well settled rule that a complaint is not demurrable if it contains allegations entitling the plaintiff to any form of relief, and that such allegations, together with relevant inferences reasonably deducible therefrom, are to be liberally construed in plaintiff's favor. Although recognizing that the complaint was vague and indefinite, yet when liberally construed the Court held that it stated a good cause of action against defendant. The fact that plaintiff had insisted that ownership be vested in defendant, that she had agreed to execute a note and mortgage, and other surrounding circumstances were held to afford a basis for estoppel to deny liability and to charge her with a promise to pay.