Certified Cases under the Statutes and the Rules of Civil Procedure

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To those of us who for many years have had the advantage of appellate review by the supreme court of appeals of certified questions, it is difficult to realize that during the first half century of the existence of our state there was no provision for an independent appellate review of such questions. During that period of time no appellate review could be had of an interlocutory order overruling or sustaining a demurrer to any pleading in an action at law or a suit in equity until the entry of a final judgment or decree. Such an order, being interlocutory and not final in character and not having been made appealable by any of the original provisions of the statute governing appeals and writs of error to the supreme court of appeals, could not be made the basis of appellate review. In consequence, if the trial court erroneously overruled a demurrer to a declaration or a bill of complaint and rendered judgment for the plaintiff on the merits, a correct decision upon the demurrer which would have prevented the expense and the delay of a trial of the case on the merits, could not be had until after a final or appealable judgment had been rendered in the case.

Typical of the cases in which upon appellate review of a final judgment on the merits the judgment was reversed and the case remanded with directions to sustain a demurrer to the declaration or the bill of complaint with leave to amend or to dismiss the case
are Atkins v. Guyandotte Timber Co.,\textsuperscript{2} and Shuttleworth v. Shuttleworth.\textsuperscript{3} These cases were selected at random, but the West Virginia Reports of decisions prior to 1915 are well supplied with cases in which final rulings upon demurrers to pleadings were rendered by the supreme court of appeals only upon appeals from or writs of error to final or appealable judgments.

On February 20, 1915, the Legislature, at its 1915 Regular Session, enacted Chapter 69 which added provisions which conferred upon the supreme court of appeals jurisdiction to decide questions certified to it by a trial court involving the sufficiency of a summons, or a return of service, or challenge of the sufficiency of a pleading in any case within the appellate jurisdiction of the supreme court of appeals. The jurisdiction so conferred was expressly limited to the particular types of questions specifically mentioned in the statute. This statute, which became effective May 21, 1915, as subsequently amended, now appears as section 2, article 5, chapter 58, Code, 1931, and to the extent here pertinent contains these provisions:

"Any question arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading, in any case within the appellate jurisdiction of the supreme court of appeals, may, in the discretion of the circuit court in which it arises, and shall, on the joint application of the parties to the suit, in beneficial interest, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The forms of the certificates of such questions, as well as the time and the manner of the hearing and notice thereof and the portion of the record to be sent up, shall be as prescribed by the supreme court of appeals."

It is also difficult to appreciate fully the far-reaching effect of the statute with respect to certain phases of appellate procedure. I think I understand its worth and importance for, as one of the old timers, I was admitted to practice about three years before its enactment.

\textsuperscript{2} 70 W. Va. 99, 73 S.E. 243 (1911).
\textsuperscript{3} 34 W. Va. 17, 11 S.E. 714 (1890).
This statute is unique in that it expressly limits the jurisdiction of the supreme court of appeals on appellate review of interlocutory orders upon certificate to questions arising upon the sufficiency of a summons, a return of service, and challenge to the sufficiency of a pleading. Though a number of states, among them Alabama, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Washington and Wyoming, by constitutional or statutory provisions authorize reservation, certification, or report of cases or questions for or to an appellate court, in particularly designated circumstances, by courts of original jurisdiction or by intermediate appellate courts, I have not found any exact counterpart to section two among constitutions or statutes of any other state and there is no statute in Virginia which provides appellate review upon certification of a question by a trial court.

A statute similar to section two, providing appellate review by the circuit court upon certificate of any question arising in a court of limited jurisdiction, upon the sufficiency of a summons, or a return of service, or challenge of the sufficiency of a pleading, was incorporated in the Code of 1931, as section 2, article 4, chapter 58. Prior to the enactment of that statute the supreme court of appeals held in at least two cases. State v. Houchins and Atkinson v. Empire Sav. & Loan Co., that a court of limited jurisdiction could not certify questions arising in cases pending before it to the supreme court of appeals or to a circuit court under the 1915 act.

Inasmuch as Rule 81(a) (1) of the new Rules of Civil Procedure provides that those rules do not apply to any case which comes before a circuit court upon appeal from or to review the judgment, order, or ruling of any court of record or administrative agency, I shall refrain from further discussion of the appellate review by the circuit court of cases certified to it by a court of limited jurisdiction, except to mention the recent case of State v. Miller. In that case a criminal court of limited jurisdiction overruled a demurrer to each of two counts of an indictment. On certificate to the circuit court the ruling of the criminal court was reversed and the demurrer sustained. Upon certificate the supreme court of ap-

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4 C.J.S., Appeal and Error § 390.
5 96 W. Va. 375, 123 S.E. 185 (1924).
peals held that the questions were reviewable by it upon certificate because the demurrer had been overruled by the trial court and reversed its ruling as to one count and affirmed its ruling as to the other counts of the indictment.

The procedure concerning cases certified by the circuit court is, as provided by the statute, governed by the Rules of Practice in the Supreme Court of Appeals. The rules which specifically apply to certified cases are Rule II, sections 4, 5, 6, and 7, Rule V, sections 2 and 7, and Rule VI, section 9.

Rule II, section 4, provides that no question shall be certified under section 2, article 5, chapter 58, Code, until after decision of the question by the trial court and that the decision shall be certified with the question; that all motions to docket certified cases shall be presented and filed in the office of the clerk within sixty days of the date of the order of certification; that no question once certified shall be included in a subsequent order of certification in the same case; and that motions to docket certified cases which do not comply with this rule will not be considered.

It should perhaps be observed that notwithstanding the provision forbidding subsequent certification of the same question in the same case, the refusal of the court to consider a question certified, though amounting to affirmance of the ruling of the trial court, does not constitute a final adjudication of the question involved.\(^6\)

Rule II, section 5, prescribes the form of certificate in connection with all questions covered by the statute. It is short and concise and should be familiar to every member of the bar.

Rule II, section 6, requires the clerk to prepare a transcript of so much of the record as is necessary for a determination of the question certified, and provides that the certificate be placed at the front of the transcript.

Rule II, section 7, directs that counsel on each side of the case shall file one typewritten copy of a memorandum of authorities when the case is presented to the court.

Rule V, section 2, provides that all certified cases docketed more than thirty days before the commencement of a regular term of court, shall be placed on the argument docket for that term.

Rule V, section 7, states that the record in certified cases need not be printed unless ordered by the court, and that without further notice all such cases docketed for hearing will be called at the next term for which they are docketed.

Rule VI, section 9, provides that all certified cases docketed for hearing shall be submitted on typewritten or printed briefs without a formal request to submit, and that the party against whom the ruling of the circuit court stands shall be regarded as the appellant or plaintiff in error in the supreme court of appeals for the purpose of filing briefs and making oral arguments in the case. In practice, under this rule, the court usually permits the submission of certified cases on typewritten briefs.

If the members of the bar will thoroughly familiarize themselves with these few short and simple rules, they will encounter no difficulty in the presentation and submission of certified cases in the supreme court of appeals.

After the enactment of the original statute in 1915, the members of the bar of this state were quick to take advantage of the method of appellate review afforded by the new legislation. Within less than six months after the statute became effective cases were certified to the supreme court of appeals. The first such case to reach that court was County Court of Hancock County v. Wilkin, from the circuit court of that county, and was decided by order and without opinion, September 14, 1915. In that case the sufficiency of a notice of motion for judgment and a plea filed by the defendant were involved. The appellate court sustained the circuit court in overruling a motion to quash the notice and reversed that court in rejecting the plea of the defendant.

Several of the earliest certified cases, numbered 1 to 23, were decided by orders without opinions and for that reason they are not recorded in the West Virginia Reports. The first certified cases in which opinions were prepared and filed are Certified Case No. 24, Marshall v. Anderson, decided April 17, 1917, and Certified Case No. 25, Johnson v. City of Huntington, decided April 3, 1917.

Since the enactment of the statute in 1915, at least 863 cases have been docketed and reviewed by the supreme court of appeals.

9 80 W. Va. 228, 92 S.E. 421 (1917).
10 80 W. Va. 178, 92 S.E. 344 (1917).
on certificate. During the forty-seven years since the enactment of the original statute an average of approximately eighteen cases a year certified by the circuit courts have been docketed and disposed of by the supreme court of appeals. From the beginning each certified case has been given a number which is entered in the records of the supreme court of appeals; but many of the earlier cases, though appearing in the reports of the decided cases, do not carry a published number. During the past several years, however, and since the decision in April 1925 of Harrison Const. Co. v. Greystone Hotel Co., Certified Case No. 346, each of the reported certified cases bears a particular number which is listed in the official case reports.

The statute authorizing the supreme court of appeals to decide questions certified to it by a circuit court is one of the most important statutes relating to appellate procedure when considered from the standpoint of its availability during the early stages of a judicial proceeding; and the general purpose of the Legislature in enacting it was to enable the appellate court to determine upon certificate all questions involving the sufficiency of a summons, a return of service, or a pleading which affect or control the final disposition of a case before vexatious costs are incurred or needless delays are encountered in its ultimate and complete determination. It was intended to operate as an aid to the prompt and economical administration of justice; and its purpose in that respect has in large measure been realized.

The method of reaching the supreme court of appeals is, as already indicated, appellate in character. Judicial action is required in the first instance in the trial court, which must decide the questions raised and record its action. The order recording the decision is interlocutory but it is generally of such vital importance in the final disposition of the case that it is imperative in the proper administration of justice that its correctness be promptly verified or denied by the court of last resort before the occurrence of unneces-

11 The most recent such case was Consolidation Coal Co. v. Mineral Coal Co., 126 S.E.2d 194 (W. Va. 1962).
13 West Virginia Water Serv. Co. v. Cunningham, 143 W. Va. 1, 98 S.E.2d 891 (1957); Weatherford v. Arter, 135 W. Va. 391, 63 S.E.2d 572 (1951); 3 Michie's JURISPRUDENCE, Case Certified § 3.
14 State v. Houchins, 96 W. Va. 375, 123 S.E. 185 (1924); 3 Michie's JURISPRUDENCE, Case Certified § 4.
sary costs and delays. The statutory procedure of presenting inter-
locutory decisions of a lower court to the appellate court upon 
certificate, being in derogation of the common law, will be strictly 
adhered to and followed.

As already pointed out, the jurisdiction of the supreme court of 
appeals is expressly limited to questions of law arising solely upon 
the face of a summons, a return of service, or a pleading. Matters 
relating to mere procedure in the trial court are not certifiable and 
an order, either interlocutory or final, granting or denying relief to 
any party, can not be reviewed upon certificate. Although the 
statute permits rulings upon doubtful questions arising upon the 
sufficiency of pleadings to be certified for review, it is necessary 
that there be a prior unequivocal ruling by the circuit court before 
the question can be certified. Only such questions as have been 
decided by the trial court and by it certified to the appellate court 
may be considered upon certificate by that court. Thus, where, in 
an action at law the circuit court sustains a motion to dismiss one 
of the defendants, but later, during the same term of court, sets 
aside the dismissal order and enters no other order except to certify 
the question which arose upon the motion to dismiss, there has 
been no prior decision of the question involved and the appellate 
court will not pass upon the question presented by the certificate.

The appellate court will not consider certified questions which 
are not necessary in the decision of the case; and it will confine 
its ruling to the specific question certified. Under the statute the 
contents of a stipulation by the parties may not be considered.

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15 Ibid.
17 Tyler v. Wetzel, 85 W. Va. 378, 101 S.E. 726 (1920); Jones v. Main 
Ist Creek Coal Co., 82 W. Va. 506, 96 S.E. 797 (1918); 3 Michin's 
JURISPRUDENCE, Case Certified § 5.
18 Tyler v. Wetzel, 85 W. Va. 378, 101 S.E. 726 (1920); 3 Michin's 
JURISPRUDENCE, Case Certified § 5.
19 Pancake Realty Co. v. Härber, 137 W. Va. 605, 73 S.E.2d 438 (1952); 
Weatherford v. Arter, 135 W. Va. 391, 63 S.E.2d 572 (1951); County Court 
of Raleigh County v. Cottle, 82 W. Va. 743, 97 S.E. 292 (1918).
22 West Virginia Water Serv. Co. v. Cunningham, 143 W. Va. 1, 98 S.E.2d 
891 (1957).
(1941).
and the supreme court of appeals has no jurisdiction to determine a question of fact upon certificate.\textsuperscript{25}

A judgment which involves a question arising upon a challenge of the sufficiency of a pleading and is not appealable presents a proper question for review by the appellate court upon certificate;\textsuperscript{26} but appealable judgments, orders, or decrees are not reviewable upon certificate.\textsuperscript{27}

In \textit{City Ice & Fuel Co. v. Dankmer},\textsuperscript{28} in which the court held that an order quashing a writ of scire facias to revive a chancery cause is an appealable order and as such is not reviewable upon certificate, the opinion contains these statements:

\begin{quote}
"Since questions appealable or reviewable by writ of error are not regarded as questions upon which the lower court could hold its ruling in abeyance pending the decision of questions certified to a superior court, we have consistently held that questions thus disposed of lack the tentative element necessary to certification. In such matters, the lower court has taken a positive position."\textsuperscript{29}
\end{quote}

Likewise the action of a trial court in overruling a motion to quash a search warrant is not certifiable to the appellate court inasmuch as such warrant is not a summons, a return of service, or a pleading within the meaning of the statute.\textsuperscript{30} As a bill of particulars is not a pleading, a motion to quash it is not a challenge to the sufficiency of a pleading, and the ruling of the trial court upon such motion is not reviewable upon certificate.\textsuperscript{31} The supreme court of appeals is without jurisdiction to review upon certificate the ruling of the circuit court upon the sufficiency of an affidavit for interpleader filed by a defendant in an action in assumpsit.\textsuperscript{32} An order quashing an attachment in a suit in equity can be reviewed by the supreme

\textsuperscript{26} Staud v. Sill, 114 W. Va. 208, 171 S.E. 428 (1933).
\textsuperscript{27} City Ice & Fuel Co. v. Dankmer, 125 W. Va. 299, 24 S.E.2d 89 (1943); Slater v. Slater, 118 W. Va. 645, 191 S.E. 524 (1932); Saffel v. Woodyard, 90 W. Va. 747, 111 S.E. 768 (1922).
\textsuperscript{28} 125 W. Va. 299, 24 S.E.2d 89 (1943).
\textsuperscript{29} Id. at 300, 24 S.E.2d at 89, citing Slater v. Slater, 118 W. Va. 645, 191 S.E. 524 (1937).
\textsuperscript{30} State v. DeSpain, 139 W. Va. 854, 81 S.E.2d 914 (1954).
\textsuperscript{31} Adkins v. Wayne County Court, 94 W. Va. 460, 119 S.E. 284 (1923).
\textsuperscript{32} Burlew Hardware Co. v. City of Spencer, 99 W. Va. 44, 127 S.E. 727 (1923).
court of appeals only upon appeal and is not reviewable by that court upon certificate.\textsuperscript{33}

Though an order of a trial court overruling a demurrer to an indictment in a criminal case may be reviewed upon certificate by the supreme court of appeals,\textsuperscript{34} the judgment of a circuit court sustaining a demurrer to an indictment or to a warrant in a criminal case before the court on appeal, and quashing the indictment or the warrant because insufficient, is a final judgment and can not be certified for review.\textsuperscript{35} Rulings by the lower court upon exceptions to answers to interrogatories appended to a bill in equity do not raise a question of the sufficiency of a pleading and are not reviewable upon certificate.\textsuperscript{36} The supreme court of appeals will not consider upon certificate the ruling of the circuit court upon the sufficiency of a petition to suppress evidence in a criminal case.\textsuperscript{37}

A decree, to be appealable and not reviewable upon certificate, must be an adjudication of not only a part, but of all, the principles of the case.\textsuperscript{38} It should be observed, however, that it was previously held in \textit{Blue v. Hazel-Atlas Glass Co.},\textsuperscript{39} that an order striking out a part of a bill of complaint which was so material as to deny the plaintiff a part only of the relief sought was a decree adjudicating the principles of the cause and as such an appealable decree, and that such order was not reviewable upon certificate, even though it failed to dispose of the remaining part of the principles of the cause.\textsuperscript{40} This holding, however, was expressly overruled in the later case of \textit{Staud v. Sill},\textsuperscript{41} which held that a decree of that character is not an appealable decree and is reviewable upon certificate. A decree for alimony \textit{pendente lite} in an amount equal to the jurisdictional amount for an appeal to the supreme court of appeals, being a decree for the payment of money, is an appealable decree and can not be reviewed upon certificate.\textsuperscript{42}

\textsuperscript{33} Marks v. Mitchell, 90 W. Va. 702, 111 S.E. 763 (1922); State ex rel Trent v. Pritt, 134 W. Va. 516, 59 S.E.2d 890 (1950).

\textsuperscript{34} State v. Morrison, 96 W. Va. 674, 123 S.E. 678 (1924).


\textsuperscript{36} County Court of Raleigh County v. Cottle, 82 W. Va. 743, 97 S.E. 292 (1918); 3 Michie's Jurisprudence, Case Certified § 10.

\textsuperscript{37} State v. Wantropski, 98 W. Va. 123, 126 S.E. 496 (1925); 3 Michie's Jurisprudence, Case Certified § 13.

\textsuperscript{38} Staud v. Sill, 114 W. Va. 208, 171 S.E. 428 (1933).


\textsuperscript{40} 114 W. Va. 208, 171 S.E. 428 (1933).

\textsuperscript{41} Slater v. Slater, 118 W. Va. 645, 191 S.E. 524 (1937).
The only question that may be properly certified to the supreme court of appeals for review arising upon a general demurrer to a declaration when such demurrer has been sustained or overruled is whether the declaration states a good cause of action against the defendant.\textsuperscript{43} A decree sustaining a demurrer to a part of a bill and dismissing it as to such part, being neither final nor appealable, but, nevertheless, dispositive of a question involving the sufficiency of a pleading is reviewable upon certificate.\textsuperscript{44} A ruling on a motion to quash a summons can not be certified for review.\textsuperscript{45} A petition or motion to appoint or remove church trustees, not being a pleading within the meaning of the statute, can not be reviewed upon certificate.\textsuperscript{46}

The appellate court has no jurisdiction to consider upon certificate the sufficiency of any pleading which it is necessary to dispose of by proof.\textsuperscript{47} In a recent case, \textit{State v. Miller},\textsuperscript{48} the opinion states that when a pleading is disposed of by proof the questions presented may not be certified and that certification may be had only when a demurrer testing the sufficiency of a pleading is filed and no proof is taken.\textsuperscript{49} Likewise the sufficiency of a bill for an injunction to which no plea putting that question in issue has been filed can not be certified to the appellate court upon the order awarding a temporary injunction.\textsuperscript{50} When the principles of a cause have been adjudicated the appellate court is without jurisdiction to review upon certificate the ruling of the trial court upon a demurrer which has been filed in the case.\textsuperscript{51}

Where a circuit court, on an issue of fact joined on a plea in abatement denying jurisdiction, decides the issue and renders final judgment, the questions involved may not be reviewed upon certificate.\textsuperscript{52} The supreme court of appeals has repeatedly held that

\textsuperscript{43} Brumfield v. Wofford, 143 W. Va. 332, 102 S.E.2d 103 (1958); Clayton v. County Court of Roane County, 96 W. Va. 333, 123 S.E. 189 (1924).
\textsuperscript{44} Gulland v. Gulland, 81 W. Va. 487, 94 S.E. 943 (1918).
\textsuperscript{45} Tyler v. Wetzel, 85 W. Va. 378, 101 S.E. 726 (1920); Nicola v. Williams, 103 W. Va. 29, 136 S.E. 512 (1927).
\textsuperscript{46} Wilsonburg Methodist Episcopal Church v. Ash, 87 W. Va. 668, 105 S.E. 915 (1921).
\textsuperscript{48} 145 W. Va. 59, 112 S.E.2d 472 (1960).
\textsuperscript{50} City of Wheeling v. Chesapeake & Potomac Tel. Co., 81 W. Va. 438, 94 S.E. 511 (1917).
\textsuperscript{51} Central Trust Co. v. Green, 98 W. Va. 200, 127 S.E. 32 (1925).
\textsuperscript{52} Jones v. Main Island Creek Coal Co., 82 W. Va. 506, 96 S.E. 797 (1918).
when a demurrer to a declaration or a bill of complaint has been sustained and the action has been dismissed, the appellate court can not upon certificate review the action of the trial court, and that the order of dismissal, being a final judgment, can be reviewed only upon writ of error or appeal. In Heater v. Lloyd the court used this pertinent language concerning the statute governing certified cases:

"The effect of the provisions of that statute is to circumscribe, restrict and limit the right of this court to entertain and decide only questions immediately arising in the preliminary stages of a controversy, that is, mere interlocutory orders, not those fully and completely terminating the action or suit by final judgment or decree. To obtain relief from an erroneous judgment or decree the party aggrieved must resort to the usual writs provided by law for that purpose, and not to those provided for a special purpose."

A statement in writing, filed by plaintiff in an action upon an insurance policy, may be challenged by a demurrer by the defendant, and the question arising upon the demurrer may be reviewed upon certificate. The typical case which regularly comes before the supreme court of appeals in which the questions presented are properly reviewable upon certificate is that in which the circuit court overrules a demurrer to a complaint or a plea, or sustains a demurrer to a complaint, or a plea, but does not dismiss the action, and certifies the ruling to the appellate court.

I have referred to many West Virginia decisions under the certification statute in what I fear may be tedious or boresome detail. This I have done to present for your benefit most of the matters dealt with by the court and for the added reason that the test prescribed for determining whether a question is reviewable upon certificate before the Rules of Civil Procedure became effective on July 1, 1960, will apply with controlling force and effect in determin-

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54 85 W. Va. 570, 573, 102 S.E. 228 (1920).

Contrary to an erroneous impression which I have been told prevails among some members of the bar in some of the judicial circuits in this state, the considerable benefits and advantages afforded by the certification statute, to which I have referred and which tend to promote the prompt and efficient administration of justice, are available under the new Rules of Civil Procedure. Though those rules abolish demurrers, pleas in bar, pleas in abatement, and exceptions for insufficiency of a pleading,\footnote{W. VA. R. Civ. P. 7 (c).} they do not eliminate or impair appellate review upon certificate but do, in lieu of the demurrer, provide the means of testing the sufficiency of a pleading by certain motions which discharge the functions previously performed by the demurrer. Those motions are dealt with by Rule 12, which among others, contains these pertinent provisions which are identical with the applicable provisions of the similarly numbered Federal Rules of Civil Procedure:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by
the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

"(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

"(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Concerning the meaning and the effect of the foregoing provisions, the Original Note of the Reporters\(^5\) contains this helpful comment, with most, but not all, of which I agree:

"4. It is somewhat difficult to draw analogies from West Virginia procedure to Rules 12(b) (6), 12(c), and 56, since the demurrer to some extent now performs the functions of all three of these motions. The three motions overlap somewhat. None of the three motions may be used to resolve genuine issues as to the material facts.

"A motion to dismiss, under Rule 12(b) (6), like a demurrer under present procedure, would be appropriate where it is obvious from the complaint that the plaintiff has failed to state a claim, i.e., where the complaint has omitted an essential element of the cause of action. The motion to dismiss is the usual way to test the sufficiency

\(^5\) 144 W. Va. xxxvii - xxxviii, LUGAR & SILVERSTEIN, WEST VIRGINIA RULES (1960).
of the complaint. Affirmative defenses should be asserted under Rule 8(c), and not under Rule 12(b)(6), with the exception of the defense of statute of limitations, at least where time allegations in the complaint show a basis for this defense.

"A motion under Rule 12(c) would be appropriate where all the pleadings show plainly that the plaintiff does not have a claim or that the defendant has no defense.

"If matters outside the pleadings are considered by the court on either a motion to dismiss or for judgment on the pleadings, Rule 56 will apply. A motion for summary judgment, under Rule 56, may be made solely on the pleadings, but is usually supported by affidavits and depositions. Then the test is whether there is a genuine issue as to any material fact. If not, judgment will be given on the issues of law presented.

"A summary judgment is a dismissal with prejudice, whereas, a motion to dismiss under Rule 12(b), or a motion for judgment on the pleadings, under Rule 12(c), is not a dismissal with prejudice. Note also that, under Rules 56(c) and (d), summary judgment may be granted in interlocutory form or as to a part of the issues in the case, whereas, this form of relief is not available under Rules 12(b)(6) and 12(c)."

During the period from July 1, 1960, when the new rules became effective, and the adjournment of the last term of the supreme court of appeals on July 6, 1962, there have been only two cases before that court in which certification of questions in cases governed by the new rules was considered or discussed.58

In Petros v. Kellas,59 decided October 24, 1961, a civil action based on negligence, the circuit court, upon the pleadings and matters outside the pleadings presented to and not excluded by the court, rendered summary judgment under Rule 56 upon motion of the defendants to dismiss for failure of the pleading to state a claim upon which relief could be granted. On appeal

the judgment was affirmed. The opinion, which I prepared, contains these statements: "[A] judgment of dismissal of an action under Rule 12(b) or a final judgment under Rule 56, rendered by a trial court is not here reviewable upon certificate but can be reviewed by this Court only upon appropriate appellate process." This pronouncement is consistent with the holdings of the court in cases decided before the adoption of the new rules that a judgment dismissing the action after a demurrer to a declaration or a bill of complaint has been sustained or a decree adjudicating the principles of a cause is not reviewable upon certificate. Though not necessary to the decision of the case, this language was incorporated in the opinion with the approval of the other members of the court, to clarify the effect of rulings under the new rules in connection with appellate review upon certificate, and to remove any existing confusion concerning the form of an order sustaining a motion to dismiss for failure of a complaint to state a claim upon which relief can be granted under Rule 12(b)(6). As under the former procedure an order sustaining a demurrer but not dismissing the action was reviewable upon certificate but an order sustaining a demurrer and dismissing the action was not so reviewable, so under the new rules an order sustaining a motion to dismiss under Rule 12(b)(6) which dismisses the complaint but does not dismiss the action is reviewable upon certificate but an order which sustains a motion to dismiss the complaint and also dismisses the action is not reviewable upon certificate but is reviewable only upon appropriate appellate process. Before the decision in the *Petros* case, the court refused to docket several cases presented on certificate because the order dismissed the action instead of merely sustaining a motion to dismiss the pleading and this situation prompted the insertion of the above quoted language in the opinion of the court in that case. If the order had dismissed the pleading but not the action the question presented would have been reviewable upon certificate.

In *Consolidation Coal Co. v. Mineral Coal Co.*, a civil action prosecuted under the Rules of Civil Procedure, decided June 19, 1962, the plaintiff sought to enjoin the defendant from mining coal by the strip or auger method in a designated disputed area in Barbour County, and obtained a temporary injunction as prayed for in its complaint. The defendant filed an answer in which it set up

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60 126 S.E.2d 194 (W. Va. 1962).
the defense that it was entitled to mine the coal in the controverted area under certain leasehold provisions. The circuit court overruled the motions of the defendant to dissolve the injunction and to dismiss the complaint because it failed to state a claim against the defendant on which relief could be granted, held that the defense alleged in the answer was insufficient because the instruments on which it was based did not constitute a lease to mine the coal in the disputed area, and on its own motion certified its ruling concerning such defense to the supreme court of appeals. That court reviewed the certified question, which of course was limited to the sufficiency of the answer in alleging a valid defense and did not relate to or involve any matter in connection with the injunction, and reversed the ruling of the circuit court. It also found that the allegations of the complaint and of the answer created a disputed question of fact which could not be considered upon certificate and remanded the case with directions that the circuit court determine the factual question presented by the pleadings.

With reference to the test to determine whether an order relating to process, a return of service or a pleading in cases governed by the new rules is reviewable upon certificate under the statute, the decisions of the federal courts which determine whether a judgment rendered upon motions, under Rules 12(b)(6), 12(c) and 56 is interlocutory and not appealable, or is appealable or final in character, are helpful and applicable. Though there is some conflict, and there are some exceptions, those cases appear to hold generally that an order under Rule 12(b), sustaining a motion to dismiss a complaint but not dismissing the action, or an order denying a motion to dismiss, or granting or denying a motion under Rule 12(f) to strike from a pleading any insufficient defense, or denying a motion under Rule 12(c) for judgment on the pleadings, is interlocutory and not appealable, but that an order sustaining a motion to dismiss under Rule 12(b) which also dismisses the action or indicates that such dismissal was clearly intended by the court or by the parties, or which sustains a motion for judgment on the pleadings under Rule 12(c), or which sustains a motion for summary judgment under Rule 56, is appealable and final. With respect to certification under the statute, logically and in principle, as a general rule, an order entered in cases under the new rules, which the federal courts regard as merely interlocutory, would be reviewable in this state upon certificate, whereas orders which such
courts regard as appealable or final would not be reviewable by that method.

As illustrative of, and as support for, some of the foregoing comments these few federal court decisions are mentioned briefly.

In Jung v. K & D Mining Company, 61 decided April 28, 1958, the Supreme Court of the United States held that an order of a district court by which the motion of the plaintiff to vacate a previous order dismissing the complaint and granting leave to file an amended complaint was denied and the plaintiff was granted further leave to amend the complaint, was not a final judgment but left the action pending for further proceedings either by amendment of the complaint or entry of a final judgment, and that, as occurs when there is an order sustaining a demurrer with leave to amend, a subsequent order of absolute dismissal after the expiration of the time allowed for amendment is required to constitute a final disposition of the case.

In Merritt-Chapman & Scott Corp. v. City of Seattle, 62 the ninth circuit court of appeals, the defendant moved to dismiss the complaint on the ground, among other grounds, that the complaint failed to state a claim against the defendant upon which relief could be granted. The district court sustained the motion and entered an order which provided "that the complaint of the plaintiff be, and the same is hereby dismissed without prejudice to the right of the plaintiff to file herein its amended complaint * * *. On appeal, which was dismissed, the circuit court of appeals held that the foregoing order was not a final order and was not appealable.

In Farbenfabriken Bayer, A. G., v. Sterling Drug, Inc., 63 the defendant moved for judgment on the pleadings and for summary judgment on the ground that under a Joint Resolution of Congress the plaintiff, because of its enemy status, was disqualified to maintain its action. The district court denied the motions and dismissed the action without prejudice. On appeal the court held that the plaintiff was entitled to maintain the action and reversed solely on that ground. 64 In the opinion the district court, in denying the motions, said: "A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only

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62 281 F.2d 896 (9th Cir. 1960).
64 251 F.2d 300 (3rd Cir.) cert. denied 356 U.S. 957 (1958).
upon a conclusive determination of the issues of law." With that pronouncement I am inclined to agree instead of with the comment in the reporters' note that a motion for judgment on the pleadings is not a dismissal with prejudice. It would appear that, as a general rule, an order sustaining a motion for judgment on the pleadings would be an appealable or final order and as such not certifiable, although it might be that an order denying such motion or granting such motion with leave to amend would be certifiable as a non-appealable interlocutory judgment.

The suggestion has been made that the certification statute should be amended to extend its scope and give it greater liberality. Such suggestion though thought provoking is not, for me at least, convincing and upon reflection I do not regard an amendment as necessary or desirable. Any amendment would have to be made by legislative enactment rather than by rule of court, for the reason that enlargement of such appellate jurisdiction would be substantive and not procedural in character and beyond the reach of any such rule. Substantial extension of the jurisdiction now conferred by the statute would most likely cause confusion and uncertainty as to the function of the established usual appellate procedure for review of the merits upon an appealable or final judgment, and tend to encourage and approve piece-meal or partial determination of the potentially decisive issues involved, and in that way prolong or delay unduly the final decision of the proceeding. By proper use of the motions for judgment upon the pleadings, or for summary judgment, under the new rules, final decisions by the trial court may be obtained with reasonable expedition; and when that stage of the litigation has been reached the present methods of appellate review upon the merits are both adequate and effective to obviate any unreasonable expense or delay in the proper administration of justice.

The opinions which I have expressed in this paper are, of course, merely my individual views. They are uttered not as those of a member of the judiciary but, instead, as those of a member of the bar. But whether they may be regarded as the views of a judge or of a lawyer, I want to make it perfectly clear that I reserve the unrestricted right to change my mind whenever and wherever I may be required to consider officially any of the matters dealt with in this paper. So my parting remark to you is that perhaps you should not pay too much attention to anything I may have told you.