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EDITORIAL NOTES

WHEN AN ANSWER MUST BE FILED AFTER A DEMURRER TO A BILL IN EQUITY IS OVERRULED

Under the statute[1] prior to the revised code, when a demurrer to a bill in equity was overruled, it was provided that there should be a rule upon the defendant to answer the bill. If the defendant failed to answer within the specified time, the plaintiff was entitled to a decree against him for the relief prayed for in the bill. In other words, the bill was taken for confessed. This requirement that the defendant should be given a rule to answer fixing a definite time within which the answer must be filed was mandatory and operated as a condition precedent to the entry of any decree granting the plaintiff relief.

"It is established in this state that when the court overrules a demurrer to a bill, if the defendant does not answer or waive

[1] CODE 1923, c. 125, § 30.

> his right to do so, there must be a rule upon him to answer the bill before any decree affording the plaintiff relief can be taken against the defendant, and that it is reversible error to decree without such rule. Yet the rule need not be served, and amounts only to an order that the defendant answer within a certain time, which may be regulated according to the circumstances of the particular case. So the statute has long been construed.'"[2]

Although failure to file an answer within the time prescribed by the rule removed the condition precedent to entry of a decree, it did not foreclose the defendant's right to answer at a subsequent time. By virtue of another statute,[3] the defendant still might answer "at any time before final decree". Consequently, when the plaintiff, upon expiration of the rule to answer, presented for entry a decree based upon allegations of the bill taken for confessed, the defendant might then, without any excuse for failure to comply with the rule, have filed his answer and so have prevented entry of the decree.[4] Furthermore, a decree was not final within the contemplation of the statute until it had actually been entered in the order book. Mere endorsement for entry of a paper decree was not sufficient.[5]

It will readily be seen that, under these statutes, all the advantage was with the defendant. When the rule to answer was entered, presumably the court granted him all the time to which, barring an unforeseen change of circumstances, he was entitled within which to file his answer. Still he was not precluded and the only way in which the plaintiff might undertake finally to foreclose him was to prepare, tender and have entered a final decree, which, until actual entry, might prove wholly useless except as a goad to compel the filling of an answer.

The avowed intention of the Revisers in dealing with these sections was to prescribe "a definite time within which the defendant must answer".[6] In the one section,[7] the following language is relied upon to prescribe the "definite time":

> ". . . . The defendant shall file his answer, in court, if in session, or, if not in session, in the clerk's office of the court in

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[2] Ross' Administrator v. Ross, 72 W. Va. 640, 78 S. E. 789 (1913).
[3] CODE 1923, c. 125, § 53.
[4] Bartrug v. Eedgell, 80 W. Va. 220, 92 S. E. 438 (1917); Snider v. Robinson, 85 W. Va. 673, 102 S. E. 482 (1920).
[5] Ash v. Lynch, 72 W. Va. 238, 78 S. E. 365 (1913).
[6] Revisers' note to REV. CODE, c. 56, art. 4, § 56.
[7] REV. CODE, c. 56, art. 4, § 56.

> which the suit is pending, within fifteen days after the overruling of his plea or demurrer, unless, for good cause shown, the time is enlarged by the court, or the judge thereof in vacation; and if he fail to appear and answer the bill within such fifteen days, or additional time, if any such be granted, the plaintiff shall be entitled to a decree against him for the relief prayed for therein. . . . ."

The other section[8] provides that

> "A defendant may file his answer at any time before final decree, unless required to file it sooner under section fifty-six of this article . . . ."

which is the section first quoted.

It will be observed that the Revisers say that they are undertaking to prescribe "a definite" (not "a *more* definite") time within which the answer must be filed. Yet, whatever may have been the specific intent of the Revisers, it must be conceded that the language quoted in the first section above is peculiarly susceptible to construction and is subject to various interpretations. In the absence of action by the court, it is true that the fixed statutory limitation of fifteen days must control and that the time will be definite. But the fact that the court is given the power to supersede the specific limitation makes the degree of definiteness depend upon the manner in which this power is to be exercised. More specifically, the effect of the statute in fixing "a definite time" will depend upon the time when the court may exercise its discretion to supersede the specific statutory limitation. (1) At what time does the statute contemplate that the definiteness (whatever it is) must appear? At the time when the demurrer is overruled, or at some subsequent time? (2) If the court grants an extension of time, must it do so before the fifteen days have expired? (3) If one extension of time has been granted, can the court subsequently grant additional extensions? (4) As a corollary to the second question, if the court can grant an additional extension, must it do so before the prior extension has expired? (5) Does the court have an absolute discretion or only a reviewable discretion as to what constitutes "good cause" for an extension? (6) Does the court have power further to limit the time within the fifteen days within which the answer must be filed? A majority of these questions have been answered within a rather surprisingly brief period after enactment of the revision.

[8] REV. CODE, c. 56, art. 4, § 57.

It has been decided in two cases[9] that the court may grant an extension of time after the fifteen days have expired. In one of these cases,[10] action of the trial court in granting an extension was approved. The opinion is silent as to the supposed "good cause" upon which the trial court's action was predicated, merely stating briefly, in the body of the opinion,

> "After the statutory period for filing the answer had expired, the chancellor, in the exercise of sound discretion, permitted an answer to be filed on behalf of the defendant. Code 1931, 56-4-56."

In the other case,[11] the demurrer was overruled at a special term, without an extension of time for answering. At a subsequent regular term, an answer was rejected because not tendered within fifteen days from the time when the demurrer was overruled. It was held on appeal that the answer was improperly rejected because non-compliance with a court rule prescribing the conditions under which cases might be submitted at a special term was "good cause" why the fifteen-day limitation should have been extended.

> "A rule of a circuit court requires written consent of counsel to the submission of a case at a special term. An order overruling a demurrer to a bill in chancery was entered at a special term without consent of counsel for defendant. Held, that the non-compliance with the court rule furnishes 'good cause' under Code 1931, 56-4-56, for enlarging the statutory period (fifteen days after entry of the order) in which an answer may be filed."

It is clear from the latter case that the trial court does not have an absolute discretion as to what constitutes "good cause" for refusing an extension of time. It would seem necessarily to follow that the trial court has no such discretion as to what constitutes "good cause" for granting an extension of time, and this view is substantiated in the *Carleton Mining & Power Company* case[12] quoted above, in which the discretion is described as a *sound* discretion. As to the nature of the discretion, these cases would seem to be wholly in accord with the intent of the statute.

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[9] Carleton Mining & Power Co. v. W. Va. Northern R. Co., 166 S. E. 536 (W. Va. 1932); Altmyer v. Fassig, 171 S. E. 529 (W. Va. 1933).

[10] Carleton Mining & Power Co. v. W. Va. Northern R. Co., *supra* n. 9.

[11] Altmyer v. Fassig, *supra* n. 9.

[12] *Supra* n. 9.

In the first case decided construing the revised statute,[13] it was held that, when an extension of time for answering was granted at the time when the demurrer was overruled, an answer could not be received after expiration of the extension. When the demurrer was overruled, the defendant was given thirty days within which to answer. An answer tendered about two months later was rejected. The decision does not purport to be based upon absence of an excuse for not having complied with the extended limitation. Whether an excuse was offered or not, expiration of the extended time alone is stated as a sufficient ground for the holding and apparently the extended limitation was treated as absolute. If so, this case furnishes a definite answer to the question, whether, under any circumstances, an additional extension of time may be granted. A further point in the decision (as the court must have held) is that the second revised section quoted above[14] definitely deprives the defendant of his former right to answer at any time before final decree after a demurrer to the bill has been overruled.

Finally, in the latest decision[15] construing the effect of the first revised section,[16] it is decided that the court has power to limit the time within the fifteen days within which an answer must be filed.

> "They [the former and the revised sections] do *not* contain a guarantee of any particular time in which to answer. They merely set a limit of the greatest length of time that shall be allowed for the coming in of an answer. The trial court has discretion in the matter, and it may either extend the time beyond the fifteen days or, in a proper case, require that the answer come in within a shorter time."

Have the revised sections accomplished the object, wise or unwise, which the Revisers intended? If the statement of their intention is to be taken literally, they were aiming at absolute definiteness, for their expressed intention was to prescribe "a definite" (not merely "a *more* definite") time within which the answer must be filed. Obviously, this definiteness was desired for the benefit of the plaintiff. But they could not have had in mind absolute definiteness. Such would have required a fixed and arbitrary limitation applying indiscriminately to all cases alike and

[13] Kinkead v. Securo, 112 W. Va. 671, 166 S. E. 382 (1932).
[14] *Supra* n. 8.
[15] Highland v. Empire National Bank, 172 S. E. 544 (W. Va. 1933).
[16] *Supra* n. 7.

not subject to qualification with change of circumstances. That would be unfair to the defendant in a greater degree than it would be beneficial to the plaintiff. Hence the court is granted a discretion, but, still bearing in mind the expressed intention of the Revisers, it may be surmised that there was a hope that the discretion would be so exercised as to achieve the highest degree of definiteness compatible with fairness to the defendant, and that such a goal would be the guide for construction. If so, then the problem of construction is where to draw the line of compromise.

In order adequately to relieve the plaintiff from the uncertainties of the former situation, the primary essential is to adhere to a procedure which, at the time when the demurrer is overruled, and at all times in the future, will inform him as definitely as possible with fairness to the defendant what he can expect, so that he may intelligently plan his future course of action. The first step toward this consummation, it may be assumed, was to prescribe the arbitrary limitation of fifteen days, presumably for the average case. In the unusual case, the court was granted a discretion to modify this limitation, but, if the modification is to be made without a loss of definiteness, it must be made in such a way that the modified limitation, in operative effect, except as to the extension of time, will function in the same manner as the superseded limitation. There are different lengths to which the court may go in this direction.

The alternative (most favorable to the plaintiff and most stringent against the defendant) leading to the greatest degree of certainty would be to refuse, once and for all time, an extension of time unless granted for "good cause shown" at the time when the demurrer is overruled. Such a construction, however, might work an unjust hardship upon the defendant. Although the defendant should act with the utmost good faith, believing at the time when the demurrer was overruled that he would be able to file his answer within the fifteen days, an unforeseeable circumstance might intervene which would make it impossible for him to comply with the fifteen-day limitation. Undoubtedly, under the former law, upon such a contingency, it was within the sound discretion of the court to extend the time of the rule to answer.

Another alternative (and the writer can not escape the surmise that something of such a nature was intended by the Revisers) would involve a compromise between absolute and

permanent definiteness for the benefit of the plaintiff on the one hand and on the other hand a reservation in favor of the defendant for the purpose of taking care of unforeseeable future contingencies, the object being to prescribe the greatest degree of definiteness compatible with fairness to the defendant. Under this alternative, the presumption should be that the fifteen-day period is sufficient for all time unless the defendant seeks an extension; and that, if he does seek an extension, he must do so at the earliest reasonable opportunity, so as to inform the plaintiff at the earliest reasonable time what he may expect. For example, if the circumstances disclosing the necessity for the extension are reasonably apparent at the time when the demurrer is overruled, application should be made at that time for the extension and not later; and if the circumstances justifying the extension appear only at a subsequent time, whether before or after expiration of the fifteen-day limitation, or before or after a prior extension, the application should be required to be made at the first reasonable opportunity. In one of the cases reviewed,[17] the defendant apparently offered a sufficient excuse for not having applied for an extension of time prior to expiration of the fifteen days. There may have been some such excuse in the other case,[18] but the opinion is silent as to the circumstances by which the discretion was motivated.

A remaining alternative is possible. On application for the extension, the court may consider solely the circumstances which prevented an earlier tender of the answer, without consideration as to whether the application for extension of time could have been made sooner. If this alternative should prevail, it would seem that the plaintiff would largely be subjected to the same degree of uncertainty as under the former statute. The defendant, it is true, would no longer have an absolute right to file his answer at any time before final decree, but he would have it within his power to subject the plaintiff to a state of uncertainty until the decree was entered. For example, if the plaintiff, after expiration of the

[17] Altmyer v. Fassig, *supra* n. 9. Apparently the defendant was unaware that an order overruling the demurrer had been entered at the special term and that the fifteen-day limitation had begun to run. At any rate, under the court rule, the demurrer could not have been decided at the special term so as to start the running of the limitation without consent of the defendant. It is decided in this case that the limitation starts to run only from the time when the order overruling the demurrer is entered, and not from a prior time when the court announced its decision.

[18] Carleton Mining & Power Co. v. W. Va. Northern R. Co., *supra* n. 9.

fifteen-day limitation, should present a decree for entry, the defendant could at that time show that circumstances had prevented him from tendering an answer earlier and obtain leave to file the answer then, or even leave to file it at a future time if the circumstances were still operative, and thus prevent entry of the decree on the allegations of the bill taken for confessed, in spite of the fact that he could have made application for the extension at an earlier date and so have forestalled useless effort and abortive expectations on the part of the plaintiff. In other words, assertion of the circumstances warranting an extension of time could await presentation of a decree.

As to the holding that the court has discretionary power to limit the time within the fifteen days within which an answer must be filed, there does not seem to be much room for complaint, although it may be argued that, if it was considered necessary to make express provision in the statute for extension of the time, the fact that no express provision is made for diminution of the time indicates that no possibility of diminution was contemplated.

As to the holding (if the court so holds) that, once an extension of time is granted, the extended limitation becomes absolute and not subject to a further extension upon the contingency of subsequent events, the defendant would seem to have ground for complaint. A contrary rule would involve a degree of uncertainty for the plaintiff, but not any more uncertainty than where an extension of the fifteen-day limitation is permitted at a time subsequent to the overruling of the demurrer; and certainty of the time within which the answer must be filed is not of sufficient importance to the plaintiff to be achieved by requiring the defendant to assume the risk of future circumstances which he could not reasonably be expected to foresee.

The practical operation of these revised sections offers a good illustration of the difficulties involved in an attempt to regulate by statute procedural matters which, from their nature, must be left largely to the discretion of the court. A realization of this difficulty by the Revisers is indicated by the fact that they left so much room for the exercise of discretion. The revised sections certainly fall far short of prescribing "a definite time within which the defendant must answer". Two things, however, they have clearly and definitely accomplished: (1) They have taken away from the defendant his former absolute right to answer,

under any and all circumstances, until final decree. (2) They have abolished the necessity for entry of the former rule to answer as a condition precedent to entry of a decree, and thus have prevented the possibility of reversal of a decree because of oversight in failure to enter a rule to answer. Beyond these two things, a great deal has not been accomplished in the way of fixing even a more definite time within which the answer must be filed. Approximately what the present situation amounts to is that a tentative statutory rule to answer, subject to modification within the court's discretion by way of substituting a judicial rule to answer, has been substituted for the former judicial rule to answer. The final results must await the test of judicial construction.

—LEO CARLIN.

NOTE *Re* INCAPACITY AS AN EXCUSE FOR FAILURE TO NOTIFY INSURER REGARDING TOTAL DISABILITY. — In the previous discussion[1] of the requirement of notification to the insurer of the total disability of the insured, — as a condition precedent to waiver of payment of premiums under a life policy, — it was suggested that the requisite notice might be excused where the proven physical or mental incapacity of the insured made performance of the condition impossible. Hence, forfeiture of the policy would be averted, and a result achieved more in accord with social interests in the individual life and conservation of social resources.[2] Such an approach had already been followed in Virginia,[3] when the problem later arose in West Virginia and was disposed of by the Supreme Court of Appeals simply by resort to ordinary principles of strict contract law.[4]

The issue has now been decided in a recent decision[5] by the Circuit Court of Appeals, for the Fourth Circuit, holding that such supervening impossibility may excuse performance of the con-

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[1] Note (1934) 40 W. VA. L. Q. 276.

[2] POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed., 1928) XIII., A., 3., iv and vi., pp. 66, 69.

[3] Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192, 168 S. E. 423 (1931, 1933).

[4] Iannerelli v. Kansas City Life Ins. Co., 171 S. E. 748 (W. Va. 1933); Da Corte v. New York Life Ins. Co., 171 S. E. 248 (W. Va. 1933).

[5] Johnson v. Mutual Life Ins. Co. of New York, 70 F. (2d) 41 (C. C. A. 4th, 1934, (W. D. Va.), per Soper, Circ. J.