DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

EDITOR-IN-CHIEF,
GEORGE M. DALLAS.
Assisted by
ARDEMUS STEWART, HENRY N. SMALTZ, JOHN A. MCCARTHY,
WILLIAM SANDERSON FURST.

HARTFORD FIRE INS. CO. *v.* KAHN.[1] SUPREME COURT OF WYOMING.

Under Rev. Stat., Wyoming, § 2447, providing that a petition must contain a statement of the facts constituting a cause of action in ordinary language, an exhibit attached to a petition, and therein referred to as a part thereof, is not a part of the petition, and cannot be referred to to determine its sufficiency, or to supply allegations omitted therefrom.

It would seem that such a system of pleading is objectionable, as permitting the pleading of evidence.

EFFECT OF EXHIBITS ON PLEADINGS.

I. *At Common Law.*—The practice of supplementing, and even supplying the allegations of a pleading by means of exhibits has become so prevalent, and has also been so far abetted by statute, that the true function and powers of an exhibit have been almost lost sight of. The pseudonymous "reforms" and unjustifiable innovations that have in the past few years so unsettled the well-established rules of pleading as to make them unrecognizable by their own progenitors have been the prime cause of this pernicious habit. How much easier to say, "Plaintiff claims of defendant five hundred dollars, as per the book account annexed," leaving the debtor at the head of the account do duty for the very essential averment that defendant is justly indebted, than to set out the same facts in the proper language of a declaration! Not that such a practice is justifiable, but when so much carelessness

[1] Reported in 34 Pac. Rep. 894.

and inaccuracy is permitted it naturally leads to extremes, and the instance given is one that may any day occur, if indeed it has not already happened, as the legitimate result of the indiscriminate wiping out of the old system of pleading, which, whatever may have been its faults, was what the new, reformed, amorphous scheme of allegations never can be, scientific and effective.

Under that system no mere tacking on of a paper could aid the omissions or errors of a pleader. The proper use and purpose of an exhibit, then as now, was merely to set forth, in detail, that which was alleged in more general terms, or to embody in the record such facts as would in legal effect amount to the facts as alleged in the pleading, or to aid the allegations in fixing more accurately and definitely their import, but not to supply the omission of allegations necessary to present a good cause of action: Burks *v.* Watson, 48 Tex. 107. In general, therefore, an exhibit cannot supply any deficiency in the allegations of the pleading. If the latter be insufficient in any respect, the filing of an exhibit cannot make it good: Mayer *v.* Signoret, 50 Cal. 298; Knight *v.* Turnpike Co., 45 Ind. 134. It forms no part of the pleading, and cannot be considered on the question of its sufficiency: Hadwen *v.* Ins. Co., 13 Mo. 473; Curry *v.* Lackey, 35 Mo. 389; Harlow *v.* Bosswell, 15 Ill. 56; Bawling *v.* McFarland, 38 Mo. 465; Poulson *v.* Collier, 18 Mo. App. 583; Pool *v.* Sanford, 52 Tex. 621. Not even if the pleader expressly states that it is part thereof: State *v.* Samuels, 28 Mo. App. 649. The pleading must embody in itself, without reference to any other paper, the facts which constitute the cause of action: Lynd *v.* Caylor, 1 Handy (Ohio), 576; MacDonell *v.* Railroad, 60 Tex. 590; Contra, Pefley *v.* Johnson (Neb.), 46 N. W. Rep. 710. Any instrument upon which the pleading is based should be stated therein according to its tenor or legal effect. Fitch *v.* Cornell, 1 Sawyer, C. Ct. 156; Oh Chow *v.* Hallett, 2 Sawyer, C. Ct. 259; Excelsior Draining Co. v. Brown, 38 Ind. 384; Etchison Assn. *v.* Hillis, 40 Ind. 408; Marshall *v.* Hamilton, 41 Miss. 229. And if this be not done, but the attempt be made to supply the failure by

annexing the instrument as an exhibit, it will be stricken out on motion, as impertinent and irrelevant: Oh Chow *v.* Hallett, *supra*, a reformation of the pleading will be reduced; Crawford *v.* Satterfield, 27 Ohio St. 421. Or the exhibit will simply be disregarded, and the pleading dealt with on its merits: Oliphant *v.* Malone (Ark.), 15 S. W. Rep. 363.

This is especially the case where the exhibit would otherwise be mere matter of evidence. The annexation of a deed to a pleading merely tends to amplify the latter, and does not make the deed evidence in the cause, if otherwise inadmissible: Shepard *v.* Shepard, 36 Mich. 173. Nor, even if it be evidence, will it dispense with the proof of delivery: Burkholder *v.* Casard, 47 Ind. 418. So, an account filed with a declaration is no part of it, and should not be allowed to go to the jury: Ingalls *v.* Crouch, 35 Md. 296. When an answer attempts to plead in defence a judgment in an action between the same parties on the note sued on, but fails to show what were the matters in controversy, or what was the judgment recovered, a copy of the entries of the justice of the peace in the first suit, filed with the answer, but forming no part thereof, does not supply the omission: Oliphant *v.* Malone (Ark.), 15 S. W. Rep. 363.

The courts of Texas have adopted a very sensible rule, which refuse to permit exhibits to relieve the pleader from making the proper allegations of which the exhibits may be the evidence: Rule 19, Dist. Ct. Tex. This is nothing but a restatement of the common law rule; but the fact that such a rule was considered necessary shows how completely the principles of common law pleading had become obscured by the laxity consequent upon innovation. Under this rule, it is held that a declaration for services rendered, which, except by reference to an exhibit, contains no allegations as to the character of the services, the time, dates, items, and amounts due therefor, is insufficient: Niles *v.* Mayo (Tex.), 16 S. W. Rep. 540.

As exhibits cannot supply a deficiency in pleading *a fortiori* they cannot, if attached to a demurrer, raise grounds of objec-

tion not existing in the pleading demurred to: Buddick *v.* Marshall, 23 Iowa, 243.

But though it cannot supply omissions, an exhibit may explain, amplify, or even counteract allegations defective in other respects. The averments of a pleading may be made certain by a reference to diagrams filed with and made a part of the pleading: Booker *v.* Ray, 17 Ind. 522; Renny *v.* Municipality No. 2, 12 La. Ann. 500. An exhibit, containing an itemized statement of property and values, may be used to explain a general allegation of indebtedness (and may save the pleader the necessity of furnishing a bill of particulars): Rider *v.* Robbins, 13 Mass. 284; Caspary *v.* Portland, 19 Oreg. 496; S. C., 24 Pac. Rep. 1036. And justifies the admission of evidence in support of the items appearing in it: Lockhart *v.* Morey, 41 La. Ann. 1165; S. C., 4 So. Rep. 581.

A copy of a note annexed to a complaint, and referred to in the body of the complaint as an exhibit, may properly be referred to by the court to ascertain the form and contents of the note: Ward *v.* Clay, 82 Cal. 502; S. C., 23 Pac. Rep. 50. An allegation that a certain written and printed contract, a copy of which is annexed to the complaint, contains the terms and conditions of the agreement between the parties, is an allegation of fact that the terms and conditions contained in the annexed paper were agreed on between the parties: Bishop *v.* Empire Transp. Co., 33 N. Y. Super. Ct. 99. And when several defendants are sued, and judgment is prayed against all *in solido*, the defect of the petition in not specifically alleging that one of them is indebted, is cured by annexing and making part of the petition a bond exhibiting his liability, by his answer without exception, and by the admission of proof without objection: McLellan Dry Dock Co. *v.* Farmers' Alliance Steamboat Line (La.), 9 So. Rep. 630.

An exhibit may prevent a variance: Peters *v.* Crittenden, 8 Tex. 131; Greenwood *v.* Anderson, 8 Tex. 225, and will control and cure any misdescription of it in the body of the petition: Pyron *v.* Grinder, 25 Tex. 159; Spencer *v.* McCarty, 46 Tex. 213; Longley *v.* Caruthers, 64 Tex. 287. When the instrument sued on is made part of the petition, the

court will give it the legal effect to which it is entitled, though it may have been misconceived by the pleader: Beal *v.* Alexander, 6 Tex. 531. It has ever been held that if an exhibit is referred to in a pleading, and its inspection shows facts contradictory of the allegations thereof, the exhibit will control on demurrer, and not the allegations of the pleading: Freiberg *v.* Magale, 70 Tex. 116; S. C., 7 S. W. Rep. 684. This can only be true, however, when the exhibit is material to the pleader's case, and shows clearly on its face that the allegations of the plea are untrue.

Though the practice of pleading exhibits is improper and pernicious, yet, if the case has been permitted to go on to judgment without objection, and the pleadings themselves contain facts sufficient to constitute a cause of action, the judgment will be allowed to stand: Crawford *v.* Satterfield, 27 Ohio St. 421.

II. *Under Statutory Provisions.*—This question has become of great importance, in view of the almost universal statutory requirements that copies of certain instruments be filed with the pleadings based upon them. Are such provisions so far derogatory of the common-law rules of pleading as to permit the neglect of averments otherwise necessary, and the supplying them by the instrument filed, or must the old rules still be observed?

It must be noticed in the first place that these provisions seem for the most part to have no reference to pleading. The instruments to be annexed to the pleading are mainly those of which oyer could not be had, and as to which, of course, the defendant had no means, in many cases, of preparing a full defence. The statute was made for his benefit, not to relieve the plaintiff from any duty that lay upon him; and on general principles, therefore, such provisions ought not to relieve him from the obligation of properly stating his cause of action.

Accordingly, in many of the States where this question has been raised, it has been decided that the annexation of the required instrument as an exhibit does not supply the omission of material averments in the pleading; that the pleadings, and the pleadings alone, must state the material facts neces-

sary to constitute the cause of action or the defence relied on; and that if they do not they will be demurrable: Dodd *v.* King, 1 Metc. (Ky.) 430; Hill *v.* Barrett, 14 B. Mon. (Ky.) 83; Vaughn *v.* Mills, 18 B. Mon. (Ky.) 634; Larimore *v.* Wells, 29 Ohio St. 13; Johnson *v.* Home Ins. Co., 3 Wyo. 140; S. C., 6 Pac. Rep. 729; Hartford Fire Ins. Co. *v.* Kahn (the principal case) (Wyo.), 34 Pac. Rep. 894.

In Arkansas, the matter seems to be undecided: Railroad *v.* Park, 32 Ark. 131, held that the exhibits required by statute formed no part of the pleadings; but in Abbott *v.* Rowan, 33 Ark. 593, it was suggested that on demurrer they might be considered part of the record, and in Beavers *v.* Baucum, 33 Ark. 722, it was definitely ruled that such exhibits would even control an averment in the pleadings. Yet this does not say that they will supply a material omission.

In Indiana, however, under the wording of the statute, Rev. Stat., § 362, it has been expressly decided that when the required exhibit is filed it becomes a part of the pleadings, and its contents need not be stated: Mercer *v.* Hebert, 41 Ind. 459. The same appears to be the case in Illinois: Nauvro *v.* Ritter, 97 U. S. 389.

If the instrument is wrongly set out in the pleading the exhibit controls: Cotton *v.* State, 64 Ind. 573. But it is acknowledged everywhere that an exhibit, not required by statute, is not a part of the pleadings: Fuller *v.* Railroad, 18 Ind. 91; Armstrong *v.* McLaughlin, 49 Ind. 370; Watkins *v.* Brunt, 53 Ind. 208; Logansport *v.* La Rose, 99 Ind. 117; Dumbruld *v.* Rowley (Ind.), 15 N. E. Rep. 463; Plunkett *v.* Black, 117 Ind. 14; S. C., 19 N. E. Rep. 537; Ross *v.* Menefee, 125 Ind. 432; S. C., 25 N. E. Rep. 545; Barnes *v.* Mowry, 129 Ind. 568; S. C., 28 N. E. Rep. 535; Dukes *v.* Cole, 129 Ind. 137; S. C., 28 N. E. Rep. 441; Railroad *v.* Smith (Ind.), 29 N. E. Rep. 1075; Abbott *v.* Rowan, 33 Ark. 593.

In general, therefore, it may be taken as the rule of the common law, still prevalent except where expressly altered by statute, that while an exhibit may be regarded as a part of a pleading for the purpose of explaining, amplifying, or particu-

arizing, or even, in special cases, for the purpose of correcting erroneous allegations therein, it can never be resorted to to supply the omission of a material allegation.

III. *In Equity.*—The rule in equity is that exhibits become part of the pleadings, and serve to help out allegations therein, in case they do not give some necessary particulars of the writing exhibited, or do not state its effect with accuracy: Brown *v.* Redwyne, 16 Ga. 67; Bolton *v.* Flourney, R. M. Charlt. (Ga.), 125; Mintier *v.* Branch Bank of Mobile, 23 Ala. 762; Surget v. Byers, 1 Hempst. 715; Armitage *v.* Wickliffe, 12 B. Mon. (Ky.), 488. As a corollary such an exhibit will, on demurrer, control the allegations of the complaint: Buckner *v.* Davis, 29 Ark. 444. Yet, if the bill show a cause of action on its face, the court will not look to the exhibit for the purpose of contradicting its allegations, and so making a demurrer effective: Terry *v.* Jones, 44 Miss. 540; Holman *v.* Patterson, 29 Ark. 357.

Some few cases have controverted this view. In King *v.* Trice, 3 Ired. (N. C.) Eq. 568, it was attempted to assimilate the equity rule to that of the common law, and it was held that the contents of the exhibit should be set out sufficiently in the pleading to which it is attached. "The purpose of annexing exhibits is not to enable the pleader to make the pleadings mere skeletons, not in themselves containing the facts and points in controversy, but to obtain an admission of their genuineness from the other side, and for greater certainty as to their contents, and as aiding in the construction from the context." So, in Buck *v.* Fisher, 2 Colo. Ty. 182, it was held that complainants who sue as representatives of an estate should show that they are such in the bill, and it is not sufficient that the fact should appear in an exhibit attached thereto. This may be true of a fact in which the right to maintain the action depends; but in regard to any other facts the equity rule undoubtedly is, as shown by the cases cited above, that an exhibit becomes part of the pleadings, and will aid them, not merely by explaining and supplementing them, but by supplying omissions therein.

ARDEMUS STEWART.