EDWIN J. COOPER, Appellant, *v.* S. TARWEH BRAPOH, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 25, 1965. Decided June 18, 1965.

1. A petition for cancellation of an instrument for fraud will be dismissed and permission to replead denied where the petitioner failed to make profert of the instrument with the petition.
2. An affidavit annexed to a pleading may be sworn to by counsel.
3. A reply or subsequent pleading is not dismissible solely for failure to traverse a prior adverse pleading.
4. A motion for leave to replead after dismissal of an action will not be granted where the dismissal was based on the merits of the cause.
5. A partnership agreement not probated within the statutorily prescribed period is void.

Appellant's bill in equity for cancellation of a lease for fraud was dismissed on the pleadings by the circuit court. On appeal from the judgment of dismissal, appellant applied to the Supreme Court for leave to replead. The application was denied and the *judgment affirmed.*

T. Gyibli Collins for appellant. *G. P. Conger Thompson* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

In a declaration or petition brought in chancery for relief against the fraudulent act of a party to a contract, it is incumbent that profert be made of the instrument on which petitioner seeks to recover or the contract itself alleged by setting it forth in some part of the bill of complaint in a comprehensive manner either in the words in which it is made or in an absolute allegation of its legal effect. If this requirement is not met, the blunder may be considered fatal because, under the practice rule of notice

in chancery as well as in law, the matter alleged in the complaint or bill is considered as lying more properly within the knowledge of the plaintiff or petitioner who brings his complaint than the defendant against whom it is brought and against whom a recovery is sought.

A close inspection of the records in this case shows that it is a bill in equity for the cancellation of a lease agreement for fraud, filed in the September 1963 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, by one Edwin J. Cooper, plaintiff below, now appellant, against S. Tarweh Brapoh, defendant below, now appellee.

Pleadings in the case continued to the rebutter and rested.

At the March 1964 term of the circuit court presided over by His Honor John A. Dennis, the case was called and issues of law involved in the pleadings were heard and ruled upon. In this very elaborate ruling on the issues of law raised in the pleadings, a traversal is made on the many inconsistencies presented by the neglect of the plaintiff to conform to the principal rules of pleadings. The ruling was finalized in this manner:

> "In view of the law respecting the court passing upon issues of law prior to the facts, the court is hamstrung and inhibited from presuming the fact of fraud. The plaintiff has violated many of the mandatory provisions of the statutes in connection with the fundamental principles of pleadings and practice which obtain both in equity and law. In keeping with the authorities of the law quoted in this ruling already, the action of the plaintiff is hereby dismissed with costs against plaintiff."

The plaintiff then and there took exceptions to the ruling of the court and prosecuted an appeal before this Court of last resort on a bill of exceptions of four counts for our review, which four counts are word for word as follows.

"1. Because in ruling on the law issues as raised in said case Your Honor overruled Count 1 of plaintiff's rejoinder with respect to defendant's affidavit being sworn to by his counsel instead of himself as to pleadings filed in equity. To which said ruling plaintiff excepts.

"2. And also because Your Honor overruled Count 2 of plaintiff's surrejoinder and sustained Count 2 of defendant's rebutter for so-called failure to traverse other counts of the rejoinder, whereas plaintifff pleaded a denial of law and facts as contained in those points. To which said ruling plaintiff excepts.

"3. And also because Your Honor overruled Counts 2 and 4 of plaintiff's reply for failure to file exhibit of partnership contract which has not been made the subject of this case and the subsequent lease agreement which was already in the possession of the defendant and was no way available to the plaintiff and thereby sustained the relative counts of defendant's rejoinder on these points. To which said ruling plaintiff excepts.

"4. And also because Your Honor overruled Count 3 of the reply and sustained Count 3 of the answer, to which said final decree plaintiff excepts and prays an appeal to the Honorable Supreme Court of Liberia at its October term, 1964."

Those were the grounds relied upon for the appeal. But when this case was called for hearing before this bar, it was brought to the knowledge of the Court that subsequent to the filing of the plaintiff's brief in the case, he had also filed a motion entitled "Motion for Judgment of Repleader." It seems necessary for the Court to make some comments on the novelty of this procedure before we attempt to analyze its legal effect. There is precedent in law for a repleader to be sought, but this practice finds favor only when there are patently clear pictures presented which, when thoroughly examined by the courts,

would present such convincing satisfaction of the immateriality of the issue that the court in its sound judgment would be able to conclude that judgment could not be rendered for either side in fairness to the parties and the law extant. For the benefit of this opinion, we shall first hereunder quote the said motion word for word before proceeding to expatiate further on the merits. It is as follows.

"And now comes Edwin J. Cooper, appellant, by and through his counsel, and respectfully prays unto this Honorable Court to award a judgment of repleader in the above-entitled cause of action on the following grounds, to wit:

"1. Because appellant says that the complaint averred the alleged fraudulent lease agreement, the subject of the action, to have been in the possession of the appellee, who was duly notified to file a copy thereof with his answer in order to be used in evidence at the trial of the case. The neglect on the part of said appellee so to do has resulted in no issue being taken on that point, as would decide the action at bar, and therefore repleading becomes necessary under the circumstances.

"2. And also because appellant says that an application for a judgment of repleader is warranted by law where the pleadings show that issue was taken on an immaterial point and not on a point proper to decide the action itself. As, for instance, the professed aims and object of pleadings being to arrive at an issue, or some point affirmed on one side and denied on the other, and the same mutually proposed and accepted by them as the subject for decision. If it happens that it was immaterial and unfit to decide the action, the proper remedy was repleader, as in the case at bar. Wherefore appellant prays that a judgment of repleader may be awarded in order that substantial justice may be meted out to both parties in this case."

This motion, as we have said before, would be regarded in law and equity to be one of legal merit if it conformed to the law providing for the same. But since the grounds of this motion are intended to have this Court reverse the decree of the chancery court and grant a repleader, we have no alternative than to first consider the motion and ascertain its legal sufficiency. In the course of the arguments, appellant's counsel belabored the point that, having averred in his complaint, as he styled it, that he "was unable to produce said subsequent lease agreement because it was in the possession of the defendant," that averment was sufficient notice for the production of the said instrument; and the defendant's not having done so resulted in no issue being taken on the point for a decision to be taken.

Sieving this point with all its legal implications, the Court is moved to make this conclusion: our practice both in law and equity in this jurisdiction requires a party filing a suit so to surround himself with the safeguards of the law that his adversary may not prevail over his rights, but when issues are raised which are inconsistent and overt according to the mandatory requirements of the law, the Court is justified in making final determinations and conclusions. Distinguishing between material and immaterial issues, the law makes this declaration:

> "An averment is *material*, when it is of the gist of the action, when the action cannot be supported without it; an *immaterial* averment is the statement of unnecessary particulars, in connection with, and as descriptive of, what is material." 3 BOUVIER, INSTITUTES OF AMERICAN LAW 215 § 2838 (1851).

From that citation of law, we might conclude with every certainty that since defendant's demurrer raised an issue against the nonprofert of a copy of the contract which plaintiff based his case upon, this was material in law and hence could not be regarded as an immaterial issue because this was a patent of the law in the regard;

and a failure to conform to the law in this respect on which the plaintiff joined issue and on which traversal was made in the pleadings, has brought no ambiguous issue on which a conclusion could not be reached by the Court. Moreover, the rule of notice specifically requires that when the matter alleged in the pleadings is considered as lying more properly in the knowledge of the plaintiff than that of the defendant, the defendant must obviously be given sufficient notice of that which he is called upon to defend against; and a failure to do so renders the declaration or bill insufficient. This is borne out by equity law under "proceedings in an action." We must be guided by the law already cited in this opinion, as well as our rules of court and the statutes which prescribe that:

> "The fundamental principle on which all pleadings shall be based shall be that of giving notice to the other party, of all facts it is intended to prove." 1956 CODE 6:252.

This Court hesitates to grant appellant's motion because the grounds relied upon are untenable in law. We are unanimously agreed that there is practice and procedure for a motion for repleader, but when the grounds upon which it is sought are insufficient, it cannot be sustained. It is our opinion that such a motion can only be given favorable consideration when it appears that the issue joined is of such immateriality that the Court finds itself unable to know in whose favor to give judgment. In that case, for the purpose of administering transparent justice, the Court would grant such a motion and award a repleader so that legal defects may be cured—which may be done only upon a judgment and by application of the defendant; and even in such a case the law requires caution. This requirement is made patent because the judgment grows out of nothing less than the sound merits which the case presents; hence, in this instance the motion is untenable. However, because, in the process of argu-

ment, the issues involved in both the bill of exceptions and appellant's motion for repleader were concurrently argued, and also because the motion did not embrace all of the issues advanced in the bill of exceptions, we shall now direct our attention to the grounds of the bill.

According to all legal authorities, it is agreed and permeates throughout that where there has been fraud, whether actual or constructive, in the making of an agreement, the party injured has in general a right to apply to a court of equity to cancel the instrument; and this is regarded as preventive or protective justice; but in seeking the necessary relief, it is mandatorily provided that the instrument in question should be produced. As this Court has held:

> "It is essentially necessary to establish the fact that a fraud or cheat has been committed by the instrument of writing which is charged to have been altered under the fraud or by which means the fraud is said to have been committed, be produced." *Potter* v. *Republic*, 1 L.L.R. 67 (1874).

Count 3 of appellant's bill alleged that the trial judge erred in overruling Counts 2 and 4 of the reply which traversed defendant's answer on the question of plaintiff's failure to file exhibit of the partnership agreement between the plaintiff and the defendant and also the subsequent lease agreement which was in the possession of the defendant and unavailable to the plaintiff.

This is a case in which the plaintiff came into equity seeking cancellation of an agreement which became the base of the proceedings and on the other hand, the plaintiff sought the cancellation on the ground that there was a previous agreement of partnership entered into between the plaintiff and the defendant which the defendant had violated by instituting a subsequent agreement with a third party for the identical tract of land that the partnership was to operate on; yet the plaintiff failed to make profert of either of the documents with the complaint or bill, contrary to the provisions of law and our rules gov-

erning our practice. This neglect was strongly attacked by the defendant's answer and issue was joined thereon in the pleadings. The controlling statute provides that:

> "In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." 1956 CODE 6:258(2).

Therefore it is our opinion that this instrument which was the subject of the fraud and under which plaintiff sought to recover should have been described with every particularity by making profert of the same; and a failure to do so was fatal. The court below therefore did not err.

Count 1 of the bill of exceptions concerns the question of defendant's affidavit being illegally sworn to in his rejoinder by his counsel as deponent, and alleges that the law makes it binding that defendant appear and swear personally and not through counsel. On this count, reference to the authority of the law makes this clear, and I quote:

> "Except as the rule may be altered by statute, an authorized agent or attorney having knowledge of the facts may make an affidavit. Under a statute requiring an affidavit to be made by a particular person himself, his agent or attorney cannot make it. However, if the statute permits the agent or attorney to make the affidavit upon good cause, such as the absence of the principal or client, in such case, an agent or attorney who is authorized and in knowledge of the facts can make the required affidavit. . . ." 2 C.J.S. 927 *Affidavits* § 6.

We have no statute in vogue which imposes an inhibition on an attorney or counsel appearing and swearing to an affidavit to a pleading for and on behalf of his client as deponent, except where the law specifies the cases of injunction or attachment by arrest, in which classes of cases the plaintiff is mandatorily required to swear to the affidavit for himself; nor have we been able to trace any law through equity jurisprudence to the contrary in this re-

gard. This view, therefore, of the appellant, which he attempts to advance as a ground for the dismissal of his adversary's rejoinder as not being in harmony with law and our practice, is absolutely untenable. Count 1 of the bill is also dismissed.

Count 2 goes to objection taken against the ruling of the court below in dismissing Count 2 of the surrejoinder because it did not conform to the statute in such case provided, in that it was not sufficiently responsive to defendant's rejoinder. The controlling statute provides that:

> "A reply or subsequent pleading may contain any or all of the following:
>
> "(a) A denial of the truth of the facts stated in the proceeding pleading;
>
> "(b) A denial of the sufficiency of the law assumed in the previous pleading; or
>
> "(c) A statement of new facts pertinent to the action." 1956 CODE 6:311.

Upon inspection of said surrejoinder, our minds have been cleared that the court below did err in dismissing plaintiff's Count 2 of the said surrejoinder, since it conforms to the provisions of the statutes to all intents and purposes; it is our opinion that the trial judge erred in dismissing the same. Count 2 is therefore, under the circumstances, sustained.

In Count 4 of the bill, plaintiff, now appellant, excepts to the court's entertaining Count 3 of defendant's answer which attacked the complaint as the wrong form of action. Among the issues raised by this count was that of the inconsistency of the suit including the illegality of the partnership agreement which allegedly was not probated and registered until after 3 years and was allegedly therefore of no legal merit to authorize a suit to be brought thereon.

On inspection of the agreement in question, we are satisfied that it was executed on April 1, 1960, and was not probated until June 8, 1963—a period of 3 calendar

years and 3 months intervening, and just 6 days before the filing of the cancellation proceedings. It follows that the agreement, not having been probated and registered within the period of 4 months prescribed by law, became void in its entirety and therefore was not a fit instrument for the contingency of a suit because it could have no binding effect upon either of the parties, especially since it is clearly portrayed from the records that the subsequent lease agreement petitioners seek to have cancelled was instituted quite some time before the partnership agreement was attempted to be legalized out of statutory time.

Moreover, the failure to make profert of the said document is another glaring act which justifies the ruling of the trial judge; and here is another common law citation in support of the act of the trial judge:

> "It is a rule of modern practice that when a pleading is founded on a written instrument a copy thereof may be annexed and made a part of the pleading by reference as an exhibit, and by statute or rule of court it is sometimes made obligatory on the pleader in such a case to annex a copy of the instrument to the pleading." 21 R.C.L. 476 *Pleading* § 39.

According to our statutes and court laws, when it is obligatory for a legal requirement to be met, a failure so to do, when attacked, is fatal and irreparable.

Considering, therefore, all of the incurable legal blunders made by the plaintiff in his complaint and condemned by the strong dictates of the law controlling, we are compelled to consider the bill of exceptions insufficient to be given a favorable consideration by this Court; hence, we are left with no option other than to affirm the judgment of the court below with costs against the appellant; and the clerk of this Court is ordered to send a mandate to the lower court to this effect. And it is hereby so ordered.

Judgment affirmed.