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Pleading

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PLEADING

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DEMURRER

The sufficiency of the complaint to state a cause of action was tested by demurrer in *Player* v. *Player*.[1] The complaint alleged a family agreement under which the mother of the plaintiff and defendant released her life estate in certain lands devised to her under her husband's will and put her children, as remaindermen, in possession of their respective tracts upon condition that each child should pay to her an annual sum of 200.00 dollars in lieu of her life estate and said payments by agreement were made a lien upon the land of each child. It was further alleged that none of the children made any payment as required under the agreement except the plaintiff, who provided practically all of his mother's support for many years, and after her death, filed a claim against her estate. The complaint further alleged that the plaintiff's mother repeatedly stated to him that he was to receive the payment of $200.00 per year from the other remaindermen for her support, which he alleged constituted an equitable assignment of the liens upon the premises. Plaintiff asked for a foreclosure of his equitable lien upon defendant's land and for the sale of the same to satisfy defendant's portion of the obligation for the support of their mother.

Defendant demurred both individually and in his representative capacity upon the grounds, (a) that the facts alleged did not constitute an equitable assignment of the mother's lien and (b) no action was alleged against defendant in his representative capacity. In the alternative defendant demurred on the ground of misjoinder of an action against him individually and one against him as administrator. The lower court sustained the demurrer for insufficiency upon both grounds and did not pass upon the alternate ground.

The sole question on appeal, which resulted in reversal, was whether or not the complaint stated a proper cause of action for foreclosure of an equitable lien based upon an assignment to the plaintiff. The Supreme Court reiterated the established rule that, in passing upon a demurrer, the court is limited to a consideration of the pleading under attack and that the facts alleged

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1. 240 S.C. 274, 125 S.E.2d 636 (1962).

will be liberally construed along with relevant inferences deducible therefrom. The court in upholding the sufficiency of the complaint, concluded that the allegations respecting the equitable assignment of the lien presented factual issues to be determined, not only from the words used, but from all the facts and surrounding circumstances.

Sossamon v. *Littlejohn*[2] was an action to compel specific performance of an alleged contract for the sale of defendant's one-half interest in a partnership, based upon correspondence between the partners. The defendant demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action for specific performance since it appeared from the complaint that the correspondence did not result in a binding contract of sale. The order of the circuit judge overruling the demurrer directed that an appeal therefrom would not operate as a stay of further proceedings for determination of the issues on the merits, pursuant to Section 7-422 of the 1952 Code. Both the special referee and the trial judge before whom the case was tried considered themselves bound by the previous order and accordingly decreed specific performance. The Supreme Court confined the appeal to a consideration of the correctness of the original order overruling the demurrer and did not consider questions arising on the merits. In reversing the lower court, the Supreme Court concluded that the correspondence did not constitute a binding contract for the sale of the defendant's interest in the partnership. The original offer was construed as implying a cash transaction; the purported acceptance was qualified by the proposition that payment be made within sixty days. This was held to constitute a counter-proposal which, not having been accepted, did not result in the consummation of the contract.

The demurrer challenging the sufficiency of the complaint to state a cause of action was sustained by the lower court and affirmed on appeal in *Smith* v. *Citizens & So. Nat'l Bank*.[3] The theory of the complaint was that the bank had unlawfully interfered with plaintiff's contractual relations with his partner resulting in damages to him. The pertinent allegations were that the plaintiff was indebted to the bank, that the bank had made a demand upon plaintiff's partner to include his name on a check to be issued in settlement of their accounts, and that the partner

2. 241 S.C. 478, 129 S.E.2d 124 (1963).
3. 241 S.C. 285, 128 S.E.2d 112 (1962). This case is also noted in the Torts section at note 14.

subsequently refused to make payment because of the bank's interference.

The Supreme Court recognized that the unlawful interference with a contractual relationship is actionable where the damages are the proximate result of the acts complained of. It concluded, however, under the allegations of the complaint, that plaintiff's loss resulted from his partner's refusal to pay under any circumstances and not from any action on the part of the bank.

In *Linder* v. *Fireman's Ins. Co.*,[4] the order of the lower court overruling defendant's demurrer to the complaint was reversed on appeal. The issue involved the construction of an insurance contract, consisting of a fire policy and attached forms, to determine coverage as to damage by windstorm to trees on insured's premises and the expense of removing debris resulting from such damage. The Supreme Court concluded that there was no ambiguity in the policy respecting damage to trees by windstorm. Under its plain provisions, such damage was not covered, and therefore the claim for expense of removing the debris would necessarily fail as well.

In *Atlantic Coast Line R. R.* v. *Park*,[5] action was brought to recover the difference between freight rates erroneously quoted and charged on three interstate shipments, and the lawful rates published by the carriers and approved by the Interstate Commerce Commission. By counterclaim, defendants sought to recover damages sustained by reason of having settled a fire loss on one shipment on the basis of the misquoted freight rates, alleging reliance upon the misquotation and the negligence of the carrier in failing for an unreasonable time to correct its error. The order of the circuit judge sustaining a demurrer to the counterclaim was affirmed on appeal. The Supreme Court concluded, on the basis of the authorities, that the defendants had no right to rely on the railroad's quotation of rates since they were presumed to know the published rates. In the absence of a right of reliance, the counterclaim would fail, whether based upon misquotation or delay in correcting the error.

The appeal in *Hopkins* v. *Fidelity Ins. Co.*[6] was from the order of the circuit judge overruling defendant's demurrer to the com-

4. 240 S.C. 331, 125 S.E.2d 645 (1962). This case is also noted in the Insurance section at note 8.
5. 241 S.C. 207, 127 S.E.2d 622 (1962).
6. 240 S.C. 230, 125 S.E.2d 468 (1962). This case is also noted in the Insurance section at note 21.

plaint and denying in part its motion to strike certain allegations therefrom. The complaint, based upon fraud and deceit, alleged that plaintiff, an illiterate woman, had been induced by misrepresentations of defendant's agents to sign a release for the wrongful death of her child based upon inadequate consideration and had thereby forfeited her legal right to recover fair compensation to which she was entitled. The demurrer questioned the sufficiency of the complaint on the ground that it showed upon its face that plaintiff had suffered no damages by reason of the acts complained of. In concluding that the demurrer should have been sustained, the Supreme Court reasoned (a) that the complaint was lacking in factual allegations that a cause of action existed since it failed to allege that the child's death was the result of negligence; and (b) assuming that such a cause of action did exist, and the release of plaintiff's interest as a statutory beneficiary was procured by fraud, she sustained no damage thereby since her cause of action would not be barred by a release fraudulently procured. Its validity could be attacked by the child's personal representative in whom the action was vested by statute.[7]

In *Appliance Buyers Credit Corp.* v. *Baxley*,[8] the appeal was from the order of the trial judge overruling a demurrer to the counterclaim interposed by defendant. The complaint charged defendant with violating a contract under the terms of which plaintiff was to purchase certain accounts, agreements and chattel mortgages from defendant, and prayed for an accounting, a money judgment and certain equitable relief. Defendant's counterclaim charged the plaintiff with libel in that plaintiff had written a letter to defendant's customers inquiring as to the balance owed and directing that payments on the accounts in the future be made only to plaintiff. The defendant alleged that this letter was libelous in that it questioned defendant's honesty and integrity. The demurrer challenged the sufficiency of the counterclaim to state a cause of action for libel. In holding that the demurrer should have been sustained, the Supreme Court noted that a demurrer admits the facts alleged in the complaint but not necessarily the inferences drawn from such facts and the court must determine if the language used can reasonably be construed to have the meaning attributed to it. In light of the

7. S.C. CODE § 10-1952 (1952).
8. 241 S.C. 64, 127 S.E.2d 8 (1962). This case is also noted in the Torts section at note 8.

contract between the parties, which was a part of the record, the court concluded that the plaintiff was authorized to write the letter complained of and there was nothing to show a malicious intent to injure defendant.

The nature of an action in claim and delivery and whether or not the issues were legal or equitable determined the court's ruling on demurrer in *Haverty Furniture Co.* v. *Worthy*.[9] Plaintiff brought action in the Civil and Criminal Court of Charleston in claim and delivery for possession of certain furniture and appliances sold to defendant under a conditional sales contract. Joined as parties were the owner of a warehouse to which the property had been removed and the agents of the landlord who had levied a distress for rent in arrears against the property. The latter defendants made the only appearance and demurred on jurisdictional grounds, contending that the issues were equitable in nature and by statute specifically excluded from the jurisdiction of said court. They also moved to strike the allegations of the complaint charging them with actual notice of plaintiff's lien, on the ground that actual notice of its existence was irrelevant to the determination of the issue as to priority of the liens. Both the demurrer and motion were decided adversely to defendants. The Supreme Court affirmed, concluding that an action in claim and delivery is one at law governed by statute. The issue as to priority of lien between plaintiff under its conditional sales contract and defendant under the distress for rent was held to rest upon legal rights declared by statute and no equitable issues were presented. As to the motion to strike, the court held that the question of actual notice is covered by statute, which expressly refers to "actual notice of any unpaid purchase money lien," and would include the conditional sales contract under which plaintiff was claiming.[10]

In *Oxman* v. *Profitt*[11] defendant appealed from the order of the trial judge overruling a demurrer to the complaint and denying motions to make the complaint more definite and certain and to require plaintiff to state separately an alleged multiplicity of causes of action. The complaint alleged that defendant entered into an employment agreement with plaintiff to act as its agent

9. 241 S.C. 369, 128 S.E.2d 707 (1962). This case is also noted in the Commercial Transactions section at note 29 and in the Property section at note 20.

10. S.C. CODE § 41-155 (1952).

11. 241 S.C. 28, 126 S.E.2d 852 (1962).

to solicit contracts of insurance, under the terms of which he agreed not to work for another company engaged in the same business while in plaintiff's employ and, after termination of his employment, not to induce other agents to terminate their employment with plaintiff nor policy holders to terminate their insurance. It was alleged that after terminating his employment with plaintiff, defendant formed another corporation and attempted to violate the restrictive covenants. Defendant's demurrer challenged the validity of the covenants on the ground of indefiniteness as to time and place and as not being necessary for plaintiff's protection. The Supreme Court held that the covenants in question were not covenants not to compete and found no invalidity therein. As to the motion to require separate statement of the alleged causes of action, the court ruled that only one primary right was alleged to have been violated and hence only one cause of action was stated. The order refusing defendant's motion to require the complaint to be made more definite and certain by stating the counties in which defendant worked while in plaintiff's employ was also affirmed on the ground that the complaint adequately apprised defendant of the exact nature of the charges. The court noted, too, that such motion is not appealable until final judgment.

In *Winter* v. *United States Fid. &Guar. Co.*[12] an action was brought by the receiver of a subcontractor under a road construction contract against the principal contractor, the corporate surety who had executed a performance bond, and the holder of a mortgage on certain equipment who had repossessed the same. The complaint sought damages for breach of contract and an accounting as to amounts due the subcontractor. It also alleged an action in tort against all the parties on the theory of a conspiracy to bring about a breach of the contract. Demurrer was interposed by two defendants on the ground that several inconsistent causes were improperly joined. It was contended that the action for damages for breach of contract was inconsistent with the action for an accounting, which presupposed the performance and validity of the contract. It was also urged that the cause of action in tort for conspiracy could not be joined with an action in contract. The third defendant moved to make the complaint more definite and certain in certain particulars. The lower court overruled the demurrer and refused the motion.

12. 240 S.C. 561, 126 S.E.2d 724 (1962).

The Supreme Court affirmed, holding that the causes of action were not inconsistent and were properly joined under Section 10-701 of the 1952 Code. In one cause of action, plaintiff sought an accounting for that part of the contract which had been performed and this was held to be an affirmation rather than a repudiation of the contract. The allegations charging the defendant with conspiracy to prevent performance of the contract were also held to be an affirmation thereof. The causes of action were held to arise out of a transaction connected with the contract which was the subject of the action and hence properly joined. The order refusing to make the complaint more definite and certain was affirmed for the reason that the exception challenging this ruling was too general and indefinite to be considered under the rules of the Supreme Court.[13] The Supreme Court noted that neither of the demurrers raised the objection that the complaint improperly joined several causes of action which did not affect all of the parties to the action.

PLEA IN ABATEMENT

An interesting question as to whether or not a tort action may be abated because of the pendency of a prior action involving the same parties in another county was treated at length in *Collins* v. *Johnson*.[14] A passenger bus company brought action in Florence County to recover property damages resulting from a collision between its bus and an automobile owned by the individual defendant. The defendant in that action did not counterclaim but thereafter brought action in Darlington County against the bus company and its driver for damages to the automobile and for personal injuries resulting from the same collision. The bus company and its agent both moved to abate the action in Darlington County by reason of the pendency of the prior action in Florence County. The trial judge sustained the plea in abatement on behalf of the company but denied the motion on behalf of the driver and both parties appealed from his order. The company contended that Section 10-652 of the 1952 Code provides for the filing of a mandatory counterclaim where it arises out of the same set of facts, as opposed to the view that this section is permissive. The Supreme Court held that the question was controlled by Section 10-705 of the 1952 Code which does not re-

13. S.C. Sup. Ct. R. 4(6).
14. 242 S.C. 112, 130 S.E.2d 185 (1963).

quire a compulsory counterclaim but permissively accords to a defendant the right to interpose a counterclaim founded on tort, if both actions arise out of the same set of facts. The plaintiff may assert his claim in an independent action if he so elects. The order of the trial judge abating the action was accordingly reversed as to the company and affirmed as to the driver. The court recognized that a plaintiff has an election to sue joint tort feasors separately or to join them as parties defendant in a single action.

MOTION TO STRIKE

Kinard v. *Polk*[15] was an action to recover damages for personal injuries sustained by plaintiff in a collision between an automobile driven by plaintiff and one driven by defendant. The defendant pleaded res adjudicata as a bar, alleging that in a prior action by a passenger in plaintiff's automobile against the drivers of both vehicles, a judgment was recovered against both of them. The trial judge sustained plaintiff's motion to strike this plea as legally insufficient. On appeal, the Supreme Court ruled that the former judgment would not be res adjudicata in a subsequent action between the drivers of the vehicles involved. The fact that the co-defendants in the former action could have filed cross-actions was held to be of no significance, in view of the permissive language of Section 10-707 of the 1962 Code.

The appeal in *J.M.S., Inc.* v. *Theo*,[16] was from the order of the trial judge granting plaintiff's motion to strike certain defenses from the answer. The action was brought for damages for an alleged breach of contract by the defendant in the construction of a dam on plaintiff's land resulting from the improper installation of a flood gate. The lower court ordered stricken a portion of paragraph two of the first defense to the effect that defendants had not been paid in full for their services under the contract, had performed extra services for which they had not been paid, and upon completion the parties had agreed upon a settlement as to the amount due. Since the complaint was restricted solely to the alleged improper installation of the flood gate, the Supreme Court held that the foregoing allegations relating to payment or non-payment were properly stricken as immaterial. The court further held that the third defense was

15. 241 S.C. 555, 129 S.E.2d 527 (1963). This case is also noted in the Torts section at note 16.
16. 241 S.C. 394, 128 S.E.2d 697 (1962).

merely a repetition of the allegations contained in the first defense and was properly stricken as redundant.

In *Culbreth* v. *Prudential Life Ins. Co.*[17] the correctness of the order of the trial judge striking certain defenses in the answer rested upon a determination as to which of two statutes was applicable to the question of the contestability of an insurance policy, under which benefits were sought for total disability due to illness. The defendant denied liability on the grounds that plaintiff had made fraudulent misrepresentations and concealed conditions relating to his health in his application for insurance, and filed a counterclaim to recover benefits previously paid. By way of reply, plaintiff alleged estoppel to contest the validity of the policy for alleged false statements in the application, since more than two years had elapsed from the effective date of the policy, and at the same time moved to strike said defenses and counterclaim, relying upon Section 37-161 of the 1952 Code. Defendant moved to strike from the reply the allegations pleading the foregoing statute as a bar, contending that such defense was proper under Section 37-471.5 of the 1952 Code which permits a contest at any time of policies of accident and health insurance based upon a fraudulent misstatement in the application. The lower court granted plaintiff's motion, holding that Section 37-161 of the 1952 Code was applicable to the policy in question and barred contest of its validity after two years from date. The Supreme Court reversed, concluding that the policy was an accident and health insurance policy covered by the latter statute and that the inclusion of accidental death benefits did not make it life insurance so as to bring it within the purview of the former.

AMENDMENTS

In *Burnett* v. *Roukedes*,[18] action was brought in claim and delivery for possession of an air-conditioning unit, or its value, and the plaintiff filed the necessary bond and obtained possession. The defendant served an answer and counterclaim, following which plaintiff served notice to require defendant to correct his pleading in certain particulars, and defendant moved to require plaintiff to make the complaint more definite and certain by alleging his security interest. The trial judge entered an order

17. 241 S.C. 46, 127 S.E.2d 132 (1962). This case is also noted in the Insurance section at note 14.
18. 240 S.C. 144, 125 S.E.2d 10 (1962).

requiring defendant to state separately and to designate his counterclaim and he interpreted the security rights of plaintiff to mean those under a landlord's lien for rent. Defendant then demurred to the complaint on the ground that plaintiff could not enforce a landlord's lien by claim and delivery after ten days from the removal of the property from the leased premises, relying upon the distraint statute.[19] The demurrer was sustained and defendant served an amended complaint alleging a conspiracy between the tenant and his father to defeat plaintiff's right to distrain by concealing the air-conditioning unit. The trial judge before whom the case was tried concluded that the defendant was entitled to judgment on his counterclaim for $750.00, the agreed value of the property. Plaintiff moved to amend the judgment, contending that it should be for the return of the property, or if the same could not be had, for judgment for its agreed value, and this was refused by the trial judge. On appeal the Supreme Court concluded that the defendant's counterclaim was an action in claim and delivery, even though defendant did not ask for return of the property in the prayer, and noted that the prayer of a complaint or counterclaim is no part thereof and cannot give character to it. This being the case, the order of the trial judge should have been in the alternative, for the return of the property, or in the event possession thereof could not be had, for its agreed value. In all other respects, the judgment was affirmed.

The question of pleading in *Hicks* v. *Giles*[20] was the propriety of the trial judge's refusal of defendant's motion to amend his answer so as to plead the statute of limitations. The action was one for accounting and for recovery of sums alleged to be due under a share-cropping agreement, and was heard under a general order of reference. During a second reference in the cause, the defendant orally moved to be allowed to amend his answer in the particular noted, contending that the complaint was insufficient to put him on notice that plaintiff would attempt to prove expenditures during the years 1951 and 1952. The court held that the complaint was sufficient in this respect and that the previous order of the circuit judge had concluded the matter as to defendant's liability during the years in question. The opinion reiterates the rule that the court's exercise of discretion

19. S.C. Code § 41-156 (1952).
20. 241 S.C. 129, 127 S.E.2d 196 (1962).

with reference to allowance of amendments to pleadings, while not unlimited, is so broad that it will rarely be disturbed.

In *Creamer* v. *City of Anderson*,[21] the appeal challenged the correctness of the trial judge's order permitting amendment to the complaint upon plaintiff's motion made at the conclusion of the testimony, which was denied by the special referee. The purpose of the action was to challenge the official results of a special annexation election, the plaintiff's main contention being that less than the required number of votes legally cast were in favor of annexation. The amendment allowed by the trial judge was to show the actual results of the election in the area in question as certified by the commissioner of elections. The Supreme Court held that the allegation as to the number of votes was evidentiary in character and not essential to the statement of plaintiff's cause of action, and the amendment to state the correct number would not change the cause of action. The proposed amendment was held properly allowed by the circuit judge, in consonance with the general rule that amendments to pleadings are favored in furtherance of justice and the determination of controversies on their real facts.

SHAM DEFENSE

The appeal in *Martin* v. *McLeod*[22] was from the order of the circuit judge striking as sham the defense set up in the answer that the plaintiff was not the real party in interest, since she had been fully paid for her loss by an insurance company to which she had assigned her cause of action. The action was one to recover damages to plaintiff's personal property as the result of fire allegedly caused by defendant's negligence. The correctness of this ruling depended upon whether or not the transaction between the plaintiff and the insurance company was one of subrogration. In support of her motion, plaintiff relied upon a "loan receipt" signed by her, whereby she acknowledged receipt of payment by the insurance company as a loan to be repaid to the extent of any net recovery against the third party responsible for the loss. The Supreme Court held that if the insurance company had paid the full amount of plaintiff's loss, it would have been subrogated to her rights against the third party and the defendant's plea in bar would have been good. However, the use of the

21. 240 S.C. 118, 124 S.E.2d 788 (1962).
22. 241 S.C. 71, 127 S.E.2d 129 (1962). This case is also noted in the Insurance section at note 2.

loan receipt was a lawful device by which the right of subrogation was avoided and under which plaintiff was entitled to bring action in her own name. The defense was accordingly held to be properly stricken as sham on plaintiff's motion.

ALTERNATIVE THEORIES

Bulova Watch Co. v. *Roberts Jewelers*[23] was an action on an account for goods sold and delivered. The complaint contained allegations appropriate to recovery on either of two theories, (1) that the goods were sold to defendant as an individual, and (2) that he ordered and received the goods for a non-existent principal and thereby became personally liable for the purchase price. The trial judge, before whom the case was tried without a jury, concluded that the defendant acted as the agent of a corporation that at least had a de facto existence incurred no personal liability. The Supreme Court reversed, holding that the evidence was sufficient to establish the defendant's individual liability. With respect to his contention that plaintiff could not recover against him individually because of the allegation that he was acting for a non-existent corporation, the court concluded that this was simply an attempt to state an alternative theory of recovery. The court found no real inconsistency in the language used, since the defendant would be personally liable under either theory, in application of the rule that one who undertakes to act for a non-existent principal renders himself personally liable.

ELECTION OF REMEDIES

The principal issue in *Lancaster* v. *Smithco, Inc.*[24] was whether or not plaintiffs were barred from maintaining their action under the doctrine of election of remedies. The complaint alleged a breach of the general warranty clause in a deed conveying real estate resulting in damages by reason of the existence of an easement for installation of pipe lines across the rear of the property. The defendant pleaded in bar the fact that plaintiffs had previously brought another action against it claiming damages on the thory of fraud and deceit by reason of the existence of the easement referred to, which was decided adversely to them on appeal to the Supreme Court. Defendant's motion for judg-

23. 240 S.C. 280, 125 S.E.2d 643 (1962). This case is also noted in the Agency section at note 1 and in the Corporation section at note 28.
24. 241 S.C. 415, 128 S.E.2d 915 (1962).

ment on the pleadings as to this defense was granted by the trial judge on the ground of res adjudicata and election of remedies. The Supreme Court held that the granting of a non-suit in the previous action was not decisive on the merits but was based upon the ground that the evidence of breach of warranty did not justify a finding of an intent to deceive; and this would not support the plea of res adjudicata. The court held further that an election of remedies presupposes existence of two or more remedies from which a choice may be made, and the election may be conclusive where the remedies are inconsistent; however, the mistaken choice of a fancied remedy on a certain state of facts is not such an election as will bar subsequent pursuit of another remedy appropriate to the same state of facts. The court concluded that the choice of improper remedy in the former action, *i.e.*, fraud and deceit, did not bar the present action for breach of warranty.

PERMITTING ANSWER

An interesting procedural question as to whether or not the trial judge properly exercised his discretion in permitting an answer to be filed after the expiration of the twenty day period was explored at length in *Lee* v. *Peek*,[25] with resulting differences of opinion as to the proper basis for decision. The action was brought in Abbeville County to recover damages for libel against numerous defendants, three of whom were granted a change of venue to Anderson County upon their motion. These defendants thereafter demurred to the complaint, following which plaintiff moved for judgment by default against them. In response the defendant filed a return and submitted an affidavit of counsel to the effect that he had acted with due diligence and in good faith to protect the rights of his clients. The trial judge denied the motion for judgment and granted defendants an extension of time to answer, from which order an appeal was taken.

The opinion of Justice Bussey noted that the motion was not one pursuant to Section 10-1213 of the 1952 Code to be relieved from a judgment or order taken as a result of "mistake, inadvertance, surprise or excusable neglect," but was made prior to judgment pursuant to Section 10-609 of the 1952 Code. The language of the latter section permits the court, in its discretion, to allow an answer to be filed after the expiration of the time

25. 240 S.C. 203, 125 S.E.2d 353 (1962).

limit. Judge Bussey was of the opinion that the judge's discretion under this section was almost unlimited except where its exercise was controlled by an error of law. He suggested affirmance of the lower court ruling on the grounds that there was nothing in the record to indicate that the lower court was controlled by an error of law in granting the motion nor was there in the order any factual finding which was without evidentiary support.

The majority of the court concurred in the result, concluding, however, that the requirements for granting relief were the same under both sections referred to. Under both, the area of judicial discretion was limited by the necessity of a finding of excusable neglect on the part of counsel. The showing of neglect on the part of counsel without a proper excuse would be insufficient to justify exercise of the court's discretion under either section. The court concluded that there was no abuse of discretion in the lower court's ruling that excusable neglect had been shown.

ADDITIONAL PARTIES

In *Robinson* v. *South Carolina Highway Dept.*[26] defendant appealed from the order of the trial judge refusing its motion to bring in as a party defendant the town of Forest Acres so as to enable the defendant to file a cross-complaint against the town, and granting plaintiff's motion to amend its complaint. The plaintiffs claimed damages to their land as the result of changes made in the drainage system by the highway department along certain streets, which they alleged constituted a taking of their property for public use without just compensation. The Supreme Court found no abuse of discretion by the trial judge in denying defendant's motion, since the complaint alleged nine different acts by defendants as causing a taking of plaintiffs' land, and the inclusion of the town would increase the complexity of the issues to be determined by the jury. The defendants were granted permission to file an answer or otherwise plead to the amended complaint.

26. 241 S.C. 137, 127 S.E.2d 286 (1962).