June 1952

The Replication and the Special Reply in Writing in Equity

R. E. M.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol54/iss3/8

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
The Replication and the Special Reply in Writing in Equity.—In a discussion of this subject it is necessary to distinguish between a special replication and the special reply in writing authorized by statute. It has been held that a special replication is not available in equity, and that if the answer sets up new matter not calling for affirmative relief, such new matter must be met by either an amended or supplemental bill. The language of the Code authorizing the plaintiff to plead as many special replications as he may deem necessary would seem to indicate that a special replication would be proper in equity. It may be noted that the first part of the statute speaks of "any action or suit"; however, it has been said that the section has no application to equity.

Although numerous West Virginia cases have held that a special replication is not proper in equity, a statute authorizes a special reply in writing. The special reply is used when new matter is alleged in the answer constituting a claim for affirmative relief. The rule as stated in Briggs v. Enslow is that, "Special replications are only authorized when an answer prays affirmative relief, and in such case they can only be filed by the person against whom such relief is prayed." Some confusion has resulted from the West Virginia court's using the term "special replication" when speaking of the special reply in writing, as it did in the above

2 "The defendant in any action or suit may plead as many several matters, whether of law or fact, as he shall think necessary, except that if he plead the plea of non est factum he shall not, without leave of the court, be permitted to plead any other plea inconsistent therewith. To any special plea pleaded by a defendant, the plaintiff may demur and in addition plead as many special replications as he may deem necessary." (Italics supplied.) W. VA. CODE c. 56, art. 4, § 39 (Michie, 1949).
3 Willis v. Willis, 42 W. Va. 522, 26 S.E. 515 (1896).
4 "A defendant in a suit in equity may, in his answer, allege any new matter constituting a claim for affirmative relief in such suit against the plaintiff or any defendant therein, in the same manner and with like effect as if the same had been alleged in a cross-bill filed by him therein; and in such case, if the plaintiff or defendant against whom such relief is claimed desire to controvert the relief prayed for in the answer, he shall file a special reply in writing, denying such allegations of such answer as he does not admit to be true, and stating any facts constituting a defense thereto. But in case a defendant allege new matter in his answer upon which he relies for and prays affirmative relief, such defendant shall not file a cross-bill in the same cause except upon condition of striking from his answer all such matter and prayer for affirmative relief as are contained in such cross-bill." W. VA. CODE c. 56, art. 4, § 58 (Michie, 1949).
5 44 W. Va. 499, 29 S.E. 1008 (1898).
6 Id. at 501, 29 S.E. at 1009.
quotation. That the court recognizes the two as being separate and
distinct is shown in the case of Ward v. Ward7 where the court
states in the syllabus, "A special replication is not available in
chancery practice, but an amended bill must be used. Under
section 35, chapter 125, Code, a special reply may be made to an
answer of new matter calling for affirmative relief and answering
the purpose of a cross-bill; but a special replication is a different
thing."

Because of the well established distinction between the special
replication and the special reply in writing, it would seem advisable
to comment upon two recent West Virginia decisions where the
distinction was apparently not called to the attention of the court
or was overlooked. In Ball v. Ball8 there was a contest over a will.
The bill of the plaintiffs, who were heirs of the deceased, prayed
that a trust purported to be established by the will be declared
void because it was indefinite and uncertain. The answer of the
executor and trustee alleged that the will was not indefinite and
uncertain. To the answer a "replication" was filed denying the
allegations in the answer and averring that the plaintiff had by
deeds of conveyance received the interests of other interested parties
to the will.9 It should be noted that there was no new matter in
the answer constituting a claim for affirmative relief, and further
that the answer contained no prayer for relief.

In Backus v. Abbot10 there was a suit for a mandatory injunc-
tion to require the assessor to enter land claimed by the plaintiffs
as owners upon the land books. The bill alleged that the land had
been conveyed to the plaintiffs by certain grantors, that the plain-
tiffs had entered upon the land and had been in adverse possession
of it, that they had redeemed the land after forfeiture to the state
for nonentry on the land books, and that the defendant had entered,
but later wrongfully removed, the land from the land books. The
defendant in his "special plea" alleged that the land was not placed
on the land books because no land of any kind or description similar
to that purported to have been conveyed to the plaintiffs had been
assessed in the names of the plaintiff's grantors. In a "special
reply" the plaintiffs alleged that the defendant had entered the

---

7 50 W. Va. 517, 40 S.E. 472 (1901).
9 It is interesting to note that to the "replication" a "rejoinder" was filed
denying the right of the other interested parties to convey their interests to the
plaintiff.
10 69 S.E.2d 48 (W. Va. 1952).
land upon the land books, but that it was later removed and further that the plaintiffs had title by adverse possession. It is apparent that there was no new matter in the plea calling for affirmative relief. The court does not mention the point under discussion in either the Ball case or the Backus case, but merely states the manner in which the cases came before it.

Since a special replication may never be used in equity, it is important to determine when it is proper to use the special reply in writing. When new matter is alleged in the answer constituting a claim for affirmative relief a special reply is necessary. However, if the new matter in the answer is purely defensive, a special reply is not permitted. The court states in Paxton v. Paxton that, "It is not enough to call for a special reply that the answer contain new matter, but it is only when the new matter, in its nature as applied to the case, calls for affirmative relief against some of the parties, and it is not simply matter of defense of the case made by the plaintiff." Nor is a special reply proper where the cross relief matter in the answer is merely incidental to the relief prayed for in the bill. In such cases a general replication is sufficient. In DiBacco v. Bendetto the court said, "... where the answer, although praying affirmative relief, avers, in addition to the denial of the allegations of the bill, only such new matter as could be set up by way of defense no special reply is required; but a general replication is sufficient to put defendant upon proof of such matter."

The question of what constitutes new matter under the statute was considered by the court in Moore v. Wheeler where it said, "The new matter constituting a claim for affirmative relief in a suit referred to in this section is such new matter as the defendant could not have the benefit of ordinarily, by answer filed in the cause before this section took effect, and such as he might avail himself the benefit of by cross-bill filed in the cause."

The new matter constituting a claim for affirmative relief in the answer is tested by the same rules governing the sufficiency of
a cross-bill. Such matter must be germane to the original bill, and it must not be matter foreign to the case. It is also necessary that the answer setting up new matter constituting a claim for affirmative relief contain a prayer for relief. If there is only a prayer for specific relief, without a prayer for general relief, then no relief other than that prayed for may be given.

Viewed by the foregoing rules, it is evident that the “replication” in the Ball case, supra, and the “special reply” in the Backus case, supra, were improper. The new matter in the replication in the Ball case should have been brought in by an amended or supplemental bill; and a general replication would have been sufficient in the Backus case. Although it would be wise to file a general replication to the answer in all cases, a West Virginia statute provides that a decree will not be reversed for want of a replication where it appears that substantial justice has been done. In view of this statute, it would seem that today a replication is largely a matter of form.

The final question to be considered is the status of a special replication which has been improperly filed in a chancery proceeding. It would appear that there are at least two ways of treating such a replication. First, the attempted special replication could stand as an amended bill because of the equity rule which regards the substance of the pleadings rather than the form. “In chancery pleadings it is the disposition and practice of the courts of equity to regard substance rather than mere form or name, and to so mold and treat the pleadings as to attain the real justice of the

---

23 Harrison v. Brewster, 38 W. Va. 294, 18 S.E. 568, 569 (1893). Dent, J., speaking for the court, said (at pp. 296-297), “The practice under the Code in relation to answers, cross-bills, special and general replications has been so often passed upon by this Court, that it is nothing but a waste of time and labor to keep repeating what has heretofore been so well settled. Familiarity with repeated decisions and statutory law might be of assistance to counsel and beneficial to their clients. This suggestion is without authority.”
25 “No decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; and when it appears that there was a full and fair hearing on the merits, and that substantial justice has been done, a decree shall not be reversed for want of a replication, although the defendant may not have taken depositions; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing on the merits, and that substantial justice has been done.” W. Va. Code c. 58, art. 1, § 3 (Michie, 1949).
case. The name and the form are immaterial. Substance is all that is required. A pleading bearing one name will often be treated and acted upon as one under another name and operate to perform its functions in the courts of equity, if such pleading contains proper matter to answer the purpose.\(^{26}\) Second, the court might treat the attempted special replication as a general one, disregarding the facts stated and giving it the effect of a traverse.\(^{27}\)

R. E. M.

\(^{26}\) Hale v. Hale, 104 W. Va. 254, 258, 139 S.E. 754, 755 (1927); Foggin v. Furbee, 89 W. Va. 170, 109 S.E. 754 (1921).

\(^{27}\) 1 Hogg's Equity Procedure § 469 (3d ed., Miller, 1943).