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Pleading

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Demurrer

Outlaw v. Calhoun Life Ins. Co.[1] was an action in fraud and deceit in inducing plaintiff to execute a final release discharging the defendant from liability under its policy of insurance of which the plaintiff was the beneficiary. The complaint alleged that the release was procured by giving the plaintiff the "impression" that she was signing a receipt for the full amount due for her son's accidental death, and that she realized for the first time when she saw the draft that the amount was insufficient to cover the full benefits to which she was entitled. The defendant demurred for insufficiency to state a cause of action on the ground that the release was valid and binding upon the plaintiff since she was able to read and accepted the benefits thereof. The trial judge overruled the demurrer.

In affirming the order of the trial judge, the Supreme Court reiterated the established 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, as well as such inferences of law or conclusions of fact as may properly arise from them. The Court held that it was inferable from the allegations of the complaint that defendant's agents represented to plaintiff that she was signing a release for the correct amount due her, and the fact that a lesser amount was being paid could only be discovered from the draft and that it was reasonable to conclude from the facts alleged that the plaintiff could not ascertain from the release that she was to receive a lesser amount. Under the circumstances, the rule that one is bound by the terms of a written instrument signed by him would not bar plaintiff's cause of action.[2]

Warr v. Carolina Power & Light Co.[3] was an action in fraud and deceit arising out of the purchase of plaintiff's land by

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1. 236 S. C. 272, 113 S. E. 2d 817 (1960).
2. Jones v. Cooper, 234 S. C. 477, 109 S. E. 2d 5 (1959).
3. 237 S. C. 121, 115 S. E. 2d 799 (1960).

the defendant. The complaint alleged that defendant's agents represented that the land would be used for planting trees whereas in fact the power company intended to create a lake in connection with the erection of a steam plant. It was further alleged that the agents represented that the company was paying only sixty dollars an acre whereas in fact it had purchased adjoining property for considerably more. The defendant's demurrer on the ground that the complaint failed to state a cause of action was overruled by the trial judge. The Supreme Court followed the settled rule that in passing on a demurrer the court is limited to a consideration of the pleadings under attack, all of the factual allegations properly pleaded being deemed admitted. The court noted that a demurrer does not admit the allegation of fraud and deceit because this constitutes a mere conclusion of the pleader; and that a demurrer does not admit the inferences drawn by the plaintiff from the facts alleged, it being the court's duty to determine whether or not such inferences are justified. The conclusion that an important element in stating a cause of action in fraud and deceit was lacking in factual allegations in the complaint, to wit, that plaintiff suffered damage as a result of the alleged misrepresentations, necessitated a reversal of the order of the trial judge.

The appeal in *Porter v. News & Courier*[4] was from the order of the trial judge overruling defendant's demurrer to the complaint in an action for libel. The pertinent allegations were that the defendant published defamatory matter in its newspaper concerning plaintiff's trial and acquittal in the general sessions court on charges of obtaining money to which he was not entitled because of an error of a grocery clerk in cashing plaintiff's check. The defendant contended that the complaint failed to state a cause of action because (1) the publication was privileged and malice was not alleged and (2) the article was not libelous per se and no intrinsic facts were alleged that plaintiff had been degraded or had suffered loss. The Supreme Court held that the demurrer was properly overruled for the reasons that privilege is a matter of defense ordinarily not available on demurrer and the publication could be understood to charge plaintiff with the crime of larceny, or breach of trust with fraudulent intent, either of which is libelous per se.

4. 237 S. C. 102, 115 S. E. 2d 656 (1960).

Costas v. Florence Printing Co.[5] was an action for libel based upon the publication of an article in defendant's newspaper giving an account of a fight between persons at the plaintiff's place of business. The complaint alleged that the article was defamatory in that it reflected upon the plaintiff in charging him with operating a place of business where disorderly conduct was tolerated. The defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action for the reason that the article was not libelous per se and no special damages were alleged was overruled by the trial judge. In reversing, the Supreme Court followed 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 that are properly pleaded being deemed admitted for that purpose. The Court concluded that the publication was not libelous per se and there were no allegations of special damages or intrinsic circumstances which would render the words libelous, hence the demurrer should have been sustained. During the pendency of the appeal in the action, the plaintiff moved to amend his complaint so as to allege special damages and this motion was granted by the trial judge. The Supreme Court held the order to be in error since the appeal acted as a stay to further proceedings in the cause under the appropriate statute.[6]

In *Calvert Fire Ins. Co. v. James,*[7] the question as to whether or not the rights of a subrogee were extinguished by a settlement between the third party and the insured was raised by demurrer to the complaint for insufficiency and was resolved, in accordance with the rule, from the facts properly pleaded and appearing upon the fact of the complaint. The action was brought against the tort-feasor and the complaint alleged that a settlement was entered into with the insured after defendant had been given notice of plaintiff's subrogation rights, and sought to recover the amount which plaintiff had paid to the insured under its collision policy. In overruling the order of the lower court which had sustained the demurrer, the Supreme Court reviewed the authorities and concluded from them that the plaintiff's subrogation rights were not extinguished under the circumstances alleged in the complaint.

5. 237 S. C. 655, 118 S. E. 2d 696 (1961).
6. CODE OF LAWS OF SOUTH CAROLINA § 7-422 (1952).
7. 236 S. C. 431, 114 S. E. 2d 832 (1960).

The appeal in *Plenge v. Russell*[8] was from an order of the circuit court sustaining a demurrer to the complaints for insufficiency. The actions, consolidated by agreement, were brought under the Declaratory Judgments Act seeking an adjudication as to the rights of the plaintiff physicians respecting the practice of radiology in the Spartanburg General Hospital. The demurrers for insufficiency to state a cause of action were interposed on numerous grounds, one of which questioned the existence of a justiciable controversy, cognizable under the Declaratory Judgments Act. The Supreme Court reversed, holding that the test of the sufficiency of the complaint in an action for declaratory relief is whether or not it shows that the plaintiff is entitled to a declaration of rights and not whether the plaintiff's theory is correct. The allegations were held sufficient to state a justiciable controversy requiring a hearing on the merits, since they involved, among other things, consideration of certain legislative acts and the validity of regulations of the hospital.

In *Watson v. Watson*,[9] a demurrer was interposed to a counterclaim by one of the defendants in a partition action and a motion to strike the counterclaim, both of which were overruled by the presiding judge. The action was brought by certain of the heirs of the decedent to partition lands of the estate and the defendants were the administratrix and the sole surviving heirs, distributees, and next of kin of the deceased. The defendant filing the counterclaim sought to recover for services rendered the deceased during her life time and the demurrer challenged her right to do so upon numerous grounds. In reversing the lower court, the Supreme Court concluded that the counterclaim did not fall within the provisions of the statute permitting the filing of a counterclaim, and could not be filed by one of the heirs in a partition action to recover for services rendered the deceased.[10]

Pleading Agency

The appeal in *Hunter v. Hyder*[11] presented the question as to whether or not it is necessary in pleading a cause of action against a master or principal based upon a tort committed by a servant or agent to allege the fact of agency, or whether

8. 236 S. C. 473, 115 S. E. 2d 177 (1960).
9. 237 S. C. 274, 117 S. E. 2d 145 (1960).
10. CODE OF LAWS OF SOUTH CAROLINA § 10-703 (1952).
11. 236 S. C. 378, 114 S. E. 2d 493 (1960).

an allegation that the wrong was done by the principal or master is sufficient. The action was based upon alleged trespasses committed by the defendant in entering upon plaintiff's lands, cutting fences, and removing timber, but there was no allegation in the complaint as to agency. The answer contained a denial that defendant "or any of his agents or servants" committed the delicts charged, and alleged further that the trespasses, if any, were done by an independent contractor. The trial judge admitted evidence by plaintiff that the trespasses were committed by agents and servants of the defendant and submitted the question of agency to the jury, and this was charged as error. The Supreme Court noted that pleadings should be considered as a whole and should be liberally construed with a view to doing substantial justice between the parties to the action, under the appropriate statute.[12] Since the defendant expressly denied agency in his answer and affirmatively alleged that the persons committing the trespasses were not his agents and servants, the Court held that the evidence as to agency was properly received and the plaintiff had the right to attack in advance any matter in defense set up in the answer. The Court found it unnecessary to determine whether the complaint should have alleged that the acts were committed by the defendant's agents and servants, since the pleadings as a whole raised the issue of agency.

Judgment on the Pleadings

The appeal in *Hamilton v. Patterson*[13] involved the propriety of the order of the trial judge striking the answer as irrelevant, sham and frivolous, and granting judgment to the plaintiff on his complaint. The action was based upon a judgment which the plaintiff had obtained against the defendant in the State of Florida and sought to recover the amount of the judgment obtained in that action. In the answer defendant attempted to raise defenses relating to the merits of the action and questioned plaintiff's right to recover the amounts claimed to be due, and these allegations were stricken upon plaintiff's motion. The Supreme Court affirmed, applying the rule that an answer may properly be stricken when it appears that the pleading is manifestly sham, irrelevant or false, and is filed merely for the purpose of delay or without

12. CODE OF LAWS OF SOUTH CAROLINA § 10-602 (1952).
13. 236 S. C. 487, 115 S. E. 2d 68 (1960).

good faith. Since there were no facts alleged in the answer rebutting the presumption of regularity of the foreign judgment, the Court was bound to give full faith and credit to it and the defendant would not be permitted to relitigate the merits of the controversy in this action.

Motion to Strike

Tate v. Oxner[14] involved an appeal from an order overruling a motion to strike certain allegations from the complaint on the grounds that the same were irrelevant, immaterial and prejudicial. The Supreme Court reiterated the established rule that such an order is not appealable, recognizing only two exceptions: (1) where the motion to strike is in the nature of a demurrer, and (2) where there is otherwise an appealable issue before the court. Since the facts did not bring the appeal within either of the two exceptions, the order was deemed to be nonappealable. The Court noted, however, that such refusal to strike would not be conclusive upon trial on the merits and would not prejudice defendant in his efforts to exclude testimony in support of the allegations.

In *Kinard v. United Ins. Co.*[15] an action was brought by the beneficiary of an insurance policy to recover damages for the alleged wrongful cancellation thereof by the defendant. Upon motion to require the plaintiff to elect between inconsistent causes of action, plaintiff stated that the action was based upon fraudulent cancellation of the policy constituting a breach of contract, accompanied by a fraudulent act. Defendant then moved to strike from the complaint allegations pertaining to fraud and deceit and allegations pertaining to benefits under the contract, which motions were denied, and the case proceeded to trial. Upon appeal from this ruling, the Court held that the allegations complained of were relevant on the issue of fraudulent acts alleged to have accompanied the breach of the contract and affirmed the lower court on this point. Similarly, the Court ruled that there was no error in refusing to strike the allegations pertaining to benefits under the contract, since the permanent and total disability benefits were relevant to defendant's claim of lapse and the death benefit was pertinent on the measure of damages. The Court, however, reversed on other grounds, finding error in

14. 236 S. C. 313, 114 S. E. 2d 225 (1960).
15. 237 S. C. 266, 116 S. E. 2d 906 (1960).

the failure of the trial judge to charge as to the burden of proof and the form of the verdict after defendant had made a timely request for such instructions.

Making More Definite and Certain

The questions of pleading involved in *Seegars v. WIS-TV*[16] concerned the propriety of the order of the trial judge requiring plaintiff to make his complaint more definite and certain and striking certain language of the complaint. The action was based upon an alleged libel committed by the defendant in reporting in a news broadcast under the facilities of its television station an account of the arrest of the plaintiff and others in connection with the beating of a school teacher in Camden. The trial court granted defendant's motions to require the plaintiff to make his complaint more definite and certain by stating with particularity the words, statements or pictures which were alleged to be false. The Supreme Court recognized that the circuit judge has a wide discretion in passing on a motion of this nature under the applicable code section,[17] and found no abuse of discretion in requiring the complaint to be made more definite and certain in the particulars noted.

The defendant further moved to strike the language in the complaint that the defendant is a "large, powerful and wealthy" corporation. The trial court struck the words "large" and "powerful" but refused to strike "wealthy," and this ruling was upheld on appeal, since the plaintiff could properly show the financial status of the defendant and its ability to pay on the issue of punitive damages.

Vacating Default Judgment

The appeal in *Davis v. Davis*[18] was from an order vacating a default judgment in an action for divorce brought by the husband, and permitting the wife to amend her answer or otherwise plead to the complaint. It appeared that the wife had signed an answer in the office of plaintiff's attorney admitting the allegations of the complaint and joined in the prayer for divorce. The answer was not filed and the decree was obtained as a default decree upon the affidavit of plain-

16. 236 S. C. 355, 114 S. E. 2d 502 (1960).
17. CODE OF LAWS OF SOUTH CAROLINA § 10-606 (1952).
18. 236 S. C. 277, 113 S. E. 2d 819 (1960).

tiff's attorney that defendant was in default. The lower court granted the petition to vacate the decree upon the ground that there was a lack of notice to defendant, who had answered, of the reference and application for the decree. The Supreme Court affirmed and overruled plaintiff's contention that the answer was a nullity since it was not verified, noting that it was prepared by plaintiff's counsel and accepted and retained by him, and this constituted a waiver of the absence of verification.