Wyoming Law Journal

Volume 1 | Number 2 Article 5

December 2019

Aider of Defective Petition by Allegations in the Answer

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RECENT CASES

AIDER OF DEFECTIVE PETITION BY ALLEGATIONS IN THE ANSWER

The petition in an action to quiet title alleged that parties plaintiff "have been" in continuous possession for ten years prior to the commencement of the action. Defendant's answer stated that he was kept out of possession by the plaintiff, and the defendant raised on appeal to the Wyoming Supreme Court a contention that the petition did not state facts sufficient to constitute a cause of action. *Held:* The expression, "have been," although in the past tense, must be given a liberal construction as referring to the time immediately preceding, and as including, the time of the commencement of the action. "If that is not correct, then the defect was supplied by the answer in which the defendant admitted the plaintiff keeps him out of possession." *Bruch v. Benedict,* (Wyo. 1946) 165 P. (2d) 561.

Aider by subsequent pleading originated in the celebrated English case of *Brooke v. Brooke,*[1] an action of trespass for the taking of a hook, in which the declaration omitted an allegation that the plaintiff had possession of the hook. The defect was held cured by the confession and avoidance of the defendant that he "took the hook out of the hands" of the plaintiff. The obvious result is that the case was disposed on issues fairly raised, and there was no surprise nor new matter prejudicial to the defendant. Some modern decisions have applied the principle of the doctrine to permit recovery when a petition is advanced upon the wrong theory if the defendant's answer shows the correct one.[2]

The ruling in the instant case, and in prior Wyoming cases touching on aider,[3] is in harmony with the modern trend to allow aider to cure defects in a petition on the reasoning that a judgment is authorized if it is supported by the pleadings of either party to a suit,[4] and the substantive rights of the defendant are not invaded.[5] There is a conflict, however, in cases in which a defendant

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1. (1664) 1 Siderfin 184, 82 Eng. Rep. 1046.
2. Brown v. Baldwin, (1907) 46 Wash. 106, 89 Pac. 483, (Answer alleging title in defendant held to have effected a waiver of objection that form of action should have been one of ejectment, instead of one to quiet title.) Rocky Mountain Fuel Co. v. George N. Sparling Coal Co., (1914) 26 Colo. App. 260, 143 Pac. 815, (Error in counterclaim which declared in assumpsit when it should have technically declared in conversion held cured by answer showing facts which amounted to a conversion and seeking to avoid liability by pleading estoppel.) Nester v. Western Union Tel. Co., (S.D. Calif. 1938) 25 F. Supp. 478, Rev'd on other grounds, 309 U.S. 582, 60 S. Ct. 769, 84 L. Ed. 960. (Plaintiff's complaint was grounded in tort, with prayer for relief in damages. Judgment was awarded in contract, on basis of liability stipulation affirmatively set out in the answer.)
3. Prior Wyoming cases holding that a petition may be aided by answer are Church v. Blakesley, (1929) 39 Wyo. 434, 273 Pac. 541, (Allegations set up in an answer in order to deny them cured defects, if any, in the petition.) Sowers v. King, (1924) 32 Wyo. 167, 231 Pac. 411, (Petition which failed to allege the reasonableness of funeral expenses held aided by allegations in the answer that the expenses were greatly in excess of a reasonable figure.)

   For an illuminating discourse on application of aider by evidence or argument, and the effect of intendments as the case progresses, see Claughton v. Johnson, (1935) 47 Wyo. 536, 541, 41 P. (2d) 527, 529.
4. Little v. Kennedy, (Tex. Civ. App. 1946) 195 S.W. (2d) 255, 260; White v. Howe, (1942) 293 Ky. 108, 168 S. W. (2d) 28.
5. Benson v. Williams, (Ore. 1944) 149 P. (2d) 549.

refers to a fact omitted from the petition only to specifically deny it. While a few jurisdictions hold that in such cases aider cannot logically be applied,[6] other jurisdictions look less to logic than to whether or not the issue has been fairly raised, and permit aider by such a denial.[7]

Instances in which the modern treatment meets with similar hostility involve the application of a "test" of aider, in that a defective statement of a good cause of action may be aided by subsequent pleading, but not a statement of a defective cause of action.[8] A petition may well be held to be a statement of a defective cause of action because of the omission of a material alegation.[9] But if the specific allegation in question may be gleaned from its general facts, it may state, albeit defectively, a valid cause of action.[10] This distinction has been termed "not particularly helpful" by Professor Charles E. Clark on his treatise on Code Pleading,[11] because of the varied meanings of the term "cause of action."

These vexing formalisms with which many courts have struggled are spared the judges and attorneys of Wyoming, since *Sowers v. King*,[12] in 1924 set the precedent that a petition may be clearly defective when filed, but the omission may be deemed supplied by allegations in the answer. This liberality was reflected in the dictum of an earlier decision[13] in which the Wyoming Supreme Court, speaking through Potter, C. J., said that "a defect in a pleading even as to matter of substance might be aided or cured by the pleading of the adverse party, as where the answer supplied a necessary fact omitted from the declaration."

Cross-petitions containing defects have been upheld with the aid of curing allegations present in the plaintiff's original complaint,[14] but omissions of averments required by statute have been held fatal to a cross-petition, although present in other pleadings not responsive to it, on the theory that a cross-petition must stand on its own allegations.[15]

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6. Scofield v. Whitelegge, (1872) 49 N. Y. 259; Vanalstine v. Whelan, (1901) 135 Cal. 232, 67 Pac. 125.
7. Clark, Code Pleading (1928) p. 518; Church v. Blakesley, (1929) 39 Wyo. 434, 273 P. 541; Whitley v. Southern Ry. Co., (1896) 119 N.C. 724, 25 S.E. 1018.
8. Mizzell v. Ruffin, (1896) 118 N.C. 69, 23 S.E. 927; Cocker v. Richey, (1921) 108 Ore. 579, 202 Pac. 551, 22 A.L.R. 744.
9. "Perhaps the main reason why the 'material allegation' test is not a satisfactory one, lies in the ambiguity of the term. A material allegation may be understood to be one the absence of which merely makes the bill demurrable, as in Cavender v. Cavender, 1885) 114 U.S. 464, 5 S. Ct. 955, 29 L. Ed. 212. On the other hand, it may understood to be one whose absence takes away the very substance of the bill, or the substance of that part in which it should appear, as in Gregory v. Gregory, (1926) 323 Ill. 380, 154 N.E. 149." (1931) 20 Geo. L. J. 373, 376, footnote 26a.
10. Knowles v. Norfolk S. R. Co., (1889) 102 N.C. 59, 9 S.E. 7. (Held, that aider cured a defectively stated good cause of action. The denial in answer was so expressed as to show that the allegations of the complaint were construed by the defendant to imply a charge of rudeness, which was therefore denied. The complaint nowhere specifically mentioned rudeness.)
11. Clark, Code Pleading (1928) p. 519.
12. 32 Wyo. 167, 231 Pac. 411.
13. Grover Irr. Co. v. Lovella Ditch Co., (1913) 21 Wyo. 204, 228, 131 Pac. 43, 48.
14. Hansen v. Wagner, (1901) 133 Cal. 69, 65 Pac. 142; Abner Doble Co. v. Keystone Consol. Min. Co., (1904) 145 Cal. 490, 78 Pac. 1050.
15. Bullard v. Bullard, (1922) 189 Cal. 502, 209 Pac. 361. (Cross-complaint in divorce action which failed to allege residence requirements.)

It is suggested that the subject is best resolved by an examination of the substantive merits of each particular case, rather than by an application of any formal test involving "material allegation," or facts "substantially alleged." The recent Wyoming decision reflects the better view of code pleading that aider should be applied to heal defects of a pleading unless such defect has misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

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VALIDITY OF DEED FROM CLIENT TO ATTORNEY

In an action to quiet title to 320 acres of land in Wyoming, plaintiff and defendant both held warranty deeds to the same property from the same or common grantor. Plaintiff, a nephew to the grantor, received his deed just prior to his aunt's death in 1941 and had it recorded immediately. Defendant, a practicing attorney in Denver, Colorado, received his deed five months before plaintiff received his but failed to record it until approximately two months after plaintiff's recording and after the death of the grantor. At the time the deed was conveyed to defendant, he was acting as the grantor's attorney. A few years prior to the conveyance, defendant had written three or four letters concerning a grazing lease on the grantor's property in Wyoming. Within the period of four or five months after the conveyance, the defendant, still acting as the grantor's attorney, handled a lease on this same property with the Continental Oil Company, in the name of and for the grantor as owner of the property. No reason was given in the testimony and evidence at the trial as to why the grantor conveyed the property to defendant other than consideration for the work he had done as her attorney, which he set at fifteen dollars, and the fact that sometime during these transactions, defendant paid the sum of nine dollars and some cents in taxes on the property.

The judgment of the trial court was for the defendant and the plaintiff appealed. *Held,* that the relationship of attorney and client existed between the grantor and defendant at the time the deed was given and that the defendant did not meet the burden resting upon him to show that his deed was a valid instrument under the circumstances in which it was given. The judgment of the lower court was reversed and remanded with instructions to quiet title in the plaintiff and that if it should appear that there was any amount of money paid as consideration for this deed by defendant which should legally be returned to the defendant, the lower court was authorized to so order in its final judgment. *York v. James,* (Wyo. 1946) 165 P. (2d) 109.

In its opinion, the court stated that the reasons the defendant had failed in his burden of proof that the deed was a valid instrument under the circumstances were that at the time the deed was given, the grantor and her husband were nearly eighty years old and in poor health; there was no reason as to why the deed was given; the defendant made no pretense that he had suggested that the grantor have independent advice concerning the deed; no reason was offered as to why the deed was not recorded until after six months and after the grantor